HB

171

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

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 overcrowded 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.

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM October 11, 1990

SUBJECT: Bill restricting non-disclosure of discovery (Work Order No. 7-0112)

TO: Representative Dave Donley

FROM: John B. Gaguine
Legislative Counsel

Enclosed is a bill that would prohibit courts from ordering non-disclosure of information concerning public hazards (very broadly defined in the bill) and that would render unenforceable private non-disclosure agreements executed to settle civil litigation. I modeled the bill on the Florida statute that Ginger sent me (and that she got from the trial lawyers). In one way this bill is significantly broader than even the broad Florida statute: I deleted the part of the definition of "public hazard" that an instrumentality both have caused and be likely to cause injury, leaving only the "have caused" part. It seemed to me that with the "likely to cause" language a court might find that the statute might not apply to products that had caused significant injury in the past but that are no longer on the market.

Note sections 2 and 3 of the bill, which state that the bill changes the rules of civil procedure and hence must be passed by a two-thirds majority in each house. It perhaps could be argued that the bill deals with substantive law, rather than procedure, and hence is not subject to Article IV, Section 15 of the state constitution. However, the bill does seem to require modifications in the three civil rule sections cited, and the Alaska Supreme Court's decisions on Article IV, Section 15 give a very broad reading to the term "procedure". See, e.g., State v. Williams, 681 P.2d 313 (Alaska 1984) (Criminal Rule 45, requiring trial in a criminal case within 120 days of the commencement of proceedings, was constitutionally adopted by the supreme court under Article IV, Section 15); State v. Smith, 593 P.2d 625

(Alaska 1979) (appellate rule governing award of attorney's fees in judicial appeals of administrative agency decisions was properly adopted under same section).

I think that the Florida approach of making all non-disclosure agreements unenforceable is far preferable to a statute that would simply prohibit attorneys from entering into such agreements. As I indicated to Ginger, the latter approach would in my opinion have raised significant separation-of-powers problems. The Alaska Supreme Court has indicated that regulation of attorneys is exclusively a judicial function under Article IV, Section 1, and the legislature may not legislate in the area. See, e.g., In re Park, 484 P.2d 690 (Alaska 1971) (court refused to recognize a statute requiring applicants to practice law in Alaska to be citizens). While the court might, as a matter of comity, choose to follow a statute in this area, see Application of Steelman, 448 P.2d 817, 819 (Alaska 1969), the Florida approach, by not framing the matter in terms of regulation of attorneys, seems to me to avoid the problem altogether.

If I may be of further assistance, please advise.

JBG:gc
G15/022

Enclosure

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM February 4, 1991

SUBJECT: Court secrecy bill (W.O. 7LS0112)

TO: Representative Dave Donley
Attn: H. Kaden

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed is the new version of the court secrecy bill. It has the changes we discussed, plus one more. I amended the definition of "interested person" (AS 09.25.250(1)) to exclude parties to litigation. I don't see why such parties should ever need to file, since they will already have the material in their files; it seems to me that the only people who would ever file would be non-parties, such as other litigants, the press, academic researchers, and government agencies. But without a change to the definition, parties could file, and that would effect a change to Civil Rule 60(b), which limits the grounds for which parties can seek to vacate judgments and puts time limits on parties to file their motions to vacate. Rather than bring in a reference to Rule 60(b) it seemed simpler just to exclude parties from the "interested person" definition.

JBG:lmb
91-012.lmb

Enclosure

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

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EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEITRAUGH

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

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 171

Revision Date: 03/27/92
Title: An Act restricting court orders and certain private agreements... public hazards
Sponsor: Judiciary Committee
Requestor: House 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 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	41.4	41.4	41.4	41.4	41.4	41.4
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	41.4	41.4	41.4	41.4	41.4	41.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	41.4	41.4	41.4	41.4	41.4	41.4
FEDERAL FUNDS						
OTHER						
TOTAL	41.4	41.4	41.4	41.4	41.4	41.4

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: 03/27/92

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 03/27/92

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

Alaska Court System
Fiscal Analysis of House Bill 171

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 Impact

Personal Services

	Salary	Benefits	Total
Pro Tem Superior Court Judge, PPT - 6 months, Anchorage (25% of active judge salary)	$12,075	$9,837	$21,912
In-Court Clerk, PPT - 6 months, 12B	13,962	5,943	19,500
Estimated Total Cost			$41,412

Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
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HB 171: SECRECY OF PUBLIC HAZARDS

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.

HOUSE BILL NO. 171

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/27/91
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"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)."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.25 is amended by adding new sections to read:

Sec. 09.25.230. COURT ORDERS ON MATERIALS CONCERNING PUBLIC HAZARDS. (a) A court may not enter an order or judgment that has the effect of concealing a public hazard or information concerning a public hazard. If an order or judgment that violates this subsection contains provisions that do not violate this subsection, those provisions are valid.

(b) Upon the motion by a party to litigation for an order prohibiting the disclosure of materials produced or to be produced in discovery, the court shall examine the materials in camera. The court shall deny the motion if it finds that the materials have previously been disclosed to the public in this or another jurisdiction or that the materials concern a public hazard. If the court finds that only a portion of the materials have been previously disclosed or

concern a public hazard, the court may enter an order prohibiting disclosure of the portion that has not been previously disclosed and does not concern a public hazard.

(c) An interested person alleging that a judgment or order entered by a court violates (a) or (b) of this section may contest the order by filing a motion to vacate the judgment or order at any time with the court that entered the motion. An interested person alleging that a requested judgment or order would, if entered, violate (a) or (b) of this section may contest the request by filing an opposition with the court where the request is pending.

Sec. 09.25.240. PRIVATE AGREEMENTS ON MATERIALS CONCERNING PUBLIC HAZARDS. (a) That part of an agreement or contract executed in order to settle civil litigation or in connection with discovery in civil litigation that has the purpose or effect of concealing a public hazard or information concerning a public hazard is void and may not be enforced.

(b) An interested person who believes that an agreement or contract that violates (a) of this section is being enforced may bring an action for injunctive relief against a party to the agreement or contract.

Sec. 09.25.250. DEFINITIONS FOR AS 09.25.230 - 09.25.250. In AS 09.25.230 - 09.25.250,

(1) "interested person" shall be construed as that term is used in AS 44.62.300, but does not include a party to the litigation in which the contested judgment or order was entered or in relation to which the contested agreement or contract was executed;

(2) "public hazard" means 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."

* Sec. 2. The provisions of sec. 1 of this Act have the effect of changing Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2) by limiting the discretion of the court in entering protective orders regarding discovery in civil litigation, by limiting the discretion of the parties to civil litigation to enter into agreements regarding discovery procedures, and by granting automatic limited intervenor status to certain persons challenging certain court orders or motions in civil cases.

* Sec. 3. AS 09.25.230(c) and 09.25.240, added by sec. 1 of this Act, are applicable only to orders or judgments entered by a court, or agreements or contracts entered into by parties to civil litigation, on or after the effective date of this Act.

* Sec. 4. This Act takes effect only if sec. 2 of this Act receives the two-thirds majority vote of each

house required by art. IV, sec. 15, Constitution of the State of Alaska.

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-

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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).* © *The Washington Monthly Company, Washington, D.C.*

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,

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June 5-15, 1991	Mid-Atlantic Regional Temple University School of Law Philadelphia, Pennsylvania	July 6-20, 1991	National Session University of Colorado School of Law Boulder, Colorado
June 11-22, 1991	Western Regional University of California School of Law Berkeley, California	July 21-31, 1991†	Pacific Regional Univ. of San Diego School of Law San Diego, California

Master Advocates Programs

March 10-15, 1991	University of Miami School of Law Coral Gables, Florida	June 30-July 5, 1991	University of Colorado School of Law Boulder, Colorado
April 3-7, 1991	Hofstra University School of Law Hempstead, New York	Oct. 13-18, 1991	The Embassy Row Hotel Washington, DC

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.

While the Dalkon Shield episode left Robins a shattered, humiliated company, Aetna almost completely escaped punishment.

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-

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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 "non-destruct" 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 F. 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.

[redacted]

'What is duty of an insurer to the public when it has knowledge of serious product defects which are likely to cause injury?'

[redacted]

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

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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 inflict 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. ☐

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.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 171

Revision Date: 03/27/92
Title: An Act restricting court orders and certain private agreements... public hazards
Sponsor: Judiciary Committee
Requestor: House 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 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	41.4	41.4	41.4	41.4	41.4	41.4
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	41.4	41.4	41.4	41.4	41.4	41.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	41.4	41.4	41.4	41.4	41.4	41.4
FEDERAL FUNDS						
OTHER						
TOTAL	41.4	41.4	41.4	41.4	41.4	41.4

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 Phone: 264-8228
Division: Alaska Court System Date: 03/27/92

Approved by: Arthur H. Snowden, II, Administrative Director BY
Agency: Alaska Court System Date: 03/27/92

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

Rev 1/92

FISCAL NOTE

Alaska Court System
Fiscal Analysis of House Bill 171

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 Impact

Personal Services

	Salary	Benefits	Total
Pro Tem Superior Court Judge, PPT - 6 months, Anchorage (25% of active judge salary)	$12,075	$9,837	$21,912
In-Court Clerk, PPT - 6 months, 12B	13,962	5,943	19,500
Estimated Total Cost			$41,412

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-
(6-28-90)

Vetoed by Governor
Edward D. DiPret
(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

OTHER STATES

(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 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.

DGT6143

3

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

2324-1

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

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

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

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 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 parties 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

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.

OTHER STATES
SUMMARY OF SECRECY LEGISLATION

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 documen 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 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.

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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM October 11, 1990

SUBJECT: Bill restricting non-disclosure of discovery (Work Order No. 7-0112)

TO: Representative Dave Donley

FROM: John B. Gaguine
Legislative Counsel

Enclosed is a bill that would prohibit courts from ordering non-disclosure of information concerning public hazards (very broadly defined in the bill) and that would render unenforceable private non-disclosure agreements executed to settle civil litigation. I modeled the bill on the Florida statute that Ginger sent me (and that she got from the trial lawyers). In one way this bill is significantly broader than even the broad Florida statute: I deleted the part of the definition of "public hazard" that an instrumentality both have caused and be likely to cause injury, leaving only the "have caused" part. It seemed to me that with the "likely to cause" language a court might find that the statute might not apply to products that had caused significant injury in the past but that are no longer on the market.

Note sections 2 and 3 of the bill, which state that the bill changes the rules of civil procedure and hence must be passed by a two-thirds majority in each house. It perhaps could be argued that the bill deals with substantive law, rather than procedure, and hence is not subject to Article IV, Section 15 of the state constitution. However, the bill does seem to require modifications in the three civil rule sections cited, and the Alaska Supreme Court's decisions on Article IV, Section 15 give a very broad reading to the term "procedure". See, e.g., State v. Williams, 681 P.2d 313 (Alaska 1984) (Criminal Rule 45, requiring trial in a criminal case within 120 days of the commencement of proceedings, was constitutionally adopted by the supreme court under Article IV, Section 15); State v. Smith, 593 P.2d 625

LAA LEGAL OPINIONS

(Alaska 1979) (appellate rule governing award of attorney's fees in judicial appeals of administrative agency decisions was properly adopted under same section).

I think that the Florida approach of making all non-disclosure agreements unenforceable is far preferable to a statute that would simply prohibit attorneys from entering into such agreements. As I indicated to Ginger, the latter approach would in my opinion have raised significant separation-of-powers problems. The Alaska Supreme Court has indicated that regulation of attorneys is exclusively a judicial function under Article IV, Section 1, and the legislature may not legislate in the area. See, e.g., In re Park, 484 P.2d 690 (Alaska 1971) (court refused to recognize a statute requiring applicants to practice law in Alaska to be citizens). While the court might, as a matter of comity, choose to follow a statute in this area, see Application of Steelman, 448 P.2d 817, 819 (Alaska 1969), the Florida approach, by not framing the matter in terms of regulation of attorneys, seems to me to avoid the problem altogether.

If I may be of further assistance, please advise.

JBG:gc
G15/022

Enclosure

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM February 4, 1991

SUBJECT: Court secrecy bill (W.O. 7LS0112)

TO: Representative Dave Donley
Attn: H. Kaden

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed is the new version of the court secrecy bill. It has the changes we discussed, plus one more. I amended the definition of "interested person" (AS 09.25.250(1)) to exclude parties to litigation. I don't see why such parties should ever need to file, since they will already have the material in their files; it seems to me that the only people who would ever file would be non-parties, such as other litigants, the press, academic researchers, and government agencies. But without a change to the definition, parties could file, and that would effect a change to Civil Rule 60(b), which limits the grounds for which parties can seek to vacate judgments and puts time limits on parties to file their motions to vacate. Rather than bring in a reference to Rule 60(b) it seemed simpler just to exclude parties from the "interested person" definition.

JBG:lmb
91-012.lmb

Enclosure

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.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 171

Revision Date: 03/27/92
Title: An Act restricting court orders and certain private agreements... public hazards
Sponsor: Judiciary Committee
Requestor: House 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 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	41.4	41.4	41.4	41.4	41.4	41.4
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	41.4	41.4	41.4	41.4	41.4	41.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	41.4	41.4	41.4	41.4	41.4	41.4
FEDERAL FUNDS						
OTHER						
TOTAL	41.4	41.4	41.4	41.4	41.4	41.4

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: 03/27/92

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 03/27/92

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

Rev 1/92

Alaska Court System
Fiscal Analysis of House Bill 171

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 Impact

Personal Services

	Salary	Benefits	Total
Pro Tem Superior Court Judge, PPT - 6 months, Anchorage (25% of active judge salary)	$12,075	$9,837	$21,912
In-Court Clerk, PPT - 6 months, 12B	13,962	5,943	19,500
Estimated Total Cost			$41,412

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, Toxicologist*
> *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

DIVISION OF LEGAL SERVICES

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MEMORANDUM May 1, 1991

SUBJECT: Department of Law's comments on HB 171

TO: Representative Dave Donley
Attn: H. Kaden

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed is a draft CSHB 171 ( ) that partially addresses the concerns raised by the Department of Law in its April 25 letter to Rep. Kubina. The draft adds a new subsection (b) to proposed AS 09.25.230 exempting from disclosure 1) information that only indirectly concerns a public hazard and that would violate an individual's privacy if released, and 2) information that is confidential by state or federal law. This change addresses the concerns of the Department of Law expressed in the last paragraph of page one and in the second full paragraph on page two.

The draft blank CS also reworks proposed AS 09.25.230(a) to make clear that the subsection only concerns materials filed with the court or produced during discovery, and not privileged materials, such as attorney work-product. This is to address Law's concerns expressed in the first full paragraph on page two of the letter. That paragraph notes that proposed AS 09.25.230(a) could be misconstrued to require a court to order the disclosure of certain attorney work-product, such as expert reports. In my opinion, such a misconstruction would be unlikely. But the reworking of the subsection better reflects what I believe to be the subsection's intent.

The final concern that Law raised I did not feel could be addressed without "gutting" the bill. The letter suggests, in the paragraph spanning pages two and three, that a court be given the discretion to balance the pros and cons of disclosure. However, I believe that the point of this bill is to make the right of public access absolute, and not allow a court the discretion to balance.

If I may be of further assistance, please advise.

JBG:lmb
91-155.lmb
Enclosure

7-LS0112\J
Gaguine
5/1/91

CS FOR HOUSE BILL NO. 171 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"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)."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.25 is amended by adding new sections to read:

Sec. 09.25.230. COURT ORDERS ON MATERIALS CONCERNING PUBLIC HAZARDS. (a) A court may not enter an order or judgment that has the effect of withholding from public disclosure information that has been filed with the court or produced in response to a civil discovery request, and that concerns a public hazard. If an order or judgment that violates this subsection contains provisions that do not violate this subsection, those provisions are valid.

(b) The provisions of (a) of this section do not apply to information that only indirectly concerns a public hazard and that would violate an individual's privacy if released, or to information that is confidential by state or federal law.

(c) Upon the motion by a party to litigation for an order prohibiting the disclosure of

materials produced or to be produced in discovery, the court shall examine the materials in camera. The court shall deny the motion if it finds that the materials have previously been disclosed to the public in this or another jurisdiction or that the materials concern a public hazard and are not exempt from disclosure under (b) of this section. If the court finds that only a portion of the materials have been previously disclosed or concern a public hazard, the court may enter an order prohibiting disclosure of the portion that has not been previously disclosed and does not concern a public hazard.

(d) An interested person alleging that a judgment or order entered by a court violates (a) or (c) of this section may contest the order by filing a motion to vacate the judgment or order at any time with the court that entered the motion. An interested person alleging that a requested judgment or order would, if entered, violate (a) or (c) of this section may contest the request by filing an opposition with the court where the request is pending.

Sec. 09.25.240. PRIVATE AGREEMENTS ON MATERIALS CONCERNING PUBLIC HAZARDS. (a) That part of an agreement or contract executed in order to settle civil litigation or in connection with discovery in civil litigation that has the purpose or effect of concealing a public hazard or information concerning a public hazard, except for information described in AS 09.25.230(b), is void and may not be enforced.

(b) An interested person who believes that an agreement or contract that violates (a) of this section is being enforced may bring an action for injunctive relief against a party to the agreement or contract.

Sec. 09.25.250. DEFINITIONS FOR AS 09.25.230 - 09.25.250. In AS 09.25.230 - 09.25.250,

(1) "interested person" shall be construed as that term is used in AS 44.62.300, but does not include a party to the litigation in which the contested judgment or order was entered or in relation to which the contested agreement or contract was executed;

(2) "public hazard" means 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.

* Sec. 2. The provisions of sec. 1 of this Act have the effect of changing Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2) by limiting the discretion of the court in entering protective orders regarding discovery in civil litigation, by limiting the discretion of the parties to civil

litigation to enter into agreements regarding discovery procedures, and by granting automatic limited intervenor status to certain persons challenging certain court orders or motions in civil cases.

* Sec. 3. AS 09.25.230(d) and 09.25.240, added by sec. 1 of this Act, are applicable only to orders or judgments entered by a court, or agreements or contracts entered into by parties to civil litigation, on or after the effective date of this Act.

* Sec. 4. This Act takes effect only if sec. 2 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

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. <u>This bill would interfere with the state court system and tie the hands of the judges</u>. 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]

---

[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).

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.

LAWYERS FOR CIVIL JUSTICE
1225 Nineteenth Street, N.W. • Suite 470
Washington, D.C. 20036 • (202) 429-0045

"A Coalition of Defense Trial Lawyers Promoting Excellence and Fairness in the Civil Justice System"

Created by defense trial lawyers, Lawyers for Civil Justice is a national coalition, which promotes excellence, fairness and improvements within the civil justice system. It supports activities at both the state and national levels designed to achieve the following reforms which will restore balance to the civil justice system: creating uniform standards of liability based upon fault; limiting noneconomic damage awards; controlling punitive damage awards; and crediting collateral source benefits to avoid double recovery.

Lawyers for Civil Justice plays a unique role in the tort reform movement by coalescing the resources of the defense trial lawyers with the support of the business community. With members throughout the United States, Lawyers for Civil Justice is supported and sponsored by four national defense trial lawyer associations and works closely with over 60 state defense trial lawyer organizations. The four national associations are: the Defense Research Institute, the International Association of Defense Counsel, and the Association of Defense Trial Attorneys. Since the defense trial lawyers of these associations are directly involved in the defense of clients in the courtroom, they provide the solid bases from which to mount an attack on abuses of the civil justice system.

Lawyers for Civil Justice offers a counterbalance to an organized plaintiff's bar on the civil justice reform issue. It provides a sharp contrast to some existing legal organizations that rigidly seek to preserve the status quo - a position which has become increasingly unpopular with consumers and providers of products and services.

Lawyers for Civil Justice provides defense trial lawyers with a united voice to educate the public on the need for civil justice reform. By assuring its members the opportunity to participate fully in hearings, forums and other public policy debates, Lawyers for Civil Justice has become part of a working network of other organizations and corporations promoting common civil justice reforms.

Contact: Barry Bauman
Executive Director
(202) 429-0045

Lawyers for Civil Justice
1225 Nineteenth Street, N.W.
Suite 470
Washington, DC 20036

MAR-31-92 TUE 14:25 LAWYERS FOR CIVIL JUSTIC FAX NO. 2024289682 P.02

MISSION STATEMENT FOR LCJ

Lawyers for Civil Justice is a national coalition of defense trial lawyer organizations and corporations which seeks to restore and maintain balance in the civil justice system for the benefit of the public.

The purpose of LCJ is to accomplish civil justice reform through

- coalitions among defense trial lawyer associations and corporate interests;
- participation in the legislative process in a way that persuasively presents the defense perspective; and
- anticipating, tracking and addressing proposals which affect the civil justice system.

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House Judiciary Committee
Chairman Dave Donley

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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.

SPONSOR STATEMENT

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) APPROVES PREVIOUS: (Dept/Date)

[X] fiscal impact Court System [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Taylor	✓	Kubina		X	
		Meacham (Chevalier)		X	
		Baker		✓	

Eugene G. Kubina
CHAIRMAN'S SIGNATURE

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.

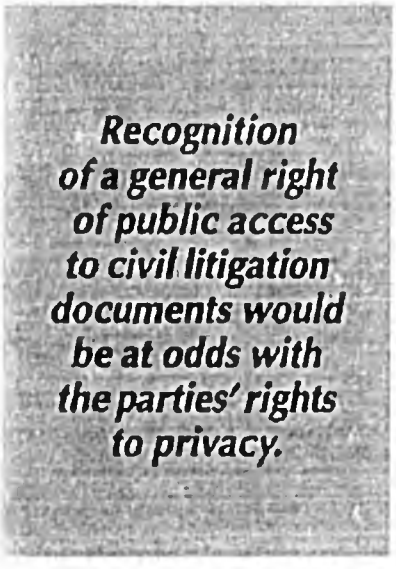
Notwithstanding the settled nature of the law on this issue, the proponents of public access strenuously argue that the public must have access to information produced by private parties at a minimum when that information affects public health and safety. Although this position initially seems to have 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.

THE DISCOVERY CONFIDENTIALITY CONTROVERSY

Richard L. Marcus•

I am honored to contribute to this symposium in memory of Edward Cleary, one of the most illustrious alumni and former faculty members of Illinois. Though he is widely and correctly recognized as a giant in the field of evidence (as the tenor of most of the other articles in this Symposium suggests), Cleary was also an important figure in the field of civil procedure. His writings in that area were and still are influential.[1] Therefore it is appropriate to turn to a pressing question of civil procedure as part of this symposium in honor of Edward Cleary.

This article focuses on the growing clamor regarding discovery confidentiality. In the late 1970s and early 1980s, several lower court decisions raised the specter that all material revealed during discovery might be presumptively public, a result that threatened to undermine concerns about the intrusiveness and costs associated with discovery. Although courts had used protective orders to limit dissemination of confidential materials, particularly in commercial litigation, some suggested that these judicially imposed restrictions could be sustained against first amendment challenges only where they satisfied the exacting requirements for a prior restraint. Eight years ago, I wrote an article challenging the assumptions of this argument,[2] and in 1984 in *Seattle Times Co. v. Rhinehart*[3] the Supreme Court rejected this first amendment limitation on the power of courts to enter protective orders, stressing that discovery was not historically open and that it is not part of a civil trial.

Since then, the debate has shifted. Before the *Seattle Times* deci-

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I served as Associate Reporter of the Federal Courts Study Committee, which made recommendations regarding the use of protective orders that are along the lines set forth in this article. See Report of the Federal Courts Study Committee 102-03 (1990). The views expressed in this article, however, are entirely my own.

1. *E.g.*, Cleary, Hickman v. Jencks, 14 VAND. L. REV. 865 (1961); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948). The Stanford article, in particular, continues to be featured in civil procedure casebooks. *See, e.g.*, J. LANDERS, J. MARTIN & S. YEAZELL, CIVIL PROCEDURE 422-29 (2d ed. 1988); D. LOUISELL, G. HAZARD & C. TAIT, PLEADING AND PROCEDURE 66-71 (6th ed. 1989); R. MARCUS, M. REDISH & E. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 175-76 (1989); M. ROSENBERG, H. SMIT & R. DREYFUSS, ELEMENTS OF CIVIL PROCEDURE 553-55 (5th ed. 1990).

2. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

3. 467 U.S. 20 (1984). This case is discussed *infra* in text accompanying notes 15-35.

sion, the issue was featured in constitutional or commercial litigation. As the 1980s were touted to be the decade of toxic tort litigation, so the discovery confidentiality debate has focused on product liability cases. Here the concern is that defendants may employ confidentiality orders to frustrate plaintiffs' preparation of their cases by preventing needed consultation with other counsel, and that such orders can keep public hazards secret. Articles echoing these concerns have appeared in the popular press and the legal press, and an entire book has been published urging that the use of protective orders be curtailed in product liability cases.[4] Responding to these concerns, three states have recently changed their rules regarding discovery confidentiality; other states may soon follow suit, and proposed legislation dealing with this subject has been introduced before Congress.[5]

This article evaluates the current controversy. Initially, the article chronicles the evolution of the discovery confidentiality debate and describes the recently adopted and pending reform proposals. It then reflects on whether the broader arguments urged in support of these proposals warrant adoption of a rule of general public access to discovery. The article concludes that neither the use of public resources to obtain discovery, nor the insights such access might afford the public about the operation of the civil justice system, nor the public's interest in the subject matter of certain discovered materials, justify such a shift from the traditional rule that discovery is essentially a private affair. This conclusion is bolstered by a brief consideration of the disruptive potential of a doctrine of general public access.

Turning to the more specific objections of the critics, the article suggests that, in one area, greater sensitivity to the dynamics of product liability cases may be needed but that, more generally, the current standards seem workable and wise. Specifically, arguments by plaintiffs' attorneys that confidentiality orders unduly hamper case preparation by preventing needed consultation with other attorneys provide reasons for flexibility in allowing such discussion of confidential materials obtained through discovery. Moreover, flexibility in allowing access to other plaintiffs who need the material as evidence in their cases seems to be warranted.

On other points, however, the critics' points are not well taken. Insisting that only full-fledged trade secrets be protected when disclosed through discovery undervalues concerns about the intrusiveness of discovery. Similarly, challenges to "umbrella" protective orders, which allow producing parties to designate materials as confidential without

4. F. HARE, J. GILBERT & W. REMINE, CONFIDENTIALITY ORDERS (1988); *see also* Hare, Gilbert & Ellenberger, *Confidentiality Orders in Products Liability Cases*, 13 AM. J. TR. ADVOC. 597 (1989).

5. *See infra* text accompanying notes 44-56. I have tried to make this summary current. There may be further developments before this article appears, but the analysis proposed is likely to apply to them as well.

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extensive hearings on questions of confidentiality, do not provide a reason for curtailing this practice. Finally, settlements conditioned on the continued confidentiality of discovered materials do not, as the critics urge, deserve to be treated as suspect. Given the interest in avoiding unnecessary disputes about confidentiality and in settling cases, courts should be receptive to such arrangements. In sum, despite the clamor for change by statute or rule revision, it appears that current legal doctrine is well adapted to handling the actual problems, and that radical changes would be risky.

I. The Evolving Debate

A. The First Amendment/Common Law Challenge

A variety of arguments for dissemination of discovery are based on first amendment and common law principles. Litigants who obtain information through discovery might have a first amendment right to disclose what they know, particularly in light of decisions seemingly upholding the right of those who steal or improperly obtain material to publish it.[6] Moreover, there is a tradition of public trials in this country that is protected by both the first amendment[7] and common law,[8] and it might be extended to pretrial discovery. Similarly, the public has a right to inspect public records,[9] including court records, that might apply to material disclosed through discovery.

The strongest stimulus toward public access to discovery came from the 1979 decision by a divided panel of the District of Columbia Circuit in *In re Halkin*.[10] In *Halkin*, the plaintiffs sued the CIA for surveillance of them during the Vietnam War, and they proposed to release to the press information they had obtained in discovery. Contending that discovery normally occurs in the open, the court granted a writ of mandamus overturning a protective order prohibiting publication on the ground that an order restricting a litigant's speech could only be allowed where a prior restraint would be justified.

A prior restraint, however, is "one of the most extraordinary remedies known to our jurisprudence."[11] Therefore, requiring such a showing effectively would preclude a confidentiality order in many circumstances. Although other courts adopted a more restrained first amendment analy-

6. *E.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (stolen reports); United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972) (material retained in violation of security agreement), *cert. denied*, 409 U.S. 1063 (1971).

7. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-10 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

8. *Richmond Newspapers*, 448 U.S. 555; Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177-78 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

9. *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1330-31 (D.C. Cir. 1985); *cf.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

10. *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979).

11. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976).

sis,[12] there is language in some lower court opinions suggesting that the "public" discovery process properly could be employed to generate information for public consumption.[13] This attitude might have effected a revolution in the actual conduct of discovery because, in reality, discovery occurred in nonpublic locations and did not result in the making of a public record.[14] There appeared to be reason for alarm, particularly given the mounting uneasiness about the burdens of discovery.

In 1984, the Supreme Court confronted these issues in *Seattle Times Co. v. Rhinehart*.[15] The case might well have aroused first amendment concerns. The plaintiffs, an offbeat religious organization and its founder, sued two newspapers that had written stories about them in a Washington state court. The plaintiffs claimed the stories were false and that the stories had driven away members and discouraged contributions to the organization. The defendants propounded discovery seeking lists of members and contributors, prompting plaintiffs to ask for a protective order. In support of this request, plaintiffs pointed out that the defendants had stated that they intended to continue publishing stories on plaintiffs, and planned to use interesting material they gained through discovery in those stories.[16] The plaintiffs also submitted affidavits detailing attacks, threats, and harassment directed at adherents of their religion.[17] On the strength of this showing, the trial court entered a protective order under Rule 26(c) of the Washington procedural rules,[18] restricting the use of this sensitive discovered material to trial preparation and forbidding defendants to publish the material.[19] Although the order did not limit the newspapers' right to publish material gained outside of the discovery process, as a practical matter this exemption provided little solace to the newspapers because it might be very difficult to prove that they had obtained information entirely independently of the discovery process.[20] Given the risk that the newspapers could be held in contempt, the case appeared to implicate important first amendment val-

12. *E.g.*, *In re* San Juan Star Co., 662 F.2d 108, 116 (1st Cir. 1981) (holding that, rather than prior restraint doctrine, "less stringent" test is required to accommodate first amendment concerns in dealing with protective order request).

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

> [M]any important social issues become entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. . . . Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.

Id. at 258; *see also* Olympic Ref. Co. v. Carter, 332 F.2d 260, 264 (9th Cir.) (discovery serves in part to "force a full disclosure" to public), *cert. denied*, 379 U.S. 900 (1964).

14. *See* Marcus, *supra* note 2, at 6-28.

15. 467 U.S. 20 (1984).

16. *Id.* at 25.

17. *Id.* at 26.

18. WASH. SUPER. CT. CIV. R. 26(c). This rule is modeled on FED. R. CIV. P. 26(c). *See Seattle Times*, 467 U.S. at 26 n.7.

19. *Seattle Times*, 467 U.S. at 27.

20. *Cf.* 3 W. LAFAVE, SEARCH AND SEIZURE § 11.4 at 612-80 (1978) (discussing difficulties in proving independent source in criminal cases where fourth amendment violation is involved).

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ues. The newspapers appealed, contending that the order violated the first amendment.

The Supreme Court disagreed, twice characterizing discovery as "unique,"[21] and declaring that "pretrial depositions and interrogatories are not public components of a civil trial."[22] Speaking through Justice Powell, the Court emphasized the intrusive nature of discovery, and the possibility that litigants could use discovery to obtain sensitive information that could be damaging to reputation and privacy if released.[23] Discovery, however, is not intended to accomplish this result; "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or settlement, of litigated disputes."[24] Protective orders accommodate the purposes of discovery and the privacy interests of those who are subject to discovery.

Justice Powell, who had complained in 1980 "that district judges often cannot keep [broad discovery] within reasonable bounds,"[25] took a managerial attitude toward the problem presented in *Seattle Times*, emphasizing the trial court's power to control the litigation process.[26] The opinion explains that "it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)" to cope with the liberality of discovery[27] and suggests that judges might have inherent authority to do so even in the absence of a rule.[28] The Court was clear that protection is warranted to protect privacy: "[a]lthough the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule."[29]

In providing for proper management of the litigation process, then,

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21. *See Seattle Times*, 467 U.S. at 34 (noting "unique position protective orders occupy in relation to First Amendment"); *id.* at 36 (referring to "unique character of the discovery process").

22. *Id.* at 33.

23. *Id.* at 35.

24. *Id.* at 34.

25. Amendments to Federal Rules of Civil Procedure, 446 U.S. 997, 999 (1980). Justice Powell dissented from the promulgation of amendments to the discovery rules because he felt that they did not do enough to curtail broad discovery. *Id.* at 997-1001.

26. *See* Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 196. Professor Post reasons that:

> [T]he crux of *Rhinehart* is neither the protection of privacy interests nor the diminishment of litigants' First Amendment interests, but rather the Court's perception that discretionary authority to issue restraining orders is essential for the administration of pretrial discovery. In this sense, the government's interests in restraining orders may be analogous to its interests in the management of other government institutions such as schools or prisons. These interests are quite different from those at stake when the government regulates the speech of the general public, as in the many cases where the Court has struck down discretionary authority to suppress speech.

Id.

27. Seattle Times Co. v. Rhinehart, 467 U.S. at 20, 34 (1984).

28. The Court quotes Judge Friendly's suggestion that "we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.' " *See id.* at 35 (quoting International Prods. Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir. 1963)).

29. *Id.* at 35 n.21.

the protective order rule furthers a substantial governmental interest unrelated to the suppression of expression; hence its "unique position" in relation to the first amendment.[30] Given this framework, the Court concluded that protective orders do not offend the first amendment even though they restrain expression:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.[31]

This resolution of the first amendment freedom of expression attack on protective orders is itself subject to challenge,[32] but for present purposes the major concern is the impact on the debate over protective orders. In general, the lower courts have read the Court's holding as permitting protective orders whenever good cause can be shown as required by Rule 26(c).[33] Some have argued that first amendment issues remain a factor,[34] but these arguments seem to exalt selected phrases in the Court's opinion over its holding, which is quoted above.[35] In any event, given the elasticity of the good cause determination under Rule 26(c), this debate seems rather beside the point; all are agreed that the broad prior restraint argument that captured attention in the early 1980s no longer has force.

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30. *Id.* at 34.

31. *Id.* at 37.

32. *See* Post, *supra* note 26, at 179 ("the Court lacked a conceptual scheme within which [the problem] could be analyzed"); Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1016 & n.94 (1986) (criticizing reliance on "fallacious syllogism" of resolving matters by relying on distinction between "rights" and "privileges").

33. *E.g.*, Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119 (3d Cir. 1986); Worrell Newspapers v. Westhafer, 739 F.2d 1219, 1223-24 n.4 (7th Cir. 1984); Tavoulareas v. Washington Post Co., 737 F.2d 1170, 1172-73 (D.C. Cir. 1984).

34. In Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986), the court rejected the view of other courts that the first amendment is no longer a factor: "the first amendment is still a presence in the review process. Protective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause." *Id.* at 7. In disagreeing with other courts, the First Circuit seemed to be persisting with the middle ground approach it developed in In re San Juan Star Co., 662 F.2d 108, 116 (1st Cir. 1981), in which it rejected a prior restraint analysis but endorsed "heightened sensitivity" to first amendment concerns in protective order issues. For arguments that the first amendment still requires a least restrictive means test, see F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 141-42; Note, Seattle Times: *What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055, 1066.

35. The Court did indicate at one point that the first amendment analysis required consideration of both the question whether the practice furthered a substantial interest unrelated to the suppression of expression and whether the restriction on expression was no greater than necessary to protect the interest involved. *See Seattle Times*, 467 U.S. at 32. Justice Brennan filed a short concurring opinion calling attention to this language in the Court's opinion. *Id.* at 37-38. Nevertheless, the Court's bottom line deferred to the good cause decision of the state courts below: "[i]t is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law." *Id.* (majority opinion). There is little room for an independent constitutional requirement that a least restrictive means test be used in such a holding. Moreover, given the Court's emphasis on the need for discretion, such a requirement would conflict with the tenor of the opinion.

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B. The Current Controversy

The principal current controversy about discovery confidentiality stresses the use of protective orders in product liability litigation. The most vigorous attacks on such use of protective orders come from plaintiff lawyers who claim that use of protective orders impedes their preparation of cases by preventing them from conferring with lawyers having similar cases about the issues raised. In the same vein, they complain that confidentiality interferes with the re-use of discovery in other cases, necessitating duplicative discovery and raising the risk that important material turned over in one case will not come to light in another.

More generally (and publicly), these lawyers urge that discovery may produce evidence of alleged hazards to public health that is not made public, a concern echoed in articles in the general media. The paradigm is a suit in which a plaintiff injured by a mass-produced product unearths evidence through discovery that strongly supports the conclusion that the product is defective and dangerous. This material is not made generally available, however, because it is subject to a protective order. The manufacturer then offers to settle the case. The result is that the plaintiff receives a favorable payment, but the information unearthed through discovery is not disseminated.[36]

This concern antedates the 1980s,[37] but some report a marked increase in discovery secrecy in product liability cases during the 1980s.[38] The decade of toxic torts also has been portrayed as a time of increased discovery confidentiality in product liability cases, prompting stinging condemnation by some. A federal district judge, for example, characterized secrecy in a public court system as "an abomination."[39] A president

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36. Of course, the significance of such discovered information depends in large measure on whether information is otherwise available. It may often be true that information about products is available through the media or from governmental agencies. Indeed, the media may in some instance inflate the risks of safe products. *See* Huber, *Manufacturing the Audi Scare*, Wall St. J., Dec. 18, 1989, at A10, col. 3 (asserting that media reports concerning risks of a make of Audi automobile wrongfully deflated public demand for car).

37. Instances of suppression of information about public health dangers go back decades; probably the best-known example involves the hazards of asbestos. *See* P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 92 (1985). There are also examples of efforts to contain such information where it was disclosed through discovery. *See, e.g.*, J. GOULDEN, THE MILLION DOLLAR LAWYERS 289 (1977) (describing offer by automobile manufacturer to settle case in return for surrender by plaintiff's counsel of material amassed on design defect).

38. *E.g.*, Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1985) ("District courts are today being bombarded by an ever increasing number of requests for protective orders."); Marcotte, *Keeping Secrets*, A.B.A. J., Nov. 1989, at 32 (referring to "growing trend" of sealing of civil case records); Blum, *Protective Orders Under Attack*, Nat'l L.J., May 8, 1989, at 3, col. 1 ("Citing a dangerous increase in protective orders, two plaintiffs' attorney organizations are undertaking new efforts to halt the spread of the tactic."); *cf.* Garcia, *Quiet in the Courtroom: Judges Keep Civil Secrets*, Austin American-Statesman, Dec. 1, 1989, at A1, col. 1 (reporting that in Dallas County judges had sealed more than 200 cases since 1980, compared with 100 cases in the previous 60 years).

39. Barrett, *Protective Orders Come Under Attack: Plaintiffs Get Judges to Open Court Files*, Wall St. J., Aug. 31, 1988, at 27, col. 3 (quoting U.S. District Judge Jim Corrigan of Denver, Colorado).

of the American Trial Lawyers Association (ATLA), the principal plaintiffs' lawyers group, attacked the "morally corrupt use of secrecy" in the "dirty little world of confidentiality agreements" that resulted in "Orwellian suppression of the truth."[40] Spurred by these concerns, the ATLA devoted its 1990 annual meeting to denouncing discovery confidentiality.[41] Despite the widely publicized instances of supposed cover-ups of hazards, hard data is generally lacking and the critics' broader assertions about widespread abuses may be validly questioned.[42]

Nevertheless, the controversy has caused changes in confidentiality practices. For one thing, plaintiffs' lawyers say they are resisting the entry of protective orders more often.[43] More significantly, plaintiffs' lawyers and the media have lobbied both Congress and state rule makers to change provisions regarding protective orders, and these efforts already have resulted in adoption of a number of rule changes.

In Texas, Rule 76(a) of the Texas Rules of Civil Procedure declares that all "court records" are presumptively public and may only be sealed upon a showing that disclosure would damage a specific and serious interest that outweighs the presumption of openness and that no less restrictive means can adequately protect this interest.[44] Included within the definition of "court record" is "discovery, not filed of record, concerning matters that have a probably adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."[45] Orders limiting access to such material may be entered only after a public hearing.[46]

ANCHORAGE LAW LIBRARY

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40. Wagner, *Secrecy Betrays Justice*, Nat'l L.J., July 24, 1989, at 17, 22.

41. *See* Cox, *Sunshine in San Diego for ATLA*, Nat'l L.J., July 30, 1990, at 3, col. 3.

42. For example, Professor Arthur Miller, the former reporter of the Advisory Committee on the Federal Rules of Civil Procedure, questioned these assertions in a memorandum opposing changes in confidentiality rules for the state courts in New York:

> This change is needed, according to its proponents, because state courts are sealing an increasing number of court documents that contain information vital to protecting public health and safety. In fact, this concern about an increasing number of sealed court records apparently stems from news media reports about a handful of cases that concerned environmental hazards, harmful consumer products, and other complex tort litigation. 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.
>
> Despite the lack of a showing that current New York practices have affected public health and safety, and notwithstanding the fact that the public clearly did learn about the alleged threats to health and safety allegedly hidden in the sealed records discussed in the media, the allegation that courts are concealing information of this type is still of concern, although there is serious reason to doubt whether this assertion is true.

A. Miller, Memorandum on New York Civil Practice Law and Rules Regarding a Right to Public Access to Information Produced in Litigation 17-18 (June 15, 1990).

43. *See, e.g.*, Barrett, *supra* note 39.

44. TEX. R. CIV. P. 76a(1) (1990). For a thorough examination of the new rule, see Doggett & Mucchetti, *Public Access to Public Courts: discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991).

45. TEX. R. CIV. P. 76a(2)(c) (1990). This provision exempts cases "originally initiated to preserve bona fide trade secrets or other intangible property rights."

46. TEX. R. CIV. P. 76a(3) (1990) requires that a motion for confidentiality be available for public inspection and that a public notice of the hearing on the motion be posted wherever notices of meetings of county governmental bodies are required to be posted. TEX. R. CIV. P. 76a(4) directs

Another recent statute, the Florida Sunshine in Litigation Act, has limited the use of confidentiality orders where "public hazards" are involved.[47] As used in the statute, a public hazard is "any instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person or product, that has caused and is likely to cause injury."[48] As to such risks, the act forbids any agreement or contract that "has the purpose or effect of concealing a public hazard" or any information about such a hazard,[49] and any person has standing to contest any order, agreement or contract that violates this section.[50]

In 1989, Virginia adopted limitations on protective orders that prevent disclosure of materials in personal injury litigation.[51] This provision is more limited than those in Texas and Florida. The Virginia statute only requires that courts allow attorneys voluntarily to share discovered information with attorneys involved in similar or related cases, provided that they get the permission of the court and that the receiving lawyer agrees in writing to be bound by the protective order.

Finally, in 1991 the New York state courts by court rule limited the sealing of court records as part of settlements[52] although the New York State Bar had voted against the proposed change in the rules.[53] This provision does not directly affect the confidentiality of materials exchanged through discovery, but it does require a finding of good cause before a court can grant a request to seal a court file as part of a settlement.

Similar rule or statute changes have been proposed in other places. In January 1989, a bill was introduced in the House of Representatives to limit use of protective orders in product liability cases.[54] The bill would have forbidden any court to enter an order limiting dissemination of information obtained in discovery regarding the safety of any product to any governmental agency that has regulatory, law enforcement, legislative or adjudicative responsibility with respect to the product or any lawyer representing a person with a product liability claim involving a product of the same type. The bill was not reported out of the House Judiciary Committee. However, in May 1990, a subcommittee of the Senate Judiciary Committee held hearings on secrecy in litigation at

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that a hearing on the motion be held no less than 14 days after notice is posted, and that "[a]ny party may participate in the hearing."

47. FLA. STAT. § 69.081 (1990).
48. *Id.* at § 69.081(3).
49. *Id.* at § 69.081(4).
50. *Id.* at § 69.081(6).
51. VA. CODE ANN. § 8.01-420.01 (Supp. 1990).
52. *See* Kolbert, *New York Bans Routine Sealing of Court Records*, N.Y. Times, Feb. 5, 1991, at A14 col. 1. For a general discussion of the New York provisions, see Carpinello, *Public Access to Court Records in Civil Proceedings: The New York Approach*, 54 ALB. L. REV. 93, 101-08 (1989) (describing proposed rule).
53. *See State Bar Votes to Oppose Court Rule on Sealing Files*, N.Y. L.J., Jan. 28, 1991, at 1.
54. 135 CONG. REC. H49 (daily ed. Jan. 4, 1989).

which a number of witnesses decried the issuance of protective orders that limit dissemination about dangerous products.[55] Thus, congressional action, possibly affecting confidentiality rulings of state courts as well as federal courts, may lie in the future. A variety of proposals affecting protective orders have been made in other states as well.[56]

In addition, in 1987 the American Bar Association Action Commission to Improve the Tort Liability System recommended that where discovered information reveals risks of hazards to other persons or evidence relevant to claims based on such hazards, courts should grant access to the information to other plaintiffs or government agencies.[57]

These efforts to ease access to discovery materials have provoked spirited opposition as well. Some link relaxation of protective orders with the declining competitive position of American industry and risks associated with "look alike" parts developed by low cost manufacturers for mass-produced products.[58] Others suggest that relaxing protective orders would enable plaintiffs to extort settlements from defendants by "unjustifiably stirring up regulatory troubles."[59] Defendants anxious for alternative methods for avoiding dissemination of materials provided through discovery have resorted to claiming copyright protection and threatening actions for copyright infringement if the materials are copied.[60] In response to proposals to make discovered information from one case available to litigants in other cases, attorneys urge that all material disclosed through discovery be considered presumptively confidential.[61] Some have even suggested that discovery itself constitutes an unconstitutional taking in cases where it forces revelation of proprietary

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55. *See Hearings on Court Secrecy, Subcomm. on Courts and Administrative Practice, Senate Judiciary Comm.*, 101st Cong., 2d Sess. (May 17, 1990) (unpublished) (statement of Sen. Kohl).

56. Legislation limiting restrictions on disclosure of discovered material has been introduced before the legislatures of a number of states: California (Senate Bill 711, March 6, 1991) Colorado (House Bill 91-1060, 58th Gen. Assembly); Mississippi (House Bill No. 87, Reg. Sess. 1991); Missouri (House Bill No. 1139, 85th Gen. Assembly); New Hampshire (SB-91, 1991 Sess.); New Jersey (Assembly Bills No. 3794 and 4110); Pennsylvania (Amendments to House Bill No. 1289, 1990 Sess.); South Dakota (House Bill No. 1252, 66th Sess., 1991); Virginia (House Bill No. 1205, Jan. 9, 1991); Washington (House Bill 1320, 1991 Reg. Sess.). In addition, reports indicate that similar legislation will soon be introduced in Illinois. *See* Blum, *Anti-Secrecy Drive Spreads in the States*, Nat'l L.J., Jan. 14, 1991, at 3, col. 2.

57. American Bar Association, *Report of the Action Commission to Improve the Tort Liability System* 32 (Recommendation No. 10) (1987).

58. *See* Hoenig, *Protective Confidentiality Orders*, N.Y. L.J., Mar. 5, 1990, at 3, 7.

59. Weiner, *Being Sued Doesn't Mean Being Stripped of Privacy*, San Fran. Recorder, Feb. 8, 1990, at 6, col. 2.

60. *See* Jacobson, *Protecting Discovery by Copyright*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 483 (1989); Blum, *Drug Maker Copyrights Documents*, NAT'L L.J., Feb. 11, 1991, at 3, col. 3; Blum, *Copyright Used to Shield Discovery*, Nat'l L.J., Mar. 28, 1988, at 3, col. 1.

61. Thus, when the Federal Courts Study Committee proposed that federal courts continue to use protective orders to limit dissemination of confidential information revealed through discovery, but that they also make such information available for other litigants needing it as evidence in their cases, the proposal was opposed by a number of leaders of the American Bar Association's 60,000 member Section of Litigation, acting in their individual capacities.

The opponents included the chair of the Section of Litigation and officers and members of the Council of the Section.

information.[62]

Despite *Seattle Times*' seeming resolution of the most aggressive arguments for access to discovery, then, the debate has intensified. But it is important to note limitations in the arguments made by those who challenge confidentiality. Although they stress a "presumption" that discovery is to be open, they do not insist upon carte blanche access for the media. Moreover, they do not deny that substantial privacy interests and other interests may be impinged by broad discovery. Their chief concern seems to be the risk that confidentiality orders can place a straightjacket on plaintiffs' attorneys in product liability litigation.

This article will suggest that the proper resolution of these competing positions is a middle course based on established protective order principles properly applied to the concerns voiced by those who cite the supposed dangers to public health resulting from discovery confidentiality. Because aspects of the controversy re-introduce the notion that discovery should be public, however, it is important first to address arguments for general public access. Putting this dispute in perspective requires some reflection on the purposes of courts.

II. The Purposes of Courts and Public Access to Discovery

Lurking in the background of the current controversy about discovery confidentiality is an undercurrent of support for the general public access arguments that were featured in the debate one would have expected to have ended with the decision in *Seattle Times*. Most of the critics deny that they are urging general public access and claim that they are not troubled by confidentiality in commercial litigation,[63] but the themes they stress belie these assurances. Not surprisingly, the reforms that are the fruit of their lobbying stress a "presumption of open-

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> We strongly believe that discovery should be used *only* for purposes of a given case—there should be a strong presumption that any materials or information disclosed in discovery would continue to remain the property of the disclosing party and should continue to be confidential.
>
> We also believe that, consistent with the purpose of discovery and of avoiding complex ancillary disputes over discovery, protective orders should be entered upon a minimal showing of good cause.

Federal Court Study Committee Tentative Recommendations, Jan. 31, 1990, at 12-13 (comments of Michael E. Tigar, Paul J. Bschorr, Theodore R. Tetzlaff, Jamie S. Gorelick, David C. Weiner, Judah Best, Ronald L. Olson, Benjamin R. Civiletti, John R. Tomlinson, Scott J. Atlas, Hon. John C. Coughenour, Paul H. Dawes, Lawrence J. Fox, William C. McCleam, Barry F. McNeil, Dianne M. Nast, William G. Paul, John F.X. Peloso, Nancy Schaefer, Charles M. Shaffer, Jr., Jean Maclean Snyder, Mark H. Tuohey III, Edward M. Waller, Jr., Allen W. Kimbrough, Casandra Lewis, Loren Kieve, and Sidney G. Leech).

62. *See* Gelfand, *"Taking" Informational Property Through Discovery*, 66 Wash. U. L. Rev. 703 (1988) (characterizing discovery as an unconstitutional taking where the party required to provide information is in the business of selling such information and the party seeking discovery ordinarily would have to pay for the information in the marketplace).

63. *E.g.*, F. Hare, J. Gilbert & W. ReMine, *supra* note 4, at 42 (limitation on communications with the media "does not in itself pose a serious impairment of the plaintiff's case preparation"); *id.* at 153 (restrictions on dissemination in commercial cases do not impede preparation for trial).

ness" in discovery[64] that invokes concerns going far beyond removing impediments to effective preparation of product liability cases. Before turning to the specific objections to confidentiality in such cases, then, it is necessary to revisit the more general question of public access to discovery. To put that in context, one must first reflect on the purposes and goals of courts.

The starting point is simple—courts exist to resolve disputes that are brought to them by litigants, a bedrock principle that finds expression in the case or controversy requirement of Article III of the Constitution. Even more basically, the American insistence that judges limit their decisions to the issues presented by the parties and base their decisions on the evidence presented by the parties may be essential to the "moral force" of the decisions.[65] But since 1938, parties have had the backing of the court in gathering evidence through broad discovery, thereby serving the goals of courts by affording easy access to evidence. Even under this regime, courts sometimes refuse discovery because material is confidential.[66] For the most part, the discovery process depends on interaction between the litigants without any involvement, or even awareness, on the part of the judge. Thus, the 1970 amendments to the Federal Rules of Civil Procedure abolished almost all requirements that litigants seeking to use discovery first make a showing of good cause to justify it to the judge.[67] Only in rare instances, for example when a litigant asks the court to compel someone to comply with discovery, is the judge involved.[68] In the great majority of civil cases, this information exchange therefore takes place out of the public eye and without involvement by the judge, who learns about the material disclosed only when it is presented to the court at trial or in a motion.

No knowledgeable contemporary observer would claim that all civil litigation today displays only these private arrangement aspects. Begin-

64. *E.g.*, TEX. R. CIV. P. 76a; Hare, Gilbert & Ellenberger, *supra* note 4, at 606 ("As a general rule, discovery is presumed to take place in public unless compelling reasons exist for denying the public access to the proceedings.").

65. *See* L. FULLER, THE PROBLEMS OF JURISPRUDENCE 706-07 (1949).

66. *E.g.*, Litton Indus., Inc. v. Chesapeake & Ohio Ry. Co., 129 F.R.D. 528 (E.D. Wis. 1990). In that case plaintiff, which claimed defendants had excluded it from building ships by violating the antitrust laws, sought to bolster its damages proof by forcing two nonparties with whom it intended to compete to disclose financial data on their operations. The court recognized that the materials sought were relevant, *id.* at 531, but refused to order disclosure even subject to a protective order, reasoning that "[t]here is a constant danger in disclosure of confidential information pursuant to a protective order. Therefore, the party requesting disclosure must make a strong showing of need, especially when confidential information from a nonparty is sought." *Id.*

67. The exception is a medical examination of a party under FED. R. CIV. P. 35, which still requires a showing of good cause and advance court approval. In addition, with regard to an expert witness who will testify at trial, a party who wants more than an interrogatory answer containing the substance of the facts and opinions to which the expert will testify must make a motion for further discovery. As a practical matter, however, this requirement of advance judicial approval is rarely applied. Judge Schwarzer, for example, reports that "experts who are prospective witnesses are normally produced for deposition by the opposing party as a matter of course." Schwarzer, *Guidelines for Discovery, Motion Practice and Trial*, 117 F.R.D. 273, 276 (1987).

68. *See* FED. R. CIV. P. 37 (motion to compel discovery).

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ning with the publication of Professor Chayes' 1976 article on "public law" litigation,[69] academics have become increasingly intrigued by the handling of suits seeking judicial intervention to reform governmental institutions by using "structural injunctions." In these cases, the judge becomes a more active player, often gathering information through special masters and originating ideas about remedial alternatives. Stimulated by these developments, some scholars have embraced a new goal for courts—to give expression to "public values" rather than resolving disputes.[70] This view can lead to an expansive attitude toward the publicness of all aspects of litigation, including discovery.[71]

There are several obvious problems with generalizations from the public law view. One is that the line between "public law" cases that deserve the court's time and "private law" cases that do not tends to blur. Modern product liability suits are an example because they are "private" actions for damages, but given the increasingly regulatory tinge of much modern tort law, they have implications for the public.[72] Indeed, in castigating discovery confidentiality, the president of the ATLA recently opined that the courts' "real role in our scheme of government [is] making our society a better place to live."[73] However much liability judgments might do that by prompting manufacturers to improve the safety features of their products, it appears that the critics' conception of courts goes well beyond their role in deciding cases. Instead, the opponents of discovery confidentiality want the courts to function as sources of information that can be used by the general public and other arms of government. In addition, some plaintiffs' lawyers proclaim that the goal of courts is to get products they deem unsafe removed from the market.[74]

These themes are reminiscent of the 1970s cases that suggested that litigation properly may be used for the primary purpose of obtaining information,[75] perhaps using an apparent dispute as a pretext to obtain discovery for use in some other arena. Even the "public law" academic view may not embrace quite this broad of a notion of courts, particularly as an across-the-board matter regarding all cases brought before them.

This article proceeds from the premise that courts, like other organs of government, cannot be all things to all people. Certainly, civil litigation has, in some instances, made information available to the public that

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69. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

70. The leading proponent of this view is Professor Fiss. *See* Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes.").

71. *See* Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984); *cf.* Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

72. *See* Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 671-75 (1988). It should be noted, however, that there is a debate about whether product liability suits actually promote product safety.

73. Wagner, *Secrecy Betrays Justice*, *supra* note 40, at 21.

74. Meier, *Lawyers Work to Publicize Risks in Household Products*, N.Y. Times, Oct. 14, 1989, at A16, col. 4 (attorney says his goal is to get drain-clearing product off market).

75. *See supra* note 13 and accompanying text.

would not otherwise have been publicly available.[76] Certainly, the trial and resolution of civil cases is often a matter of significant public debate. Indeed, in some instances the resolution of public law cases has fueled legislative efforts to curtail courts' jurisdiction.[77] But these are basically side effects. The primary purpose for which courts were created, distinguishing them from other organs of government, is to decide cases according to the substantive law.[78] The collateral effects of litigation should not be allowed to supplant this primary purpose.[79]

Accordingly, the more ambitious goals posited for courts simply do not, as abstract propositions, provide a ground for insisting that discovery be public. However, more specific arguments for this result also have been made, and we now turn to examine these. First, it is suggested that discovery is public because it uses public resources. Second, public access to discovery might be justified in order to give the public an adequate opportunity to observe the functioning of the court system. Finally, the public interest in certain information might warrant public access to that information where it is revealed through discovery. The next section examines these arguments and notes the countervailing considerations pertinent to the primary purposes of courts.

A. Public Resources and Discovery

Some argue that material turned over through discovery should be public because it is disclosed as part of a judicial proceeding that is publicly created and funded.[80] Having been unearthed through the use of the public system, they conclude, discovery information should be available to the public.

As an initial matter, it is somewhat difficult to understand why the

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76. It is hard to know how often this has happened, or how to interpret the frequency of such revelations. On the one hand, regular revelation of information through prior litigation calls into question the need for any change in attitudes or procedures regarding discovery confidentiality. On the other hand, much information that obtained notoriety through litigation might have been obtained from other sources. Moreover, the fact that information is "public" due to exposure through litigation may say little about whether it actually comes to the attention of the public.

77. *See* Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976).

78. *E.g.*, Link v. Wabash R.R., 370 U.S. 626, 648 (1962) (Black, J., dissenting) (objecting to docket management program that "undercuts the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties"); A. Miller, *supra* note 42, at 23 (referring to "the primary purpose for which courts exist—to resolve disputes").

79. Some critics of confidentiality appear to agree with this basic starting point. *See* Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie*, 24 U. RICH. L. REV. 109, 121 (1989) ("In general, the particular lawsuit ought to be the primary focus of our litigation rules. Thus, if the parties are willing, for whatever reasons, to keep most information secret, we ought to be willing to allow them to do that.").

80. *E.g.*, Note, *supra* note 71 at 1846 ("by bringing the dispute to court and using its powers, the parties involve the judicial system long before a judge takes an active role in the process"); *cf.* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates.").

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involvement of the public court system should have a significant bearing on access to discovered information. Even information that is gathered *by* a public entity is not automatically available to the public. On the federal level, for instance, the Freedom of Information Act[81] does direct that information compiled by government be accessible to the public, but even that Act exempts a variety of categories of information from government's duty to disclose.[82] Hence, the fact that public entities have used public money to obtain information does not necessarily mean that the information itself should be publicly available,[83] and a large quantity of information that has been gathered by public entities is not available to the public under the Act.

Against this background, the role of the public court system in providing a framework for the exchange of information through discovery hardly provides a basis for providing public access to the information thus generated; there is no Freedom of Information Act applicable to information obtained through discovery. The reality of modern discovery is that most information exchange occurs without any significant involvement of the court system. Since 1970, almost all discovery in the federal court system has been entirely party initiated,[84] and court personnel are ordinarily ignorant of the specific timing, much less the subject matter, of the information exchange.[85] This point is reinforced by the common complaint in recent years that judges have taken an insufficiently active role in discovery.[86] As a consequence, the rules have been

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81. 5 U.S.C. § 552 (1988).

82. *See id.* § 552(b), which lists exemptions from the disclosure requirements. These include, among others, confidential trade secrets or financial information, *id.* § 552(b)(4), personnel and medical files whose disclosure would constitute an invasion of privacy, *id.* § 552(b)(5), or information prepared by or for the use of an agency responsible for regulation of financial institutions, *id.* § 552(b)(8). The Supreme Court has sometimes interpreted these exemptions broadly. *See, e.g.*, John Doe Agency v. John Doe Corp., 110 S. Ct. 471 (1989) (interpreting exemption for "records compiled for law enforcement purposes" to include materials originally obtained for entirely different reasons and transferred to FBI only after FOIA request was made).

83. *Cf.* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468, 1476-77 (1989) (fact that federal funds were used to prepare files demonstrates that information in files was not "freely available"; therefore privacy interests justifying refusal to disclose attached). Indeed, in some circumstances disclosure of information obtained by governmental entities to other agencies of the federal government is forbidden. *See, e.g.*, United States v. Sells Eng'g Co., 463 U.S. 418 (1983) (Federal Rule of Criminal Procedure, 6(e) forbids routine disclosure of grand jury materials to attorneys in the Civil Division of the Department of Justice); 26 U.S.C. § 6103 (1988) (limiting intra-governmental revelation of income tax return information). Given these limitations on dissemination of information *within* the government, it is hard to credit claims that the public should have a presumptive right of access to material because it was obtained through use of public resources.

84. Until 1970, parties seeking to inspect documents had to make a motion supported by good cause before obtaining discovery. This proved unworkable, and only about 25% of litigants seeking inspection complied, preferring instead to rely on informal agreements. *See* W. GLASER, PRETRIAL DISCOVERY IN THE ADVERSARY SYSTEM 210 (1968); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2205 (1970). The 1970 amendment allowed document production, like depositions and interrogatories, to be initiated without any involvement of the court. *See* FED. R. CIV. P. 34.

85. *See* Marcus, *supra* note 2, at 12.

86. For example, when Rule 26 was amended to require limitations on discovery in some cir-

amended recently to create additional opportunities for judicial supervision of discovery,[87] although the thrust of changes has been to invite the judge to curtail discovery rather than promote it.[88] The basic point is that the role of the court, where the court takes a role at all, is as a manager of the litigation and not as a producer of information.

Under normal circumstances, then, it is an overstatement to say that discovery makes significant use of public resources. True, the possibility of resort to judicial enforcement lies in the background of cases where discovery proceeds relatively amicably. In addition, in some product liability cases it may be that, despite protective orders, plaintiffs encounter much "hard ball" resistance from defendants.[89] Yet in general, the actual involvement and investment of publicly funded courts in the process is minimal. Given the breadth of disclosures that may occur between the parties (sometimes without the filing of any formal discovery requests), this factor does not justify public access to discovery materials.

This is not to say that there are never cases in which the court system plays an integral role in developing information during the discovery phase. A leading example is the initiative taken by Judge Miles Lord in several Dalkon Shield cases before his court to pressure defendant A.H. Robins Co. to produce more information on the product.[90] Perhaps in such extraordinary cases arguments could be made to justify public access due to this investment of judicial resources. But such arguments disregard the normal limitations on the judicial function in the American system. Judge Lord himself was reprimanded by the Eighth Circuit for his partisan conduct of these litigations,[91] and efforts by judges to develop evidence generally exceed the American model of judging.[92] Whatever one's view of these extraordinary instances, they do not provide support for the general proposition that the involvement of public resources warrants access to discovery.

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cumstances, the Advisory Committee on the Civil Rules explained that: "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." FED. R. CIV. P. 26 advisory committee's note (1983 Amends.).

87. *See* FED. R. CIV. P. 26(f) (providing for discovery conferences).

88. *See* FED. R. CIV. P. 26(b)(1) (describing situations in which court shall limit discovery).

89. *See infra* text accompanying notes 239-42 (regarding evaluating claims of reliance by defendants on protective orders with reference to their actual behavior in discovery).

90. For a description of this effort, see S. ENGELMAYER & R. WAGMAN, LORD'S JUSTICE: ONE JUDGE'S BATTLE TO EXPOSE THE DEADLY DALKON SHIELD 165-93 (1985). It is worth noting that there was an order in the case not to destroy documents obtained in discovery. *See* Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1184-85 (8th Cir. 1984).

91. *A.H. Robins Co.*, 747 F.2d 1180. The appellate court noted the judge's active participation in discovery, including travelling to Richmond, Virginia, to preside over depositions and appointing two special masters to supervise the production of documents. *Id.* at 1185-86, 1191-92. The Eighth Circuit reprimanded Judge Lord for requiring three top Robins officials to appear in his courtroom in connection with the dismissal of the cases through settlement and castigating the officials for the defendant's conduct in relation to the Dalkon Shield and the conduct of the case.

92. *See, e.g.*, Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 163 A.2d 466 (1960) (court reverses because trial judge appointed "amicus curiae" to develop extra evidence and called 27 witnesses at trial while parties called only five).

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Lurking in the background, however, one senses a broader contention that litigants who use the courts should make a public disclosure of pertinent information as a sort of price tag for admittance. In some ways, the courts traditionally have required such disclosure. Ordinarily, for example, the plaintiff must file a complaint disclosing some specifics about the claim,[93] the defendant must file an answer, and these documents are regarded as a part of the court record that is open to public view. Although it is far from clear that this disclosure is designed to reveal information about the parties,[94] the fact that it occurs sometimes surfaces explicitly as a sort of price that courts require litigants to pay for access to the publicly-supported court system.[95]

Perhaps this price-of-admission view is appropriate with regard to some organs of government, such as the Securities Exchange Commission in its review of public offerings of stock, since those disclosures are directed to the public.[96] But it is hard to see why such attitudes should apply in general to civil litigants, and especially difficult to understand why they should apply to the essentially nonpublic discovery process.[97] As a general matter, one should be cautious about imposing new burdens on those who seek to use the public courts, particularly given the potential intrusiveness of discovery. One should ask how insistence on revealing discovery serves the goals of courts. Below, this article turns to the ways in which access to discovery information might improve public understanding of the courts[98] and the public interest in discovered information itself.[99] Beyond these possibilities, the proponents of public disclosure have offered no persuasive reasons for access, and the generalized "ticket of admission" attitude therefore adds no weight to arguments for public access.

B. Public Scrutiny of the Court System

Beyond saying that discovery should be public because it occurs

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93. The practice of allowing some plaintiffs to proceed anonymously provides an exception to this rule in some cases. *See* Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

94. The main reason for requiring some notice of the grounds for the suit and defense would seem to be to enable the public to be aware of the kinds of cases that are before the courts, not to provide public insight into the matters in dispute. Nevertheless, it is frequently true that such disclosure does occur and is an important side-effect of the filing of a suit.

95. *See* Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 119 (Fla. 1988) ("The parties seeking a dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system.").

96. "Federal securities laws place a price of disclosure upon access to interstate capital markets. Once materials are utilized in that disclosure, they become representations to third parties by the corporation." *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982).

97. Some courts recognize this point: "the Marshalls have a right to seek to vindicate their civil rights without their individual concerns being sacrificed to a generalized desire of the press to publish and the public to know every fact disclosed by the discovery process as soon as the parties do." The Courier Journal v. Marshall, 828 F.2d 361, 366 (6th Cir. 1987).

98. *See infra* text accompanying notes 100-27.

99. *See infra* text accompanying notes 128-57.

under the auspices of a public court system, proponents of access invoke first amendment and common law rights of access to trials and some related proceedings in court. Although providing access on these grounds can enable the public to observe and evaluate the actual dispute resolution performance of the courts, the arguments for applying them to discovery are too broad.

In a series of decisions, the Supreme Court has gradually expanded rights of public access to criminal trials and certain pretrial events in criminal cases, developing a two-part test to govern public access. The first step looks to whether a given litigation-related event historically has been open to the public.[100] The second stresses various functional values furthered by public access. The Court has found that public access affords the public an opportunity to understand the court system,[101] permits the public to serve as a check on the court system,[102] furthers the truth-seeking process by prompting witnesses to tell the truth,[103] and fosters an appearance of fairness by enabling the public to content themselves that trials are handled in a fair manner.[104] Given these benefits of access, the Court has overturned orders closing the trial of a sex offense during the testimony of the victim,[105] the voir dire of the jury in a criminal case,[106] and a preliminary hearing in a criminal case.[107] The importance of these issues of public access to criminal trials recently has been brought home in the trial of Washington D.C. Mayor Marion Barry by the court's order excluding two religious leaders, which the D.C. Circuit ordered the district judge to reconsider in light of the first amendment right of access to trials.[108]

The Supreme Court has not ruled on whether these propositions apply to civil cases as well, but the consensus among lower courts is that they do.[109] Moreover, the general policies served by access arguably apply to discovery. Given the centrality of discovery to disposition of civil cases,[110] and the widespread clamor about abuse of discovery, it would

100. *E.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982).

101. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

102. *E.g.*, *Globe Newspaper*, 457 U.S. at 606.

103. *E.g.*, *Richmond Newspapers*, 448 U.S. at 596-97 (Brennan, J., concurring).

104. *E.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) [hereinafter *Press-Enterprise I*].

105. *Globe Newspaper*, 457 U.S. 596.

106. *Press-Enterprise I*, 464 U.S. 501.

107. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

108. *See* United States v. Barry, Nos. 90-3149; 90-3150; 90-3151 (D.C. Cir. July 5, 1990) ("No individual can be wholly excluded from the courtroom merely because he advocates a particular political, legal or religious point of view—even a point of view that the district court or we may regard as antithetical to the fair administration of justice."), *reh'g denied*, (D.C. Cir. Nov. 29, 1990); Lewis, *2 Barry Supporters Get New Bid to Attend Trial*, N.Y. Times, July 6, 1990, at A11, col. 1.

109. *E.g.*, Westmoreland v. Columbia Broadcasting Sys., 752 F.2d 16, 22-23 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Publicker Indus. v. Cohen, 733 F.2d 1059, 1067-71 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177-79 (6th Cir. 1983).

110. For a description of this transformation, see Lunquist, *Trial Lawyer or Litigator*, 7 LITIGATION 3, 4 (Summer 1981).

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seem that access serves the value of giving the public a basis for assessing the system's functioning. Although it would be ironic if complaints about the burden and intrusiveness of discovery magnified those burdens by providing a basis for public access, some commentators have so urged.[111] Furthermore, if public access promotes truthfulness in testimony, that service would seem important at the deposition as well as the trial stage, and arguments based on this notion have been made for public access to depositions.[112] Indeed, public interest in the resolution of disputes involving public norms might justify public access to settlement discussions[113] and information about disputes that did not mature into actual lawsuits.[114] The potential impact of this set of access arguments is therefore truly breathtaking, transforming the public's role in litigation from the one we have known traditionally. Not surprisingly, courts have rejected the extension of this reasoning to discovery.[115]

The restraining influence on such arguments is the Supreme Court's historical test that looks to whether there is a tradition of openness to the litigation activity in question.[116] Yet such historical inquiries often have

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[D]iscovery has replaced trial as the mechanism for resolving disputes. Litigators march forth from law firms flanked by junior partners, associates and paralegals much as fifteenth century Italian armies ventured from warring city-states. These armies left home and lived well off the land as they proceeded to confront the enemy. They avoided direct combat at all costs. The process leading up to it was too rewarding, while battle itself was too risky. Thus does litigation proceed today.

Id.

111. *See* Note, *supra* note 71, at 1823 ("because many cases end at the pretrial stage, citizens should be given access to such proceedings to avoid distorted views of the judicial system").

112. *See* Resnik, *supra* note 71, at 423 (noting, in connection with arguments about value of public participation in taking of testimony, that "witnesses testify not only at trials but also at depositions, and judgments are rendered not only after live testimony, but also after the submission of papers"); Palm Beach Newspapers, Inc. v. Burk, 471 So.2d 571, 582 (Fla. App., 4th Dist. 1985) ("Florida, like virtually every other jurisdiction, has in essence a pretrial criminal justice system in which the overwhelming majority of cases are concluded without a trial. In most instances, then, the information disclosed through discovery will be the only information the public has about the facts of the case."); *see also* Applications of Nat'l Broadcasting Co., 828 F.2d 340, 347 (6th Cir. 1987) ("Openness in judicial proceedings promotes public confidence in the courts. The Supreme Court has pointed out that openness has been a principle that accompanied the long evolution of proceedings culminating in the modern criminal trial. One feature of that evolution has been the increasing importance of pretrial proceedings.").

113. Resnik, *supra* note 71, at 430 ("Should we mandate that litigants discuss settlements in places where strangers can listen?").

114. *See id.* at 428 ("if lawsuits are important moments that implicate the public, so are many disputes that are never transformed into lawsuits").

115. *E.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986) ("Nor does public access to the discovery process play a significant role in the administration of justice. Indeed, if such access were to be mandated, the civil discovery process might actually be made more complicated and burdensome than it already is."); *see also* Mokhiber v. Davis, 537 A.2d 1100, 1110 (D.C. 1988) ("General access to discovery materials, however, will not promote these ideals of public scrutiny. By definition, discovered materials, as such, play no role in the courtroom or in the judge's decision-making. . . . Public access to discovery materials, therefore, would focus attention not at all on the courts, but solely on the presumptively private affairs of the parties.").

116. *E.g.*, Note, *What Ever Happened to "The Right to Know"? Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1117 (1987) (historical prong as limit on "theoretically endless" scope of right to access).

proved difficult to accomplish in an era of innovations in litigation.[117] Certainly, intense browsing through the arcana of past litigation practices often seems an unrewarding way of resolving issues of public access.[118] Moreover, innovations in litigation fortify arguments for an expansion of the areas of legitimate public interest, as some courts have recognized.[119]

This country may be gingerly approaching epochal shifts in litigation that would warrant profound changes along the lines of those suggested by commentators speculating on the supposed policy advantages of public access to an array of dispute resolution activities.[120] There are signs that our attitude toward adjudication itself may be moving away from the trial in court to an extent that calls for expansion of access to other litigation events, including but not limited to discovery, as a substitute for the traditional public right to attend the trial.[121] Beyond that, judges may be tending to emphasize mediated settlements as preferable to adjudicated outcomes.[122] This movement toward alternative dispute resolution has generated a mountain of literature, and need not be examined in any detail here. The point is that arguments based on public interest in access to proceedings now important to litigation may at some point be justified although these proceedings were not traditionally open to the public.

Recent developments suggest sensitivity toward these concerns. Thus, in order to afford the public a greater opportunity to observe actual trials, the federal courts are embarking on an experiment allowing

117. For analogous difficulties with such an historical test, consider the problems the Court has encountered in applying the seventh amendment's guarantee of a right to jury trial in "cases at common law" when confronted with new types of proceedings. Although the Court continues to make historical inquiry under one prong of its seventh amendment analysis, last term Justice Brennan urged that this inquiry be abandoned altogether. *See* Local 391 v. Terry, 110 S. Ct. 1339, 1350-53 (1990) (Brennan, J., concurring in part and concurring in the judgment).

118. For an example, see *In re* Reporters' Comm. for Freedom of the Press, 773 F.2d 1325, 1333-36 (D.C. Cir. 1985) in which then-Judge Scalia dredged through nineteenth and early twentieth century cases to divine the attitude of courts at that time concerning public access to filings in court.

119. *See* Mokhiber v. Davis, 537 A.2d 1100, 1112 (D.C. 1988). Referring to discovery motions, not the raw fruits of discovery, the court stated:

> It would make little sense to shut off access for what is, practically speaking, a new kind of judicial process just because that particular procedure did not exist at common law. Instead, the public should enjoy the right to view new kinds of proceedings when they are like traditional ones in this significant respect: that access will serve the same values and policies which underlie the common law's recognition of the public right to view other parts of court procedure and which, indeed, are similar to those values and policies upon which asserted first amendment rights are justified. In short, we do not view the common law right of access as one frozen in history but rather as one that, in the finest tradition of our jurisprudence, must reflect changes brought by the times.

Id.

120. *See supra* text accompanying notes 109-14.

121. For a discussion of these developments, see Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989).

122. *See, e.g.*, Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 50 (1987) (describing "an attitude [among judges] that a trial represents judicial failure").

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television cameras into courtrooms.[123] More significantly, in California a recent report urged that statutorily mandated proceedings before private judges be open to the public in the same way trials are open in the public court system.[124]

Obviously, it is a large step from these broad issues to public access to discovery.[125] Moreover, the Supreme Court already has declared itself unanimously of the view that discovery was not historically open and is not a part of the civil trial.[126] The array of nontrial activities that might

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123. *See* Greenhouse, *Federal Courts are Moving to Let in Radio and TV*, N.Y. Times, Sept. 13, 1990, at A14, col. 4.

124. *See* Judicial Council of California, *The Report and Recommendations of the Judicial Council Advisory Committee on Private Judges* 25, 29-32 (1990).

125. Qualitatively different and more difficult issues arise when discovery materials are presented to the court in connection with a pretrial motion, because access then may be important to public scrutiny of the decisions of judges. As a general matter, the decision of whether this use of the materials provides a basis for access turns on the nature of the motion and the role of the documents in the resolution of the motion. *See* Marcus, *supra* note 2, at 46-49. The courts sometimes have taken different approaches to these issues.

As a starting point, where a motion results in a decision on the merits, access to the materials on which the decision is based seems as necessary as access to a trial. *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (2d Cir. 1988) ("Because summary judgment adjudicates substantive rights and serves as a substitute for trial, we fail to see the difference between a trial and the situation before us now."); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308-09 (7th Cir. 1984); *cf.* Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) (access to materials used on summary judgment motion "at the farthest reaches of the first amendment right to attend judicial proceedings").

Some have concluded that where summary judgment is denied access is not necessary, because such a ruling does not resolve the merits of the case. *See* Times Herald Printing Co. v. Jones, 717 S.W.2d 933, 940 (Tex. Ct. App. 1986) (order denying summary judgment "only a preliminary ruling that a fact issue existed"). Some even question the need to grant access to materials submitted on a summary judgment motion. Consider the views of then-Judge Scalia in *In re* Reporters' Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985).

> [M]aterial placed before the court in connection with summary judgment motions is not constitutionally required to be open to the public—unless we are to subject the trial courts to the constitutional necessity of ruling, either pre-trial or post-trial, on the admissibility of voluminous material that is filed, and perhaps even referred to in the summary judgment motion, but not sought to be introduced [at trial].

Id. at 1338.

Others take a broader view. Thus, in *In re* Petroleum Prods. Antitrust Litig., 101 F.R.D. 34 (C.D. Cal. 1984), the court reasoned that access extends to all documents the judge should have considered, not only those actually relied on. *See id.* at 43. One court has concluded that "the presumptive public right of access does apply to motions filed with the court concerning discovery." Mokhiber v. Davis, 537 A.2d 1100, 1111 (D.C. 1988). Contrast the First Circuit's view:

> [A] request to compel or protect the disclosure of information in the discovery process is not a request for the disposition of substantive rights. Materials submitted to the court for its consideration of a discovery motion are actually one step further removed in public concern from the trial process than the discovery materials themselves.

Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986). *But cf.* Note, *A First Amendment Right of Access to Affidavits in Support of Search Warrants*, 90 COLUM. L. REV. 2216 (1990) (urging that role of affidavits in decision whether to issue warrant justifies access).

This discord shows that there are genuine areas for disagreement concerning the access issues raised in civil litigation. But these issues turn on the decision-making role of the court, not the mere fact that material is turned over through the discovery process.

126. *See supra* text accompanying note 22; *see also In re* Reporters' Comm. for Freedom of the Press, 773 F.2d 1325, 1337 (D.C. Cir. 1985) (Scalia, J.) ("Traditionally, absent a statute or court order, even parties to the case did not have the right to inspect depositions taken at the behest of their opponents."); *In re* Agent Orange Prod. Liab. Litig., 104 F.R.D. 559, 566 (E.D.N.Y. 1985)

be encompassed within such a public right of access—possibly including settlement negotiations and information about potential suits that are never even filed in court—emphasizes the present reality that such access is not required. The point is that this sort of access argument proves far too much to be persuasive on the question of discovery access at this juncture. Perhaps greater access to in-court activities may soon arrive, but even that raises risks of disrupting or completely frustrating settlement promotion efforts. Given the severely disruptive consequences of general public access to discovery,[127] there is no reason to expect such arguments to prevail on that issue in the foreseeable future.

C. Public Interest in Discovered Information

The critics of protective orders in product liability cases do not stress the systemic arguments examined above so much as the public interest in the content of the material sometimes unearthed through discovery in those cases. Certainly there may be instances in which public interest in the information itself may warrant access to discovered information.[128] But a broad invitation to afford access to confidential discovered information because there is a public interest in the information itself diverges significantly from the basic purpose of courts to resolve lawsuits.

This divergence is illustrated dramatically by the attitude of the media, often strong proponents of access based on the public interest in the information itself. By publicizing the actual actions of courts, the media may further interests in public knowledge and understanding of the work of the courts. But it should be emphasized that the media do not embrace the goal of adjudication based on full disclosure that lies behind broad modern discovery. To the contrary, the media go to great lengths to resist disclosing relevant evidence they possess in order to protect their confidential sources.[129] Indeed, they even resist testifying about things they personally witness in public.[130]

One need not question the strong arguments in favor of such special

("After *Seattle Times v. Rhinehart*, . . . there can be no question that the First Amendment does not *require* open access to discovery materials."), *aff'd*, 821 F.2d 139 (2d Cir. 1987).

127. *See infra* text accompanying notes 158-71.

128. *See* Marcus, *supra* note 2, at 50-53 (discussing instances in which public interest in governmental acts may warrant access to discovered information).

129. For a time, some reporters claimed a first amendment privilege to refuse to testify. The Supreme Court rejected this contention in Branzburg v. Hayes, 408 U.S. 665 (1972). Curiously, reporters also have argued that the first amendment protects them from liability if they break a promise of confidentiality. *See* Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn.), *cert. granted*, 111 S. Ct. 578 (1990).

130. *E.g.*, New York Times Co. v. Superior Court, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990) (newspaper could refuse to turn over unpublished photographs of accident that gave rise to products liability action); Delaney v. Superior Court, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990) (California newsperson's shield law protects reporter from having to disclose unpublished nonconfidential eyewitness information, but immunity can be overcome in criminal case where defendant demonstrates reasonable likelihood that information will be helpful to defense).

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treatment of the press to recognize that in important ways the goals of the press are fundamentally different from the goals of the courts. Thoughtful representatives of the press recognize the irony of simultaneously arguing for public access to information others are compelled to reveal in pretrial discovery while refusing to provide information they possess at trial where it is important to the resolution of a case.[131] Reporters' resistance to revealing information that is relevant to resolution of suits underscores the differences between the information-gathering objectives of the media (to satisfy public curiosity) and that of courts (to resolve cases correctly). That difference is the key to appreciating the difficulties presented by arguments for access to discovery based on public interest in the information itself.

Reflecting on the attitudes of the media emphasizes another key point—the public's actual interest in information about other people may not accord with an informed observer's belief about what the public should find interesting. The variety of subjects that some sector of the public will find interesting is almost unlimited. Anyone who has surveyed the magazine offerings at the checkout counter of an average American supermarket will appreciate that the public appetite for tidbits of information, even about seemingly ordinary people, is very broad.

This omnivorous public appetite could support a finding of public interest in a wide variety of matters subject to discovery. Famous people often become involved in litigation, for example. Is it not likely that most members of the public would prefer to attend depositions of the parties in *Trump v. Trump*[132] than depositions in an automobile rollover suit? Is there any doubt that more members of the public would be interested in documents concerning the financial worth of singer Diana Ross[133] than copies of testing done on a new drug before it was released on the market? Indeed, a leading protective order case involved excluding a plaintiff from the deposition of defendant Jacqueline Onassis because of concern that he would use the deposition as an opportunity to photograph her and disseminate the resulting pictures to the interested public.[134]

These questions may seem to demean the issue of public interest, but it is worth noting that such matters as the operation of a professional football team have been found to have sufficient public interest to warrant access to discovery.[135] The proponents of public interest access

131. *See* Keeping Secrets: Justice on Trial, at 31-32 (Apr. 1990) (statement of Alice Lucan, attorney for various reporter groups, at program put on by the American Trial Lawyers Association) ("Ironically, when they are subpoenaed, reporters want this same kind of secrecy.").

132. Litigation has erupted in New York state court between Donald and Ivana Trump.

133. *See* Davis v. Ross, 107 F.R.D. 326 (S.D.N.Y. 1985) (court refuses to order production of information about Diana Ross's financial condition even though plaintiff agrees to submit to protective order).

134. Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973).

135. *See* Bowlen v. District Court, 733 P.2d 1179 (Colo. 1987) (overturning trial court order vacating protective order). The educated reaction to this example, of course, is that professional

clearly have a certain agenda in mind, but their arguments are premised on the notion that what they think the public should be interested in should be preferred to the actual interests of other citizens. In terms of the right to attend trials, it is not clear that the public's actual interests (particularly as conceived by the media) correspond to what the enlightened believe the public should prefer, a point underscored by the rapt attention paid to the trial of Zsa Zsa Gabor for hitting a policeman.[136] It is curious that those who decry the discretion judges have in crafting protective orders to protect interests in confidentiality[137] disregard the elasticity of the notion of public interest as it might apply to discovered information.

Moreover, the kinds of interests that the critics of protective orders urge to justify public access to discovery material are precisely the kinds of things that are likely already to be the subject of public regulation and scrutiny by other branches of government. It may well be, as some point out,[138] that these public regulators are not always as attentive or enthusiastic as we might prefer. But this possible failure of the regulatory agencies is a curious ground for allowing courts to take up the slack by turning discovery into a device for developing information to prod regulators into action.[139] Regulators have powers for gathering information on their own for their purposes; when they obtain it through the discovery process they may not be allowed to use it for purposes other than preparation for the case at hand.[140] Similarly, delivering discovered information to regulatory agencies is not per se a proper objective,[141]

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football is big business, and often is entwined with local politics, making the finding of a public interest persuasive. It is hard to resist the conclusion, however, that a key ingredient to the public interest in details about this particular big business is simple curiosity.

136. *Cf.* Note, *The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Access to Pretrial Discovery*, 42 STAN. L. REV. 1577, 1578 (1990) ("Instead of focusing on the substantive issues of the case, the media may focus on information only tangentially related to the issues.").

137. *See infra* text accompanying notes 178-98 (relating efforts to limit protective orders to "true trade secrets").

138. *See* Morrison, *supra* note 79, at 114. Sporkin, *SEC Enforcement and the Corporate Board Room*, 61 N.C.L. REV. 455, 456 (1983) ("when a government agency has limited resources, it is not able to investigate every form of chicanery that comes within its jurisdiction").

139. Critics have argued, however, that general access to discovery in product liability cases would give the public a basis for evaluating the performance of regulators. *See* F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 68. The evaluation argument for public access, however, relates to the evaluation of the court system, not the executive or legislative branch. The courts are not designed to be a window through which the public may evaluate all aspects of governmental action.

140. For example, in Harris v. Amoco Prod. Co., 768 F.2d 669 (5th Cir. 1985), the EEOC intervened in a Title VII action alleging racial discrimination. The EEOC obtained discovery about the age and sex of the employer's workforce for use in a multiple regression analysis. When the private plaintiffs settled their case, the EEOC sought to make use of the material for other purposes. Finding that the employer's interest in preserving the confidentiality of its records constituted good cause, the court held that the EEOC could not do so. The court reasoned that "Title VII does not require that the EEOC receive full use of material discovered as an intervenor, whether that use is further investigation, litigation, or interagency cooperation." *Id.* at 685.

141. *See* State of New York v. United States Metals Ref. Co., 771 F.2d 796 (3d Cir. 1985), in which the state's discovery included an inspection of the defendant's plant during which the state took dust samples. The state then prepared a report that it wished to submit to the Environmental

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although in many instances it might be regarded as proper.[142]

More generally, the argument that courts should identify and publicize information obtained through discovery relating to public health overstates the role of courts in product liability litigation because courts do not have the kinds of powers regulators wield. True, one of the theoretical props of modern product liability law is the notion that by imposing liability on producers of defective products courts prompt them to make the products safer.[143] In addition, permitting discovery sharing among plaintiffs pursuing similar claims may further this objective by facilitating recovery by other injured persons.[144] Yet the courts' "regulation" effect occurs as a result of judgments or settlements in individual cases. This is qualitatively different from issuing orders that products should no longer be sold. That simply is not the proper task of courts in actions brought by private individuals in our system, nor is it a reason for requiring disclosure of information through discovery.

In addition, it is hardly clear that publicity under the auspices of courts is necessary, or even that it would be helpful. Indeed, in some areas regulators appear to be taking up the responsibility.[145] Although self-policing by defendants in response to discovery revelations is probably a rare thing,[146] the ability of courts to discern whether discovery materials bear on public safety must be doubted. In some instances, judges may become so familiar with the material developed through discovery that they can make such a judgment, but those will be rare cases. Courts could hardly make reliable determinations from the pleadings, which are often quite vague. Requiring judges to master the subject to determine whether issues of public safety truly are implicated seems to

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Protection Agency (EPA), but the court held that its need to do so was not compelling, noting that the EPA was doing its own investigation. *Id.* at 803. Given the overlap in investigations, the decision refusing to allow the results to be turned over seems unduly unyielding.

142. For example, in Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986), the district court permitted disclosures to public health and environmental authorities. When a newspaper objected that refusing it access was discriminatory and unfair, the appellate court found the difference in treatment warranted. "In a case involving allegations that a city's water supply had been poisoned by toxic chemicals, the public interest required that information bearing on this problem be made available to those charged with protecting the public's health." *Id.* at 8. After a 78 day trial, however, the jury found that the plaintiffs had failed to prove any contamination by defendants. *See* Anderson v. Cryovac, Inc., 862 F.2d 910, 914 (1st Cir. 1988). The trial court found that this meant that "there existed no cognizable hazard that could be the subject of abatement." *Id.* at 922 (quoting lower court). Thus, the case illustrates the risks of assuming that charges about public hazards invariably mean that there is in fact a public hazard.

143. *See* Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

144. *See infra* text accompanying notes 212-54.

145. *See* Hitts, *Single Data Bank to Identify Incompetent Doctors*, N.Y. Times, Aug. 30, 1990, at A17, col. 1 (reporting that the federal government will create and administer a single databank compiling records of claims against doctors for malpractice).

146. *But see* Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985). "A litigation partner in a New York firm told us that in the course of defending a product liability action, he learned facts that led him to seek out the company's chief executive officer to tell him that the corporate product safety and quality control systems 'were a mess.'" *Id.* at 432. Laudable though this seems, one cannot be confident that such intervention will occur often.

indenture them for a task often unnecessary to deciding cases before them and certainly unnecessary to presiding over settled cases. Otherwise, judges called upon to determine whether public safety is implicated could rely only on some generalized ideas about the kind of information disclosed in discovery, a relatively unhelpful way of determining what really needs to be turned over.

Finally, public safety concerns might often clash with other concerns, principally privacy. Consider, for example, the provisions of the new Florida statute. The statute limits court restrictions on access to information about a "public hazard," which includes a "person . . . that has caused and is likely to cause injury."[147] Putting aside public safety concerns such as those that might arise from disclosure through discovery of diagnoses of various forms of mental illness, consider how this approach might work in connection with the public health issue most prominently on the minds of Americans right now—AIDS.

Surely information about the identity of persons carrying the AIDS virus might be viewed as indicating a risk of injury to others. One need only look to recent headlines concerning claims that patients of a dentist in Florida may have contracted AIDS from the dentist to appreciate the point.[148] A similar concern recently surfaced in California, where a prostitute told a *Newsweek* magazine reporter that she had AIDS, but continued to ply her trade. After the story appeared, she was arrested and charged with attempted murder.[149] Whatever the merit of the charges, the episode points out the broad potential sweep of a judicial undertaking to reveal information about public health risks associated with AIDS infection.

In fact, AIDS has played a leading role in some of the most difficult recent cases involving issues of discovery confidentiality. Many plaintiffs who have contracted AIDS have sued blood banks or other providers of blood, charging that they became infected due to tainted blood, and that the provider of blood was negligent in failing to screen out donors with AIDS. There has been no suggestion in these cases that courts should publicize the identity of AIDS sufferers. To the contrary, the issue is whether the court will order discovery of the identity of blood donors at all given the "hysteria" currently prevailing concerning AIDS.[150] In

147. FLA. STAT. § 69.081(2) (1990).

148. *See* Altman, *Dentist With AIDS is Linked to 2 Other Cases*, N.Y. Times, Jan. 17, 1991, at A13, col. 4 (reporting that two other patients of dentist also are infected with AIDS virus); Altman, *2 New AIDS Infections Deepen Florida Mystery*, N.Y. Times, Sept. 22, 1990, at A1, col. 5 (same); Applebome, *Dentist Dies of AIDS, Leaving Florida City Concerned but Calm*, N.Y. Times, Sept. 8, 1990, at A1, col. 1 (describing one patient of dentist who has been diagnosed as having AIDS and who attributes it to dentist).

149. *See* Bishop, *For Prostitute, Limelight and Now Jail*, N.Y. Times, July 15, 1990, at A2, col. 1. In California, a 1988 state law requires that anyone convicted of prostitution be tested for AIDS. *See* Markell, *Court Upholds AIDS Testing For Prostitutes*, San Fran. Chron., Jan. 1, 1991, at A3, col. 1.

150. Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 652 (D.S.C. 1989) (noting "hysteria" with which public has reacted to AIDS).

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terms of the traditional objectives of courts, plaintiffs in these cases have a valid ground for wanting to learn the identity of the donor because that person is a potential witness concerning the screening procedures actually used by the blood bank. Nevertheless, courts are split on whether to allow such discovery because of the risk of impairing the blood supply of the nation should the risk of such disclosure deter donors.[151] Even those courts that order disclosure, however, do so subject to protective provisions designed to ensure that the information is used only for purposes of preparation for trial. Similar controversy surrounds other efforts to disseminate information about the identity of persons with AIDS, even doctors.[152]

Thus, the public safety ground for access not only seems unworkable because the judge often will not be sufficiently versed in the possible public safety implications of discovered material, it also seems overbroad. If publicizing the identities of AIDS sufferers disclosed through discovery is not justified on such grounds, neither is disseminating material produced in product liability suits. Obviously the confidentiality interests are different in the two cases, and one could debate about what information is more likely to afford the public an opportunity to avoid a genuine risk. The basic point, however, is that treating litigation generally as a way to disseminate information about matters affecting public health disregards the intrusiveness of discovery and distorts the litigation process.

Therefore, it is not surprising that when judges do take the extra step and embrace a public clearinghouse stance, this endeavor is later found to exceed judicial authority. The prime example is *Wyeth Laboratories v. United States District Court*.[153] In *Wyeth*, the plaintiff claimed injuries due to use of defendant's DTP (diphtheria, tetanus and pertussis) vaccine. After a two-month trial, the plaintiff won a large verdict. The plaintiff then moved to vacate a protective order that had been entered governing material produced by defendant, and the court allowed the plaintiff to share this information with counsel for other claimants suing the defendant.

Unsatisfied with only allowing the use of the material in other litigation, the court went further and directed the creation of a Wyeth Laboratory DTP vaccine litigation discovery library to be housed in the

151. *Compare* Belle Bonfils Mem. Blood Center v. District Court, 763 P.2d 1003 (Colo. 1988) (discovery allowed); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987) *with* Coleman v. American Red Cross, 130 F.R.D. 360 (E.D. Mich. 1990) (discovery refused); Doe v. American Red Cross Blood Servs., 125 F.R.D. 646 (D.S.C. 1989).

152. *E.g.*, Altman, *AIDS Testing of Doctors is Crux of Thorny Debate*, N.Y. Times, Dec. 27, 1990, at A1, col. 2; Barringer, *Doctor's AIDS Death Renews Debate on Who Should Know*, N.Y. Times, Dec. 8, 1990, at A1, col. 5. In a related development, an AIDS researcher in Colorado defied a state statute requiring that he report the names of AIDS-infected study participants. *See Researcher Defies AIDS Law*, San Fran. Chron., Jan. 7, 1991, at A3, col. 4.

153. 851 F.2d 321 (10th Cir. 1988).

courthouse as a reference tool for other litigants and for researchers.[154] Beyond opening the discovery material to all interested people, the judge proposed to augment the collection with contributions from other sources.[155] The Tenth Circuit upheld the vacation of the protective order,[156] but granted a writ of mandamus ordering the district court to vacate the order establishing the library on the ground that federal judges have no authority to do what the judge proposed to do.[157] Providing a source of information for general public edification is beyond the role of courts.

D. Countervailing Considerations

The foregoing shows that the broad arguments for access to discovery based on a public interest in litigation proceedings or on the public interest in the content of discovered matter are overbroad. Before turning to a more restrained approach to the problems that form the heart of the recent controversy, it is important to mention some countervailing considerations favoring protecting confidentiality in discovery proceedings.

One basic problem is that presumptive public access would disrupt orderly pretrial preparation by fomenting opposition to broad discovery, forcing judges to resolve confidentiality issues that the parties do not dispute between themselves but only as to the public, and impeding efforts

154. The judge's opinion made it clear that he intended the library to be used for any related litigation and for other purposes:

> [A]ll of this kind of material ought to be available in the event a similar case is undertaken here or elsewhere. To put this in context, if I were a trial judge undertaking my first Wyeth vaccine case, at the time of my first status conference with the lawyers, and wherein I will hear of the mass of discovery that is to be undertaken, I would say, "go to Wichita, study the Graham case, familiarize yourselves with what both sides know is necessary in your case, and return here with an understanding that the discovery process can and will be refined and shortened."
>
> . . . .
>
> Henceforth, and as pertains to similar litigation filed here or elsewhere, on application by any attorney engaged and with the authorization of any trial judge — federal or state — wherein a similar case is filed or under way, the attorney's admission to the library is welcomed here.
>
> Additionally, because the trial record of this case probably will be of interest to researchers, academics, institutions, consumer groups, members of the medical profession or associations, private or governmental, legal associations such as the ATLA and/or Defense Research Institute, and even law students, all in the interest of stimulating scientific and/or public discourse or learning regarding whooping cough vaccinations and their ramifications, they are all welcomed here.

Graham v. Wyeth Laboratories, No. 85-1481-K (D. Kan. Feb. 2, 1988) (Court's Memorandum and Findings Regarding Modification of Protective Order and Establishment of Wyeth Laboratories DTP Vaccine Litigation Library).

155. "It is my intention that this facility will be extended by way of additional material supplied from time to time by other litigants, lawyers, judges, or associations following the trial of successive cases, and such additions will be welcome." *Id.*

156. On this point, the trial court reasoned that the materials were no longer confidential given the disclosures that had happened at the trial. The court permitted the defendant to show that materials nevertheless were still confidential. Thus, the appellate court explained that "the court has simply reopened the entire matter of disclosure to informed and particularized consideration." Wyeth Laboratories v. United States District Court, 851 F.2d 321, 322-23 (10th Cir. 1988).

157. *Id.* at 324.

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to settle cases.[158] In particular, discovery in product liability cases can be very broad, seeking a large volume of records about related products over a number of years.[159] Defendants who claim that much of what the plaintiff seeks really has no bearing on the case often find it simpler to allow plaintiffs to learn this themselves by examining the materials. Defendants might well take a different view, however, if the result of that decision was to make these materials generally available to the public. Thus, general public access would tend to disrupt the cooperative exchange of information between the parties.

This disruption could be accentuated if public access included a right to be present at the discovery proceeding. Few lawyers would react with equanimity to the arrival of a television crew at a deposition. There already has been one instance in which a witness refused to proceed with a deposition by videotape.[160] Even in cases where courts have allowed the press to attend depositions, courts seem to be uneasy with efforts to publicize these events.[161] If access was intended to enable the public to observe the actual discovery activities, however, the disruptive effects would be maximized because taping might not be enough. These difficulties would be compounded at document productions, which may occur on one of the party's premises. Would the public participants be allowed to bring along microfilming or other photocopy services to reproduce the items they deemed of interest even if the parties themselves did not wish copies of these items for use in the litigation? Whatever the current complaints about the delay and expense of discovery, it is difficult to believe that having the public present at discovery events would reduce those concerns.

Besides disrupting discovery, presumptive public access might provide incentives to pursue discovery to serve collateral purposes rather than to prepare for trial. Defendants routinely condemn proposed discovery as a fishing expedition, but usually courts order disclosure over

158. *See generally* Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986) ("[A] public right of access would unduly complicate the [discovery] process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals."); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986) (if discovery were readily available to public and press, severe consequences would follow, including chilling voluntary discovery); Marcus, *supra* note 2, at 18-28.

159. *E.g.*, Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 74 (D. Mass. 1976) (in action brought by child injured due to burning of pajamas bought from Sears, plaintiff sought information on all "complaints and communications" about burning children's nightwear manufactured or sold at any time by Sears).

160. In Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985), former Central Intelligence Agency Director Richard Helms refused to proceed with a videotaped deposition arranged by defendant CBS concerning the Vietnam war. Whether he had a right to resist is a debatable point, but his actual resistance should give pause to those who might encourage general public or press access to depositions. Although witnesses testifying in federal court may soon be subject to being photographed while on the stand, *see supra* note 116 and accompanying text, the longstanding uneasiness about the disruptive effect such taping would have on a trial should give us pause in contemplating something of the sort at the deposition level.

161. *See* Avirgan v. Hull, 118 F.R.D. 257, 262 (D.D.C. 1987), in which the court notes "the zest with which the Christic Institute has invited the press to the deposition."

such objections. Instances in which discovery seemingly has been employed to develop information for nonlitigation purposes continue to occur, however.[162] Courts and parties have enough trouble dealing with discovery targeted on the issues to be presented at trial, and they do not need to be distracted by incentives to develop information for purposes other than use in the litigation. Moreover, there appears to be a significant risk of such activity in product liability cases because some plaintiffs' counsel seem to view it as their job to evaluate the safety of entire product lines. Some plaintiffs' attorneys even argue that evidence about the manufacturer's handling of unrelated products is relevant.[163] If general pursuit of safety information is a valid objective of discovery, plaintiffs might have an incentive to try to obtain as much information as possible on products not at issue in the case as a way of alerting the public and developing a file for actions involving other products.

Finally, opening up the discovery process could have the ironic effect of deterring claimants from seeking relief in court in order to avoid the resulting publicity. To a substantial extent, the longstanding requirement that court records be open to the public means that those who seek judicial redress will need to reveal some information about their dispute. But magnifying disclosure to include discovery erects a higher barrier to access to the courts. The Supreme Court noted this problem in *Seattle Times*,[164] and proponents of access also have acknowledged it.[165] It has been suggested, for example, that the reason Dalkon Shield claimants have proven to be more numerous than expected is that many originally chose not to sue to protect their privacy.[166] Indeed, given the availability of intimate information about plaintiffs through discovery in personal injury cases, there may even be reason to suspect that defendants would seek to exploit this concern.[167]

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162. *E.g.*, International Union v. Garner, 102 F.R.D. 108, 109-10 (M.D. Tenn. 1984) (discovery used for public relations battle and to develop information for use in proceedings before NLRB).

163. See *In re* Richardson-Merrell, Inc., 97 F.R.D. 481, 484 (S.D. Ohio 1983), in which plaintiffs claiming injury due to exposure to defendant's drug Bendectin sought discovery regarding the defendant's development of two other drugs, Thalidomide and MER-29. The plaintiffs claimed that this discovery would shed light on the defendant's testing procedures and its "common pla[n]" to withhold and falsify safety information. The court rejected this relevancy argument.

164. "[R]ather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it . . . ." Seattle Times v. Rhinehart, 467 U.S. 20, 36 n.22 (1984) (quoting Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 254, 654 P.2d 673, 689 (1982)).

165. *See* Resnik, *supra* note 71, at 429 ("The thought that uncaring others might have access to details of one's most intimate actions may well deter many from seeking judicial remedies.").

166. F. McGovern, Special Master for Dalkon Shield settlement fund, Remarks during the program *Processing Mass Tort Cases: Technology Saves the Day*, American Judicature Society Future of the Courts Conference (May 21, 1990).

167. For an example, see Turner, *Confidences of Malpractice Plaintiffs: Should Their Secrets be Revealed?*, 28 S. TEX. L. REV. 71 (1987).

> Consider this scenario: A patient during his youth discloses to a physician, in order to enable him to diagnose venereal disease, that he has engaged in promiscuous sexual activity. Years later, another physician negligently treats him for a broken leg, and the patient files a medical

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The disruptive possibilities of public access also implicate serious public interests because the smooth operation of the civil justice system is an important value. Not only does Rule 1 of the Federal Rules of Civil Procedure endorse this goal, but recent events emphasize the growing public concern about it. Specifically, in January, 1990, Senator Biden introduced legislation to accelerate the handling of civil cases in federal court.[168] This bill prescribed a detailed new regime of tracking and scheduling to move cases through the courts more rapidly and less expensively. The detail in the bill prompted opposition from the Judicial Conference, which issued its own fourteen point plan to accelerate disposition of civil cases.[169] In reaction to this criticism, Senator Biden's bill was rewritten and eventually enacted.[170] This new law is strong evidence of the need to avoid time-consuming litigation over matters, such as confidentiality, that are not central to the decision of the case.[171] In the face of these concerns, the overbroad general access arguments should yield.

III. Accommodating Access Concerns Within the Existing Confidentiality Framework

Although the current controversy over product liability actions invokes broad principles of public access, it seems that the real goal of many of the critics[172] is more limited. The critics themselves go to some lengths to proclaim that they are not challenging confidentiality across the board and that they accept broad confidentiality interests in commercial litigation and to protect personal privacy.[173] Their principal desire is

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malpractice lawsuit. Should this prior treatment for venereal disease be permitted to spring forth from its previously confidential state, thereby forcing the patient into virtual silence in the medical malpractice lawsuit? While it should not happen, unfortunately, defense counsel and defendants in medical malpractice litigation are presented with an opportunity to seize upon such confidential matters in an overanxious attempt to win the lawsuit or frighten the plaintiff into silence.

Id. at 87-88.

Appropriately enough, the Dalkon Shield provides another example. Thus, it has been charged that the A.H. Robins Co. embarked on such a campaign to deter women who had used the Dalkon Shield contraceptive device from suing.

The central feature of this tactic is the humiliating of plaintiff-victims by prying into their sex lives and personal habits, including demanding to know the names of all sex partners, their hygienic habits before and after intercourse and in general; their habits during menstruation, etc.; and all in as personal and graphic a manner as the presiding judge will allow.

S. Engelmayer & R. Wagman, *supra* note 90, at 87. For an example of such an interrogation, see *id.* at 87-90. This campaign may explain the tendency noted by Professor McGovern, *supra* text accompanying note 166, who concluded that many women chose not to assert claims in court against Robins.

168. Civil Justice Reform Act of 1990, 136 Cong. Rec. S493-495 (daily ed. Jan. 29, 1990).

169. *See Judicial Conference Approves Plan to Improve Case Management*, The Third Branch, May 1990, at 1.

170. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (Dec. 1, 1990).

171. Legislative activism in this area is not limited to the federal government. In California, for example, the legislature recently imposed a "fast track" system for civil cases throughout the California state courts. *See* Ainsworth, *Fast Track Becomes Permanent*, San Fran. Recorder, Sept. 26, 1990, at 1, col. 3.

172. Some, such as the media, press constantly for more disclosure.

173. Another president of the ATLA has said that "confidentiality is appropriate in divorce and

to relax protective order practice as it affects plaintiffs in product liability cases.

Many of their goals can be achieved within the existing protective order format. This section reviews a variety of areas of protective order practice and evaluates ways in which confidentiality issues in product liability cases properly can be handled. Although the absolutist claims of the critics should be rejected, their interests can be accommodated in important ways, principally through flexibility in affording access for use in other litigation.

A. The Standard for Issuance

The first area of controversy is the showing that must be made to justify issuance of a protective order. Federal Rule 26(c)[174] and most parallel state provisions are imprecise in their definitions, and the resulting difficulties essentially raise three questions.

First, need the moving party really make any showing at all to justify issuance of a protective order? Some urge that protective orders issue on a "minimal showing."[175] Indeed, some defendants may suggest that they will obstruct discovery unless granted such protection, prompting the opponent of the protective order to stress the existence of a duty to comply with discovery without bribes. Rule 26(c) leaves little doubt that this ransom approach is not sufficient; simple willingness to cooperate with the other side's legitimate discovery efforts does not justify a broad protective order. Nevertheless, the critics' emphasis on defendants' duty to respond to discovery[176] also misses the mark somewhat. Except in those rare situations where the risks of disclosure are so great that the court will not direct that relevant material be turned over,[177] the question raised by a protective order motion is whether the court ought fairly to inflict the additional risk of dissemination of confidential material on top of the duty to disclose. If a showing of harm has been made, it is not important that the responding party has a "duty" to turn over the information.

The second question is whether protection should be limited to "true" trade secrets. Plaintiffs' lawyers urge that only where the material they seek through discovery qualifies as a true trade secret can it be protected under Rule 26(c),[178] citing the First Restatement of Torts[179] and

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child custody contests. Other proceedings, like juvenile justice, use confidentiality to help achieve the goal of rehabilitation. And no one I know of disputes the right of businesses to maintain confidentiality of *true* trade secrets." *Experts Offer Opinions on Secrecy in the Courts*, Nat'l L.J., July 30, 1990, at 15, col. 2 (quoting Bob Gibbons, ATLA president).

174. FED. R. CIV. P. 26(c).

175. *See supra* note 61 and accompanying text.

176. *E.g.*, F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 145-46.

177. *See supra* notes 150-51 (regarding identity of blood donors with AIDS).

178. *E.g.*, F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 118-22.

179. RESTATEMENT OF TORTS § 757, comment a (1939).

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the Uniform Trade Secrets Act[180] as support for this position. One leading critic of protective orders, for example, characterized the rule as "the trade secret rule."[181] Some courts also have adopted this trade secret analysis in evaluating protective order showings.[182] Certainly some things courts have ordered to be revealed constitute trade secrets by any definition. For example, in a suit by several bottling companies against the Coca-Cola Company, the court ordered the defendant to turn over the formula for Coca-Cola, which it acknowledged to be "one of the best-kept trade secrets in the world."[183] Products liability actions may involve similar secrets. For example, in one case the plaintiffs sought the formula for Pall Mall cigarettes.[184]

As a baseline, this approach has some value. As to "true" trade secrets, such as the formula to Coca-Cola, it probably would be an abuse of discretion to order that they be turned over without also imposing stringent limitations on dissemination of the secret.[185] Indeed, failure to use a protective order might be considered an unconstitutional taking where such trade secrets are involved.[186] Thus, the Uniform Trade Secrets Act directs courts to use protective orders to guard trade secrets during litigation.[187] Trade secret law is therefore a valuable referent in resolving issues of discovery confidentiality.

The critics, however, want to go beyond this baseline and limit protective orders to cases involving "true" trade secrets. This argument is not persuasive. In the first place, it disregards the explicit wording of Rule 26(c)(7), which authorizes protection of "a trade secret *or* other confidential research, development, or commercial information."[188] On its face, then, Rule 26(c) looks beyond trade secrets. Moreover, trying to

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180. UNIF. TRADE SECRETS ACT § 1 (1985).

181. Morrison, *supra* note 79, at 111; *see also id.* at 118 (genuine trade secrets "a very narrow category of records").

182. *E.g.*, John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986) (courts in District of Columbia have looked to RESTATEMENT OF TORTS § 757 in interpreting FED. R. CIV. P. 26(c)(7)); United States v. IBM, 67 F.R.D. 40, 46-47 (S.D.N.Y. 1975).

183. Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288 (D. Del. 1985). Only two people in the company knew the formula, and they were forbidden to fly on the same plane. The formula itself was kept in a bank vault in Atlanta that could only be opened upon a resolution of the company's board of directors. *Id.* at 289.

184. American Tobacco Co. v. Evans, 508 So. 2d 1057 (Miss. 1987) (ordering disclosure).

185. *E.g.*, Smith v. BIC Corp., 869 F.2d 194 (3d Cir. 1989) (district court abused discretion by removing protection for genuine trade secrets).

186. Thus, Professor Gelfand, who contends that discovery of certain information constitutes a taking, distinguishes trade secrets from information that the responding party markets. "[A] typical trade secret . . . may likewise be disclosed during litigation under suitable protective orders and not be 'taken' by disclosure." Gelfand, *supra* note 62, at 708. He apparently would find a taking in the absence of an effective order.

187. UNIF. TRADE SECRETS ACT § 5 provides:

> In an action under this [Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

188. FED. R. CIV. P. 26(c)(7) (emphasis added).

narrow the grounds for protection under Rule 26(c) unduly constricts the broad discretion the rule vests in district courts to superintend the discovery process.[189] Accordingly, there is no justification for reading out of the rule the additional grounds for obtaining a protective order.

A brief examination of trade secret law confirms that importing it wholesale into the litigation confidentiality context would create more problems than it would solve because it would introduce additional grounds for dispute. As a general matter, trade secret protection is similar to but less complete than that afforded by patent law, and the requisites for protection are less stringent.[190] The definition of a trade secret stresses both the secret nature of the information and the existence of some confidential relationship that makes disclosure a breach of good faith. This duality has led to a question of whether trade secret rights should be viewed as property rights in secret information or as a policy of the law guarding honest commercial relations.[191] At its core, then, trade secret law labors under a central ambiguity.

This ambiguity is compounded by the elasticity of the definition of trade secret. The critics of discovery confidentiality speak as though one can easily apply a litmus test to determine what is a true trade secret. Although some discovery materials would not have even an arguable claim to trade secret protection, trade secret law does not display such great certainty in many instances. The Restatement of Torts acknowledges that it is "impossible to define a trade secret."[192] Others note that "[t]he subject matter that has been awarded trade secret protection can be extraordinarily broad,"[193] and that trade secret "is at best a nebulous concept which . . . is somewhat incapable of definition."[194] This is hardly the kind of template that will easily solve disputes about whether some piece of information sought in discovery should be held in confidence. Indeed, there are instances in which courts allow recovery on trade secret grounds because information has been obtained in bad faith even though it is not truly secret.[195]

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189. *See* Post, *supra* note 26, at 225. "Although Rule 26(c) makes no effort to specify 'narrow, objective and definite standards' to govern the issuance of restraining orders, any attempt to do so would likely cripple trial courts' ability effectively to manage the pretrial exchange of discovery information." *Id.* In *Seattle Times*, the Court appeared to be thinking along these lines when it observed that "[b]ecause of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)." Seattle Times v. Rhinehart, 467 U.S. 20, 34 (1984).

190. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (holding that federal patent laws do not preempt state trade secret law).

191. *See* R. MILGRIM, MILGRIM ON TRADE SECRETS § 1.01 (1988) (beginning multi-volume treatise on trade secret law with question whether trade secrets are property); Klitzke, *Trade Secrets: Important Quasi-Property Rights*, 41 BUS. LAW. 555, 556-57 (1986).

192. R. MILGRIM, *supra* note 191, § 2.01, at 2-20.

193. Klitzke, *supra* note 191, at 558.

194. Kodekey Elecs., Inc. v. Mechaniex Corp., 486 F.2d 449, 453-54 n.3 (10th Cir. 1973) (quoting Sarkes Tarzian, Inc. v. Audio Devices, 166 F. Supp. 250, 257-58 (S.D. Cal. 1958)).

195. *See* Lowndes Prod., Inc. v. Brower, 191 S.E.2d 761 (S.C. 1972) (defendants' "disloyalty" warrants damage recovery although lack of secrecy precludes injunction). Milgrim criticizes this

The ambiguity of trade secrets has contributed to the complexity of trade secret doctrine, which has grown into a separate branch of the law. The arduous nature of patent litigation is a familiar concept,[196] and the task of deciding whether something deserves trade secret protection can be comparable. In the absence of some directive from Rule 26(c)(7), imposing these additional burdens on the courts is unwarranted. Accordingly, while it is perfectly reasonable to say that confidential information that is not a trade secret is entitled to less protection,[197] and that a court may not use a protective order to restrain dissemination of non-trade secrets unless they are obtained through discovery,[198] it is not reasonable to say that such information is entitled to no protection.

That brings us to the third question: what showing is required if the moving party need not prove entitlement to classical trade secret protection? Besides trade secret precedents available by analogy, Rule 26(c)(7) provides no independent test of what should be protected.[199] A threshold requirement is that the material actually be held in confidence, but that often may be easy to satisfy.[200] If the material is sensitive commercial data, it would seem to qualify relatively easily on that ground. One should keep in mind that this determination does not imply endorsement of the business practices reflected in the materials. In a leading protective order case, for example, much of the information related to special arrangements the defendants had with their distributors that, if made public, might offend others with less favorable arrangements.[201] Similarly, where revelation of confidential information might facilitate collusion, that is a ground for limiting access.[202]

In some instances, however, commercial parties rely on the more general protection in Rule 26(c) against "annoyance, embarrassment,

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decision as "logically unsound." R. MILGRIM, *supra* note 191, § 7.08[3][a], at 7-313. For our purposes, the point is that because such decisions exist, courts applying trade secret principles will have to grapple with them.

196. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 331 (1971) ("[S]ome courts have frankly stated that patent litigation can present issues so complex that legal minds, without appropriate grounding in science and technology, may have difficulty in reaching decision.").

197. Littlejohn v. BIC Corp., 851 F.2d 673, 685 (3d Cir. 1988).

198. *Seattle Times* declares that protective orders may restrain only dissemination of information obtained through the discovery process. For a case in which a court tried to restrain use of material not obtained through discovery, see *In re* Rafferty, 864 F.2d 151 (D.C. Cir. 1988) (vacating protective order limiting use of computer disks obtained under unknown circumstances, but not through discovery). Of course, if the trade secret nature of materials obtained outside discovery independently would warrant the issuance of an order restraining their use, that could provide an independent basis for the order in *Rafferty*.

199. Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137, 1146 (1985).

200. Morrison, *supra* note 79, at 112 ("the defendant believes that everything about its business is proprietary; it is all trade secrets").

201. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 880-81 nn.20-21 (E.D. Pa. 1981).

202. *See* Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1346 (7th Cir. 1986) ("Access to the data could turn an antitrust suit into the basis of effective collusion . . .").

[or] oppression,"[203] stressing financial or reputational harm to the company that would result from disclosure of details about its activities. It seems that these entities are trying to invoke something akin to privacy interests. The Supreme Court has unequivocally declared that privacy interests are protected by Rule 26(c),[204] but that does not mean that this protection applies in all commercial cases. In some cases it will. For example, in an action between a bank and the Federal Deposit Insurance Corporation, the court upheld the confidentiality of a list of 423 "questionable loans" that included details about the lenders' financial circumstances.[205] These privacy interests, however, were ultimately the interests of the borrowers, not the bank. Corporate records also may include information that would involve similar infringement of individual privacy concerns, but it is hard to believe that this would be the case often.

Tricky problems are presented by this sort of claim. As an abstract proposition, it would not seem that revelation of wrongdoing alone is a ground for protection against disclosure. Indeed, some courts embrace the evil empire attitude that "common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know"[206] in resisting overbroad assertions that privacy or embarrassment concerns warrant protective orders. Others intone that "[i]t is not the duty of federal courts to accommodate the public relations interests of litigants,"[207] and evince little concern about what appear to be substantial declines in stock prices or sales in the wake of the litigation.[208]

The courts' reluctance to be concerned with broad assertions of harm, in general, appear to be warranted. Just as public interest about information regarding safety of products does not of itself provide a basis for access to otherwise confidential discovery information, the possibility of such public interest does not provide, of itself, a reason for a protective order. Nevertheless, some flexibility on this point appears warranted. Where all parties agree, for example, there should be little reason to resist accommodating interests in confidentiality at the discovery stage. Even in the absence of an agreement, there may be a sufficiently close link to warrant protection. Perhaps the proper attitude is that of the Third Circuit, which states that where the basis for protection is competitive or

203. FED. R. CIV. P. 26(c).

204. *See supra* text accompanying note 29.

205. *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 471 (6th Cir. 1983).

206. Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1984).

207. *In re* Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 40 (C.D. Cal. 1983).

208. *See, e.g.*, Smith v. BIC Corp., 121 F.R.D. 235, 242-43 (E.D. Pa. 1988) (fact that defendant's stock dropped 33% on day article published in New York Times regarding allegedly defective butane lighter not ground for protective order regarding complaints concerning other complaints and accidents involving the lighter), *aff'd in part, rev'd in part*, 869 F.2d 194 (3d Cir. 1989); *cf.* State v. Cottman Transmission Sys., 75 Md. App. 647, 542 A.2d 859 (Md. Ct. Spec. App. 1988) (fact that defendant's gross sales dropped 35% after attorney general issued news release about suit did not provide ground for sealing files on suit).

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financial harm, "an applicant . . . whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious."[209] Here, as elsewhere, courts may insist on a particularized showing rather than general claims of possible harm. Where that showing is forthcoming, however, there seems to be little reason to insist on allowing discovery materials to be disseminated in all cases. As set forth above, the "ticket of admission" view that one must reveal all in order to use the public court system is too harsh.[210] Trade secret law does not afford the courts a categorical approach that will solve difficult protective order problems, and courts will have to grope toward sensible resolutions of difficult cases.[211]

B. Access for Other Litigants

Courts long have recognized the validity of granting other litigants access to material obtained under protective orders when that material is relevant to their claims and properly would be discoverable in their cases.[212] The new Virginia statute is directed toward this end.[213] If anything, the trend of procedural developments during the 1980s has been in directions that reinforce this proposition. These developments are pertinent to consideration of the access issue in product liability cases because these cases may be prime candidates for the new procedures if they are implemented.

Within the last few years, numerous proposals have been made to enhance the federal courts' ability to aggregate cases filed across the country for combined treatment. The Federal Courts Study Committee, in its 1990 report, endorsed expanding multidistrict transfer in the federal judicial system to include transfer for trial[214] and the creation of a new federal subject matter jurisdiction to permit the addition of cases from state courts to such aggregated multidistrict proceedings.[215] Similarly, Congress recently has come close to passing the Multiparty, Multiforum Jurisdiction Act of 1990, which would have permitted transfer for trial in some multidistrict cases and created a new federal subject matter jurisdiction for cases in which many people are harmed by a sin-

209. Cipollone v. Ligget Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986).

210. *See supra* text accompanying notes 95-99.

211. The critics, and some of the recent reformers, add a public interest criterion to the requirements that the party seeking protection prove confidentiality and a specific harm that could be caused by disclosure. *See, e.g.*, F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 127-29. These arguments seem designed to revive the sort of public interest issues examined previously. *See supra* text accompanying notes 128-57. Although individualized assessment of these issues is more sensitive than an across-the-board access approach, placing significant weight on ill-defined public interest factors raises many problems. *See supra* text accompanying notes 63-171.

212. *See* Marcus, *supra* note 2, at 41-43.

213. *See supra* text accompanying note 51.

214. At present, 28 U.S.C. § 1407 (1988), which authorizes the transfer of cases by the Judicial Panel on Multidistrict Litigation, permits such transfer only for pretrial purposes and directs remand for trial.

215. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 44-45 (1990).

gle accident.[216]

Nongovernmental organizations are pursuing these ideas further. The American Law Institute has embarked on a multi-year complex litigation project focusing on "multiparty, multiforum litigation," which is defined as "related claims dispersed in several forums."[217] The thrust of this project is to devise new methods for combining such cases for common resolution of at least the common issues.[218] In a similar vein, in 1989 the American Bar Association Commission on Mass Torts produced a report favoring broader consolidated treatment of mass tort litigation.[219] Finally, in 1990 the National Conference of Commissioners on Uniform State Laws began consideration of a possible Transfer of Litigation Act that could facilitate aggregation of cases pending in courts of different states.[220]

There are legitimate questions about the seeming momentum behind combining cases for common disposition. Critics cite the loss of individual control and diminished attention to the unique circumstances of individual plaintiffs that can result from aggregated trial procedures.[221] More generally, the use of consolidation methods creates tensions when courts have to designate committees of counsel, lead counsel or liaison counsel to dictate the handling of the case for each side.[222] Required collaboration among plaintiffs' counsel, in particular, may create tensions.[223] A threshold assumption of all these innovations is that they will reduce duplicative and costly discovery, and the critics have no objection to that.[224] Even if there is infighting about tactics in discovery and at trial, duplication of effort is to be avoided.

Against this background, the controversy about allowing dissemina-

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216. H.R.3406, 101st Cong., 2d Sess., 136 CONG. REC. H3116-3117 (daily ed. June 5, 1990). The House passed the bill, 136 CONG. REC. H3119 (daily ed. June 5, 1990), but the Senate did not.

217. *See* American Law Institute, *Complex Litigation Project* 11 (Tent. Draft No. 1, Apr. 14, 1989).

218. *See id.*; American Law Institute, *Complex Litigation Project* (Tent. Draft No. 2 Apr. 6, 1990); American Law Institute, *Preliminary Study of Complex Litigation* (Mar. 31, 1987).

219. *Report of the American Bar Association Commission on Mass Torts* (1989). The ABA refused to adopt the recommendations, however. *See* Cox, *ABA Midyear Takes a Stand*, Nat'l L.J., Feb. 26, 1990, at 3, col. 4.

220. National Conf. of Comm'rs of Uniform St. Laws, Transfer of Litigation Act (July, 1990, draft).

221. *See, e.g.*, Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69. For an example of a consolidated trial that raises serious questions, consider *In re* Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988), in which the trial court consolidated over 800 cases brought by persons claiming injury due to exposure to the drug Bendectin in one mass trial limited to the issue of general causation. Although it found this treatment the "most troubling" aspect of the case, the appellate court upheld the procedure. *Id.* at 307.

222. *See generally* MANUAL FOR COMPLEX LITIGATION (SECOND) §§ 20.221-225 (1985).

223. Consider the caution in the Manual for Complex Litigation with regard to complex tort cases: "Lawyers representing the plaintiffs in such cases may be unaccustomed to working as part of a litigation team; often they have highly individualistic styles and very different approaches towards the conduct of discovery and trial." *Id.* at § 33.22.

224. *E.g.*, Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 833-34 (1985).

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tion of discovery information to other plaintiffs who need the information for use in their cases seems retrograde. Indeed, it appears that such collaboration is already commonplace on the defense side,[225] and some courts in multidistrict products liability cases are beginning to see cooperation among plaintiffs' counsel as creating a sort of "ad hoc law firm."[226] Curiously, the Supreme Court's *Seattle Times* decision sometimes is cited as a reason for curtailing access for plaintiffs.[227] *Seattle Times*, however, emphasized that discovery is intended only to prepare for trial.[228] The Court therefore found restraints on collateral use of the information constitutional, despite a claimed first amendment right to publish the fruits of discovery, because these limitations were justified by the governmental interest in smooth functioning of the discovery process.[229] Regardless of whether one products liability plaintiff would have a first amendment right to disclose the fruits of discovery to another plaintiff after *Seattle Times*, it is difficult to see how the Court's reasoning should prompt other courts to curtail access for use in other litigation.[230]

Indeed, in product liability cases there is a particularly good reason for allowing some sharing of information gleaned from discovery. A prime objection to protective orders in such cases is that they cut off the ability of plaintiffs' counsel to fully prepare their cases. Noting that collaboration among counsel for defendants is frequent in such cases, plaintiffs' lawyers argue that a protective order that prohibits consultation with other plaintiffs' lawyers about the meaning and implications of material obtained through discovery interferes with their ability to prepare their own cases.[231] This is an empirical assertion that a court might question in a given case, but the intuitive likelihood of the claim should entitle it to consideration. To the extent plaintiffs' lawyers genuinely need to confide in others to prepare their cases adequately, allowing such

225. *See* Note, *supra* note 34, at 1061-62 & n.42 (describing use of in-house counsel or national law firm to supervise litigation nationwide).

226. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1452, 1458 (E.D.N.Y. 1985) (suggesting that committee of plaintiffs' counsel "may be considered an ad hoc law firm, a joint venture formed for the purpose of prosecuting the Agent Orange multidistrict litigation").

227. *E.g.*, Note, *supra* note 34, at 1066-68.

228. *See* Seattle Times v. Rhinehart, 467 U.S. 20, 34 (1984).

229. *See id.* at 32-34. *See generally* Post, *supra* note 26 (explaining decision as premised on propriety of regulation of governmental activity).

230. This is not to say the Court mandated such access, but only that the Court's reasoning does not provide a reason for abandoning the common willingness of courts to allow such access.

231. Thus, the leading opponents to protective orders point out that "[p]roduct cases are technically demanding, and the significance of the documents is often not apparent until after the attorney has conferred with others." F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 61. They see this factor as central to the desire of defendants to obtain protective orders. "The principal and most direct effect of a provision that prohibits counsel from disclosing discovery information and discussing it with other lawyers is that it magnifies the enormous disparity of resources between the plaintiff and the defendant." *Id.* at 126; *see also* M. DOMBROFF, DISCOVERY § 1.20, at 28 (1988) ("If the defense is successful in instituting a protective order, depending on its scope, the plaintiff's attorney could be completely isolated . . . and forced to incur considerable expense in order to gain otherwise readily available information.")

consultation does not even go so far as endorsing sharing of information with other litigants who can use it in their cases. If such consultation is shown to be necessary to proper preparation of the case, it would seem courts should rarely deny it, although it might be best to regulate it in the protective order itself.

More generally, however, it seems that the courts continue to recognize that access for other plaintiffs should be allowed whether or not it is necessary to facilitate the preparation of the case before them because such sharing saves the courts and the litigants time and money.[232] In addition, sharing is consistent with a settled doctrine exempting exchange of information between litigants with a common litigation opponent from the risk that the exchange will be deemed a waiver of privileges.[233] This is not to say that there are no cases in which material is so sensitive that a court should not permit sharing. When ordering disclosure of something so sensitive as the formula for Coca-Cola, for example,[234] it would be unusual for the court to condone sharing with anyone not working on the litigation at hand. Such cases are probably rare, however.

In addition, in some cases access may prevent efforts to mislead the court in the second case. Although the plaintiffs' bar has an understandable temptation to overstate the likelihood that later plaintiffs will be unable to uncover such misconduct without access to discovery in earlier cases, it is true that there have been instances of perjury that were unearthed by comparison of deposition testimony in different cases.[235] Unless one is prepared to assume that product liability defendants are routinely prone to such behavior, however, this possibility generally is not of major importance.[236]

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232. For cases so holding, see Marcus, *supra* note 2, at 42 n.175. For more recent cases, see, e.g., Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 486 (D.N.J. 1990) ("if the basis for defendants' motion is to prevent information from being disseminated to other potential litigants, the defendants' application must fail"); Deford v. Schmid Prods. Co., 120 F.R.D. 648, 654 (D. Md. 1987) (plaintiffs' "desire to share information with other litigants" is "an appropriate goal under the Federal Rules of Civil Procedure" that "may be particularly appropriate where multiple individual plaintiffs assert essentially the same alleged wrongs"). This is not to say that there are no cases that buck the trend. *See, e.g.*, Scott v. Monsanto Co., 868 F.2d 786, 792 (5th Cir. 1989) ("Although plaintiffs claim harm from the inability to share and compare information with other litigants in other cases, no prejudice has been shown sufficient to overcome the district court's broad discretion in this area."); Wampe v. Ayerst Laboratories, 548 A.2d 798, 805 (D.C. 1988) (where defendant has shown good cause for protective order, disclosure for benefit of another litigant in another case would probably not be justified).

233. *See, e.g.*, United States v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980); Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1637-38 (1986).

234. *See supra* text accompanying note 183.

235. In Harre v. A.H. Robins Co., 750 F.2d 1501 (11th Cir. 1985), one of defendant's experts claimed that he had performed tests on the Dalkon Shield and determined that it did not cause infections in women, but later testimony by the same witness in another case showed that he had not done any such experiments. Noting that defendant was represented by the same lawyer in both cases, the court directed a new trial under FED. R. CIV. P. 60(b)(3) due to the fraud on the court. The expert was prosecuted later for obstructing justice. *See* Shenon, *Professor is Charged with Lying for Maker of Birth Control Device*, N.Y. Times, Mar. 4, 1988, at 1, col. 4.

236. For this reason, there seems to be no need to accept the critics' blanket opposition to the

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If the sharing idea only surfaces after disclosure has occurred, however, that may be a reason for greater caution in allowing sharing, particularly when the sole ground for sharing is to assist other litigants with their cases. In such circumstances, producing parties legitimately may have relied on the protections and be unfairly surprised to have them revised after the fact. A number of courts have noted the importance of protecting these legitimate expectations, some concluding as a result that modification of protective orders should be limited to extraordinary circumstances.[237] Other courts have taken a more relaxed attitude.[238]

In assessing claims of reliance, it would seem that courts should consider two factors. First, are there indications of actual reliance? Just as the fact that parties are required to comply with proper discovery is not a ground for endorsing publicity of the resulting information about them,[239] the fact that they actually produced some information is not proof that the party relied on the protective order. Indeed, anecdotes in product liability cases about frantic battles over discovery in cases where protective orders are in place suggest that such defendants would have a hard time persuading a court that they in fact did rely on the protective order. By way of contrast, in other cases the courts have noted that the responding party's cooperative and open-handed behavior in discovery warranted the conclusion that reliance interests counseled against modification of the protective order.[240] Given the intrusiveness of discovery, a

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conventional provision that at the end of the case all confidential information be returned to the producing party. *E.g.*, MANUAL FOR COMPLEX LITIGATION (SECOND) § 41.36 ¶ 11 (1985) (within 120 days after termination, all stamped confidential documents should be returned). The critics, however, contend that plaintiffs' attorney should be able to stockpile the documents forever. "[A] requirement that deprives plaintiffs' attorneys of the ability to maintain a set of the documents ultimately impairs cooperation and assistance on the plaintiffs' side of product litigation. Gone is the capacity for the documents to be used to verify the completeness and accuracy of discovery responses in other lawsuits." F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 46. This assertion appears to assume that sometime there will be further suits, but it is not clear why one should so assume if none have been filed. Note that the Manual's proposed order contains a provision that can include pending litigation within the sharing allowed under the order without further approval by the court. *See* MANUAL FOR COMPLEX LITIGATION (SECOND), *supra*, § 41.36 ¶ 10. In some instances, the court also may decide that it is appropriate to order the defendant to retain the documents. *See infra* text accompanying note 282. The critics' position appears to be overkill.

237. *E.g.*, Palmieri v. New York, 779 F.2d 861, 866 (2d Cir. 1985).

238. *E.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990).

239. *See supra* text accompanying note 175.

240. *E.g.*, H.L. Hayden Co. v. Siemens Medical Sys., Inc., 130 F.R.D. 281, 282-83 (S.D.N.Y. 1989) (defendant produced highly sensitive information only upon assurance that it would be kept under wraps and used only for this suit); Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658-59 (D.D.C. 1986) (nonparty relied on protective order by allowing defendant access to massive discovery); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 55 (E.D. Mich. 1985) (defendant gave plaintiffs immediate and unimpeded access to documents).

In making this inquiry, courts should be aware that litigants may try to lard the record with claims of reliance. One commentator advises the following:

> Scrupulously document your reliance. Each time you produce confidential data, make a record. Stamp each document with a legend like this: "Highly Confidential Material Produced in Reliance on and Subject to the Confidentiality order in *Jones v. Smith*, C.A. No. 86-1002, N.D. Illinois." State in every response to discovery requests that you are producing in reliance on the order. And make your position explicit at depositions and in the courtroom.

party who cooperates in this fashion probably should get the benefit of a presumption of reliance, but that could be overcome by a showing of obstructive behavior.

Related to the question of actual reliance is the reasonableness of that reliance. In upholding the unsealing of discovery in the massive *Agent Orange* liability litigation, for example, the Second Circuit noted that defendants could not reasonably have relied on the order.[241] In part, this conclusion was premised on the fact that it was an umbrella order not based on a finding of good cause.[242] The extraordinary publicity that attended the case and the fact that it was a class action[243] also support the appellate court's decision. In product liability cases, the repeated willingness of courts to allow other litigants access to obtain evidence for their cases[244] often may support the conclusion that reliance was not reasonable with regard to such a request.

Concluding that other litigants often may be afforded access to material covered by a protective order does not solve some tricky problems of implementation, however, and care in the handling of access seems appropriate. As a minimum measure, a court might limit access to affiliated counsel assisting primary counsel in preparing the case for trial.[245] A more flexible approach would permit the sharing of information with any counsel for other plaintiffs who agreed to be bound by the protective order themselves. Substantially greater dissemination would follow were the court to authorize inclusion of discovered material in data banks maintained by organizations such as the American Trial Lawyers Association.[246]

In designing such an order, a court might focus on two sets of issues. Exploring these issues suggests some of the problems that courts will need to work through in dealing with this area.

First is the question of money. At first blush it seems inappropriate for the lawyer or party who obtained information through discovery to sell it to others. With proprietary information, sale would be inappropriate to purchasers contemplating anything but use in other litigation.[247]

Levitt, *Keeping Secrets Secret*, 13 LITIGATION 10, 13 (Fall 1986). Despite such protestations, the court ordinarily should make some independent assessment of whether there was genuine reliance.

241. *In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 147 (2d Cir. 1987).

242. The problem of umbrella and stipulated orders is considered *infra* text accompanying notes 255-68.

243. In a real sense, the unsealing order afforded the class members themselves access to the discovery done in their own case.

244. *See supra* note 236.

245. Consider the following provision identifying those who could receive covered information: "Attorneys associating plaintiffs' counsel in the future in any cause of action against Ford or its subsidiaries; however, the association must be genuine in the sense that plaintiffs' counsel's expertise and knowledge of the relevant documents is being sought, rather than simply obtaining a copy of the documents." F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 49 (quoting an order entered in Munson v. Pearcy, No. B-840,570 (Orange Co. Dist. Ct. Texas, May 15, 1986)).

246. *See* Note, *supra* note 34, at 1057 & n.14 (describing the ATLA exchange).

247. *E.g.*, National Polymer Prods., Inc. v. Borg-Warner Corp., 641 F.2d 418 (6th Cir. 1981) (officer of plaintiff markets programs on defendant's processes that were disclosed in litigation).

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But where the first plaintiff has, at great expense, put together a valuable trial package that could be used in other litigation, there may be legitimate reasons for allowing the initial plaintiff to recoup some of that cost from those other litigants who later benefit from the attorney's path-breaking activities, and some charge is said to be customary.[248] Indeed, if this work enables later plaintiffs to obtain higher verdicts or settlements, some have suggested that the initial litigant might claim a share of the award.[249]

Curiously, at this point the positions of the plaintiff and the defendant on whether the development of material through discovery was "public" are inverted; defendants are likely to stress the importance of the court's authority in procuring the information for the plaintiff, while the plaintiff emphasizes personal initiative rather than the helping hand from the court.[250] But the purpose of discovery is to allow a litigant to prepare a case for trial, not to mine the defendant's files for sale to others. Allowing profit not only seems to exceed the purposes of discovery but also to promote overbroad discovery in hopes of finding something that could be marketed in the litigation community. Hence, while there may be a justification for a court to allow controlled recovery of part of the cost of discovery in some instances,[251] it would seem wise to be wary of substantial changes.[252]

The second issue is the question of who must take the initiative to obtain access to the documents. A traditional approach is to insist that anyone wanting access for use in another litigation apply to the court that entered the protective order, leaving the initiative largely in the hands of the other litigants. At the other extreme might be advertising,[253] although publicity efforts might be less likely if the process offered no prospect for profit. Aggressive publicity might raise the risk that the content of the materials themselves would be disseminated as well, suggesting that a conservative approach should be adopted. Although these problems of implementation will have to be worked out in later cases,[254] the basic point is that access for other litigants is consistent with

248. *See* Note, *supra* note 14, at 1058 ("Almost always, litigants must pay for the previously discovered information.") For an examination of ethical and other considerations bearing on the question of the amount of compensation and the sharing of that money between the initial lawyer and the initial plaintiff, see Note, *supra* note 199, at 1155-58.

249. *See* Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 289 (1982) (suggesting that first plaintiff might be entitled to such windfall).

250. *Cf. supra* text accompanying notes 80-99 (evaluating argument that all discovery should be public because it is produced by process of public court system).

251. *E.g.*, *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482, 485 (E.D. Mich. 1979) (any money collected for sharing discovery subject to approval by court), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

252. *See* Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C.L. Rev. 771, 774 (1990) (asserting that attorney can "reap enormous financial rewards . . . by enlisting others in review and republication of proprietary information").

253. *See* Note, *supra* note 199, at 1158 ("Successful marketing of discovery materials will require advertising.").

254. Courts have confronted such issues in the past. Consider the following provision: "Plain-

the purposes of courts. Indeed, to the extent consultation with other attorneys is essential to full preparation of certain cases, it may be necessary to serve the goals of the court in this case, and discovery confidentiality rulings should take account of these points.

C. Umbrella Orders

Another ground of protest has been the use of "umbrella" orders that permit producing parties to designate materials confidential and grant protection against dissemination of those materials without advance examination of the materials by the court. Customarily such orders are entered at the beginning of discovery and allow any party to object to any designation of any materials as confidential, putting the burden on the producing party to make the requisite showing.[255] Yet often parties do not challenge such designations, and the umbrella order thus may impose significant limitations on dissemination without careful scrutiny by the court.

The absence of careful scrutiny by the court is precisely the objective of the umbrella order, which is designed to facilitate discovery without miring the court or the parties in disputes about what is confidential. That task could be daunting in a case with large volumes of documents.[256] Moreover, the more detailed the showing is required to be, the more the party seeking protection of confidentiality would have to reveal details about how to misuse confidential information to get protection against misuse. In this light, the absence of challenges to designations pursuant to umbrella orders seems to prove that these orders serve a valuable purpose, and the Manual for Complex Litigation (Second) declares that they "greatly expedite the flow of discovery material while affording protection against unwarranted disclosures."[257]

From an absolutist first amendment position, however, it is difficult to see how umbrella orders could pass muster because, at the time the order is presented to the court, the identity of the documents to be designated confidential is not known.[258] *Seattle Times* rejected that absolutist view, however, and left it for lower courts to make good cause determinations in issuing protective orders. Given the managerial orientation of

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tiffs shall not under any circumstances sell, offer for sale or advertise either the contents of protected documents or the fact that plaintiffs have obtained FORD confidential documents." F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 50 (quoting a protective order in Munson v. Pearcy, No. B-840,570 (Orange Co. Dist. Ct., Texas, May 15, 1986)).

255. *See, e.g.*, the form proposed by the MANUAL FOR COMPLEX LITIGATION (SECOND) § 41.36 (1985).

256. "Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document." *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987). *See generally* Marcus, *supra* note 2, at 23-27 (regarding burden of confidentiality determination).

257. MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.431 (1985).

258. *See generally* Marcus, *supra* note 2, at 20.

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the *Seattle Times* opinion,[259] this approach should accommodate umbrella orders as well as those based on an examination of the materials in question. Thus, a court could issue an umbrella order based on a showing that discovery that had been undertaken or that was contemplated sought materials falling within categories that deserve protection. In ordinary commercial litigation this solution should work well.

The principal objection to use of umbrella orders in product liability cases is one dealt with in the preceding section—that by broadening the ambit of protection an umbrella order further isolates the plaintiff's lawyer and impedes the preparation of the case.[260] For the reasons set forth above,[261] courts imposing umbrella orders should accommodate these interests by permitting needed consultation where it is shown to be necessary to the preparation of the case. To the extent sharing is allowed beyond the confines of the given case,[262] this solution further ameliorates the problem. The other objections do not provide a ground for abandoning the use of umbrella orders in appropriate product liability cases.

Another objection to the use of umbrella orders is that producing parties may overdesignate. Although this temptation exists,[263] it is difficult to determine why it is important unless it interferes with preparation of the case at hand. A party that too heavily leans on the confidential stamp runs the risk that the judge will conclude that it has acted in bad faith and is entitled to no further protection at all, and perhaps to liability for sanctions.[264] Critics complain that overdesignation is rarely challenged because plaintiffs have little incentive to challenge it, and because some challenges may involve revealing the plaintiff's conclusions about which documents are the most important in the case.[265] Given the basic purpose of affording full preparation for disposition of *this* case, these concerns do not seem compelling. If plaintiffs themselves can live with the designations, presumably they are able to prepare their cases despite it, and the alternative of requiring the court to undertake an otherwise unnecessary and burdensome inquiry into confidentiality hardly seems warranted.

Some courts and commentators argue that umbrella orders ultimately do not save the court or parties time because they only defer the

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259. *See* Post, *supra* note 26.

260. *See* F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 56.

261. *See supra* text accompanying notes 212-54.

262. Note that the form umbrella order contained in the Manual for Complex Litigation includes a possible provision allowing use in "this litigation" and defining that term to include "other related litigation in which the producing person or company is a party." MANUAL FOR COMPLEX LITIGATION (SECOND) § 41.36 ¶10 (1985).

263. "[T]here is a danger here that counsel will err on the side of caution by designating confidential any potentially sensitive document." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 n.17 (3d Cir. 1986).

264. "The designation of a document as confidential may be viewed as equivalent to a motion for protective order and subject to the sanctions of Fed. R. Civ. P. 26(g)." MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.431 n.60 (1985).

265. *See* F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 55-56.

date on which the court has to make its determination of whether the designated materials are in fact entitled to protection.[266] This argument seems somewhat inconsistent with the contention that overbroad designations will not be challenged, which assumes that the exercise often will not be needed. Beyond that, it is difficult to understand why the court will have an easier time determining whether materials qualify for protection at the outset of the case, before production has occurred, rather than later when the identity of the actual materials is known. Admittedly this could be an arduous task even then, but at the outset of the case there is at least the possibility that court determination will never have to be undertaken since there may be no dispute about the propriety of the designations. Admittedly, the court may find the fact that an umbrella order has been used bears on reasonable reliance issues[267] if modification of the order is sought,[268] but it hardly would ease its task by embarking on full-scale litigation of confidentiality questions at the outset where that is not necessary for the case at hand.

D. Settlement

A further pressure point arises when the parties settle a case with a provision for maintaining confidentiality of materials exchanged through discovery. At this juncture, the court might resist the easy route of adopting the parties' agreement and insist that they choose between confidentiality and settlement. Although the court might, in cases presenting special circumstances, consider making a special provision to ensure that important evidence remains available should it be sought by other litigants, there seems to be little reason to curtail confidentiality when the parties are on the verge of settlement.

As a starting point, it is important to separate the discovery confidentiality controversy from the ongoing debate over the desirability of judicial promotion of settlements. There is no doubt that American judges, particularly federal judges, increasingly view settlement promotion as an important objective. There also are valid grounds for questioning this tendency in judicial activity, both because it can distort the proper role of the courts[269] and because it does not measurably increase the frequency of settlement.[270] Yet it is hard to believe that anyone currently would argue strongly in favor of obstructing settlements in prod-

266. *See id.* at 55. Some courts have echoed these sentiments. *See, e.g.*, John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986) ("Blanket orders only postpone, rather than prevent, the need for the Court to closely scrutinize discovery materials to see if the seal is justified.").

267. *See supra* text accompanying notes 239-44 (regarding reliance on orders).

268. "Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature over-inclusive and are, therefore, peculiarly subject to later modification." Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988).

269. *See, e.g.*, Brunet, *supra* note 122; Fiss, *supra* note 80.

270. *E.g.*, Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 374-85 (1986).

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uct liability cases,[271] and this article will assume that settlements are in general desirable events.

Secrecy, however, is not important to fostering settlements in all cases. Some courts have rejected the proposition that secrecy fosters settlements,[272] while others have been uncertain about cases before them.[273] But there can be no doubt that confidentiality is sometimes critical; in at least some cases, public access is sought precisely to disrupt a settlement.[274] Among the critics of confidentiality in product liability cases, there seems to be at least a tacit assumption that confidentiality will prompt a defendant to favor settlement over trial because at trial the common law right of access is likely to apply to all evidence offered. Critics, however, view this as a sinister purpose that should be resisted. As a general matter, there appears to be no reason to assume that a defendant who has exacted a promise of confidentiality from the plaintiff as a condition to settlement does not deem that promise important. Indeed, it is generally accepted that confidentiality of settlement negotiations is important to the settlement process,[275] and some courts have noted that public access could "seriously impair the settlement process."[276]

The critics, however, are unwilling to leave it to the plaintiff to resist this malign desire to settle on terms involving continued confidentiality.[277] Thus, the recent efforts to curtail confidentiality seek to preclude such agreements.[278] The court cannot remake the parties' settlement by removing one provision and leaving the others in place, however.[279] Thus, the court is left with a choice between playing its hunch about a defendant's willingness to proceed without continued confidentiality and

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271. The critics of discovery confidentiality sometimes emphasize the tendency of defendants to drive hard bargains in product liability cases by exploiting plaintiffs' need for money. *See* Morrison, *supra* note 79, at 118. It does not appear that the critics wish to retard settlements, however, but only to devise some counterbalance for this perceived slant in favor of defendants. To the extent that the imbalance exists because protective orders have prevented litigants from getting evidence, confidentiality might play an important role, but accommodations designed to enable other litigants to obtain needed evidence, *see supra* text accompanying notes 212-54, seem the appropriate response to this concern. To the extent that the imbalance exists because defendants have greater litigation resources than plaintiffs, it is curious to contend that proper confidentiality measures in litigation should be curtailed because plaintiffs need a leg up in such confrontations with defendants.

272. *E.g.*, United States v. Kentucky Utilities Co., 124 F.R.D. 146, 153 (E.D. Ky. 1989) ("In the experience of the court, settlements will be entered into in most cases whether or not confidentiality can be maintained.").

273. *E.g.*, Richard Wolf Medical Instrument Corp. v. Dory, 130 F.R.D. 389, 391 (N.D. Ill. 1990) ("I do not know whether Wolf would have agreed to the settlement if it had known [about a pending document request for documents covered by a protective order].").

274. *See* Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 911, 205 Cal. Rptr. 92, 103 (1984) (newspaper seeks access to settlement of action against county by inmate in hopes that disclosure will void agreement).

275. *See generally* Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988).

276. Times Herald Printing Co. v. Jones, 717 S.W.2d 933, 939 (Tex. Ct. App. 1986).

277. *See* Morrison, *supra* note 79, at 123 ("we cannot count on the plaintiffs' attorneys to see that the government and other plaintiffs' attorneys will get this information").

278. *See* FLA. STAT. § 69.081(c) (1990); H.R. 129, 101st Cong., 1st Sess.

279. Evans v. Jeff D., 475 U.S. 717, 727 (1986).

acquiescing in a request for confidentiality. Certainly there may be cases in which plaintiffs believe that they have obtained favorable settlement terms by agreeing to confidentiality.[280] It is hard to insist that plaintiffs forego these advantages so that the materials they obtained through discovery will become a matter of public record at the trial, particularly if there is a risk they might not prevail at trial.

This does not mean that the court must accept any provisions the parties have found agreeable. In extreme instances, a settlement agreement might be void as against public policy if it is intended to suppress evidence.[281] Such instances will be exceedingly rare, however; if the agreement provided that all materials turned over through discovery be returned and that all copies of these materials be destroyed the court might suspect such concerns are implicated. The solution would seem to be to insist that defendants preserve evidence returned under a protective order.[282] Disallowing a scorched earth policy in some cases is far short of compelling the parties to disseminate the information obtained through discovery.[283] Lying behind the objections to settlement of this sort is an assumption that the material covered by the agreement customarily contains potent evidence of wrongdoing by the defendant, probably implicating public health. However, there is little reason for a court to make this assumption when presented with a request to implement an agreement. In some instances, the court may be familiar with particular and damning evidence,[284] but that will be a rare case at the pretrial stage.

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280. Consider, for example, the attitude of one plaintiffs' attorney about defeating defendant's effort to have deposition transcripts filed under seal:

> I was happy to let Pittston [defendant] take its time delaying the public filing of these transcripts. I hoped it would feel pressured by the forthcoming publication of these facts of recklessness we had uncovered. Maybe Pittston would try to settle with us now to forestall the public filing of these transcripts.

G. STERN, THE BUFFALO CREEK DISASTER 171 (1976). Certainly there have been examples of efforts to use threats of exposure to enhance settlement value. *See, e.g.*, White v. General Motors Corp., 908 F.2d 675, 680 (10th Cir. 1990) ("Plaintiffs had made prefiling threats to contact the media and government agencies about the allegedly defective brake work being done at the plant if settlement demands were not met.").

281. *Cf.* Williamson v. Superior Court, 21 Cal.3d 829, 836-37, 582 P.2d 126, 131, 148 Cal. Rptr. 39, 44 (1978) (agreement between defendants to withdraw expert witness and keep his report from plaintiffs found to be effort to suppress evidence and work product protection therefore not applicable). Note that this case does not stand for the proposition that discovery confidentiality is invalid.

282. For an example of such a preservation order, see Coalition Against Police Abuse v. Superior Court, 170 Cal. App. 3d 888, 894-95, 216 Cal. Rptr. 614, 617-18 (1985). Of course, appropriate consideration should be given to the burden that such retention might cause in some big-document cases.

283. In Oklahoma Hosp. Ass'n v. Oklahoma Pub. Co., 748 F.2d 1421 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985), the court held that a newspaper lacked standing to challenge a protective order regarding discovery because it had no right of access to the material and no basis for proving that the parties would, in the absence of the protective order, have allowed the court to examine the materials in question. The court invoked Supreme Court decisions affirming a first amendment right not to speak if one chooses not to, and concluded that "it does not follow that they can be compelled to disseminate such information." *Id.* at 1424 (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

284. *See, e.g.*, *supra* notes 90-91 and accompanying text (regarding Miles Lord in Dalkon Shield case).

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Even where there is some such evidence, there may be no reason to question the desire for confidentiality of the great bulk of sensitive but unimportant material turned over through discovery. Thus, sensible flexibility in approving such orders seems appropriate.[285]

IV. CONCLUSION

Like so many controversies about litigation nowadays, the debate about discovery confidentiality has escalated to extremes. On one side, the critics conjure up images of deadly threats to public health kept under wraps in secret court records. On the other, there is the spectre that untrammelled discovery may deal a coup de grace to American industry, which faces increasing global competition. The reality, however, is less inflammatory. Current protective order practice accommodates competing concerns rather well, and neither extreme is likely to materialize in the near future.

Nevertheless, this article highlights some important pressure points

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285. Very different issues arise in situations in which the court's involvement in the design of the settlement itself provides a reason for public access. Increased judicial involvement in promoting settlements may one day provide a basis for allowing the public to observe judges at work on this effort. As indicated above, the possible application of first amendment and common law rights of access to innovative judicial procedures remains an open issue. *See supra* text accompanying notes 100-27.

There are some disquieting examples of judicial willingness to close proceedings in the courthouse that resemble trials. For example, in Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988), the court convened a summary jury trial with jurors drawn from the public jury roles and presided over a seven-day trial in the courthouse, but refused to allow the public access to the event. Even though this involved presentation of evidence and an advisory decision by a jury, the court held that it could be conducted in secret because it was really just a way of promoting settlement. By way of contrast, in Bank of Am. Nat'l Trust & Saving Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986), the court held that where a settlement agreement is filed in court, and the parties then begin litigating its terms in court, the court may not keep records of these proceedings under seal because the public has a right of access to them.

Somewhat similar issues are presented by efforts via settlement to wipe the slate clean *after* a case has been tried. In product liability cases, defendants might wish to undo the possibly preclusive effects of a judgment by offering the prevailing plaintiff a premium for settling in return for vacating the judgment and findings. Some courts resolutely refuse to entertain such attempts. *In re* Memorial Hosp., 862 F.2d 1299 (7th Cir. 1988); *see also* National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989). However, other courts grant these requests. *E.g.*, Nestle Co. v. Chester's Market, Inc., 756 F.2d 280 (2d Cir. 1985).

In the product liability area, in Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985), the court was particularly forceful on the difficulties involved in trying to undo the results of court proceedings:

> We feel certain that many parties to lawsuits would be willing to bargain (with the adverse party and the court) for the sealing of records after listening to or observing damaging testimony and evidence. Such suppression of public records cannot be authorized. The situation here is further aggravated by the attempted suppression of a jury verdict because it might adversely affect American Motors in other judicial proceedings. Such action is contrary to the most basic principles of American jurisprudence.

Id. at 1571-72 n.4; *see also* Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731; Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860 (1987).

The situation presented, however, is quite different from that which arises when a pretrial settlement negotiated by the parties is presented to the court. In that case, the systemic interests that counsel against purely private control of the information and outcome do not apply.

regarding public access that are likely to remain with us for some time. Most significantly, there is the possibility that one day courts may have to rethink their general attitude toward the public right to attend litigation events other than trials, given the increasing judicial commitment to substitutes such as summary jury trials. At some point, a radical revision of the public right of access might warrant public access to discovery proceedings as well. However, that day has not arrived, and the other arguments for general public access—the notion that discovery uses public resources and the public's hypothesized interest in some material obtained through discovery—hardly outweigh the disruption that would attend a broad public right of access. The current critics' intimations in this direction therefore should not be pursued.

At the same time, the recent criticisms should sensitize courts to proceed carefully on some issues encompassed within the existing protective order analysis. In particular, it is important that courts be aware of the possibility that plaintiffs' counsel in some product liability cases need to consult with other attorneys about discovery material to prepare effectively for trial. Moreover, there are substantial reasons for flexibility in allowing other litigants access to discovery materials for use in their cases. But the critics also seek to erode confidentiality protections too much by urging an unduly stringent standard for finding materials confidential, challenging the use of umbrella orders and urging resistance to settlement provisions providing that confidential discovery materials be kept in confidence. Far from providing a basis for wholesale abandonment of current legal principles, the critics' objections point out the need for judges to apply these principles with care.

Judges generally seem to be doing just that. Even the critics concede that judges rarely reach the bad results they warn against.[286] This is not to say that no instances of inappropriate orders can be found, but the ones that are paraded in support of widespread changes in discovery confidentiality have not been shown to be representative of either the norm in discovery confidentiality or some evil conspiracy to keep under wraps evidence of numerous serious threats to public health. The disruptive and intrusive potential of radical changes in this area is significant, however, and it does affect many cases. In an era of constantly diminished privacy it is important that we resist unnecessary efforts to curtail protections for confidential information. In an era when litigants have difficulty obtaining decisions of their cases, we should not rush to embrace a public information purpose for discovery. The need for radical change is not there, but the risks that would attend such change are.

286. *E.g.*, F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 19 ("Most trial courts have denied protective orders or have refused to include terms that would restrict discovery sharing.").

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THE WASHINGTON POST
April 21, 1990

Texas Supreme Court Curbs Secrecy of Lawsuit Records

Far-Reaching Action Focuses on Public Health, Safety

By Saundra Torry
Washington Post Staff Writer

The Texas Supreme Court this week took unprecedented action that makes it more difficult for Texas judges to seal court records from public view, particularly in lawsuits involving public health and safety.

The move, opposed by industry groups and corporate attorneys, was hailed by supporters as the most dramatic step toward court openness to emerge from a growing national debate about secrecy in civil lawsuits, notably those involving allegedly defective products.

Legislation aimed at curbing secrecy has been passed in Virginia and is pending in Congress and a number of states, including Florida, Missouri and Rhode Island. Similar legislation was defeated in Georgia.

Texas, however, is the first state to take such far-reaching judicial action on the issue by adopting a new court rule and amending others.

"This makes it much, much harder for corporations to value profits over lives while keeping the public in the dark by settling cases in secret," said Arthur H. Bryant, executive director of Trial Lawyers for Public Justice, a national public-interest litigation group.

Industry groups and their lawyers argued in Texas that the new rule would force disclosure of trade secrets to competitors, spur lengthy and expensive lawsuits and create a hostile business climate in the state.

Texas Supreme Court Justice Lloyd Doggett, who worked to fashion the 5-to-4 majority on the divided court, said the justices had been "bombarded with letters from major corporations and defense attorneys expressing concern."

But Doggett said court secrecy, in the form of sealed records and "protective orders" that limit access to documents, "has been greatly abused" and that valuable information about products has been kept from the public.

He said a 1988 series in The Washington Post, in part, prompted his actions. The Post reported that judges routinely grant requests for orders to seal corporate documents in the early stages of lawsuits and that the information rarely reaches the public or government regulators.

For example, General Motors Corp., in defending against scores of lawsuits filed by victims of fiery car crashes, avoided public debate about the safety of its gasoline tanks by obtaining protective orders preventing disclosure of key documents.

Under the changes in court procedure passed by the court, no court order or opinion may be sealed, and other types of records may be sealed only if those seeking the closure can prove that the need for secrecy outweighs any "adverse effect . . . upon general public health and safety."

The new rule also requires public notice of any move to seal records and allows anyone, including news media representatives, to fight the sealing at an open hearing. That, according to proponents, is a significant tool because under previous procedures, the public seldom knew when records were about to be sealed.

San Antonio attorney Phil Hardberger, who represents individuals suing corporations in product-liability cases, said secrecy orders are becoming almost routine in cases involving everything from "vacuum cleaners to lawn mowers."

John Marks, president-elect of the Texas Association of Defense Counsel, which opposed the rule, said the debate in Texas and elsewhere has been pushed by plaintiffs' attorneys who will reap its benefits. "There certainly may be situations which require [disclosure] . . . but this rule goes way beyond that," Marks said.

But Russ Herman, president of the Trial Lawyers of America, an organization of plaintiffs' lawyers, said the rule change "is a big win for America's victims and consumers." The news media, regulatory agencies and the public, he said, can now monitor lawsuits "to discover hazardous products and practitioners, and challenge secrecy orders that they believe hide trends or patterns of negligence."

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
54

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.

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 Bisbop 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

MIAMI HERALD
May 7, 1990

End secret hazards

TO ITS credit, the Florida Senate has voted 38-0 to approve the Public Hazard Disclosure Act. The House ought to echo that zeal, because the bill would do much to ensure Floridians' safety.

The bill prohibits civil courts from sealing records in "public-hazard" cases but still protects genuine "trade secrets" from disclosure. It gives standing to citizens to challenge a secrecy order in hazard cases.

The hazard can be a device or product, such as Pfizer, Inc.'s heart valve. It can be a person, such as the gynecologist who sexually assaulted a patient during an exam. It can be a condition or procedure, as in a chemical-plant leak that caused cancer and nerve damage in people living nearby.

These all are cases where an admitted hazard was hidden because courts agreed to seal records during legal proceedings and after settlements were reached. Many such cases never go to trial. A settlement's primary condition is usually secrecy. Such callous dedication to profit and personal interest over public safety is appalling.

Consider the Pfizer heart valve, withdrawn from use in 1986, though 50,000 are still implanted. A 1985 report on the valve's defects was withheld from doctors and the public because of secrecy orders attached to settlements. Pfizer admits that its device caused nearly 250 deaths.

THE PUBLIC VS. THE COURTS

The gynecologist admitted that he had indeed assaulted a patient. The case records were sealed in exchange for his admission and a settlement, leaving other patients unknowing potential victims.

Why has such secrecy grown all too routine in civil litigation? Well, it can seal from public access evidence about a dangerously defective product. That may preserve the producer's short-term profits, but it can be a costly mistake ultimately. A.H. Robins Co. many years ago chose to keep quiet about the deadly defects of its Dalkon shield birth-control device. Women died because of that decision. Others became sterile. When the truth came out, the resulting litigation and public outrage eventually sank the company.

The House can help to halt this invidiously dangerous secrecy in Florida courts by approving HB 839 this week. Keeping civil-suit records open is the one sure way to alert Floridians to hazards whose existence might never emerge from sealed court records.

THE WALL STREET JOURNAL

June 4, 1990

PUBLIC HAZARDS can't be concealed by a court order under new Florida law.

The law, which was signed Friday and takes effect July 1, prohibits courts from sealing records that contain information about a public hazard. The legislation—the first comprehensive law of its type in the nation—was vigorously opposed by automobile manufacturers and pharmaceuticals companies, which are frequent targets of product-liability suits.

The Association of Trial Lawyers of American called the law "a tremendous victory for the public's right to know." Manufacturers have increasingly insisted that court records and information related to product-liability litigation be kept secret as part of settlement agreements.

Secrecy makes it far more difficult for the public to ascertain that a hazard exists, the trial lawyers argued.

—Ann Hagedorn contributed to this article.

Continued
USA Today, April 23, 1990

..'If only we had known,' say victims of secrecy

What you don't know can hurt — or even kill — you. Corporations often fight to ensure the public never finds out by keeping secret reports about defective products and court settlements with injured parties.

Ed Keller of Hughesville, Md., was hurt because he didn't know American Motors' CJ-5 Jeep would roll over more easily than other vehicles. In 1981, Keller suffered a spinal cord injury when he swerved to avoid a stopped car. His car rolled, and today Keller walks with the aid of braces and crutches.

Keller, a former electrician, said Sunday, that "What makes it so bad, I learned later that American Motors had known for at least two years that its CJ vehicles would roll over more easily than regular cars."

If you can imagine losing your job, having your marriage threatened, becoming financial troubled and losing the ability to walk all in one day, Keller said, "then you can understand what happened to me."



Ed Keller

The pressure to settle out of court is tremendous, he said. "I needed money to pay my bills, so you settle and you don't get your day in court and you don't get what is due you."

Keller said that, as part of the settlement, he had to agree to keep the financial award secret. "That keeps me from saying anything bad about the company, which isn't fair. That means no one will know just how serious my case was, but I have a family to support and that's why I agreed."

James Miller of Carlsbad, Calif., also was asked to keep his out-of-court settlement secret. In 1986, his 11-year-old twin sons were severely injured in a head-on-collision while wearing rear-seat lap belts in a Ford Escort. One son died and the other is paraplegic as a result of the accident.

Miller agreed to keep the settlement amount secret if Ford would alert its customers to the belt problem and provide shoulder harnesses at a reasonable cost. Miller said he refused to keep the $6 million settlement secret after Ford refused to alert the public.



James Miller

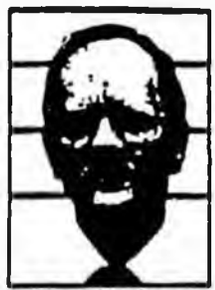
Of the request for secrecy, Miller, a 44-year-old printer, said: "We told Ford that we would agree to such a request only if Ford would send a letter to every existing pre-1990 Ford Escort and Mercury Lynx owner, advising them of what Ford had known for 20 years — that properly installed shoulder harnesses protect passengers better than lap belts alone."

Miller said the belts cost an extra $12 each when installed at the factory, and European Escorts are required by law to have shoulder harnesses installed before sale.

On the settlement, he said that since Ford is self-insured, consumers pay for Ford's disregard for safety. "Our settlement was financed by the purchasers of Ford cars."

Fred Barbee of Minong, Wis., blames the corporate ability to build a wall of secrecy around defective products for the death of his wife, Carol, in April 1988.

Barbee, in recent testimony before a House investigative committee, said that his wife had a Bjork/Shiley artificial heart valve implanted in May 1982 and had no knowledge that the valve could fracture until the day his wife died. If he had known of the potential problem, Barbee said, instead of taking his wife to a local hospital, he would have taken her to a hospital where open-heart surgery could have been performed, which may have saved her life.



Fred Barbee

Barbee said the secrecy prevented him from knowing that other valves had fractured before his wife's broke, that Shiley had not provided any information about the problem to its patients, and other families had filed lawsuits against Shiley and its parent company, Pfizer.

Other secret out-of-court settlements, according to the Association of Trial Lawyers of America:

▶ Xerox Corp. paid two families in Webster, N.Y., nearly $5 million in a case alleging that chemical leaks caused neurological damage to seven people. Neighbors on the same street cannot obtain any information about the toxic hazards they may face.

▶ Requests to the Food and Drug Administration by public interest groups for 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 they know about the hazards of materials in breast implants used by thousands of women.

▶ Physicians have avoided disciplinary charges by their peers because sealed court files remove all records of civil suits. In the District of Columbia, for example, records of a 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.

— *Barbara Reynolds*

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,

"Wrongdoers who want to cover their tracks will have to think twice before labeling their negligence a 'trade secret'..."

automobile fuel tanks, toxic wastes, defective heart valves, butane lighters and so many other products, have seen their work buried under judicial protective orders.

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.

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THE WASHINGTON POST, August 24, 1989

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 specific 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 Belicsky, 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," Belicsky 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 Sachman, 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.

The Washington Post
August 17, 1989

63

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 for 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.

THE WASHINGTON POST
MARCH 22, 1989

7-25-89 p. B8

LAW

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other Princeton/Newport officials never cheated the government out of taxes and that none of the defendants had derived any financial benefits from the trades.

"Would it be arrogant to commit a crime where you got no money?" Mr. Wells asked jurors. "That wouldn't be arrogant; that would be insane," he said.

Mr. Wells said Mr. Regan believed the trades "were legal then and he still thinks they're legal now." Citing the tape recordings of phone calls that the government has relied on to present the bulk of its case, Mr. Wells said that most of Princeton/Newport's phone calls were recorded by the firm itself. "Why would you do criminal acts on a taped phone?" Mr. Wells asked jurors.

Mr. Wells said that the government hadn't proved anything against his client. "This is a weak case," he said, adding that, under the circumstances, the government owes Mr. Regan an apology for putting him on trial.

Administration Backs Legislation to Stiffen Antitrust Penalties

By a Wall Street Journal Staff Reporter

WASHINGTON—The Bush administration backed pending legislation that would increase the maximum fine for corporate antitrust offenders in criminal cases to $10 million from the current $1 million.

"This increase in penalties will send a strong signal to those who intend to defraud American consumers or the federal government through criminal antitrust conspiracies," Attorney General Dick Thornburgh said in a statement. Criminal fines for corporate antitrust violations haven't been raised for 15 years.

Mr. Thornburgh endorsed the stiffer penalties in connection with legislation under consideration by the Senate Judiciary Committee. A senior committee staff member said the panel may vote before the Senate recesses Aug. 7 on a bill increasing the maximum fine to $10 million. Hearings on the bill, whose primary sponsor is Sen. Howard Metzenbaum (D., Ohio), are scheduled for today.

James Rill, the Justice Department's antitrust chief, said the department now has more than 150 antitrust grand jury investigations in progress. "Current criminal fines for antitrust violations don't appear to be adequately deterring this unlawful conduct and therefore a substantial increase in maximum corporate fines is clearly warranted," said Mr. Rill. He is expected to testify today on the bill.

Mr. Rill previously indicated he intends to expand investigations of possible bid-rigging and price-fixing to focus on larger national companies. The Reagan administration increased the number of criminal prosecutions in this area but focused on smaller local and regional conspiracies.

Plaintiffs Lawyers Move to Preserve Exchange of Data

They Defend Public Access To Company Documents In Product-Liability Cases

By Milo Geyelin
Staff Reporter of The Wall Street Journal

BOSTON—Personal-injury lawyers who gathered here last week had one thing uppermost on their minds: preserving public access to company files in product-liability cases.

More than 2,750 plaintiffs lawyers came to the annual convention of the Association of Trial Lawyers of America, which has 53,000 members nationwide.

The association—the bane of corporate defendants—is adept at passing information among member lawyers involved in personal-injury suits. The network is especially handy in complex product liability complaints against manufacturers; association members who obtain internal company documents in one case routinely pass them on to help other lawyers representing clients in similar cases.

Increasingly though, defendants in such suits have responded by seeking—and often obtaining—protective orders from judges to restrict which documents can be turned over and who can see them. Protective orders, obtained usually on grounds that the requested material contains company trade secrets, have been issued in a number of product liability suits, including litigation over General Motors Corp.'s design of fuel tanks in the early 1960s, Bic Corp.'s disposable butane lighter and Hoffmann-La Roche Inc.'s anti-acne medication Accutane.

In response, a former president of the association, Bill Wagner, a Tampa, Fla., trial lawyer, has announced a national offensive. The trial lawyers group's board of governors adopted a resolution urging judges to refuse to grant protective orders and encouraging fellow lawyers to reject settlement offers conditioned upon secrecy agreements.

As another tactic, some trial lawyers suggested that when attorneys receive company documents that could prove critical in court they immediately pass them on to other lawyers if no protective orders have already been issued. "One of the requirements for a trade secret is that it is, in fact, a trade secret," said Mr. Wagner. "By putting it in the public domain, you destroy the secret. The broader the dissemination has been, the less likely a judge is to enter a protective order."

* * *

The Association of Trial Lawyers of America members spent much of the week attacking the insurance industry, which hires defense lawyers in many instances and is responsible for many of the civil-liability reform initiatives taking place nationwide. So it came as some surprise late last week to find an ally of the enemy unwittingly camped one floor below the association's convention site in the Marriott Copley Place.

The National Conference of Insurance Legislators, an organization of state legislators friendly to the insurance industry, met last Friday and Saturday to discuss their national goals and strategy, just as the trial lawyers group was wrapping up its weeklong convention.

"It is a strange coincidence," said Charles O. Davis, executive secretary of national conference. "Had we known, we would have created some dialogue—I'm sure."

* * *

Little noticed during the years of litigation over A.H. Robins Co.'s Dalkon Shield have been claims from 13,827 foreign women who were injured by the contraceptive. Now that Robins's bankruptcy-law reorganization is in its final stages, plaintiffs lawyers for the foreign claimants and trustees who will administer claims settlements have begun discussing some of the complexities last week. The issues are particularly troubling to foreign claimants because Robins sold the Dalkon Shield abroad for more than a year after halting domestic sales in the early 1970s.

Language is a major problem facing foreign claimants. The trust has a Taiwanese nurse to help with claims resolution and both Portuguese and Spanish speaking employees. Yet snafus abound. When initial claim forms were mailed to Taiwanese women, groused Edward C.Y. Lau, a San Francisco plaintiffs lawyer, they were written in English.

Some of the other issues: Should foreign claimants receive the full dollar value of their settlements or should the amounts be adjusted to reflect the value of the dollar where they live? What is the likelihood that a claim against Robins could succeed in a foreign country and should that be considered when deciding how much to pay abroad? Some countries, Sweden for example, don't have tort systems in which to bring negligence or product-liability lawsuits.

The most serious problem facing foreign claimants overall will be access to medical records. The trust will require some form of proof that the Dalkon Shield was used before paying a claim. The trouble is that medical records easily available in the U.S. may not be in foreign countries. And even if the records can be obtained, as in Sweden's socialized health-care system, for example, who will pay the cost of translation and certify its accuracy?

Trustees who met with plaintiffs lawyers for foreign claimants at the trial lawyers convention offered no sure answers, but they invited suggestions. "Each country has unique problems," said trustee Stephen Saltzburg.

* * *

Lawyers at the Association of Trial Lawyers of America convention heard speeches, attended legal symposiums and offered advice on the latest legal reforms, but it wasn't all hard work. A waitress at the Marriott's Terrace Bar counted six American Express cards left behind by conference attendees—all of them, platinum.

WHO'S NEWS

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related to the U.S. concerns it. P. Schering Corp. and Schering-Plough Corp.) is "more international in their approach than any other company here," says Kiran Bhojani,

D'Agostino Named Chief And Chairman of Pantera's

DALLAS—Pantera's Corp. said Stephen I. D'Agostino, chairman of Lord Capital Corp., was named chairman and chief executive officer of this owner of the Pizza Inn chain.

Mr. D'Agostino succeeds Jack D. Harris, who was named a vice chairman.

Drexel's Spurge, A Milken Protege, Resigns From Firm

By Matthew Winkler

8-31-88

Protective Orders Come Under Attack

Plaintiffs Get Judges to Open Court Files

By Paul M. Barrett
Staff Reporter of The Wall Street Journal

In high-stakes court battles over product liability, internal corporate documents are often the best ammunition. A research report, a memo from the boss, or the minutes of a meeting, for example, can establish clearly what company officials knew about a product's safety or effectiveness—and what they did about it.

But as defendants, manufacturers routinely press courts to wrap in secrecy any sensitive material unearthed in pre-trial investigation. Defense lawyers argue that plaintiffs demand information that could help a company's competitors, damage its reputation or stir up frivolous lawsuits.

Hoping to prevent long, costly disputes over what documents defendants have to surrender, judges grant blanket "protective orders." The orders typically bar public dissemination of records and depositions even after a settlement or verdict. Plaintiffs' lawyers generally haven't balked as long as they can get the information they need to prepare for their trials.

But now, a growing number of plaintiffs' attorneys are refusing to consent to protective orders and are mounting challenges to them. These lawyers argue that protective orders tilt the scales further against individuals challenging well-heeled corporate defendants.

Plaintiff's View

"Essentially it makes every plaintiff's lawyer reinvent the wheel in every case," says C.F. Hitchcock, an attorney with Public Citizen Litigation Group. The Washington-based consumer advocacy organization has successfully opposed protective orders in lawsuits over the hazards of cigarettes and the Vietnam defoliant Agent Orange.

Companies hit with multiple liability suits frequently hire several regional law firms coordinated by national counsel and backed by specialists from corporate headquarters. In contrast, protective orders effectively isolate plaintiffs' lawyers, who are inhibited from consulting with each other or relying on documents pried loose in similar suits.

That is why Anthony Picadio fought such an order when representing Philip Brandimarti, a Pittsburgh man who suffered severe pelvic injuries when a forklift he was operating tipped over and landed on top of him. Mr. Brandimarti sued the machine's manufacturer in Pennsylvania state court for an unspecified amount, claiming that poorly designed safety devices contributed to the accident.

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After losing one trial but winning on appeal, Mr. Brandimarti is now awaiting a new trial. Meanwhile, Mr. Picadio has begun distributing the accident reports to other lawyers representing workers allegedly hurt by Tow Motor forklifts.

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Courts are beginning to share that view. "The whole idea of secrecy in a public court system is an abomination," says U.S. District Judge Thomas Hogan in Washington, D.C., who has presided over a number of asbestos cases. Judge Hogan observes "more and more" plaintiffs' lawyers refusing to acquiesce in protective orders and trying to overturn established ones. "Where there are disputes," he adds, "I now tend to refuse protective orders."

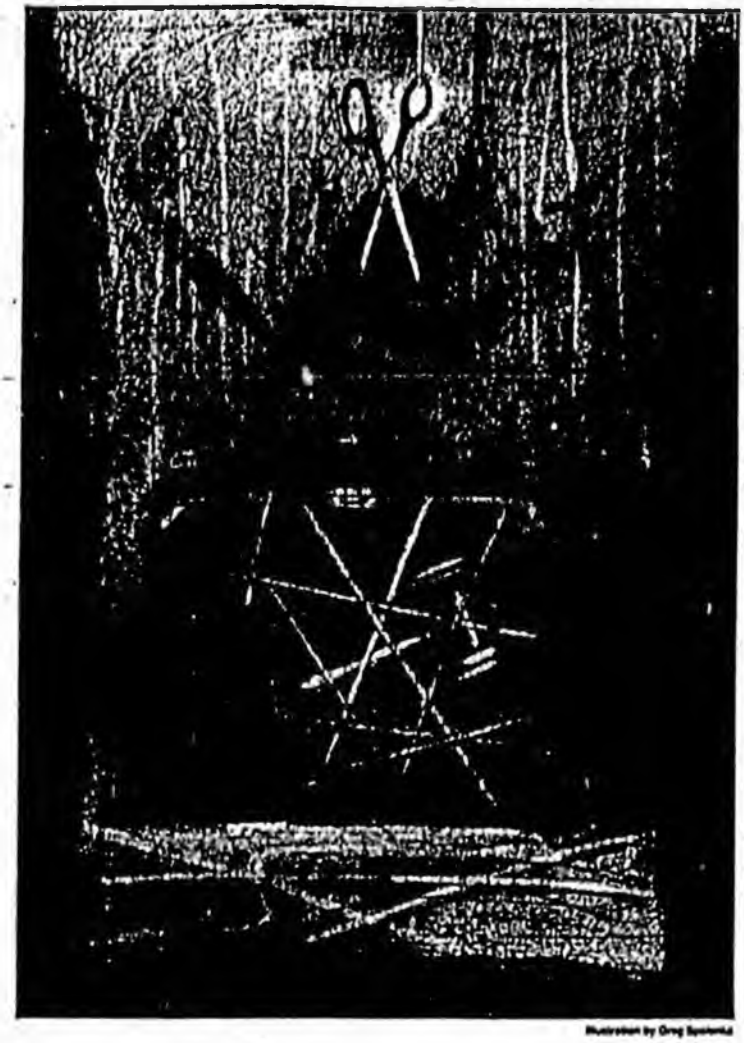


Illustration by Greg Spalenka

Concern about the issue has also spread to Congress. In June, the House Energy and Commerce Committee approved an amendment to pending products liability legislation that would encourage judges to permit disclosure of product hazards to government agencies and claimants in lawsuits.

To be sure, protective orders aren't in any danger of disappearing soon. Defense lawyers stress that under federal and state rules on discovery, a company shouldn't have to surrender its competitive edge at the cost of defending liability suits.

Judges grant protective orders not only in liability suits, but also in commercial litigation over such matters as antitrust and intellectual property. Moreover, other types of confidentiality arrangements—especially secrecy pacts agreed to by plaintiffs as a condition of out-of-court settlement—remain common, if controversial.

The change is that plaintiffs' lawyers are getting more savvy about the advantages of trading internal corporate documents, says Francis Hare Jr., a Birmingham, Ala., plaintiffs' attorney who recently completed a book on protective orders. Mr. Hare links this development with the recent emergence of numerous plaintiffs' clearinghouses, which provide attorneys with a means to compare trial tactics and evidence on purportedly dangerous products.

This kind of teamwork irks defense lawyers, who say it encourages irresponsible suits. The danger, says Edward Madeira, a corporate defense attorney with the Philadelphia law firm Pepper, Hamilton & Scheetz, is that a single, highly publicized a particular product" before all of the facts have been examined in court.

But a number of courts have endorsed the plaintiff exchanges. Setting aside a protective order last year, the Texas Supreme Court said that "allowing shared discovery is far more efficient than the repetitious system now employed." The court added that plaintiffs' cooperation "make[s] discovery more truthful" because companies "subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."

Judges are also looking more skeptically at manufacturers' contention that valuable trade secrets are frequently at risk in liability cases.

A U.S. district judge in Wichita, Kan., recently watered down an earlier order protecting internal research records of Wyeth Laboratories, a division of American Home Products Corp. In that case, which is pending on appeal, Wyeth lost a $15 million jury verdict to the parents of a girl who suffered brain damage allegedly caused by her taking a whooping cough vaccine the company formerly produced.

Granting the parents' request to allow dissemination of the documents, Judge Patrick Kelly noted that "the [trial] record does contain much, even within Wyeth's own files, which is adverse to its position here, and its desire to hold this evidence forever secret is understandable." But he emphasized that trade secrets weren't imperiled, especially since Wyeth no longer makes the vaccine.

The parents' lawyer, Ted Warshafsky, says the protective order would have sealed records, including some used during the trial, which should be available to consumers. He contends that some of the records indicate that, based on research Wyeth did in the 1970s, it could have reduced risks associated with the vaccine or produced a different, safer drug.

The company denies the charge. Wyeth's lead lawyer, Albert Knopp, insists that the company has in the past provided plaintiffs with all relevant safety information about the vaccine. "The idea that there is some deep, dark secret in the Wyeth documents, some smoking gun, that's garbage," he says. More hearings on the disputed documents are scheduled for next month.

Bic's Battles

A similar confrontation is taking place in Philadelphia, where Bic Corp. is engaged in protective order battles related to lawsuits charging that defects in the company's disposable lighters can cause dangerous fires.

In one pending suit, brought on behalf of the estate of a woman who died in a fire allegedly caused by a defective Bic lighter, a U.S. district judge rejected the company's claims that years of proprietary research on lighter design might be revealed. Concluding that Bic failed to provide specific evidence that it would suffer "any significant harm to its competitive and financial position," Judge E. Mac Troutman ordered documents on safety tests and prior accident complaints disclosed without restrictions. The company has appealed the ruling.

Alan Schwartz, the plaintiff's lawyer opposing Bic, says he could have avoided hundreds of hours of extra work by agreeing to take the documents under a protective order. But he is looking beyond his case. "The next person injured," he explains, "shouldn't have to go through the same battle I've engaged in."

Brokers Offer Higher Rates On Bank CDs

YOUR MONEY MATTERS

By Alexandra Peers
Staff Reporter of The Wall Street Journal

Wall Street securities firms are putting their marketing muscle behind certificates of deposit.

Brokers are doing big business by acting as shopping services, searching out the houses offer 7.9% to 8.35%. That compares with an average of 6.9% at banks and thrifts, according to Banxquote, a New York information services firm.

In some cases, however, banks promoting particular CDs—such as a one-year Dime Savings CD that pays 8.48%—offer similar or higher rates than brokerage houses. For now those are exceptions, though many banks and thrifts plan aggressive promotions for October, when many CDs will mature.

There are drawbacks to investing in CDs through brokerage firms. For one thing, investors don't get the free checking, free credit card or other privileges that being a bank or thrift depositor can bring. For example, a customer with no other money on deposit at a bank may pay $10 a month for a checking account, a fee that would eliminate the yield advantages of buying a CD through a broker.

lic Citizen Litigation Group. The Washington-based consumer advocacy organization has successfully opposed protective orders in lawsuits over the hazards of cigarettes and the Vietnam defoliant Agent Orange.

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Firms Use Copyright Law To Keep Documents Secret

Plaintiffs' passion for internal corporate records has prompted companies to invent new legal defenses for their files. The latest creation: copyrighting.

Federal copyright law aims to protect an author's exclusive right to profit from reproduction of original work. But in at least two product liability cases, Japanese manufacturers have copyrighted testing and safety documents to prevent plaintiffs from exchanging information in similar suits.

It's unclear whether the novel strategy will withstand judicial scrutiny, but lawyers predict that American companies will soon follow the example.

The strategy has already worked once for American Honda Motor Co., Gardena, Calif., a subsidiary of Honda Motor Co. of Japan. The company copyrighted documents in a recent suit brought in Tennessee state court alleging dangerous defects in an all-terrain vehicle made by the company. After winning the trial, Honda got a federal court to order the plaintiff's lawyer not to distribute documents used in the case.

Of Honda's strategy, Sidney Gilreath, the defeated attorney, says: "I never heard of it in my life. But you've got to give the devil his due—it's very ingenious."

Plaintiffs' lawyers complain that copyright law wasn't intended as a litigation weapon. "This creates a conflict with discovery rules designed to allow people to get information, as well as with the First Amendment," says Buddy Rake, a lawyer who is facing the copyright defense in a pending suit in Arizona state court over alleged defects in a Jet Ski water scooter made by Kawasaki Heavy Industries Ltd. of Japan.

Kawasaki says it is "attempting to comply" with Mr. Rake's requests for documents describing the Jet Ski's handling and stability. But the company asks that even if it is forced to turn over some documents, it will prohibit Mr. Rake from distributing them to anyone else, enforcing its "exclusive rights to publish, reproduce, disseminate or retain these documents."

Under the law, any "original work of authorship" expressed in a tangible medium can be copyrighted to prevent unauthorized reproduction. Courts interpret the requirement loosely, and it would probably cover even the most mundane test specifications, says Michael Clayton, a copyright specialist in the Washington, D.C., office of the law firm Morgan, Lewis & Bockius. The question is whether plaintiffs could persuade a judge to allow distribution of the documents anyway under a somewhat amorphous rule permitting "fair use" of copyrighted material.

"It becomes a matter of common sense," says Mr. Clayton. But, he adds, one thing is clear: Copyright law "is aimed at other purposes."

—Paul M. Barrett

> "THIS CREATES a conflict with discovery rules designed to allow people to get information, as well as with the First Amendment," says one plaintiff's lawyer.

Brokers Offer Higher Rates On Bank CDs

YOUR MONEY MATTERS

By Alexandra Peers
Staff Reporter of The Wall Street Journal

Wall Street securities firms are putting their marketing muscle behind certificates of deposit.

Brokers are doing big business by acting as shopping services, searching out the highest CD rates offered by banks and thrifts across the country—and often negotiating even higher rates for volume business. Then they use the CDs to court individual investors skittish about the stock market.

"I haven't opened a stock account in two months; CDs have become the bulk of my business," says Ilene J. Kuino, a broker at Shearson Lehman Hutton Inc. in New York. "Right now, people are really nervous and don't want to tie their money up; they're waiting till after the election and want to stay liquid. People feel yields are going to be going up."

Similarly, at Merrill Lynch & Co., CD sales last week totaled $620 million, up from a weekly average of $100 million in July.

Loss Leader

Many securities firms charge investors only a minimal commission, or none at all, and some offer to buy back the CDs before maturity if investors want out. While brokerage firms receive a minimal commission from the banks, CDs are "a loss leader," says Peter Wagner, a broker with Oppenheimer & Co. in New York. "The trick is to capture assets so that when investors are ready to roll out of a CD, the money's already here."

The competition is good news for investors seeking to make the most of higher interest rates. A 91-day CD bought directly from Dime Savings Bank of New York, for example, has a 5.92% rate and requires a $2,500 minimum deposit. But a 91-day Dime CD bought through PaineWebber Inc. comes with a 7.9% rate and requires a minimum deposit of just $1,000. In addition, PaineWebber is giving investors a $1.50 cash rebate for every $1,000 invested.

Similarly, Columbia Savings & Loan of Beverly Hills, Calif., offers investors depositing $1,000 to $9,999 a three-year CD with a rate of 8%, while some brokerage houses offer rates of 8.9% to 9% on three-year Columbia CDs.

On three-month CDs, the top-selling maturity at brokerage houses, the securities houses offer 7.9% to 8.35%. That compares with an average of 6.9% at banks and thrifts, according to Bankquote, a New York information services firm.

In some cases, however, banks promoting particular CDs—such as a one-year Dime Savings CD that pays 8.48%—offer similar or higher rates than brokerage houses. For now those are exceptions, though many banks and thrifts plan aggressive promotions for October, when many CDs will mature.

There are drawbacks to investing in CDs through brokerage firms. For one thing, investors don't get the free checking, free credit card or other privileges that being a bank or thrift depositor can bring. For example, a customer with no other money on deposit at a bank may pay $10 a month for a checking account, a fee that would eliminate the yield advantages of buying a CD through a broker.

Double Penalties

In addition, the secondary market promised by some brokerage houses may provide less liquidity than a bank or thrift. On top of the early-withdrawal penalties imposed by banks, some brokerage houses impose their own—as much as $100 for a big CD. And the secondary market for a CD can prove illusory if rates surge.

With brokerage-house CDs, the banks and thrifts ultimately backing them might be a little riskier than those that investors would pick on their own. But that isn't necessarily a drawback. In fact, investors may want to seek out CDs from struggling institutions through brokerage firms for the highest yields of all.

> "I HAVEN'T opened a stock account in two months; CDs have become the bulk of my business," says one broker.

Standard & Poor's Corp., a New York-based rating firm, ranks the creditworthiness of many bank and thrift CDs on a scale from "A1-plus" to "D." Lower ratings, or no ratings, usually mean higher yields—even though virtually all deposits in CDs offered by brokerage firms and banks are insured for up to $100,000 by the Federal Savings & Loan Insurance Corp. or the Federal Deposit Insurance Corp.

Several brokerage firms, for example, are selling unrated three-month CDs from Benjamin Franklin Savings & Loan of Houston that offer about 8.35%, the top end of the range for that maturity. Three-month CDs bought directly from the thrift have a rate of 7.1%.

"The rating of the institution is irrelevant because of the federal insurance," says Norberto Mehl, publisher of Bankquote. "Yield should be the only concern if the investor is depositing less than $100,000 at one institution."

Lawyers Launch Fight Against Court Secrecy

'Project Access' Will Challenge Judge's Order in Oregon ATV Suit

By Benjamin Weiser
Washington Post Staff Writer

A Washington legal organization has launched a nationwide effort called "Project Access" to combat the growing trend toward secrecy in courts.

The group of 650 plaintiff lawyers said it will begin to file court papers around the country opposing judicial orders that shield some pretrial proceedings from the public and preclude "access to information about dangerous products, environmental hazards and other matters of public significance."

Executive director Arthur H. Bryant said his group, called Trial Lawyers for Public Justice, already has persuaded a federal magistrate in Boston to deny an industry request for confidentiality in a case involving paint manufacturers.

The group also has challenged a confidentiality order in an Oregon suit alleging injuries caused by an all-terrain vehicle (ATV).

"Companies are repeatedly asserting that their products are safe and that the lawsuits against them are frivolous," Bryant said. "As long as they are successful in keeping things secret there is no way for the public to know whether they're telling the truth or lying."

The action by the trial lawyers group, and a pronouncement earlier this year by the Association of Trial Lawyers of America condemning court secrecy, is part of a burgeoning debate over how much access the public should have to documents produced by defendants in civil lawsuits.

Defendants usually seek broad confidentiality orders to prevent the dissemination of trade secrets. Plaintiffs' attorneys often agree in order to expedite settlements.

Bryant said Trial Lawyers for Public Justice will try to educate lawyers and judges on the ramifications of such agreements, such as keeping from the public or government regulators information that could prove damaging or embarrassing to a company or prevent future injuries.

"From my perspective, the reason these companies want everything to be kept secret is that they know that information is power, and that without information the public is powerless to act," Bryant said.

A defense lawyers group criticized the campaign against court secrecy and said it has its own pitfalls, such as creating additional litigation costs and delays. Moreover, courts already have a method of regulating secrecy, the defense lawyers said, since judges are supposed to weigh the issues involved.

"Judges are capable of deciding how to balance those factors in the best interests of all the parties, and the best interests of the public," said James C. Rinaman, a Florida attorney who heads Lawyers for Civil Justice.

Boston lawyer Richard P. Campbell, who has written widely on the need to maintain the current rules on confidentiality, said defendants are entitled to some measure of privacy in a system where "anybody can bring a lawsuit over anything with impunity."



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Robert L. Long, Director
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LAW

Train Car Owner, Lessee Not Liable In Ohio Wreck

By James P. Miller
And Wayne E. Green
Staff Reporters of The Wall Street Journal

The owner and lessee of a phosphorous-filled tank car that split open and burned in a 1986 train wreck aren't liable for the disruptive effects of the massive evacuation that ensued, an Ohio court ruled.

When a CSX Corp. train derailed at Miamisburg, Ohio, a cloud of toxic smoke sent tens of thousands fleeing from their homes. The car later reignited and generated a second exodus. Residents filed suit against CSX Transportation and also named as defendants Union Tank Car Co. of Chicago, which owned the car, and Albright & Wilson Inc., a shipping concern which was leasing it.



As the five-week trial neared completion, CSX settled the suit for $16 million, admitting no wrongdoing. The other two defendants then asked the Common Pleas Court of Montgomery County in Dayton for a directed verdict in their favor on the charges of negligence, qualified nuisance, and malice.

Judge John W. Kessler granted that request. He wrote that Union Tank's car met all federal standards for transport of hazardous materials, and complied with all requirements for design and construction of a rail car. "Almost no tank car design could have withstood" the wreck, the judge wrote.

The judge also said: "Much evidence was adduced in plaintiffs' case to show that CSX could have prevented or substantially lessened the probability of derailment by taking appropriate measures in the operation of the train and the maintenance of the track." But he said Union Tank and Albright & Wilson "cannot be shown to have had sufficient control of either aspect of CSX's functions to attribute liability to them for the derailment."

James L. O'Connell, a CSX attorney, says that the plaintiffs and CSX Transportation have asked the court to certify a "mandatory settlement class" that would cover all parties with any claims, even if they weren't included in the original class.

James D. Ruppert, an attorney for the plaintiffs, said the ruling will be appealed. "Compliance with minimum standards doesn't mean you have satisfied" legal requirements, if better information becomes available, he said. "Our position is that the information was available [so that] this car could have been designed in a way that the toxins wouldn't have been released upon derailment."

SUIT AGAINST GM to test new Texas rules limiting protective orders.

The rules, which took effect Sept. 1, make it harder for defendants in product liability and other civil damage suits to seal court records. The GM case may help define how far the rules go in requiring public disclosure of information produced in the pretrial stages of litigation.

General Motors Corp. is being sued by William and Erma Dunkle, who were injured in an automobile accident in May 1989. The plaintiffs contend the seat belt system in their 1987 Buick Le Sabre was defective, and they accuse GM of negligence and breach of warranty. General Motors is asking the court to withhold from public scrutiny certain safety test results and other information plaintiffs are seeking through pretrial discovery procedures.

Such information should be protected as trade secrets, GM argues. Moreover, it says the materials can be sealed because they aren't the kind of "court records" specified in the new rules.

But Brent Carpenter, a Houston attorney for the plaintiffs, says the documents are exactly the kind the new rules are designed to cover: court records "concerning matters that have a probable adverse effect upon the general public health or safety."

A hearing on GM's request is scheduled for today in state court in Beaumont, Texas. It is one of the first such proceedings to be held under the new rules, which require motions for protective orders to be aired in public.

* * *

SUIT SEEKING "no smoking" sign at Philip Morris shop is dismissed.

Philip Morris Cos.' cigarette manufacturing unit in Richmond, Va., won dismissal of a suit filed by an anti-smoking activist who wanted the sign posted in the company's gift shop.

Brought by Anne Morrow Donley and the Virginia Group to Alleviate Smoking in Public Inc., the suit alleged that Philip Morris is not in compliance with Virginia's new indoor smoking law, which requires "No Smoking" signs in public areas such as cashier lines. The law provides for a $25 penalty for convictions.

But at a hearing last week, retired Circuit Judge Joseph F. Spinello, in Henrico County, ruled that only the party with authority to collect a judgment – in this case the state – can bring the case. The opinion highlights one of the many ambiguities in the new law; it specifies civil penalties for violations, but doesn't designate any government agency to bring complaints.

Ms. Donley, who has forced several Richmond-area supermarkets and public agencies to comply with the law, said she will file a new complaint.

Philip Morris contends that the suit is a publicity stunt and that the law is unconstitutionally vague.

* * *

DISCIPLINARY ACTIONS: A report issued by the New York State Bar Association shows that 111 lawyers were disciplined for misconduct in the state last year. According to the bar's statistics, 48 lawyers in New York were disbarred, 15 resigned in the wake of disciplinary action and 63 were suspended from practice. In addition, more than 12,000 new complaints were filed in 1989. About 80,000 lawyers practice in the state.

* * *

–Milo Geyelin contributed to this article.



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stead that the proper solution was simply to tax newspapers as well. The state's high court rejected the magazine publishers' argument that the tax violates freedom of the press guarantees.

The Florida Supreme Court decision reversed the Leon County Circuit Court's ruling that held that the sales tax on magazines was indeed a first amendment violation and struck down the tax.

William Hyde, a lawyer for the Florida Press Association, which intervened in the interest of newspapers, said the association will ask the c rt to reconsider its unanimous decision.

He said newspaper interests may appeal to the U.S. Supreme Court.

• • •

A JUDGE REFUSED to step down from an oil company antitrust case.

The federal judge in Los Angeles had been accused of conflicts of interest by lawyers for the city of Long Beach and the state of California in an antitrust suit they filed against six oil companies.

U.S. District Judge William L. Gray proclaimed his impartiality in the case, which he has presided over since the state and city filed their suit against the companies in June 1975.

The plaintiffs allege that the concerns conspired to pay artificially low prices to the state and city for oil produced from state-owned tidelands. The defendants are Chevron Corp., Texaco Inc., Unocal Corp., Mobil Corp., Royal Dutch/Shell Group's Shell Oil Co. unit and Exxon Corp.

In 1984 and 1985 Judge Gray issued a series of summary judgments, effectively throwing the case out. But last year the Ninth U.S. Circuit Court of Appeals reversed his findings, reviving the case.

After a 18-month investigation, the plaintiffs' attorneys disclosed in their recent motion to disqualify the judge that Elizabeth Gray, the judge's wife, had signed a lease with Texaco to drill for oil on property she owns. The lawyers charged that Mrs. Gray owns 10 shares of stock in Chevron. The inquiry was first disclosed in the Los Angeles Daily Journal, a legal trade publication.

The lawyers also claimed that since the case began, Judge Gray has attended several seminars in Florida sponsored by defendants. Experts who lectured were working for the concerns in connection with the pending case, the lawyers have said.

The motion was filed on behalf of state Attorney General John Van de Kamp and Long Beach City Attorney John R. Calhoun.

In an interview last week Judge Gray said, "Neither my wife nor I has had an equitable interest in any defendants, except for the Chevron stock which neither she nor I was aware of until it was distributed from a family partnership about three months ago and she will be glad to divest herself of it."

U.S. District Judge Robert M. Takasugi will decide whether Judge Gray must step down.

• • •

THREE LAWYERS were ordered to pay damages to their former firm.

The Philadelphia lawyers took client files from their law firm to start their own partnership and were ordered to pay compensatory damages to their former firm.

The case, one of a handful in the country, illustrates problems that develop when lawyers break away from firms and lay claim to clients, even clients they represented. In this case, a Pennsylvania appellate court panel found the three lawyers interfered with the firm's contracts with the clients and could be held liable to the firm for compensatory damages.

Richard P. Myers, Alan I. Reich and Robert E. Paul worked as associates for Joseph D. Shein P.C., a law firm specializing in personal injury and asbestos cases. They signed stipulations that Mr. Shein would receive half the fees from the clients they brought to his firm.

But in October 1985, the three decided to form their own practice. After consulting a lawyer they moved 400 of the firm's case files in a rental truck to new offices, began calling clients and urged them switch their business to the new firm.

Philadelphia Court of Common Pleas Judge Abraham J. Gafni immediately ordered the files returned and blocked the lawyers from further contact with the clients. In a subsequent ruling, he found the three wrongfully interfered with Mr. Shein's contracts and ordered each of the clients who switched over to the new partnership to "re-select their attorney."

Approximately 290 stayed with the three lawyers, and that, in turn, prompted Mr. Shein to sue for damages. In May 1989, Judge Gafni awarded $10,000 in punitive damages for the removing of the files, but refused to order damages to compensate Mr. Shein for his lost clients. The judge reasoned that the "re-selection process" he ordered expunged the three partners of liability. Those clients who stayed with the new partnership, the judge reasoned, left Mr. Shein voluntarily.

But the three-member appeal panel rejected that theory, saying the lawyer's conduct met the legal test of wrongful interference with a contract. The panel ordered Judge Gafni to access damages.

Philadelphia lawyer Judy F. Berkman, who represented the three lawyers in the appeal, said the ruling raises fundamental questions about a client's right to choose a lawyer and plans to ask the full appeal court to reconsider the decision.

Mr. Shein's attorney, Thomas F. Johnson, declined comment.

• • •

PUBLIC HAZARDS can't be concealed by a court order under new Florida law.

The law, which was signed Friday and takes effect July 1, prohibits courts from sealing records that contain information about a public hazard. The legislation—the first comprehensive law of its type in the nation—was vigorously opposed by automobile manufacturers and pharmaceuticals companies, which are frequent targets of product-liability suits.

The Association of Trial Lawyers of American called the law "a tremendous victory for the public's right to know." Manufacturers have increasingly insisted that court records and information related to product-liability litigation be kept secret as part of settlement agreements.

Secrecy makes it far more difficult for the public to ascertain that a hazard exists,' the trial lawyers argued.

—Ann Hagedorn contributed to this article.

Majority Right, Majority Be Rich.



Manville Corp. Told to Consider Changes in Trust

Funding Called Inadequate, Administration Unfair; Suit Ban May Be Lifted

By Wade Lambert
And Mary Charlier
Staff Reporters of The Wall Street Journal

Manville Corp. was ordered to return to federal bankruptcy court to consider making major changes in the funding and operation of the trust that the company formed to pay asbestos claims.

The order, issued jointly by a U.S. district judge and a New York state judge, criticized the fund as being inadequately funded and unfairly administered. The changes recommended by the judges could have implications for thousands of Manville asbestos personal-injury claimants nationwide.

Federal Judge Jack B. Weinstein and New York state Justice Helen Freedman also left open the possibility that they will lift a court order preventing asbestos victims from suing the company, rather than the trust. The judges said they were wary of taking such a step because it might hurt the company that funds the trust.

The judges estimate that the trust will need $7.5 billion to pay pending and future claims. "There's no way [the company] is putting enough money in the trust to take care of $7.5 billion in claims," Judge Weinstein said. "At most the trust appears to be worth $1.5 billion. . . . The 100,000 claims and the limited access [to funds] cries out for a more workable and compassionate system."

Temporary Cover

The judges said the best way to temporarily cover the trust's shortfall may be for the company to advance the trust from $200 million to $300 million.

Trust and company officials wouldn't comment on details of the judges' proposals. Previously, trust officials have said that a shortage was expected in the early years of the trust. Manville will begin making regular payments to the trust in August 1991.

The judges directed the company and the trust to meet with U.S. Bankruptcy Court Judge Burton Lifland, who approved Manville's 1988 Chapter 11 reorganization. It was the formation of the trust that enabled Manville to emerge from bankruptcy-law proceedings.

Judge Weinstein and Justice Freedman gave the company five weeks to take up the matter with Judge Lifland, and 10 days for the trust to file a report in response to the proposals.

The Denver company, which was holding its annual meeting as the judges issued their order, tried to put the best face on the matter, focusing on indications that the judges aren't eager to lift the injunction barring suits against the company.

Manville Statement

"We are pleased that the judges agreed that the most important element of the plan is the provision which prevents suits against the company and directs all settlements to the [trust]," Manville said in a statement. Manville said the injunction, which was part of the bankruptcy reorganization plan, allows the company to provide maximum value to shareholders, including the trust, which holds 80% of the company's common stock and eventually could hold 90%.

"Suits against Manville would substantially reduce the value of the trust's assets," the company said. Officials said they wouldn't be able to comment further u[ntil] the [ju]dges' order this week.

In their order, the judges also said,

PacifiCorp Calls Halt For Now to Buy-Back Of Stock for Merger

By a Wall Street Journal Staff Reporter

PORTLAND, Ore.—PacifiCorp said it temporarily stopped open-market purchases of its stock in order to allow a quiet period for setting an exchange ratio related to the $250 million stock and cash acquisition of North West Telecommunications Inc.

PacifiCorp, an electric and telephone utility, has been buying its stock to accumulate the about 10.5 million shares it will need at current prices to complete the North West purchase.

In composite trading Friday on the New York Stock Exchange, PacifiCorp closed at $31.50, unchanged.

As reported, PacifiCorp's agreement to buy the La Crosse, Wis.-based telephone company calls for it to pay North West

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 considerabl 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.



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. □

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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 Poisoning, 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.

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Conclusion

As Justice Brennan stated in his dissent to *Fisher v. United States*: "History and principle, not the mechanical application of its wording, have been the life of the [Fifth] Amendment."[148] This Note has shown how the history and principles embodied in the fifth amendment urge a reexamination of the limitation expressed in *Fisher* when a court requires defense counsel to reveal information incriminating to the accused. The history of the fifth amendment reveals the delicate balance the Framers sought to provide between the state and the accused. Using defense counsel as witness against the accused upsets that balance and endangers the accusatorial system of justice.

The fifth amendment privilege against self-incrimination should be interpreted to require the state to bear the full burden of proving guilt. When courts determine new methods of conducting the criminal trial process, they must remember that the fifth amendment assures the accused the

> absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"[149]

148. 425 U.S. 391, 417 (1976) (Brennan, J., dissenting).

149. Williams v. Florida, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part).

Article

Protecting the Confidentiality of Settlement Negotiations

by

WAYNE D. BRAZIL*

The wise lawyer takes care to understand the scope of the protection the law affords to statements made and acts done in connection with settlement negotiations. This Article, which focuses on settlement negotiations in federal courts, begins by exploring the scope of Federal Rule of Evidence 408.[1] I describe how far this rule's promise of confidentiality extends and the circumstances under which it would permit communications made during settlement negotiations to be admitted into evidence at trial.

Second, this Article discusses other possible sources of protection against admissibility, especially Federal Rule of Evidence 403[2] and stat-

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* United States Magistrate, Northern District of California. B.A. 1966, Stanford University; M.A. 1967, Ph.D. 1975 Harvard University; J.D. 1975, University of California, Boalt Hall School of Law.

Very useful discussions of the problem of confidentiality of settlement communications can be found in Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISPUTE RESOLUTION 1 (1986); Dauer, "Confidentiality in ADR," a chapter in a forthcoming book by the Center for Public Resources entitled Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government. I am especially indebted to the work by Professor Green, which brought to my attention for the first time several important cases and concerns.

1. Federal Rule of Evidence 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

2. Federal Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially

utes that several states have recently enacted to encourage use of mediation.[3] This state legislation is significant because it erects a protective shield around mediations that appears to be more difficult to penetrate than the shields that Federal Rules of Evidence 408 and 403 erect around settlement communications. Thus, counsel might want to take into account before filing a lawsuit or selecting the court in which to file it the extent of the protection that is available for communications whose purpose is to resolve the dispute before trial.[4] When it is especially important to preserve the confidentiality of such communications, lawyers might consider mediation, as opposed to party-to-party settlement negotiations or even a judicially hosted settlement conference, because of the greater protection that some state laws seem to offer to mediation proceedings.

Third, this Article examines the circumstances under which settlement communications might be subject to pretrial discovery. It by no means follows that material from settlement negotiations is protected from discovery just because a rule of evidence would make that material inadmissible for certain purposes at trial. In fact, the weight of authority suggests that there is no generalized "privilege" for settlement communications and that they are discoverable, at least after a showing of substantial need.[5] Lawyers who conduct settlement negotiations on behalf of or with public entities face an additional peril: there are a number of reported cases in which the press or parties who were not involved in the negotiations have been able to use the Freedom of Information Act,[6] or a state law equivalent to the Act, such as the California Public Records Act,[7] to force disclosure of settlement documents.[8]

Finally, this Article examines the effectiveness of alternative methods for enhancing protection of settlement communications, including protective or sealing orders and side agreements. Although placing a settlement under seal pursuant to a court order may be useful in some circumstances, counsel cannot be confident that this procedure assures protection of the settlement's confidentiality. In an important recent case from the United States Court of Appeals for the Third Circuit, an entity that was not a party to the settlement agreement successfully invoked its common law right of access to court records to force disclosure of a settlement agreement between purely private parties, even though that agreement had been sealed by order of the District Court.[9] Likewise, counsel must appreciate the limitations of side agreements to protect the confidentiality of a settlement. A recent opinion from the United States Court of Appeals for the Second Circuit distinguishes between "private" judgments entered pursuant to settlement and "public" judgments so entered,[10] holding that in the latter the parties must disclose any side agreements that would permit satisfaction of the judgment on lesser terms than those reflected in the public record.[11]

The bottom line of this Article's analysis will be disheartening to some: despite the policy that inspires rule 408, there are many circumstances in which the things that lawyers and clients say and do during settlement negotiations will not be protected from disclosure or barred from use at trial. Thus, the prudent lawyer must think carefully about what she communicates in the settlement context and about selecting the safest possible environment for these communications. As I suggest in subsequent sections, the state of the law in this area may offer an extra incentive to parties who are especially interested in confidentiality to conduct their negotiations through a judicially hosted settlement conference that is structured around private caucuses.[12] Counsel also should consider using private contractual agreements to strengthen the protection of the confidentiality of their settlement communica ions.[13]

I. Federal Rule of Evidence 408: Failure to Fulfill its Promise of Confidentiality

A. The Scope of Rule 408 Beyond the Common Law: Historical Background and Policy Rationale

Federal courts had afforded an uneven and limited protection to settlement proposals prior to the adoption of the Federal Rules of Evidence in 1975. The principal source of limitation on the scope of the common

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. *See* Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 452 (1984). *infra* note 385.

4. It is possible that federal courts sitting in diversity cases would construe the *Erie* doctrine (*see* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny) or Federal Rule of Evidence 501 to require deference to state laws that confer privileged status on settlement discussions or mediation proceedings.

5. *See infra* notes 156-217 and accompanying text.

6. 5 U.S.C. § 552 (1982).

7. CAL. GOV'T CODE §§ 6250-6265 (West Supp. 1988).

8. *See infra* notes 234-98 and accompanying text.

9. Bank of Am. v. Hotel Rittenhouse Assoc., 800 F.2d 339 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 921 (1987).

10. Janus Films, Inc. v. Miller, 801 F.2d 578, 584-85 (2d Cir. 1986).

11. *Id.*

12. *See Infra* text following note 394.

13. *See Infra* notes 395-408 and accompanying text.

law doctrine applied prior to 1975 was the policy rationale that gave birth to it: for most courts, the reason not to admit offers of compromise lay in the notion that they were irrelevant. According to Wigmore, an offer to settle evidenced only a party's desire to terminate the litigation; it could not support any reliable inference about the merits of the claim or the amount of damages.[14]

While the "irrelevance rationale" could support exclusion of the parties' offers or demands, the courts had considerable difficulty using this rationale to exclude statements made by the parties or their conduct while they were trying to negotiate a settlement. As a result, most courts would not exclude from evidence admissions of fact that parties made during settlement discussions unless the author explicitly made the statement hypothetical, or incanted the prophylactic words "without prejudice," or unless the words constituting the admission were "so connected with the offer as to be inseparable from it."[15]

In drafting rule 408, the Advisory Committee decided that the common-law rationale for exclusion of offers of compromise was too narrow. The Committee (and, eventually, the Supreme Court and Congress) concluded that another rationale, recognized earlier by some courts,[16] was "more consistently impressive."[17] This rationale recognized that it was in the public interest, and in the interest of individual litigants, to encourage consensual resolution of disputes. Thus, the Committee made "compromise and settlement of disputes" the principal purpose of Federal Rule of Evidence 408.[18] To promote that purpose, the Committee reconstructed the law so as to expand considerably the zone of "freedom of communication with respect to compromise."[19] Most significantly, the new rule offered protection not just to offers or demands, but also to "conduct or statements made in compromise negotiations."[20] Thus, in adopting this rule, the Supreme Court and Congress in effect reversed a

14. *See* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5302 (1980); Note, *supra* note 3, at 447.

15. FED. R. EVID. 408 advisory committee's note; *see also* Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 553 (1st Cir. 1974) (court admitted notes with calculations of amounts owed in breach of contract dispute); Megarry Bros. v. United States *ex rel.* Midwestern Elec. Constr., Inc., 404 F.2d 479, 484 (8th Cir. 1968) (admission of testimony of statement by opponent in settlement negotiations prejudicial error); Nau v. Commissioner of Internal Revenue, 261 F.2d 362, 364-65 (6th Cir. 1958) ("admission of fact will not be summarily excluded simply because it was made in connection with an effort to compromise")

16. *See, e.g.*, Edward Valves, Inc. v. Cameron Iron Works, Inc., 286 F.2d 933, 938-39 (5th Cir. 1961).

17. FED. R. EVID. 408 advisory committee's note.

18. *Id.*

19. *Id.*

20. FED. R. EVID. 408.

long line of federal cases that refused to protect unqualified (*e.g.*, not in hypothetical form) statements of fact or admissions that were made during the course of settlement talks.[21]

The importance of the principal rationale for rule 408 cannot be overemphasized. As articulated by the District Court in Minnesota shortly after the rule was adopted, "[t]he purpose for the privilege surrounding offers of compromise is to encourage free and frank discussion with a view toward settling the dispute."[22] Counsel should use this rationale to enhance the protections the law affords their and their clients' words and deeds in settlement negotiations. Counsel should preface letters and direct or telephonic oral communications that are designed to contribute to prospects for settlement with an express statement that their purpose is to explore possible bases for settlement or to promote settlement negotiations. Lawyers who find themselves trying to dissuade a court from admitting evidence involving settlement negotiations should argue vigorously that a ruling in favor of admission would pose a grave threat to the policy objective that is at the heart of the rule. That policy objective is vital to the survival of our court system, for if a large percentage of our cases did not settle, the backlog in our courts would become totally intolerable.

The language of rule 408 unfortunately leaves a great deal of uncertainty about the scope of the rule. Trial judges must make judgments on a relatively unguided basis in many gray areas. It is in these areas that resort to the primary purpose of the rule is most important.

Counsel can argue persuasively that this is a rule that the courts could easily eviscerate. By resolving close cases in favor of admitting the evidence, courts would strike fear into the hearts of negotiating lawyers and clients and could compel them to play their settlement cards closer to their chest. Negotiations would thus become more of an irrational poker game and deprive parties of access to the reasoning that supports one another's positions. To avoid this result, counsel should argue that judges should construe the rule broadly. Broad construction of the rule would enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept. Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality. Every blow the courts strike against openness is a blow against the health of the

21. *See supra* note 15 and accompanying text.

22. United States v. Reserve Mining Co., 412 F. Supp. 705, 712 (D. Minn. 1976)

system and against the fundamental values on which it is based. These kinds of arguments should be effective because rationality is at the center of the judiciary's self-image.

Because the drafters of rule 408 departed so substantially from the principal thrust of the common-law tradition, lawyers cannot safely assume that cases decided before 1975 offer reliable guidance about the scope of the protection the rule affords.[23] An attorney will be on firmer ground if he looks to ways in which state courts have interpreted provisions from state law that served as models for the current federal rule. California provided one such model when it adopted a rule extending protection to statements made during compromise negotiations.[24] The notes of the United States Senate's Committee on the Judiciary suggest that provisions adopted in Nevada, New Mexico, and Wisconsin also served as models for the federal rule.[25]

B. Two Key Prerequisites to Invoking the Rule

Two important prerequisites to successful invocation of rule 408 emerge clearly from its terms: the rule only offers protection if there is a disputed claim, and it only applies to communications made or conduct that occurs "in compromise negotiations." In other words, unless there are both a real dispute and negotiations to resolve it, the rule provides no help. Thus, if a client first acknowledges both the existence and size of a debt, then the attorney tries to negotiate compromise terms of payment, the conduct and statements receive no protection.[26] The Advisory Committee's notes articulate this limitation: "The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. . . . Hence, the rule requires that the claim be disputed as to either validity or amount."[27]

Of course, rule 408 could afford protection if a client acknowledged the existence of an obligation but did not concede its size.[28] It also is important to emphasize that the rule's reference to claims for an "amount" does not imply that its protections are available only in cases in which a party seeks monetary relief. The rule clearly applies regardless of the character of the relief sought (legal or equitable) or the kinds

23. *See* C. WRIGHT & K. GRAHAM, *supra* note 14, at 175-76.

24. *Id.* at 165-66, 172; *see* CAL. EVID. CODE §§ 1152, 1154 (West Supp. 1988).

25. S. REP. NO. 1277, 93d Cong., 2d Sess., *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 283-84 (West 1987).

26. C. WRIGHT & K. GRAHAM, *supra* note 14, at 213-14.

27. FED. R. EVID. 408 advisory committee's note (citation omitted).

28. C. WRIGHT & K. GRAHAM, *supra* note 14, at 215, 249-50.

of terms negotiated. As discussed below, however, a proposal to settle that consisted of inviting the opposition to join in an illegal act or conspiracy would not be protected.[29]

Counsel must beware of the possibility of narrow judicial views of when a claim is "disputed" for purposes of the rule. For example, in *Hiram Ricker & Sons v. Students International Meditation Society*,[30] which was decided before rule 408 became effective but which acknowledged that one purpose of the common-law rule was to encourage settlement negotiations, the First Circuit upheld a decision to admit evidence of an offer that was intended to conclude a frayed relationship and preclude a follow-up lawsuit. The plaintiff had become "increasingly dissatisfied with the size of the periodic payments" that the defendant had been making, payments whose size was supposed to be a function of the number of the defendant's guests who used the plaintiff's facility. At trial, the plaintiff testified that, on the day the last payment was due, the defendant handed the plaintiff a sheet of paper that contained calculations and a bottom line figure and said "This is what we owe you. If you agree and sign a release absolving us from any and all damage and all future bills we will pay you."[31]

Both the trial court and the appellate court held that this statement was not entitled to protection as an offer of compromise. Recognizing that the "rule excluding offers of settlement is designed to encourage settlement negotiations *after a controversy has actually arisen*,"[32] the appellate court reasoned that the defendant's statement did not qualify for protection because the plaintiff could not be sure there was "an actual controversy" until the defendant tendered its final payment.[33] The appellate court found that the making of the subject statement marked the beginning of the "actual controversy" for purposes of rule 408.[34] Readers should appreciate what this reasoning means: courts may deny protection even though (1) before the subject statement was made both sides knew that plaintiff was dissatisfied with defendant's performance and that litigation was a clear possibility, and (2) the obvious purpose of the statement was to make an offer, which, if accepted, would settle accounts and preclude any subsequent lawsuit.

Counsel also must beware of courts making a distinction between

29. *Id.*
30. 501 F.2d 550, 553 (1st Cir. 1974).
31. *Id.*
32. *Id.* (emphasis added).
33. *Id.*
34. *Id.*

mere business communications, which are not entitled to protection, and "offers of compromise," which are.[35] The key to drawing this line lies in how the courts define "dispute" or "controversy" for purposes of rule 408. If the dynamic between the parties does not qualify as a "dispute" within the meaning of the rule, then by definition communications cannot constitute offers of compromise.

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.[36] first suggested the distinction between business communications and offers of compromise. Prior to the filing of the action, plaintiff and defendant had exchanged correspondence to determine which company had the right to use the phrase "Big Foot" to identify its tires. In this correspondence, the plaintiff claimed that it had exclusive trademark rights in this phrase. In response the defendant indicated, among other things, that if the plaintiff sued "the case would be in litigation long enough that Goodyear might obtain all the benefits it desired from the term 'Bigfoot.' "[37] Thus, at the time the subject communications took place, clearly (1) the parties had a real and economically significant disagreement about who had the right to use the phrase "Big Foot," (2) the purpose of the subject communications was to attempt to resolve this disagreement, and (3) litigation was a real possibility.

Despite these facts, the Tenth Circuit upheld the trial court's conclusion that the communications from the defendant in this context did not qualify for protection under rule 408 and should be admitted into evidence.[38] Although the judges may have been motivated by a desire to punish the defendant for its "strong-arm" negotiating tactics,[39] the "law" that emerges from this appellate court opinion remains with us and can be troublesome for lawyers who make good faith efforts to negotiate settlements before lawsuits are filed. The Tenth Circuit seemed to suggest that the correspondence remained mere "business communications" because at the time the letters were sent the "discussions had not crystallized to the point of threatened litigation, a clear cutoff point."[40] The court apparently felt that it was not until the parties had exchanged positions through their letters that they could know that the plaintiff's claim was in fact "disputed" within the meaning of rule 408.

The difficulty with this reasoning lies in the implication that rule

35. *See, e.g.*, Olin Corp. v. Insurance Co. of N. Am., 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985).
36. 561 F.2d 1365 (10th Cir. 1977).
37. *Id.* at 1368.
38. *Id.* at 1373.
39. C. WRIGHT & K. GRAHAM, *supra* note 14, at 214.
40. *Big O Tire Dealers*, 561 F.2d at 1373.

408's protections are available only after negotiations have degenerated to the point at which one party threatens litigation. In a slightly more recent Seventh Circuit case, *United States v. Hooper*, the court obliquely suggests (but does not unequivocally announce) the even more troubling idea that the protections of rule 408 might be available only when a lawsuit is already on file.[41] If adopted by other courts, the overly technical and demanding views suggested by the *Big O* and *Hooper* courts would defeat one of the principal purposes of the rule: to encourage parties to settle their disagreements outside the court system.

Some courts have adopted more generous interpretations that are less threatening to rule 408's purposes. For example, in *Olin Corp. v. Insurance Co. of North America*,[42] the District Court concluded that there was a disputed claim within the meaning of rule 408 because the plaintiff reasonably "contemplated that litigation might be necessary," and another party "conceded that litigation was possible." The court reached this conclusion even though no suit had been filed and the parties might not have known they were fully at loggerheads.[43]

There is another context in which courts may find rule 408 inapplicable because no "dispute" existed prior to the time the subject communication occurred. *Cassino v. Reichhold Chemicals, Inc.*,[44] concerned the admissibility of a document entitled "Settlement Agreement and General Release" that defendant had asked plaintiff to sign during a meeting in which defendant informed plaintiff that he was being terminated. "The document, which Cassino refused to sign, offered $18,000 in exchange for Cassino's release of all claims against [defendant] 'including, but not limited to, rights under federal, state or local laws prohibiting age or other forms of discrimination. . . .' "[45] It is important to note that the *Cassino* result may reflect, sub silentio, the court's belief that the interests protected by federal statutes that prohibit age discrimination simply outweigh the interests that might have been advanced by permitting the defendant in this case to use rule 408 to bar admission of a document the court believed was probative of defendant's motive in terminating an older employee.

In concluding that this document was admissible, however, the Ninth Circuit Court of Appeals distinguished between an offer that is

41. *See* United States v. Hooper, 596 F.2d 219, 225 (7th Cir. 1979).
42. 603 F. Supp. 445, 450 (S.D.N.Y. 1985).
43. *See* Gangl v. Gangl, 281 N.W.2d 574 (N.D. 1979) (construing the parallel state court rule, N.D.R. Ev. 408).
44. 817 F.2d 1338 (9th Cir. 1987).
45. *Id.* at 1342.

extended to try to settle a dispute that arises "after the termination," and an offer that is presented at the time the decision to terminate is communicated to the employee.[46] Characterizing offers made at the time of termination as proposed "termination agreements," the court observed that such proposals "are generally made a part of the record in the case and are considered relevant to the circumstances surrounding the alleged discriminatory discharge itself. The termination agreements, therefore, are probative on the issue of discrimination."[47] The "record" alluded to by the court presumably is the record developed during administrative proceedings on the underlying claim. Administrative bodies' routine consideration of these kinds of documents supports the court's conclusion that the documents are probative on the core liability issue; but that fact has no bearing on the scope of a rule of evidence that is inapplicable in the administrative context.

To support its holding that rule 408 barred admission of the proposed settlement and release agreement, the *Cassino* court relied on only one proposition: "the protections of Rule 408 were designed to encourage the compromise and settlement of *existing disputes*."[48] The Court emphasized not the language or policies of the rule, but the probative weight (on the liability issue) of the content and timing of the settlement offer:

> Where, as here, the employer tries to condition severance pay upon the release of potential claims, the policy behind Rule 408 does not come into play. Rule 408 should not be used to bar relevant evidence concerning the circumstances of the termination itself simply because one party calls its communication with the other party a "settlement offer."[49]

Perhaps significantly, the court promptly added that "[s]uch communications may also tend to be coercive rather than conciliatory."[50] The court proceeded to admonish that " 'courts should not allow employers to compromise the underlying policies of the ADEA[51] [Age Discrimination in Employment Act] by taking advantage of a superior bargaining position or by overreaching.' "[52] This language suggests that *Cassino* may be another case in which the judiciary's hostility to "strong-arm" bargaining helps to explain the court's analysis of rule 408. In the end, however, one senses that the principal reason that the *Cassino* court

46. *Id.*
47. *Id.*
48. *Id.* at 1343 (emphasis added) (citations omitted).
49. *Id.*
50. *Id.*
51. 29 U.S.C. § 621 (1982).
52. 817 F.2d at 1343 (citations omitted).

insisted on construing rule 408 narrowly was the court's understandable belief that the policies that inspire rule 408 simply are not as important as those that inspire the ADEA.

What lessons should counsel learn from these cases? First, the policies that inform rule 408 often will be in competition with other social policies, and that competition may cause some courts to interpret the rule narrowly. A second lesson, implicit in *Big O* and *Cassino*, is that many courts do not like "strong-arm" negotiation strategies.[53] Judges are especially likely to resent litigants or lawyers who try to use the cost and delay of litigation to gain an advantage to which they know they are not entitled. The most significant lesson from *Big O* is that some courts might punish your client if they believe that its bargaining position is not based on its perception of the merits of the case, but reflects a self-conscious attempt to use the fact that it will cost your opponent a great deal of money or take him a great deal of time to get relief through the court system or both.

The technical lesson from *Big O, Hiram Ricker & Sons*,[54] and *Cassino* is this: To maximize the odds that communications will be protected by rule 408, an attorney should either (1) file suit before beginning negotiations (a move may not be conducive to constructive discussions) or (2) announce, as a preface to communications, that he is invoking the protections of rule 408, that communications already completed between the parties establish that they have a dispute, that his client fears the dispute could lead to litigation, and that the purpose of his communication is to present an offer of compromise and to contribute to negotiations looking toward a settlement agreement. The problem with this advice is that by following either route an attorney risks damaging the prospects for creating the kind of feelings between the parties that are most conducive to reaching agreement. It is unfortunate that tough cases (and overreaching litigants) have forced courts to construe rule 408 in ways that tend to defeat its purposes.

There is authority, however, for the view that statements need not rise to the level of formal "offers" in order to qualify for protection. Communications whose primary purpose is to explore whether an opponent is interested in discussing settlement should be protected, as should communications that solicit an offer or a demand from an opponent.[55] Moreover, as long as it is viewed either as part of an effort to negotiate settlement or as an offer of compromise, a proposal to refer a dispute to

53. *See* C. WRIGHT & K. GRAHAM, *supra* note 14, at 214.
54. See cases cited *infra* notes 155-217.
55. *See* C. WRIGHT & K. GRAHAM, *supra* note 14, at 178.

arbitration or to some other alternative dispute resolution procedure also should come within the ambit of the rule.[56]

II. The Principal Limitations on the Scope of Rule 408

Unfortunately for lawyers and clients who want "free and frank discussion"[57] to maximize the odds of achieving settlement, limits on the scope of rule 408 result in many circumstances in which courts may admit into evidence even communications that clearly were part of good faith negotiations, the sole purpose of which was to settle claims that already have been filed in court.

The primary reason counsel cannot safely assume that their communication will be protected by rule 408, however, is not the possibility that courts might construe narrowly the threshold requirements that there be a "claim" and that it be "disputed." The more consequential limit on the rule's scope is the proviso that it applies only when the purpose of admitting evidence from the negotiations is "to prove liability for or invalidity of the claim or its amount."[58] Thus, by its own terms, rule 408 does not preclude admission of offers of compromise, or statements made in negotiations, when admitting the evidence would serve any purpose other than directly proving or disproving liability for or the amount of the claim. Because there are so many other purposes for which such evidence might be admitted, because it is impossible to forecast the likelihood that any such purpose will surface at trial, and because the outcome of any given judge's balancing analysis under rule 403 is not predictable, the wise lawyer has no choice but to be circumspect when negotiating directly with the opposition.

This sobering position means that counsel either must accept only half-rational negotiations (the "blind man's bluff" approach, in which neither side has meaningful access to the reasoning that supports the other side's view of the case) or must look to some device other than rule 408 to protect the confidentiality of what they say during negotiations. I describe some of the alternative sources of protection after briefly discussing some of the purposes for which evidence from settlements might be offered other than to "prove liability for or invalidity of the claim or its amount."[59]

There are many purposes for which settlement negotiation evidence might be offered that would not be within the scope of rule 408. The

56. *Id.* at 202-03.
57. United States v. Reserve Mining Co., 412 F. Supp. 705, 712 (D. Minn. 1976).
58. FED. R. EVID. 408.
59. *Id.*

most significant of these are (1) to impeach a witness; (2) to negative a contention of undue delay; (3) to prove wrongful acts during negotiations; (4) to prove the existence of or to block enforcement of an alleged settlement contract; and (5) to show the state of mind of a party. The principal impression created by most of the cases discussed in this section is that the scope of rule 408 is indeed limited and that many courts appear to be quite comfortable permitting parties to brush past the thin veil of confidentiality that surrounds settlement negotiations. Before turning to these cases, however, I point out that there is authority for the view that the policies that inspire rule 408 are so important that courts should interpret the scope of its protection liberally and should resolve doubts about its scope by refusing to admit evidence from settlement negotiations.

One recent case exemplifies this liberal spirit. In *Stacey v. Bangor Punta Corp.*,[60] Judge Carter refused to rule in advance of trial that evidence of a settlement between the plaintiff and a third-party defendant should be admitted, even though the defendant's proffer showed that the purpose of the evidence would be to establish the bias of the third party defendant and not to prove the "invalidity of the claim or its amount." In announcing that he would not rule on this motion until the unfolding of the trial itself better exposed "exactly the context in which Defendants will seek to offer [the] evidence," Judge Carter quoted with approval the following passage from a treatise by Professors Louisell and Mueller:

> There are, to be sure, purposes for which the proof [of settlement] is competent, but these are relatively narrow. It is well recognized, and rightly so, that the risks of prejudice and confusion entailed in receiving settlement evidence are such that often Rule 403 and the underlying policy of Rule 408 [to encourage settlement] require exclusion even when a permissible purpose can be discerned.[61]

Judge Carter went on to point out that it is often difficult to keep separate the purposes for which evidence is offered, and that if issues of impeachment "are inextricably bound up with issues of causation and liability," as they sometimes are, offers of evidence made ostensibly to impeach might still run "afoul of Rule 408."[62]

These passages from *Stacey v. Bangor Punta Corp.* suggest a point that we must keep clearly in mind while journeying through the forest of cases that conclude that rule 408 offers no protection because the purpose for which the settlement material is proferred is not to "prove liability for

60. 620 F. Supp. 636, 637 (D. Me. 1985).
61. *Id.* (citing 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 170, at 272 (1978)).
62. *Id.* (citing McInnis v. A.M.F., Inc., 765 F.2d 240, 250-51 (1st Cir. 1985)).

or invalidity of the claim or its amount." Courts cannot assume that evidence from settlement negotiations is admissible simply because it is offered for a real purpose other than one of the purposes prohibited by rule 408.[63] In this situation courts also must conduct a balancing analysis under rule 403. Before deciding to admit settlement evidence, judges must be satisfied that its probative value is not clearly outweighed by any prejudice, confusion, or delay that introducing it might cause.

Counsel also should understand that trial judges have discretion in fixing the scope and content of cross-examination and that rule 408 does not destroy that discretion even when evidence of settlement is offered for some purpose other than that to prove liability. The Fifth Circuit's opinion in *Reichenbach v. Smith*[64] illustrates this point well. Without adverting to rule 403 at all, the *Reichenbach* court upheld the district judge's decision to exclude evidence of plaintiff's settlement with a co-defendant even though the proffered purpose was to challenge the credibility of plaintiff's testimony. In upholding the trial judge's ruling the appellate court emphasized the importance of encouraging settlements and the role confidentiality can play in the settlement dynamic. The Fifth Circuit panel proceeded to declare that when ruling on an objection to the admission of evidence of settlement rule 408 permits the trial judge to:

> balance the policy of encouraging settlements with the need for evaluating the credibility of the witnesses. . . . The importance of informing the jurors fully so that they can carefully judge the credibility of each witness in making their fact determination *may in some situations* outweigh the desire to encourage settlements. But this choice must be made in the first instance by the trial j e.[65]

The appellate court went on to affirm the trial judge's conclusion that because there were other, obvious reasons for scrutinizing closely the plaintiff's testimony, admitting the evidence of the settlement would not add significantly to the jury's ability to assess her credibility. Because it was reasonable to conclude that admitting the evidence of the settlement would not contribute materially to the jury's ability to assess credibility, the trial judge committed no harmful error by deciding that the balance tipped in favor of encouraging settlement.[66]

Inexplicably, however, the *Reichenbach* panel added a concluding paragraph that seems inconsistent with the body of its opinion and that appears to take away much of the discretion the court had just acknowledged. The court emphasized that its "affirmance is not to be considered an approval for the future of the trial court's approach. The existence of a settlement agreement goes directly to the issue of credibility and usually the better approach is that codified in rule 408."[67] While this last paragraph obviously compromises the utility of this opinion for lawyers resisting the admission of settlements, the reasoning in the body of the opinion is sound and consistent with the body of doctrine developed separately under rule 403.

63. *See infra* notes 150-54 and accompanying text.
64. 528 F.2d 1072 (5th Cir. 1976).
65. *Id.* at 1075 (emphasis added).
66. *Id.*

A. Impeachment

The first purpose outside rule 408's scope for which settlement material might be offered is impeachment. The word "impeachment" is used to embrace a great many purposes for which evidence might be introduced at trial. These purposes include showing witness bias or prejudice; demonstrating that a prior claim of the opponent is inconsistent with his present claim or that the present claim was omitted from a prior action in which it logically should have appeared; or providing evidence that a party made a prior statement that is inconsistent with a statement made at trial. When thinking about the scope of rule 408, lawyers must appreciate that whether it will serve as an obstacle to admissibility may depend in part on which kind of impeachment is being attempted.

(1) Bias or Prejudice of a Witness

Despite the fact that the *ultimate* purpose for introducing impeaching evidence is to help the proffering party win the case on the merits (or at least to affect the size of the damage award), and thus, in the language of the rule, "to prove liability for or invalidity of the claim or its amount," many courts would hold that rule 408 does not bar admission of statements made during negotiations if the *immediate* purpose is to impeach *by* proving "bias or prejudice of a witness."[68] By its express terms, the rule "does not require exclusion when the evidence is offered for . . . proving bias or prejudice of a witness."[69]

A classic example of the application of this express limitation on the scope of the rule arises when one of several defendants settles with the plaintiff, then appears at trial to testify on the plaintiff's behalf. In this setting, some courts interpret rule 408 as permitting the non-settling de-

67. *Id.* at 1076.
68. *But cf.* Stacey v. Bangor Punta Corp., 620 F.Supp. 636, 637 (D. Me. 1985) (premature to determine admissibility of evidence of plaintiff's settlement with third party defendant prior to offer of evidence of settlement).
69. FED. R. EVID. 408.

fendants to introduce the terms of the settlement agreement in an effort to show that the testifying former defendant is biased in favor of the plaintiff.

The opinion by the Court of Appeals for the Third Circuit in *John McShain, Inc. v. Cessna Aircraft Co.*[70] illustrates this point. In this case, the plaintiff had settled a purported $25,000 property damage claim with one of the named defendants for consideration that had two elements: (1) the defendant agreed to pay the plaintiff ten dollars and (2) the defendant permitted the plaintiff to use one of the defendant's employees as an expert witness at trial. When the employee testified at trial, the district judge permitted the remaining defendant to introduce evidence about the terms of the earlier settlement agreement, on the theory that these terms could support an inference that the employee-expert witness was biased in favor of the plaintiff.[71] On appeal, the court concluded that this ruling neither offended rule 408 nor constituted an abuse of the trial court's discretion under rule 403.[72]

In reaching this conclusion, the Third Circuit panel characterized quite narrowly the "core of the public policy that the rule against admission of compromises was designed to vindicate."[73] That policy, according to the court, "encourages negotiation by preventing the parties to the compromise from being tied elsewhere to the concession they made *inter sese*."[74] Unfortunately, this narrow view ignores the Advisory Committee's and Congress' use of rule 408 to expand the common-law protection so that not just offers and demands would be covered, but also (as the language of the rule itself states) "conduct or statements made in compromise negotiations." Moreover, since the purpose of the extended coverage was to encourage "freedom of communication with respect to compromise,"[75] it is clear that the drafters of the rule intended to do much more than reduce fear of the *one* danger that the *McShain* opinion acknowledged, namely the fear of "being tied elsewhere to the concession . . . made *inter sese*."[76]

70. 563 F.2d 632 (3d Cir. 1977).
71. *Id.* at 635.
72. *Id.*
73. *Id.* at 635 n.5.
74. *Id.*
75. FED. R. EVID. 408 advisory committee's note.
76. *John McShain, Inc.*, 563 F.2d at 635 n.5; *see* Quad Graphics, Inc. v. Fass, 724 F.2d 1230, 1235 (7th Cir. 1983). For further discussion of *McShain*, see C. WRIGHT & K. GRAHAM, *supra* note 14, at 201, 262-67. *See also* Sharp v. Hall, 482 F. Supp 1 (D. Okla. 1978) (whether jury should be fully advised of fact of settlement and amount thereof is a matter resting in the sound discretion of the trial court); L. J. Ventz Constr. Co. v. Alliance Indem. Inc., 215 Neb. 268, 272-73, 338 N.W.2d 60, 63 (1983) (evidence relating to a "Mary Carter" agreement—covenant not to execute—should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to an agreement).

Professors Wright and Graham have pointed out another problem that the *McShain* court ignored: when judges permit introduction of evidence that the plaintiff settled a closely related claim against a former co-defendant on terms that are generous to the former defendant, the jury might infer that the plaintiff really does not believe in his claim against the remaining defendant.[77] It is precisely this risk that rule 408 was designed to avoid. The principal fear that inspires exclusion of evidence of offers of compromise is that juries will interpret these offers as acknowledgements that a claim or defense is weak or meritless. Given this risk, lawyers should argue that even if a literal reading of rule 408 would not block admission of evidence about offers or demands, the balancing analysis (weighing probative value against the likelihood of unfair prejudice) required under rule 403 would compel exclusion.

Counsel looking for support for this line of argument can cite *Kennon v. Slipstreamer, Inc.*,[78] a recent opinion from the Fifth Circuit. In this case a divided appellate court held that a trial judge violated rule 408 and committed reversible error when, in explaining to the jury the sudden absence of three defendants, he disclosed not just the fact that plaintiff had settled with them, but also that the amount of the settlement was a nominal ten dollars each.[79] The *Kennon* majority acknowledged that the purpose of disclosing the fact of the settlement was to avoid jury confusion, but insisted that in the circumstances presented there was "no proper purpose" for disclosing the amount.[80] Thus by disclosing the amount of the settlement the trial court had violated rule 408.

Having reached that conclusion, the appellate court was required to proceed to the next question: Did the violation of the rule require reversal? To answer this question, the Fifth Circuit panel had to assess the likelihood and probable magnitude of unfair prejudice to the remaining defendant. The centerpiece of the court's justification for reversing and remanding was its conclusion that when the trial judge disclosed the terms of the settlement, he created a great risk of extreme prejudice to the remaining defendant.[81] The court's words have significant implications for many issues concerning the scope of rule 408:

> First, the fact that the settlement was for a nominal amount suggests that the plaintiffs thought that the settling defendants were not liable

77. C. WRIGHT & K. GRAHAM, *supra* note 14, at 264.
78. 794 F.2d 1067 (5th Cir. 1986).
79. *Id.* at 1071.
80. *Id.* at 1070.
81. *Id.*

> for the plaintiff's injuries and therefore points the finger at Slipstreamer as the one responsible. Just as we held in *McHann v. Firestone Tire and Rubber Co.*, that informing the jury of a large settlement by a co-defendant might lead the jury to believe that only the co-defendant, and not the nonsettling defendant, was negligent, the disclosure of the "nominal" ten dollar settlement in this case suggests to the jury that Slipstreamer alone was liable. Furthermore, the willingness of the plaintiff to settle for a pittance with the other defendants could be taken by the jury as a reflection of the strength of the plaintiffs' case against Slipstreamer.[82]

Based on these and other considerations, the majority held that "no party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure . . . ."[83] The fact that the court's logic about the scope of rule 408 is not air-tight[84] should not obscure this opinion's importance: it delineates the kind of substantial prejudice that can result from admitting terms of settlement into evidence and makes it clear that courts have a responsibility to weigh this prejudice when deciding whether to admit such evidence, regardless of the technical purpose for which it is proffered. In the end, the *Kennon* opinion may prove more useful to courts conducting analyses under rule 403 than under rule 408. In either event, it casts a long shadow of doubt over the continuing vitality of opinions like *John McShain, Inc. v. Cessna Aircraft Co.*[85]

(2) Prior Inconsistent or Omitted "Claims"

Another form of impeachment that might not be prevented by rule 408 involves evidence that before trial the opposing party made a claim that is inconsistent with a claim he is pressing at trial. As Professors Wright and Graham point out, rule 408, by it own terms, applies to offers of compromise and to statements made "in compromise negotiations," but not to claims.[86] Thus there is some risk that a court would view a party's initial demand not as an offer of compromise of a disputed claim but as a description by that party of what his claim embraces. For example, in *Reich v. Reich*,[87] the court decided that the evidence of how much a party was willing to pay for her interest in property was not an offer of compromise but a reflection of what she believed to be the value of the property. Courts also might permit an opponent to introduce evidence of

82. *Id.* at 1070 (citation and footnote omitted).
83. *Id.* at 1071.
84. *Id.* at 1075-76 (Thornberry, J., dissenting).
85. 563 F.2d 632 (3d Cir. 1977).
86. C. WRIGHT & K. GRAHAM, *supra* note 14, § 5311 at 266.
87. 235 Kan. 339, 344, 680 P.2d 545, 549 (1984).

an initial demand to show that it did not include some claim that the plaintiff later pressed at trial. In *Fieldson Associates v. Whitecliff Laboratories, Inc.*,[88] a California appellate court construed a state law counterpart to rule 408 to permit a defendant to prove the scope of a contract by introducing evidence that the plaintiff had not made a claim for lost profits.[89]

The view that rule 408 simply does not apply to statements of claims can be interpreted as a variation on the theme described above, which provides that the parties may seek the protection of this provision only after they know that there is a "dispute." If taken too literally, this requirement would mean that rule 408 could apply only after an initial offer or demand has been rejected. This obviously makes no sense, in part because such an interpretation would not encourage settlements and would frustrate the purposes of the rule, and in part because it is not consistent with the "real world." Opening offers or demands are often in fact "compromise" proposals, made in an environment in which everyone knows the parties do not see eye-to-eye about how a particular matter should be resolved.

The situation is different, of course, when a debtor expressly admits that he owes a specified sum, but offers to pay a smaller figure in the hope that the creditor will accept it rather than go through the hassle and expense of litigation to collect. The Advisory Committee's notes to rule 408 make it clear that the "policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle *an admittedly due amount* for a lesser sum."[90] Good lawyers will argue, however, that except when a party expressly concedes the amount of its obligation, courts should not construe rule 408 either to discourage parties from being the first to put an offer or demand on the table or to force the careful lawyer to inflate his client's opening demand to cover every conceivable claim, thus eliminating the possibility of a later argument that because something was omitted his client does not really believe in the validity of it.[91]

The moral of these stories is relatively straightforward. The careful lawyer should preface an opening demand or offer by expressly stating that there is a dispute between the parties and that the proposal being advanced reflects neither a complete statement of the client's claims nor a full valuation of them. Rather, the lawyer should make clear that the

88. 276 Cal. App. 2d 770, 773, 81 Cal. Rptr. 332, 334 (1969).
89. *Id.* at 772-73, 81 Cal. Rptr. at 333-34 (interpreting CAL. EVID. CODE §§ 1152, 1154).
90. FED. R. EVID. 408 advisory committee's note (emphasis added).
91. *See* C. WRIGHT & K. GRAHAM, *supra* note 14, at 197-98.

proposal is an offer of compromise made in the hope that it will produce a settlement and thus enable both sides to avoid the cost and delay associated with litigating to judgment.

(3) Prior Inconsistent Statements

One of the most common forms of impeachment consists of evidence that a party or witness on some earlier occasion made a statement that is arguably inconsistent with a statement he or she has made on the stand during trial. Rule 408 bars admission of offers or demands, or statements made in settlement negotiations, if the direct and immediate purpose is "to prove liability for or invalidity of the claim or its amount." Thus a party clearly cannot introduce evidence of pretrial offers or statements made during negotiations as part of that party's case-in-chief on the liability or damages issues before the party who allegedly made the statement testifies. Surprisingly, however, courts have not formulated a consistent, reliable body of doctrine to determine the extent to which rule 408 bars evidence of pretrial offers or statements made during negotiations (1) when the party who allegedly made them has given testimony at trial with which the pretrial offer or statement is arguably inconsistent and (2) when the purpose of introducing the evidence is to attack that party's credibility by calling into question his veracity, memory, or accuracy of perception.

There is support from commentators and in cases for both sides of this issue. Among commentators, Professors Redden and Saltzburg take the position that it would effectively defeat the principal purposes of rule 408 to hold that it permits admission of statements made in negotiations solely because they are arguably inconsistent with testimony offered by a party at trial.[92] Professors Louisell and Mueller seem to line up on the other side.[93] Professors Wright and Graham also advocate admission of such statements, even though they do so without overwhelming conviction, and after acknowledging that the competing arguments are not without substance.[94] The few judicial opinions in this area are not elaborately reasoned, but most seem to favor admission of settlement communications for impeachment purposes when the communications qualify as

92. K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 172 (2d ed. 1977). Additional support for this view from commentators can be found in M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 255-56 (1981); Waltz & Huston, *The Rules of Evidence in Settlement*, 5 LITIGATION 11, 16 (1981); Kirkpatrick, *Reforming Evidence Law in Oregon*, 59 OR. L. REV. 43, 67 (1980).

93. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 277 (1978).

94. C. WRIGHT & K. GRAHAM, *supra* note 14, at 227-28; *see* Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 242 (1983).

prior inconsistent statements.[95] Judicial support for the opposite view can be found in *C & K Engineering Contractors v. American Steel Co., Inc.*[96]

The next few paragraphs suggest arguments that could be used by lawyers whose objective is to persuade a court that rule 408 does not permit admission of statements made by a party opponent during negotiations merely because the statements are arguably inconsistent with testimony by that party at trial. Counsel should keep in mind, however, that even if they fail to persuade the court that rule 408 should be so construed, they may still be able to mount powerful arguments against admission under rule 403, since the evidence's marginal contribution to the jury's capacity to assess the credibility of the witness often clearly will be outweighed by the risk of unfair prejudice, confusion, and digression into collateral matters.[97]

The most important argument counsel can make under rule 408 is that to admit statements made during negotiations simply because they are arguably inconsistent with a party's prior trial testimony would eviscerate the rule completely. To admit such statements would make a mockery of the rule's promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are completely consistent and because it is so easy to find some tension between virtually any two statements on the same subject. Even Professors Wright and Graham concede that interpreting rule 408 to permit the admission of statements merely because they are inconsistent with trial testimony threatens to reduce "the second sentence of Rule 408 to a cipher."[98]

If lawyers and parties know there is a great risk that what they say in settlement negotiations may be used against them at trial, they will retreat into a shell of secrecy and non-communication in the pretrial period, thus turning settlement "negotiations" into little more than posturing and poker-playing. If parties are afraid to share the reasoning that supports and explains their offers and demands, they bear a greater risk that the substantive terms of settlement agreements will not reflect rational and fair resolutions of disputes. Since so many of our cases are

95. *See, e.g.*, County of Hennepin v. AFG Indus., Inc., 726 F.2d 149, 153 (8th Cir. 1984); American Family Life Assurance Co. v. Teasdale, 733 F.2d 559, 568 (8th Cir. 1984); Missouri Pac. Ry. v. Arkansas Sheriff's Boys Ranch, 280 Ark. 53, 63-65, 655 S.W.2d 389, 394-95 (1983); *In re* Commodore Hotel Fire and Explosion, 324 N.W.2d 245, 248 (Minn. 1982).

96. 23 Cal. 3d 1, 12-13, 587 P.2d 1136, 1142-43, 151 Cal. Rptr. 323, 329-30 (1978) (interpreting CAL. EVID. CODE § 1155).

97. *See infra* notes 125-54 and accompanying text.

98. C. WRIGHT & K. GRAHAM, *supra* note 14, at 227.

concluded by settlement agreements, it is unseemly to interpret rules of evidence in a way that significantly reduces the likelihood that settlements will be rational and that the parties will feel the settlements are fair. The courts' interpretation of evidentiary rules should promote rationality and respect for the ways disputes are resolved in the system rather than irrationality and cynicism.

Counsel can buttress these policy arguments by noting that the only form of impeachment acknowledged by the rule itself is proof of "bias or prejudice of a witness." In addition, all of the cases cited in the Advisory Committee's note supporting admissibility for purposes of impeachment involved evidence of generous settlements with former defendants who were subsequently called to testify at trial on behalf of plaintiff.[99] It seems unlikely that the drafters of the rule would have failed to mention as common a form of impeachment as prior inconsistent statements, if they felt that it should constitute an exception to rule 408. Moreover, it is difficult to imagine that the drafters did not see that the apparent promise of meaningful protection offered by rule 408 would be a charade and a huge trap for the unwary if impeachment by a prior inconsistent statement were considered a sufficient basis for admission.

Counsel also can argue that there are other well-established "exceptions" to rule 408 that give courts ample power to admit evidence necessary to correct wrongs committed during settlement negotiations. As discussed below, there is clear authority to admit evidence of statements made during negotiations if the purpose is to show illegality in the terms of an agreement or that an agreement was acquired through fraudulent representations or omissions.[100] Similarly, courts have held that because rule 408 applies only to genuine compromises of real disputes, it offers no protection when statements made during negotiations or the terms of an agreement tend to show that a purported settlement was in fact a sham. For example, rule 408 would not protect a statement that a settlement was entered solely to buy the testimony of a former defendant, or to induce him to pretend to remain active in the case by pursuing claims against co-defendants in order to give plaintiff more leverage with those other defendants.[101]

The only wrong that a party could hide behind rule 408 if courts refuse to admit statements made during negotiations simply because they

99. *Id.* at 262; *see* FED. R. EVID. 408 advisory committee's note.

100. *See infra* notes 108-16 and accompanying text.

101. C. WRIGHT & K. GRAHAM, *supra* note 14, at 263; *see* L. J. Vontz Constr. Co. v. Alliance Indus., Inc., 215 Neb. 268, 272-73, 338 N.W.2d 60, 63 (1983); *see also* Quad/Graphics, Inc. v. Fass, 724 F.2d 1230, 1235 (7th Cir. 1983).

are arguably inconsistent with testimony at trial is lying on the stand or during a settlement discussion. Lying from the witness stand or during settlement negotiations is a serious evil. But acknowledging that fact is not where thinking about this matter should stop.

First, courts must ask how much the narrower interpretation of the rule would affect real world behavior: how much less lying would there be, and how much more often would lying be detected, if rule 403 were construed to permit admission of statements that were made in settlement negotiations solely on the ground that they arguably are inconsistent with testimony offered at trial? Since there is no empirical study that answers this question, we are forced to speculate. My speculation is that adopting the narrower interpretation of the rule would have little effect on lying. The psychological and other forces that lead people to lie are probably sufficiently powerful in most instances to overwhelm whatever fear might be engendered by the rather remote possibility of exposure through admission of words uttered in settlement negotiations. Most lawyers and litigants understand that only a small percentage of cases reach the trial stage, so most counsel and clients probably would believe that the odds are small that a lie committed during settlement negotiations would be exposed at trial. Moreover, if a party lies during settlement negotiations about a matter of any real consequence, it seems unlikely that he would not repeat the lie at trial. If he repeats the lie, his stories will not be inconsistent and the narrower interpretation of the rule would not help expose his dishonesty.

There is some possibility that parties might be truthful during settlement negotiations but untruthful at trial. The odds of that scenario occuring often with respect to important issues seem small, however, because the pressure to be truthful at trial is much greater than it is in the informal, off-the-record settlement negotiations. Moreover, most settlement negotiations are conducted almost exclusively by counsel and not by the clients. Thus, in the vast majority of cases, the stories that would be compared for impeachment purposes would be (1) the story told by the client at trial and (2) the story told by his lawyer in settlement discussions. It is not clear that courts would permit impeachment of a *party's* trial testimony by words uttered earlier by his *lawyer* in private efforts to compromise the claim. In sum, it is questionable whether the narrower interpretation of the rule would contribute to the goal of deterring or detecting perjury at trial or lying during settlement negotiations.

On the other hand, the broader interpretation of the rule, which would bar evidence of settlement communications if the only ground for admission was arguable inconsistency between statements in settlement

negotiations and testimony at trial, might promote positive ends by encouraging parties to share, during settlement discussions, more of the reasoning and evidence that supports the offers or demands they make. I hasten to concede that just as it is not clear how much a narrow interpretation of rule 408 discourages or exposes lying, it also is not clear how much a broad interpretation of the rule would improve the openness and rationality of settlement discussions. The absence of empirical data forces courts to make educated guesses on both sides of the debate. I fear, however, that fair consideration has not been given to the arguments that support a broader interpretation of the rule. Such consideration might begin by acknowledging that it is not true that only liars need fear an interpretation of rule 408 that would permit admission of statements made in negotiations solely on the ground that they are arguably inconsistent with trial or deposition testimony. Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent. In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous. The choice clearly is *not* between protecting liars and exposing liars. Rather, the choice is between (1) an interpretation of the rule that might, to some unmeasured extent, deter some lying by permitting party opponents to expose it when negotiations do not lead to settlements, and (2) an interpretation of the rule that would give some reality to its promise of confidentiality and that might, to some unmeasured extent, make settlement negotiations more rational by encouraging parties to share the reasoning that supports their positions. Given the lack of evidence that the narrow view of the rule has any effect on lying, courts should reject that interpretation on the ground that it makes rule 408 hollow and misleading and creates pressures on counsel and litigants that tend to defeat the rule's purposes.

B. Negativing a Contention of Undue Delay

By its own terms, rule 408 does not compel exclusion of settlement communications if they are proffered for the purpose of "negativing a contention of undue delay." Parties are most likely to want to use settlement communications for this purpose when the opposition is asserting that the doctrine of laches should bar their claim. As both Wigmore and

Professors Wright and Graham point out,[102] however, often it will only be the existence of negotiations that is relevant, not the content of the parties' statements during the discussions. Lawyers who are trying to limit disclosures from the negotiations should press this point on the judge. On the other hand, the content of statements made during the negotiations would be relevant and admissible, barring protection from some other rule such as rule 403, if plaintiff contended that he had failed to press forward because of specific promises defendant made during their settlement talks. For example, this may occur where there is evidence that the defendant told the plaintiff not to file suit because the defendant would make the plaintiff whole without the necessity of resorting to the court system.

In contrast, parties will rarely be able to use an opponent's assertion of a defense based on the statute of limitations to justify introducing evidence from settlement negotiations. The obstacle, however, would not be rule 408, but rule 402's requirement of relevance.[103] Under most statutes of limitations, "the fact that one was attempting to compromise the dispute is usually no excuse for failure to file the complaint or to take whatever steps are required to comply with the statute."[104] An exception to this generalization might arise when the evidence from the negotiations suggests that the defendant had affirmatively induced the plaintiff not to file his claim by making false promises to pay or otherwise correct the situation. When a defendant's request or promise reasonably induces the plaintiff not to file within the statutory period, the plaintiff might well be able to invoke the doctrine of equitable estoppel to make the evidence relevant.[105]

Courts have permitted parties to use evidence of settlement negotiations to excuse failures to begin efforts to mitigate damages promptly, or to rebut a defendant's contention that the plaintiff's delay in stopping work under a contract showed that the plaintiff did not believe that the defendant had breached.[106] Similarly, a defendant is likely to be permitted to introduce evidence that during settlement negotiations it offered to

102. *See* C. WRIGHT & K. GRAHAM, *supra* note 14, at 272 (citing WIGMORE, EVIDENCE § 1061 n.43 (1972)).

103. FED. R. EVID. 402.

104. C. WRIGHT & K. GRAHAM, *supra* note 14, at 271.

105. *Id.* at 283.

106. *See, e.g.*, California & Haw. Sugar Co. v. Kansas City Terminal Warehouse Co., 602 F. Supp. 183, 188 (W.D. Mo. 1985) (company sold sugar to alternate buyer while negotiations progressed, resulting in greater damages due to drop in market price); Urico v. Parnell Oil Co., 708 F.2d 852, 855-56 (1st Cir. 1983) (plaintiff incurred additional loss of use damages while negotiating with insurer over who would pay for truck repair); C. WRIGHT & K. GRAHAM, *supra* note 14, at 272, 283.

reinstate the plaintiff when the purpose of the evidence is to show that the plaintiff did not mitigate his damages.[107]

C. Wrongful Acts During Negotiations

Rule 408 will not block admission of evidence from settlement negotiations if the purpose of the evidence is to show that a party committed a civil or criminal wrong or proposed illegal activity. For example, rule 408 would be no obstacle to introducing evidence that an offer to compromise made by a defendant in an antitrust action consisted of an invitation to join an illegal conspiracy.[108] Similarly, there is no reason to read rule 408 as barring evidence that a party attempted to extort another during settlement negotiations. As suggested by Judge Weinstein, a former member of the Advisory Committee on the evidence rules, courts also should admit evidence from settlement negotiations that shows a libel, an assault, or an unfair labor practice during the negotiations themselves.[109]

Evidence from settlement negotiations may be used in other contexts. Parties may use such evidence to help prove the failure of an insurance carrier to make a good faith settlement within policy limits.[110] Evidence from settlement negotiations also might be used to help prove a claim of attorney malpractice, or as part of a lawyer's effort to prove that he is entitled to a fee that a former client is wrongfully refusing to pay.[111] There is also authority for the view that a grand jury investigating criminal charges may subpoena evidence about settlement negotiations in an earlier civil lawsuit.[112] This exception finds support in rule 408's express permission to use evidence from settlement negotiations to prove "an effort to obstruct a criminal investigation or prosecution."[113]

A significant variation on this theme can arise when some members of a putative class object to a proposed settlement of a class action. An important Seventh Circuit opinion held that "the conduct of the negotia-

107. *See* Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 637-38 (E.D.N.Y. 1982) (discrimination in employment not cause of damages after reinstatement offer).

108. *Cf.* Crouse-Hinds Co. v. Internorth, Inc., 518 F.Supp 413, 414-16 (N.D.N.Y. 1980) (Clayton Act provides an exception to rule 408 as regards consent decrees or nolo contendre pleas in antitrust actions; exception is necessary to allow use of past antitrust conduct in enforcing law).

109. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 408-428 (1975).

110. *See, e.g.*, Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 396, 89 Cal Rptr. 78, 90 (1970) (construing an earlier version of analogous state law, CAL. EVID. CODE § 1152).

111. C. WRIGHT & K. GRAHAM, *supra* note 14, at 282.

112. *See In re* Special Nov. 1975 Grand Jury, 433 F.Supp. 1094, 1097 (N.D.Ill. 1977) (subpoena duces tecum issued to Peat, Marwick, Mitchell & Co.).

113. FED. R. EVID. 408.

tions [is] relevant to the fairness" of a proposed class settlement.[114] Therefore, members of a class that seek to block approval of such a settlement are entitled to conduct discovery or examinations into how the negotiations were handled, including inquiry into alternative offers that may have been considered and potential conflicts of interest of counsel who led the settlement negotiations on behalf of the class.[115] The court noted that the "seemingly irregular conduct of the negotiations" raised real questions about whether those who had purported to represent the members had done so adequately and whether the terms of the proposed agreement were unfair to some of the people who would be included.[116]

D. To Prove or Block Enforcement of an Alleged Settlement Contract

Rule 408 does not bar the use of evidence from settlement negotiations if the purpose is either (1) to prove that an agreement was reached and should be enforced, or (2) to defeat enforcement of an apparent agreement. For example, the rule will not prevent a party from introducing evidence from the negotiations to show that a settlement contract was procured by fraud[117] or was the product of duress or mutual mistake.

There are some circumstances, however, in which counsel may be able to forestall such suits. Counsel may incorporate a release into the settlement contract that specifically announces that in deciding to enter the agreement neither party is relying on "any inducements, promises or representations" that are not set forth with particularity in the settlement contract itself. The Ninth Circuit recently relied, in part, on such language to deny a sophisticated commercial entity an opportunity to prove that a settlement and release were obtained through the intentional fraud of an opponent.[118] Courts presumably would be more reluctant to permit such language to foreclose an effort to set aside a settlement between parties of substantially unequal bargaining power and sophistication. Moreover, state statutes may prevent general release language (as opposed to language that specifically identifies certain events or documents out of which no future claims could be made) from extinguishing "claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."[119]

114. Oswald v. General Motors Corp., 594 F.2d 1106, 1124 (7th Cir. 1979).
115. *Id.* at 1123-25.
116. *Id.* at 1124.
117. *See* Gorman v. Soble, 120 Mich. App. 831, 842, 328 N.W.2d 119, 124-25 (1982) (construing the parallel state rule).
118. Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1445 (9th Cir. 1986).
119. CAL. CIV. CODE § 1542 (West 1982).

E. State of Mind

Although there are innumerable other purposes for which counsel might seek to introduce evidence from settlement negotiations, one has been upheld over objections based on rule 408 so often that it warrants specific mention. Courts often have admitted evidence of settlements or from settlement negotiations to help prove the state of mind or the knowledge of a party to those negotiations. In *Breuer Electric Manufacturing v. Toronado Systems of America, Inc.*,[120] for example, the court held that evidence from settlement negotiations that occurred before filing a complaint was admissible to rebut an assertion by defendant that it had not been aware of an issue until the suit was filed. In *United States v. Gilbert*,[121] the Second Circuit upheld a trial court's decision to admit a consent decree entered by defendant with the Securities Exchange Commission when the purpose of the evidence was to show the defendant's knowledge of securities reporting requirements. Similarly, the Third Circuit has admitted evidence from settlement negotiations to show that a police department knew that a particular officer had violent propensities.[122]

Most reported opinions seem quite liberal in admitting evidence from settlement negotiations to prove or rebut contentions about a party's state of mind or knowledge. At least one court, however, has viewed this kind of reasoning as perilously close to permitting the use of such evidence to prove the validity of a claim itself. In *Fidelity & Deposit Co. of Maryland v. Hudson United Bank*,[123] the court refused to admit evidence of an earlier settlement with a non-party that was proffered to show that the defendant knew about alleged employee dishonesty earlier than it contended at time of trial. The court reasoned that admitting the evidence for such a purpose was tantamount to admitting it to establish the validity of the plaintiff's underlying claim.[124]

III. Rule 403: An Additional Source of Protection

Rule 408 does not purport to compel courts to admit evidence of settlement whenever that evidence is offered for some purpose other than to prove liability or damages. Rather, in such situations the rule simply does not compel exclusion of the evidence. Rule 408 also does not purport to prevent counsel from invoking other rules of evidence to attempt

120. 687 F.2d 182, 185 (7th Cir. 1982).
121. 668 F.2d 94, 97 (2d Cir. 1981).
122. Gagliardi v. Flint, 564 F.2d 112, 116 (3d Cir. 1977).
123. 493 F. Supp. 434, 444-45 (D.N.J. 1980).
124. *Id.*

to block admission of settlement material. When rule 408 does not compel exclusion, counsel should look to Federal Rule of Evidence 403 as an independent potential source of protection.[125]

Rule 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[126]

It is important to emphasize at the outset that the Advisory Committee's note to this rule states that the other rules in article IV, which include rule 408, "reflect the policies underlying" rule 403 and consist of "concrete applications evolved for particular situations."[127] Thus, rule 408 is a sub-species of rule 403, and the kind of analysis required by rule 403 is appropriate to decide whether evidence from settlement negotiations should be excluded under rule 403 even though it is not barred by rule 408.

Before turning to the case law that supports this view, it is important to describe a strong argument by analogy from rule 404(b). Rule 404(b), also in article IV, is one of the "concrete applications [of the kind of balancing generally called for in rule 403] evolved for particular situations."[128] The structure of rule 404(b) parallels the structure of rule 408. Both begin by prohibiting admission of specified kinds of evidence for a specified purpose, then go on to announce that courts are not required to exclude the kind of evidence the rule covers if it is offered for a purpose other than the one proscribed. Rule 404(b) prohibits admission of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith."[129] In its second sentence rule 404(b) states that such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[130] Explaining how courts should proceed when "the rule does not require that the evidence be excluded" because it is offered for a purpose that is not prohibited, the Advisory Committee's note declares:

> No mechanical solution is offered. The determination must be

125. *See, e.g.*, Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987); *infra* notes 134-54 and accompanying text.
126. FED. R. EVID. 403.
127. FED. R. EVID. 403 advisory committee's note.
128. *Id.*
129. FED. R. EVID. 404(b).
130. *Id.*

> made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.[131]

Thus, for a rule that also is in article IV, and that is structured just like rule 408, the Advisory Committee makes it clear that courts should conduct an independent analysis under rule 403 *after* they conclude that the concrete application provided for in a particular rule does not require exclusion.[132]

The Fifth Circuit proceeded exactly in this manner in *United States v. Cook*.[133] Significantly, the evidence that generated the dispute consisted of a consent decree and supporting documents that resulted from a settlement of a prior civil lawsuit.[134] Thus the court arguably could have adverted to the policies supporting rule 408 in addition to relying on rule 404(b). Neither party sought to draw support from rule 408, though, and the court did not raise the issue. The court did state clearly, however, that even if the evidence was not barred by rule 404(b) because it was proffered for a purpose other than the purpose proscribed, its admissibility "remains subject to the balancing test of rule 403. The probative value of the evidence under consideration must be determined and compared with the danger of unfair prejudice occasioned by its admission, error being found when it is clear that the latter substantially outweighs the former."[135] Applying this test, the *Cook* court concluded that the trial court had committed reversible error by admitting the consent decree documents.[136] Since the reasoning in support of this conclusion was colored substantially by the special concern for protecting a defendant's rights in a criminal trial, however,[137] the implications of this holding for civil litigation are not clear.

As the *Cook* court suggested, and as the Advisory Committee's note makes clear, the kind of analysis that is appropriate under rule 403 consists of "balancing the probative value of and need for the evidence against the harm likely to result from its admission."[138] In conducting this kind of analysis, courts may consider, among other things, the "availability of other means of proof" and whether the evidence would

131. FED. R. EVID. 408(b) advisory committee's note.
132. *Id.*
133. 557 F.2d 1149, 1153-55 (5th Cir. 1977).
134. *Id.* at 1151.
135. *Id.* at 1153 (citing FED. R. EVID. 404 advisory committee's note; United States v. Catano, 553 F.2d 497, 499-500 (5th Cir. 1977)).
136. *Id.* at 1155.
137. *Id.* at 1153-54.
138. FED. R. EVID. 403 advisory committee's note.

have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[139] *Olin Corp. v. Insurance Co. of North America*[140] is instructive in this context. In that case, the court refused to order pretrial disclosure of settlement documents, reasoning in part that representatives of the party seeking discovery had participated in the settlement discussions and thus would be in a position to impeach erroneous testimony about those discussions without discovery of the documents.[141] Interestingly, the *Olin* court did not cite rule 403; instead, the court based its holding on the implications of rule 408.[142]

Given the strength of the common-law view that an offer of compromise sheds light only on a party's desire to terminate litigation, not on its assessment of the merits of an opponent's underlying position, counsel should be able to argue persuasively in many environments that evidence of an offer of compromise is of little or no probative value.[143] Simultaneously, counsel can argue that admission of an offer of compromise would create a huge risk of unfairly prejudicing the party who made the offer and of confusing and misleading the jury—risks that could not be eliminated by limiting jury instructions. Moreover, if a court admitted evidence from settlement negotiations, fairness would require giving opposing counsel a full opportunity to explicate for the jury the context in which the settlement statements or offers were made. This would effectively expand the litigation into collateral matters that would exacerbate the jury's confusion and fruitlessly lengthen the trial.

Counsel should add arguments based on the policy that informs rule 408: courts that admit evidence from settlement negotiations discourage communication about settlement and impair the rationality of settlement discussions, and thus help to defeat the policy of encouraging consensual resolution of disputes. Admitting the proffered evidence would seriously threaten these important interests. Since that evidence generally would be of marginal probative value, it should be excluded.

While not numerous, there are several cases that clearly endorse the propriety of using a rule 403 balancing analysis before deciding to admit evidence from settlement that is not clearly barred by rule 408. In *Weir*

139. *Id.*
140. 603 F. Supp. 445, 450 (S.D.N.Y. 1985).
141. *Id.*
142. *See id.*
143. *See, e.g.*, Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F. Supp. 499, 535-37 (E.D. Mich. 1974) (efforts to settle or compromise a claim, along with direct suggestions or overtures of settlement, will not be received in evidence as an admission of liability on part of the party making the offer).

v. Federal Insurance Co.,[144] the district court had conducted a rule 403 analysis of proffered settlement evidence and had decided to exclude the evidence because "its relevance was outweighed by its prejudicial value."[145] On appeal, the panel of Tenth Circuit judges explicitly upheld the propriety of conducting such an analysis under rule 403.[146] The reviewing court declared:

> The prejudicial effect of allowing a jury to hear of the circumstances surrounding the settlement of a claim was one of the concerns that motivated the drafters of the Federal Rules of Evidence to absolutely prohibit the use of evidence of a settlement to prove liability or the amount of a claim. Fed. R. Evid. 408. Although Rule 408 does not prohibit the admission of evidence of the circumstances surrounding a settlement to prove something other than liability—such as voluntariness—many of the same concerns about prejudice and deterrence to settlements exist regardless of the purpose for which the evidence is offered.
>
> The district judge must weigh the prejudicial effect of such evidence against the relevance of the evidence.[147]

Remanding the case for other reasons, the *Weir* court explicitly instructed the district judge to conduct a full balancing analysis of the proffered settlement evidence under rule 403.[148] While the Tenth Circuit panel did acknowledge that the "exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly," it also emphasized that the "decision to exclude (or admit) evidence under [rule 403] is within the sound discretion of the trial court, and will not be reversed by this court absent a clear abuse of discretion."[149]

Several years earlier a different panel of Tenth Circuit judges had more summarily endorsed this use of rule 403 in *United Fidelity v. Law Firm of Best, Sharp, Thomas & Glass*.[150] The appellate court upheld a trial judge's decision under rule 403 to exclude testimony that "would have revealed settlement efforts" in a related earlier case. The appellate court noted that rule 403 confers considerable discretion on a trial judge with respect to such matters and found no abuse of that discretion.[151]

Several cases provide additional, but less direct, support for the notion that courts may use a rule 403 balancing analysis to decide whether

144. 811 F.2d 1387, 1395 (10th Cir. 1987).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1396.
149. *Id.*
150. 624 F.2d 145, 149 (10th Cir. 1980). Only Judge McWilliams participated in both *Weir* and *United Fidelity*.
151. *Id.*

to admit settlement evidence whose exclusion would not be compelled by rule 408.[152] In *Kennon v. Slipstreamer, Inc.*,[153] the majority found a violation of rule 408, then focused on the extent of the prejudice to defendant in deciding that reversal was necessary because of the trial court's disclosure of the amount of a settlement with former codefendants. The *Kennon* dissent argued that the appropriate analytical model in this situation consists of the balancing called for by rule 403.[154]

In sum, it is entirely appropriate to invoke rule 403 to oppose the admission of settlement evidence that rule 408 would not automatically bar. As the arguments and authorities described above make clear, there are many circumstances in which the interests that would be advanced by exclusion clearly outweigh the benefits that might result from admission.

IV. Discoverability vs. Admissibility: Is There a "Privilege" for Settlement Communications?

Attorneys must be careful to distinguish pretrial discoverability from admissibility at trial. Litigators cannot safely assume that statements made during settlement negotiations that would not be admitted at trial (by virtue of rule 408, or rule 403, or simply because they would be irrelevant) are also immune from discovery. Courts attempting to resolve the discoverability question must face issues and conduct analyses that are quite different from the issues and analyses relevant when ruling on the question of admissibility. Unfortunately for counsel, who would like to be able to predict the likelihood that settlement communications will remain confidential, the published opinions on discoverability of settlement negotiations do not reflect a consensus about basic issues in this area. As the paragraphs that follow make clear, some courts are sympathetic with the need to preserve confidentiality even as against discovery,[155] while many others have ruled that settlement communications are discoverable despite the policies that inform rule 408.[156]

Whether or not communications made during settlement negotia-

152. *See, e.g.*, John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635 (3d Cir. 1977); United States v. Cook, 557 F.2d 1149, 1152-55 (5th Cir. 1977); Stacey v. Bangor Punta Corp., 620 F.Supp. 636, 637 (D. Me. 1985). The *McShain* court concluded that a trial judge's decision to admit evidence of settlement with a former defendant to show bias of an expert witness employed by that former party "was not an abuse of discretion 'so inconsistent with substantial justice' as to require a new trial." *John McShain, Inc.*, 563 F.2d at 635.
153. 794 F.2d 1067, 1070-71, 1075-78 (5th Cir. 1986).
154. *Id.* at 1076 (Thornberry, J., dissenting).
155. *See infra* notes 160-71 and accompanying text.
156. *See infra* notes 172-217 and accompanying text.

tions are discoverable may depend, in part, on whether courts will recognize a "privilege" for settlement communications under rule 408 or federal common law. This question is important because the scope of discovery is defined as "any matter, not privileged, which is relevant to the subject matter involved in the pending action."[157] It follows that if communications made in connection with settlement are privileged, they will fall outside the scope of discovery, even if they are relevant. While no appellate court in the federal system has addressed this question directly, several district court opinions express or imply views on this matter. The majority view seems to be that settlement communications are not "privileged" within the meaning of the rules that define the scope of discovery.[158] The same question arises under analogous state statutes. As discussed below, the only appellate court in California that has addressed this question also has concluded that there is no generalizable "privilege" that shields settlement communications from discovery.[159]

A. Support for the Existence of a Settlement Privilege

The case law support for the view that rule 408, or its common-law antecedent, creates a privilege is relatively thin and appears to represent the minority view. At least one important opinion from a federal court of appeal prior to 1975, when the Rules of Evidence became effective, uses the word "privileged" when referring to settlement communications.[160] This reference, however, appears almost casual, not the product of self-conscious analysis about the significance of the word privilege.

More recently, Judge MacMahon of the United States District Court for the Southern District of New York appeared to endorse the notion that Federal Rule of Evidence 408 creates a "settlement privilege." This privilege would block discovery of communications related to settlement unless the party seeking the discovery can show clearly that rule 408 would not bar admission of the communications at a subsequent trial.[161] Unfortunately, the only reasoning the court offers in support of this conclusion is a cryptic suggestion that denying discovery of the product of earlier settlement negotiations is necessary "in order to safeguard the policy favoring settlements."[162]

157. FED. R. CIV. P. 26(b).
158. *See infra* notes 172-217 and accompanying text.
159. *See* Covell v. Superior Court, 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371, 373 (1984).
160. *See* Edward Valves, Inc. v. Cameron Iron Works, Inc., 286 F.2d 933, 938 (5th Cir. 1961).
161. Olin Corp. v. Insurance Co. of N. Am., 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985).
162. *Id.* at 450; *see* Bottaro v. Hatton Assoc., 96 F.R.D. 158 (E.D.N.Y. 1982), discussed *infra* notes 211-19 and accompanying text.

Two of the other opinions that support the argument that rule 408 creates or reflects a privilege offer a little more by way of explanation but focus on the trial stage rather than on the discovery stage. *Kennon v. Slipstreamer, Inc.*,[163] presented the issue of whether or not a trial judge had committed reversible error when, in explaining to the jury why certain defendants were no longer present, he disclosed not only the fact that they had settled with the plaintiff but also the nominal amount for which they were released. In support of his dissenting view that the trial court had not committed reversible error, Circuit Judge Thornberry emphasized that rule 408 "is rooted in the policy of promoting settlement by privileging settlements and settlement negotiations."[164] When Judge Thornberry insisted that the rule "is based on the privilege rationale," however, his purpose was not to argue against the discoverability of such material, but to support his minority view that a party could effectively waive the operation of rule 408 at time of trial by agreeing to the introduction of its own settlement offer or demand.[165] Thus his dissenting opinion lends only oblique support to arguments that rule 408 has created a generalized privilege for settlement negotiations that protects them from pretrial discovery.

Counsel will find a little more support for such an argument in the rationale that supports Senior District Judge Marovitz's conclusion in *Dunlop v. Board of Governors*.[166] This case presented the issue of whether the court should strike an affidavit submitted in support of a motion for summary judgment because the affidavit contained accounts of positions the parties had taken in settlement negotiations.[167] In explaining its decision to strike the affidavit, the court pointed out that the purpose of rule 408 is "to encourage settlement and compromise negotiations."[168] The court then proceeded to argue that "[i]t is only through such orderly and privileged' discourse regarding claims that this policy is most effectively served, and only when the privileges thereby received are strictly enforced will opposing counsel feel free to candidly and fully set forth their proposed compromises."[169]

While these opinions in *Kennon* and *Dunlop* addressed issues raised at the trial stage, the rationale that supports them surely is not irrelevant to the question we face here, which is whether federal law, through rule

163. 794 F.2d 1067, 1068-69 (5th Cir. 1986).
164. *Id.* at 1075-76.
165. *Id.*
166. 16 F.E.P. Cases 1116 (N.D. Ill. 1975).
167. *Id.* at 1117.
168. *Id.*
169. *Id.*

408 or otherwise, creates a "privilege" that can offer settlement communications some protection from discovery. The root of the rationale in each opinion is identical: if the law wants to encourage settlement by encouraging frank negotiations, it is important to create an environment in which counsel and parties can be fairly confident that what they say as they negotiate, and the terms of any agreements they might reach, will not be used against them later. Arguably, the law will fail to create such an environment if settlement communications are discoverable simply on a showing that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[170]

A strong argument in favor of viewing rule 408 as creating a privilege can be built from the principal purpose of this rule. Because its principal purpose is to encourage settlement by encouraging "freedom of communication with respect to compromise, even among lawyers,"[171] rule 408 has something very important in common with traditionally recognized privileges. The principal reason the law cloaks communications between attorney and client with confidentiality, for example, is to encourage clients to "tell all" to their lawyers. The traditional privileges, in short, have been designed to open up lines of communication in certain settings in which full communication will serve important societal interests. The fact that rule 408 is designed to serve a closely analogous function is a major argument in favor of viewing it as creating a privilege.

B. Support for the View that No Settlement Privilege Exists

The traditional privileges attach to communications between persons who have ongoing, *supportive*, interdependent, nonadversarial relationships (*e.g.*, between priest and penitent, husband and wife, doctor and patient, lawyer and client). One purpose of the traditionally recognized privileges is to strengthen these relationships, relationships that society has an interest in fostering. Parties to settlement negotiations, in sharp contrast, are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants, at least none that parallels the kind of societal interest that inspires the traditional privileges. Because no special relationship that society is committed to fostering is involved in most settlement negotiations, it can be argued that a key rationale supporting traditional privileges is inapplicable to the kinds of communications covered by rule 408.

170. FED. R. CIV. P. 26(b).

171. FED. R. EVID. 408 advisory committee's note.

Additional arguments can be marshaled against the view that rule 408 creates a privilege. One such argument is that the rule purports to apply only at the trial stage and offers no express protection against pretrial discovery of settlement communications. Another argument is that by its own terms rule 408 erects no barrier to admission at trial of settlement communications when the evidence is offered for any purpose other than "to prove liability for or invalidity of the claim or its amount." Thus the protection rule 408 offers is much more limited than the protection offered by a privilege like the attorney-client privilege. The attorney-client privilege attaches automatically to certain kinds of communications and can be penetrated only on an extraordinary showing. Rule 408, however, does not come into play at all unless a party wants to introduce the settlement communication at trial for the only purpose that is forbidden by the rule. The rule alone is not a bar if the party who wants to introduce the evidence can proffer any one of the scores of other purposes that might make the evidence relevant. Since rule 408 promises so much less, it cannot serve as the source of an expectation of privacy that is nearly as strong as the expectation created by the attorney-client privilege.

Another reason that might be cited by courts in declining to hold that rule 408 creates a privilege lies in the fact that the legislative history of rule 501[172] strongly suggests that Congress did not want the Federal Rules of Evidence to serve as a source of "privilege" law. As originally submitted by the Supreme Court to Congress, article V of the proposed Federal Rules of Evidence contained thirteen rules, nine of which defined specific nonconstitutional privileges that the federal courts would have been required to recognize.[173] Another of these proposed thirteen rules announced that federal courts could recognize only those privileges identified in the proposed rules or in some other act of Congress.[174] Significantly, the prohibition against admission of settlement negotiations to prove liability was not in this package of privileges. It was set forth not in the article dealing with privileges, but in the article entitled "Relevancy and Its Limits," in which it is presently located. Thus, it would appear that the Advisory Committee and the Supreme Court did not consider the protection offered by rule 408 a privilege. Moreover, Con-

172. *See* H.R. REP. No. 650, 93d Cong., 1st Sess. 8, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7082; S. REP. No. 1277, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7058. *Compare* Proposed Rules of Evid., 51 F.R.D. 315, 356-83 (1971) *with* FED. R. EVID. 501.

173. *See* Proposed Rules of Evidence, 51 F.R.D. 315, 356-83 (1971).

174. *See* H.R. REP. No. 650, 93d Cong., 1st Sess. 8, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7082.

gress rejected the privilege rules as proposed by the Advisory Committee and the Court and substituted in their place what is now rule 501, which essentially provides that privileges in federal question cases "shall be governed by the [evolving] principles of the common law." Thus, Congress in effect decided that the Federal Rules of Evidence should not be used to establish or to change the scope of privileges. Since Congress rejected the use of the Federal Rules for this purpose, it would seem difficult to argue that rule 408 creates a privilege.

While they have not directly endorsed all the arguments described above, several federal courts have concluded that there is no generalized privilege that protects settlement communications from discovery. Before discussing opinions whose reasoning would appear to apply to cases of all kinds, it is important to discuss a Seventh Circuit opinion that deals with the special problems associated with settlement of class actions.[175] In *In re General Motors Corp.*,[176] the trial court had approved settlement as to a subclass of plaintiffs after refusing to permit lawyers for disgruntled class members to conduct discovery into how the negotiations were handled by other lawyers who purported to represent the interests of all members. The appellate court concluded that this refusal constituted an abuse of discretion and reversible error.[177] The court pointed out that, before approving proposed class action settlements, district courts have a special responsibility to make meaningful inquiry into their fairness.[178] If lawyers for class members who did not have an opportunity to participate in the negotiations challenge this fairness, meaningful review requires affording them an opportunity to discover " 'the options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement.' "[179]

The court of appeals noted that there was "no convincing basis" for an argument that the conduct of these class action settlement negotiations "is protected from examination by some form of privilege."[180] The court insisted that its ruling was consistent with the letter and spirit of

175. Presumably similar problems could arise in connection with any settlement that required court approval, *e.g.*, "shareholder derivative suits, bankruptcy claims, antitrust suits brought by the United States . . . , and any suits 'affecting the public interest.' " Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986).

176. 594 F.2d 1106, 1124-25, 1131 (7th Cir. 1979).

177. *Id.* at 1131.

178. *Id.* at 1123.

179. *Id.* at 1125 (quoting Note, *Developments in the Law—Class Actions*, 89 HARV. L REV. 1318, 1562 (1976)).

180. *Id.* at 1124 n.20.

rule 408.[181] It was consistent with the letter of that rule because, on its face, rule 408 "only governs admissibility."[182] It was consistent with the spirit of the rule, which seeks to promote settlement, because:

> Participants in negotiations to settle class actions are aware that Rule 23(e) requires the trial court's approval of any settlement reached. Moreover, they are or should be aware that the court will inquire into the conduct of the negotiations. . . . To the extent that such inquiry discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial doubt on their fairness.[183]

In other words, the Seventh Circuit panel concluded that participants in class action settlement negotiations had no reasonable expectation of privacy, at least as against other members of the class. Where there is no reasonable expectation of privacy, no privilege should attach.

Because no published opinion takes exception to the holding or reasoning of *In re General Motors Corp.*, counsel who participate in class action settlement negotiations should appreciate the substantial likelihood that their words and deeds in that context are both discoverable and admissible in a proceeding to assess the fairness of the proposed agreement or the adequacy of the representation of the class. Similar risks may attend any negotiations in which the court must approve the terms of a purported settlement.

In *Federal Trade Commission v. Standard Financial Management Corp.*,[184] a First Circuit panel held that the common-law right of access reaches financial statements submitted in confidence as part of a negotiated consent decree and that the parties resisting disclosure of these documents had failed to make the compelling showing that would be required to overcome this common-law right. The *Standard Financial* court accepted the premise that a common-law right of access attaches to all documents considered by a court "in the course of adjudicatory proceedings."[185] The court then held that a judge's consideration of a proposed consent decree constitutes an "adjudicatory proceeding."[186] According to the court, even when the proposed decree already has been hammered out through private settlement negotiations between a governmental agency and private parties, the trial court retains a responsibility to "make its own inquiry into the issue of reasonableness" before it can

181. *Id.*
182. *Id.*
183. *Id.* (citation omitted).
184. 830 F.2d 404, 409 (1st Cir. 1987).
185. *Id.*
186. *Id.* at 408-10.

put its imprimatur on the decree as proposed.[187] In the case at hand, the district court had relied on the confidential financial statements "in assessing the reasonableness of the order, *i.e.*, in determining the litigants' substantive rights, and in performing its adjudicatory function. The common-law presumption of public access therefore attached to them."[188] The court went on to hold that a party who attempts to overcome the common-law right of access must make a compelling showing and that the courts should prohibit public disclosure (in this case to a newspaper) only when the interests that would be served by sealing the documents clearly outweigh the policy and tradition that support the public right of access.[189] In the case at hand, the First Circuit upheld the trial court's decision to unseal the financial documents even though they had been submitted to the governmental agency as part of settlement negotiations on the assumption that they would remain confidential. *En route* to its holding the court noted that the "appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."[190]

Two of the most important cases outside the class action environment that hold that settlement communications are not privileged from discovery involved the Freedom of Information Act (FOIA).[191] Because the opinions in these cases obviously were influenced by the policies favoring disclosure that inform the FOIA, it may not be safe to assume that these courts would adopt the same posture in cases in which the target of the discovery is not the federal government and the FOIA is irrelevant.[192] Neither court, however, limited its holding that rule 408 does not create a generalized discovery privilege.[193] Thus, on their face, these opinions apply across the board.

District Judge Hogan wrote the first of these two opinions in *Center*

187. *Id.* at 408.

188. *Id.* at 410.

189. *Id.*

190. *Id.*

191. 5 U.S.C. § 552 (1982); *see* NAACP Legal Defense & Educ. Fund, Inc. v. Department of Justice, 612 F. Supp. 1143 (D.D.C. 1985); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739 (D.D.C. 1983).

192. *See NAACP Legal Defense & Educ. Fund*, 612 F. Supp. at 1146-47; *Center for Auto Safety*, 576 F. Supp. at 742 n.5, 748-49; *see also infra* notes 234-325 and accompanying text (discussing FOIA's role in efforts to discover settlement communications from the federal government).

193. *See NAACP Legal Defense & Educ. Fund*, 612 F. Supp. at 1146; *Center for Auto Safety*, 576 F. Supp. at 748.

for Auto Safety v. Department of Justice.[194] Because it has been cited with approval in subsequent opinions from other courts, the pertinent passage from this opinion warrants full reproduction here:

> Moreover, the argument that a 'settlement negotiation' privilege is authorized under F.R.E. 408 is also misplaced. The cited rule limits a document's relevance at trial, not its disclosure for other purposes [citing 2 Weinstein's Evidence Par. 408 (1)]. The protection afforded by Rule 408 is far less broad than the DOJ asserts. While its intent is to foster settlement negotiations, the sole means chosen to effectuate that end is a limitation on their [sic] admission of evidence produced during settlement negotiations for the purpose of proving liability at trial, not the application of a broad discovery privilege. Otherwise parties would be unable to discover compromise offers which could be offered for a relevant purpose, i.e., proving bias or prejudice of a witness, opposing a claim of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or enforcing a settlement agreement.[195]

This interpretation of rule 408 is arguably inconsistent with the Advisory Committee's note, which indicates that excluding evidence of settlement negotiations as irrelevant is not as "consistently impressive" as the rationale that focuses on the importance of promoting settlement by encouraging "freedom of communication with respect to compromise."[196] The *Center for Auto Safety* passage in effect reverses the position taken by the Advisory Committee by slighting, or discrediting altogether, the privilege rationale for rule 408 and restoring the pre-rule 408 predominance of considerations of relevance. Moreover, the paragraph cited from Judge Weinstein's treatise lends no real support to this reversal because that paragraph only makes the obvious point—a point made in the text of rule 408 as well—that a party cannot hide relevant *facts* simply by presenting them in a settlement discussion before they are requested in discovery, a principal that applies to all privileges.

While *Center for Auto Safety* is not faithful to the reordering of rationales for rule 408 that is suggested by the Advisory Committee, the opinion is consistent with the structure of the rule itself. In fact, the reasoning in *Center for Auto Safety* exposes the central difficulty that arises from the kind of compromise between competing concerns that rule 408 embodies. The compromise in the rule consists of the decision to make settlement communications inadmissible only for limited purposes—to prove liability for, the invalidity of, or the amount of damages from a claim—clearly leaving open the possibility that courts could ad-

194. 576 F. Supp. 739 (D.D.C. 1983).

195. *Id.* at 749.

196. FED. R. EVID. 408 advisory committee's note.

mit this same kind of evidence for any of a large number of other purposes.

By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege rationale that they purported to find so "consistently impressive" and that they intended to make the principal underpinning of the newly formulated rule. The protection of rule 408 virtually evaporates; there are so many conceivable purposes for which settlement communications might be admissible, and counsel easily can argue that they cannot determine whether there is some permissible purpose for which the communications might be admissible at trial unless they can discover their contents.[197] The *Center for Auto Safety* opinion shows that the drafters constructed a rule that is unfaithful to its own rationale. To truly serve the privilege rationale, a rule would have to offer at least presumptive protection from both discovery and admissibility in most circumstances (perhaps analogous to the protection offered by the work product doctrine as it applies to material that does not reflect a lawyer's mental impressions or legal theories). By adopting the much more limited approach reflected in rule 408, the drafters made results such as those reached in *Center for Auto Safety* virtually inevitable.

Several other reported opinions support the notion that there is no generalized "privilege" for settlement communications. In *NAACP Legal Defense and Educational Fund, Inc. v. Department of Justice*,[198] for example, the court paraphrases part of the key passage from *Center for Auto Safety* to justify the conclusion that rule 408 "was never intended to be a broad discovery privilege."[199] Examples of opinions that reach the same conclusion on the privilege issue but do not rely on *Center for Auto Safety* include *Triax Co. v. United States*[200] and *Manufacturing Systems, Inc. v. Computer Technology, Inc.*[201] In an opinion issued just before rule 408 became effective, Judge Charles Richey concluded that while settlement communications "are clearly not admissible at trial for a number of public policy reasons, such negotiations do not fall within the confines of

197. *See, e.g.*, Bennett v. La Pere, 112 F.R.D. 136, 139-40 (D.R.I. 1986), discussed *infra* notes 203-13 and accompanying text.

198. 612 F. Supp 1143, 1146 (D.D.C. 1985) (FOIA case).

199. For a similar use of *Center for Auto Safety*, see Weissman v. Fruchtman, No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database).

200. 11 Cl. Ct. 130, 134-35 (1986).

201. 99 F.R.D. 335, 336 (E.D. Wis. 1983).

the privileges recognized at common law."[202]

Judge Selya's recent opinion in *Bennett v. La Pere*[203] reflects the most aggressive assault on the notion that settlement communications should be at least presumptively privileged from discovery. The court addressed "whether a nonsettling defendant in a civil action may compel disclosure of an accord reached between the plaintiffs and (former) codefendants."[204] The court first faced the question whether or not the remaining defendant could show that the settlement documents met the "liberal view of the standards of relevance applicable in discovery proceedings."[205] The judge answered this question in the affirmative. Significantly, he pointed out that rule 408 bars admission of such material only for limited, specified purposes, leaving open the possibility of admissibility for other purposes,[206] and that there is "no satisfactory way for the [remaining defendant] to determine whether it can slip within the integument of the Rule 408 exception unless it gains discovery access to the settlement documents."[207] The court confirmed the implication of this observation, noting that "in our adversary system" the only fair way to reach a conclusion about whether there might be a permissible use of the settlement documents at trial is to compel their disclosure in discovery.[208]

Having thus concluded that it would be virtually impossible to block discovery of such material on grounds of irrelevance, the *Bennett* court asked whether there were any other considerations that "might militate against disclosure."[209] In particular, it discussed whether some policy consideration reflected in rule 408 should either bar discovery of the settlement materials or, short of creating an absolute bar, lead courts to require parties who seek discovery of such material to make some showing of justification or need beyond satisfying the liberal relevance standard of rule 26(b).[210] Rejecting the reasoning and conclusion in *Bottaro v. Hatton Associates*,[211] the court held that nothing in rule 408's language or purposes justifies a conclusion that it creates any special obstacles to discovery. In finding that the settlement documents in question were

202. Oliver v. Committee for the Re-Election of the President, 66 F.R.D. 553, 556 (D.D.C. 1975).

203. 112 F.R.D. 136 (D.R.I. 1986).

204. *Id.* at 137.

205. *Id.* at 139.

206. *Id.* at 139 n.1.

207. *Id.* at 139.

208. *Id.*

209. *Id.*

210. *Id.* at 140.

211. 96 F.R.D. 158 (E.D.N.Y. 1982); *see infra* notes 218-19 and accompanying text.

"not privileged" and were discoverable, the court relied not only on the fact that rule 408 applies only to admissibility at trial, but also on his argument that compelling disclosure of the terms of a completed settlement could not adversely affect the policy goal of encouraging settlements.[212] In making the latter argument the court asserted that the *only* fear that might inhibit settlement, and that rule 408 attempts to assuage, is the fear that a pretrial settlement proposal would be used against the party who made it during a subsequent trial in the same case.[213]

The one fear that the court in *Bennett* was willing to acknowledge is not the only fear that rule 408 is designed to assuage, as the courts in *Bottaro v. Hatton Associates*,[214] and *Weissman v. Fruchtman*[215] recognize. The *Bennett* opinion misconstrues rule 408 in part because it accepts an unrealistically narrow view of the several different ways that fear of disclosure could impair the settlement dynamic. If the only fear the drafters of rule 408 wanted to combat was fear that the terms of a settlement proposal would be used against the party who made the proposal, they would have written the rule much more narrowly than they did. If combating this fear had been their only objective, the drafters certainly would not have extended the protections of the rule to evidence "of conduct or statements made in compromise negotiations." The Advisory Committee's note leaves no room to question the reason the drafters expanded the common-law doctrine through the rule to cover "admissions of fact" and other statements made during settlement discussions: the drafters believed that the "inevitable effect" of the narrower common-law approach had been "to inhibit freedom of communication with respect to compromise, even among lawyers."[216] The rule was designed to encourage communication about a broad range of settlement-related matters, not just about offers or demands.

Common sense supports the drafters' broader vision. The *Bennett* court's approach would enable counsel to exchange only offers and demands and would reduce "negotiations" to irrational volleys of numbers. It is hard to understand how a law that encourages only the exchange of numbers, with no regard for the reasoning or the evidence that supports those numbers, could contribute much to fostering settlement. It takes no genius to see that a rule that offers some protection to lawyers who share the reasoning underlying their positions will contribute much more

212. *Bennett*, 112 F.R.D. at 139-40.
213. *Id.* at 141.
214. 96 F.R.D. 158, 160 (E.D.N.Y. 1982).
215. No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database).
216. Fed. R. Evid. 408 advisory committee's note.

to the prospects for settlement than a rule that permits only mechanical and sterile exchanges of bottom lines. Moreover, adopting rules whose effect is to reduce the negotiation process to mere number swapping degrades our system in fact and in the eyes of litigants who are forced to use it.

The *Bennett* court also mistakenly assumed that the purposes of rule 408 are fully satisfied once a settlement agreement has been reached by some or all of the parties to a particular action.[217] What people say in negotiations to settle one lawsuit may well be relevant to other litigation in which they are involved or in which they fear they might become involved. I have hosted many settlement conferences during which parties have expressed concerns about related cases or parallel situations involving nonparties, or in which one party has been unwilling to settle unless it is assured that the terms will not be disclosed to others who might be encouraged to file new claims or hold out for more money in cases already docketed. It is naive not to recognize that lawyers and litigants are constantly concerned about how their statements or actions in one setting might come back to haunt them in other settings. If courts construe rules so as to increase the circumstances in which communications made during negotiations can be discovered or admitted into evidence, they create inhibiting forces that reinforce the instinct parties and lawyers already have to play their cards as close to their chests as possible.

C. A Test for Discoverability that Appropriately Reflects the Policy Objectives

For the reasons just described, I disagree strongly with the *Bennett* court's suggestion that it is appropriate to decide whether negotiation material is discoverable simply by using the same kind of analysis that courts would use for any other nonprivileged matter. Although it may be fair to say that rule 408 does not create a privilege, the rule clearly reflects a significant federal policy in favor of promoting settlements *by encouraging freedom of communication* that is not implicated by most discovery requests. This policy would be seriously jeopardized if courts routinely permitted discovery of communications made in settlement discussions. Counsel seeking to protect settlement materials from discovery should argue vigorously that courts should order disclosure only after conducting a balancing analysis in which the federal policy of promoting settlement is given the full weight it deserves.

Case law supports this balancing approach. For example, in *Bottaro*

217. *Bennett*, 112 F.R.D. at 140.

v. *Hatton Associates,*[218] the opinion Judge Selya attacked in *Bennett*, the court declared:

> Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we . . . require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.[219]

In *Weissman v. Fruchtman,*[220] the court quoted this passage from *Bottaro* with approval. The court relied on it to justify blocking a party's access to settlement materials when he could not make a clear showing that these materials would be admissible at trial or lead to discovery of admissible evidence. In effect, the *Bottaro* and *Weissman* courts reversed the presumption that the *Bennett* court indulged in favor of discovery. The *Bennett* court held that a party must have discovery access to settlement materials in order to determine whether they might be admissible on some theory that would not be barred by rule 408.[221] The *Bottaro* and *Weissman* courts, in contrast, insisted that because free discovery access to such materials would threaten the policy objectives of rule 408, courts should protect these materials unless a party can make a persuasive showing that such materials are likely to be admissible or to lead to significant other evidence.[222]

Groton v. Connecticut Light & Power[223] further supports the approach endorsed by *Bottaro* and *Weissman*. In *Groton*, the court used a balancing test to determine whether to permit discovery that might interfere with ongoing settlement negotiations.[224] The court made clear that it would prohibit discovery of this kind where the potential prejudice to the settling parties outweighed the need for disclosure.[225]

Even without *Bottaro*, *Weissman*, and *Groton*, lawyers would be on solid ground in asking a court to conduct a balancing analysis before permitting discovery of confidential settlement communications. Federal courts conduct exactly this type of balancing analysis when a party seeks a protective order under Federal Rule of Civil Procedure 26(c). Rule

218. 96 F.R.D. 158, 160 (E.D.N.Y. 1982).
219. *Id.*
220. No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database).
221. Bennett v. La Pere, 112 F.R.D. 136, 139 (D.R.I. 1986).
222. 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Assoc., 96 F.R.D. 158, 160 (E.D.N.Y. 1982); Weissman v. Fruchtman, No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database); *cf.* Olin Corp. v. Insurance Co. of N. Am., 603 F. Supp. 445, 449-50 (discovery of terms of insurance agreement denied in order to safeguard the policy favoring settlements).
223. 84 F.R.D. 420, 423 (D. Conn. 1979).
224. *Id.* at 422-23.
225. *Id.* at 423.

26(c) clearly contemplates the courts' making particularized judgments comparing the potential utility of requested information with the harm that might be done if the information were disclosed.[226] Rule 26(c) also expressly empowers courts to enter orders that certain discovery not be conducted at all, or that "certain matters not be inquired into, or that the scope of the discovery be limited to certain matters," or that "trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."[227] Rule 26(c) obviously acknowledges that there will be circumstances in which the interests that support preserving the confidentiality of certain material will outweigh the interests that might be served by permitting discovery of this material.

Thus, even if federal courts refuse to hold that rule 408 creates a "privilege," they should afford settlement material an extra level of protection from routine discovery by conducting a balancing analysis in which the federal policy reflected in rule 408 is given the full weight it deserves. Courts should acknowledge that the public policies reflected in rule 408 create a substantial presumption against discovery of settlement material. Moreover, courts should permit rebuttal of this presumption only after a strong showing that the competing interests clearly outweigh the interests and the policies favoring confidentiality and that the competing interests cannot be satisfied in some other, less intrusive manner.

The only authority in this subject area is from a California court and points, albeit somewhat unclearly, in the direction of *Bottaro* and its progeny. In *Covell v. Superior Court,*[228] the appellate court considered section 1152 of the California Evidence Code,[229] which served as a model for Federal Rule of Evidence 408[230] and affords the same kind of protection to settlement negotiations as the federal rule. The court concluded that the section does not create a privilege, relying entirely on one fact: section 1152 is not located in the division of the California Evidence Code that defines "privileges."[231] While this reasoning is not profound, it may be sufficient.

226. FED. R. CIV. P. 26(c) (giving court discretion to grant a motion for protective order where "good cause shown," and "which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense"). *See, e.g.*, Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (D. Mo. 1950); *cf.* FED. R. CIV. P. 26(b)(1) (1983 amendments) (describing general scope and limits of discovery).
227. FED. R. CIV. P. 26(c)(4), (7).
228. 159 Cal. App. 3d 39, 205 Cal. Rptr. 371 (1984).
229. CAL. EVID. CODE § 1152 (West Supp. 1988).
230. FED. R. EVID. 408 advisory committee's note.
231. *Covell*, 159 Cal. App. 3d at 42, 205 Cal. Rptr. at 373. Section 1152 appears in the division that sets out evidence affected by or excluded for policy reasons.

The *Covell* court went on to hold, however, that the settlement material was not discoverable, even though it was not privileged, because the party seeking it had failed to show that it was "reasonably calculated to lead to the discovery of admissible evidence."[232] Most significantly, the spirit in which the court reviewed the relevance arguments seems more demanding than one would normally expect at the discovery stage. The appellate court took the unusual step of finding that the trial court had abused its discretion when it ordered disclosure of the material.[233] The appellate court's willingness to take this unusual step supports an inference that, under California law, judges will impose a more demanding standard for discovery of settlement material than they would for discovery of material that is unprotected by the kinds of public policies reflected in section 1152 of the California Evidence Code.

D. Settlements with Public Entities: Public Right of Access

Lawyers who represent public entities in settlement negotiations, or private parties who decide to enter a settlement agreement with a public entity, must be aware of the possibility that interested persons could use the Freedom of Information Act (FOIA),[234] or a state law equivalent like the California Public Records Act,[235] to force disclosure of both the terms of a settlement agreement and other documents related to settlement negotiations. This section focuses primarily on the applicability of the FOIA to materials generated in connection with settlement negotiations conducted by agencies of the federal government. It also includes a discussion of the only major opinion from a California appellate court that addresses the applicability of California's Public Records Act to an effort by a third party to compel disclosure of the terms of a settlement entered by a local government with a tort claimant.[236]

FOIA contains no exemption that explicitly mentions materials generated in connection with settlement negotiations. Because of this, and the general admonition that courts are to construe FOIA's exemptions narrowly and to resolve doubts in favor of disclosure,[237] there are circumstances in which citizens can use FOIA to force governmental agencies to disclose documents generated in connection with settlements.[238] The reported decisions suggest that documents related to settlement negotiations will be deemed exempt from FOIA if they have not been disclosed to or received from an adversary.[239] These decisions also suggest, however, that documents disclosed to or received from an adversary during confidential settlement negotiations are vulnerable to a FOIA request, regardless of the nature of the interest that inspires the request.[240]

232. 159 Cal. App. 3d at 43, 205 Cal. Rptr. at 374.

233. *Id.*

234. 5 U.S.C. § 552 (1982 & Supp. IV 1986).

235. Cal. Gov't Code §§ 6250-6265 (West Supp. 1987).

236. Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 205 Cal. Rptr. 92 (1984).

237. Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 741 n.2 (D.D.C. 1983); County of Madison, New York v. Department of Justice, 641 F.2d 1036, 1040 (1st Cir. 1981).

Among the nine exemptions from FOIA, the one that seemed most promising to lawyers trying to preserve the confidentiality of settlement documents was number five, which covers "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[241] This exemption protects government-generated documents whose confidentiality the government has maintained and which satisfy the criteria for any clearly established privilege. For example, this exemption would prevent use of FOIA to compel disclosure of a document the government generated in connection with settlement negotiations if the document satisfied the criteria for the attorney-client privilege or the work product doctrine.[242] Similarly, the fifth exemption applies to documents that would be protected from disclosure in civil litigation by the "deliberative process" privilege.[243]

On several occasions government lawyers have tried unsuccessfully to persuade courts that there is a separate "settlement privilege" in civil litigation and that materials that would qualify for it also should fall within the protections of the fifth exemption.[244] The seminal case is

238. FOIA applies only to documents. 5 U.S.C. § 552 (1982).

239. This is true provided that documents also fit into some existing privilege or constitute work product. *See, e.g., Center for Auto Safety*, 576 F. Supp. at 748; *see infra* notes 241-43 and accompanying text.

240. For authority for the proposition that analysis of access rights under FOIA is not contingent on the nature or intensity of the requesting citizen's interest, see *County of Madison*, 641 F.2d at 1040-41. *See also* National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).

241. 5 U.S.C. § 552(b)(5) (1982).

242. *See* Pennsylvania Dep't of Pub. Welfare v. Department of Health and Human Serv., 623 F. Supp. 301, 305-07 (M.D. Pa. 1985); Murphy v. Tennessee Valley Auth., 571 F. Supp. 502, 506-07 (D.D.C. 1983).

243. *See Pennsylvania Dep't of Pub. Welfare*, 623 F. Supp. at 305-07; *Murphy*, 571 F. Supp. at 504-06.

244. *See* County of Madison, N.Y. v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981); NAACP Legal Defense & Educ. Fund, Inc. v. Department of Justice, 612 F. Supp. 1143 (D.D.C. 1985); Norwood v. Federal Aviation Admin., 580 F. Supp. 944 (W.D. Tenn. 1984); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739 (D.D.C. 1983).

County of Madison, New York v. United States Department of Justice.[245] In that opinion, Chief Judge Coffin, writing for a unanimous panel, ordered the government to disclose documents generated in connection with settlement negotiations in an earlier, related matter.[246] The documents in question had either been sent by the party opponent to the government or by lawyers for the government to opposing counsel during the course of the negotiations.[247] The appellate court refused to categorize these documents as "intra-agency" memoranda or letters.[248]

The court also rejected an argument that FOIA empowers federal courts, under the guise of exercising equitable discretion, to decide whether considerations of "public policy" justify adding exemptions to FOIA for categories of documents not specifically exempted by Congress on the face of the statute.[249] The court acknowledged the importance of the government's ability to resolve disputes by settlement and conceded that the government's ability to reach consensual agreements with adversaries in litigation would be impaired if parties knew that under FOIA "written settlement communications will be available to anyone, irrespective of the merit of his or her need to know."[250] The *County of Madison* panel felt constrained, nonetheless, to honor the letter and spirit of FOIA, which they emphasized "is not a withholding statute but a disclosure statute."[251] The court ruled that the public policy favoring settlement simply cannot justify distorting FOIA's language and giving courts discretionary power to limit the statute's disclosure mandate by carving out an exemption that is not even intimated in that language.[252] The effect of *County of Madison* is clear: exemption five will not protect documents related to settlement that were generated by or shared with a party opponent, even if both the government and its opponent intended all such documents to remain confidential.

Center for Auto Safety v. Department of Justice[253] followed and in some measure extended the reasoning of *County of Madison*. The former case arose when the Center for Auto Safety attempted to use FOIA to force the Justice Department (DOJ) to disclose documents it had shared with or received from the "big four" American auto manufacturers dur-

245. 641 F.2d 1036 (1st Cir. 1981).
246. *Id.* at 1039, 1041.
247. *Id.* at 1040-41.
248. *Id.* at 1040-42.
249. *Id.* at 1041.
250. *Id.* at 1040.
251. *Id.*
252. *Id.* at 1041.
253. 576 F. Supp. 739 (D.D.C. 1983).

ing the course of negotiations to modify a consent decree entered in an antitrust action.[254] In the end, the court rejected the Justice Department's arguments that these documents were exempt from disclosure under either exemption five or exemption seven of FOIA.[255]

First, the court ruled that memoranda or letters exchanged by the government and the consent decree defendants could not be considered "intra-agency" documents within the meaning of exemption five.[256] The court rejected the argument that entry of the original consent decree somehow converted the auto makers into the equivalent of independent contractors working with the government to ensure that the public interest was satisfied.[257] Instead, the court insisted that the auto makers remained adverse parties and thus that communications between them and the DOJ could not be considered "intra-agency."[258] This ruling applied even to drafts of consent decrees prepared by DOJ lawyers and accompanying memoranda, both of which included comments and notations that reflected, among other things, "the mental impressions and views of various agency personnel."[259] Drawing on *Coastal States Gas Corp. v. Department of Energy*,[260] Judge Hogan held that documents that might otherwise be protected can be swept within the scope of FOIA once they are shown to adversaries because in so doing the governmental agency can be deemed either to adopt the documents as its position on an issue or to use them "in its dealings with the public."[261] The court articulated its holding clearly: "[w]hile these documents may at one time have been used for internal advisory purposes and would therefore be protected, when the DOJ elected to use them as tools in their negotiations with the public [the defendants] they lost their internal status, and their qualification for Exemption 5."[262]

In a significant part of the opinion, the court held that even if the documents in question somehow could be deemed "intra-agency" they would not satisfy the second requirement of exemption five—that they would be protected by some privilege that would have protected them

254. *Id.* at 741.
255. *Id.* at 747, 754-55. Exemption seven protects documents "compiled for law enforcement purposes" from disclosure. 5 U.S.C. § 552(b)(7)(A) (1982) (current version at 5 U.S.C.A. § 552(b)(7)(A) (West Supp. 1988)).
256. *Center for Auto Safety*, 576 F. Supp. at 748.
257. *Id.* at 745-46.
258. *Id.* at 745-47.
259. *Id.* at 747.
260. 617 F.2d 854, 866 (D.C.Cir. 1980).
261. Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 747 (D.D.C. 1983).
262. *Id.*

against an adverse party if the agency had been involved in litigation.[263] Noting that there is a "presumption against recognizing new discovery privileges under Exemption 5,"[264] Judge Hogan concluded that "there is no clear congressional intent to include a settlement negotiation privilege within Exemption 5" and that Federal Rule of Evidence 408 neither acknowledged nor created any such privilege.[265] According to the court, since there is no clearly established "settlement negotiation privilege," the mere use of documents in settlement negotiations does not mean that they "would not be available by law to a party . . . in litigation with the agency," as required by the second clause of exemption five.[266]

In combination, *County of Madison* and *Center for Auto Safety* stand for this proposition: Exemption five will not protect documents related to settlement unless they have *not* been shared with or received from an adverse party *and* they meet all the requirements of a clearly established discovery privilege. The *County of Madison* court did make a suggestion, however, to which government counsel should attend. Relying on *Federal Open Market Committee v. Merrill*,[267] the court implied that FOIA could not be used to acquire these kinds of materials, even when shared with an adverse party, if counsel had persuaded a court to enter a protective order making the settlement negotiations and the documents related thereto confidential.[268] Counsel practicing in the Second Circuit should be able to rely on this method of protecting confidentiality,[269] but those practicing in the Third Circuit cannot assume that sealing orders will protect such material.[270]

The *Center for Auto Safety* court disposed of the government's arguments under exemption 7A with comparable dispatch.[271] Congress recently expanded this exemption,[272] but apparently not in ways that would eviscerate *County of Madison's* reasoning or dislodge its conclusion. To qualify under exemption seven, even as amended, the documents must have been "compiled for law enforcement purposes" and

263. *Id.* at 748.
264. *Id.*
265. *Id.* at 749.
266. 5 U.S.C. § 552(b)(5) (1982).
267. 443 U.S. 340, 362 (1979).
268. Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 749 (D.D.C. 1983).
269. *See infra* notes 300-33 and accompanying text.
270. *See infra* notes 334-55 and accompanying text.
271. 576 F. Supp. at 749-55; *see* 5 U.S.C. § 552(b)(7)(A) (1982) (current version at 5 U.S.C.A. § 552(b)(7)(A) (West Supp. 1988)).
272. *See* 5 U.S.C. § 552(b)(7) (Supp. IV 1986).

satisfy at least one of six other criteria.[273] The case law suggests that a document will not be deemed to have been generated "for law enforcement purposes" unless it was created in connection with an investigation that focused on " 'specifically alleged illegal acts, illegal acts of particular identified officials, acts which if proved result in civil or criminal sanctions.' "[274] Most documents generated in connection with efforts to settle civil litigation will not satisfy this requirement.

In 1984 and 1985 two federal district courts followed the lead of the *County of Madison* and *Center for Auto Safety* opinions in refusing to acknowledge a "settlement negotiation privilege" under exemption five and ordered governmental agencies to disclose terms of settlements or settlement-related documents that had been shared with an adversary.[275] These two cases are *Norwood v. Federal Aviation Administration*[276] and *NAACP Legal Defense and Educational Fund, Inc. v. United States Department of Justice*.[277]

Norwood adds an important factor to the exemption five analysis. Pointing out that "the Supreme Court has held that 'final dispositions' of matters by an agency can never be exempt under exemption 5,"[278] *Norwood* announced that "the FAA [Federal Aviation Administration] cannot use exemption 5 to withhold production of the settlement agreements themselves, since the settlement agreements represent the final disposition of an agency case."[279] Whether or not other courts will find this reasoning persuasive is difficult to predict, but counsel should be aware that exemption five might offer no protection at all to the final terms of settlement agreements.

The *Norwood* opinion discusses an additional exemption that might apply to some settlement documents. Exemption six covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[280] In *Norwood*, a lawyer who represented 170 terminated air traffic controllers was using the FOIA in an effort to gain access to settlement agreements and related documents between the FAA and controllers reinstated after the nation-

273. *Id.*
274. *Center for Auto Safety*, 576 F.Supp. at 750 (quoting Rural Housing Alliance v. Department of Agric., 498 F.2d 73, 81 (D.C. Cir. 1974)).
275. Apparently there are no opinions that contradict this line of authority.
276. 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984).
277. 612 F. Supp. 1143, 1146 (D.D.C. 1985).
278. 580 F. Supp. at 1000 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153-54 (1975)).
279. *Id.*
280. 5 U.S.C. § 552(b)(6) (1982).

wide strike in 1981.[281] District Judge Horton declared that in order to qualify for exemption six the government would have to show three things: "(1) that the requested information is properly classified as a 'personnel,' 'medical,' or 'similar' file [and not simply put in a personnel file to shield it from the scope of FOIA]; (2) that the release of the information would violate substantial privacy interests of those involved; and (3) that the privacy interest is not outweighed by the public interest in disclosure."[282] The court concluded that the removal letters and the settlement agreements had been properly classified as "personnel" matters, but that the government had failed to carry its burdens with respect to the remaining two requirements.[283] In concluding that the documents had to be disclosed, the court made it clear that it would hold government counsel to demanding standards with respect to the second and third requirements, thus implying that it would be difficult to use exemption six to avoid disclosure of settlement documents.[284]

Other exemptions to the FOIA might, in rare cases, protect documents related to settlement,[285] but as far as I am aware only one of these other exemptions is the subject of a reported opinion in which a court ruled on an effort to discover materials related to settlement negotiations. In *Parker v. Equal Employment Opportunity Commission*,[286] Judge Robinson, relying on exemption three, rejected an effort to use the FOIA to compel the Equal Employment Opportunity Commission (EEOC) to disclose "all predetermination settlement agreements and conciliation agreements made in the Commission's Philadelphia Regional Office during March, 1974."[287] Exemption three covers agency records that are "specifically exempted from disclosure by statute," as long as the statute in question meets specified criteria.[288] The court held that these documents qualified for exemption three even though the statute that governs EEOC procedures does not mention these kinds of documents, and the statute would impose a duty of confidentiality only on negotiations that occur after the Commission has found reasonable cause to believe that a charge of an unlawful employment practice is true. The significance of

281. *Norwood*, 580 F. Supp. at 996-97.
282. *Id.* at 998.
283. *Id.* at 998-99.
284. *Id.*
285. For example, exemption four covers "trade secrets and commercial or financial information obtained from a person and priviledged or confidential." 5 U.S.C. 552(b)(4) (1982).
286. 534 F.2d 977 (D.C. Cir. 1976).
287. *Id.* at 979.
288. 5 U.S.C. 552(b)(3) (1982) (the exempting statutes must be framed so as to leave no discretion on the question of disclosure, or must either refer to the particular types of matters to be withheld or establish particular criteria for withholding).

the latter point is that "predetermination settlement [agreements] are entered into after a charge is filed but before any determination of reasonable cause by the Commission."[289] Despite these technical difficulties, both the District Court and the appellate court were satisfied that Congress intended to place a cloak of confidentiality around all types of informal negotiations conducted by the Commission and all of the agreements that such negotiations produced.[290] Both courts concluded that Congress had elevated the public interest in fostering settlement of EEOC claims, by extending a promise of confidentiality, above the public interests generally reflected in the FOIA.[291] Thus, both the predetermination settlements and the conciliation agreements are "specifically exempted from disclosure by statute" within the meaning of exemption three. No other reported opinion has interpreted this exemption with respect to settlement agreements.

The extent to which state law analogues to the FOIA might be used to force disclosure of settlement materials is not at all clear. In fact, only one reported opinion by a California appellate court even addresses this question. That opinion suggests that attorneys who negotiate settlements with or on behalf of public agencies in California cannot safely assume that the terms of the deals they strike will remain confidential. In *Register Division of Freedom Newspapers, Inc. v. County of Orange*,[292] the appellate court affirmed a trial court's ruling that California's Public Records Act[293] entitled a newspaper to access to virtually all of the documents related to a confidential settlement of a tort claim brought by a prison inmate against a county government. The court explicitly concluded that the public agency's promise to the plaintiff to maintain the confidentiality of the negotiations and of the terms of the agreement was insufficient to overcome the statutory mandate of public access to the records involved.[294]

Holding that the terms of the settlement itself, as well as most related documents, had to be disclosed, the court of appeal made some sweeping pronouncements that seem to reflect little sympathy for the notion that confidentiality can be a key to the success of the settlement process. Among other things, the county defendant had argued that disclosure of settlement documents would encourage people to file frivolous

289. 534 F.2d at 979.
290. *Id.* at 980-81.
291. *Id.* at 978, 980.
292. 158 Cal. App. 3d 893, 205 Cal. Rptr. 92 (1984).
293. CAL. GOV'T CODE §§ 6250-6265 (West Supp. 1987).
294. 158 Cal. App. 3d at 909-10, 205 Cal. Rptr. at 102.

claims and would compromise the public body's freedom to decide that it was in the taxpayer's best interests to offer a nuisance value settlement rather than incur the much greater expense of defending a case through trial and appeal.[295] "Against this interest," responded the court:

> must be measured the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny. We find these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs fostered by both the CPRA and Brown Act. While County's concern with the potential for escalating tort claims against it is genuine, opening up the County's settlement process to public scrutiny will, nevertheless, put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds. This in turn will strengthen public confidence in the ability of governmental entities to efficiently administer the public purse.[296]

In a footnote that apparently was intended to offer some reassurance to public bodies, the court added a potentially significant, but unclear, limitation on the implications of this paragraph: "Plaintiff does not claim, nor do we hold, every discussion regarding settlement of an actual or potential case against the county should be made public. We limit the scope of our holding to the actual discussion and actions of the claims settlement committee."[297]

Because the *Register* court's analysis turned almost entirely on California statutes, the law that emerges from this lengthy opinion is binding only in California courts.[298] Counsel working in other states must determine whether their states have statutes comparable to California's Public Records Act.

V. Alternative Methods of Enhanced Protection of Settlement Negotiations

In light of the numerous threats to the confidentiality of settlement communications previously discussed, the following section presents a number of alternative approaches counsel can consider in order to protect settlement negotiations from disclosure. Part A will discuss the use

295. *Id.* at 909, 205 Cal. Rptr. at 102.
296. *Id.*
297. *Id.* at 909 n.13, 205 Cal. Rptr. at 102 n.13.
298. It would also be binding on a federal court whose jurisdiction was premised solely on diversity of citizenship if the court were to decide, under principles announced in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny, that it was bound to follow California law on this kind of question.

of protective orders or sealing orders. Part B discusses side agreements under seal. Federal Rule of Civil Procedure 68 and recently enacted state mediation statutes are the subject of part C. Finally, part D discusses the enforceability of private contracts between settling parties to ensure confidentiality.

A. Protective or Sealing Orders

A protective or sealing order entered by a federal court apparently will prevent interested persons from being able to use FOIA to force disclosure of settlement agreements and related documents. The court in *Center for Auto Safety* stated, "[I]n the antitrust decree modification context, the DOJ is in the position of petitioning the supervisory court for a protective order under [Federal Rule of Civil Procedure] 26(c) which would qualify as a *per se* discovery privilege and bar to disclosure under FOIA."[299] Other authorities suggest that the protections from FOIA that are available through protective or sealing orders are not limited to antitrust or consent decree settings.[300]

One technical, but apparently sufficient, reason that court orders can protect documents otherwise discoverable under FOIA is that this statute reaches only "agency" records,[301] and courts generally do not consider themselves to be "agencies" within the meaning of the statute.[302] Thus, settlement documents that become court documents are simply outside the purview of the FOIA.[303]

The most explicit consideration of this issue occurred in the trial court and affirming appellate court opinions in *In re Franklin National Bank Securities Litigation*,[304] and *Federal Deposit Insurance Corp. v. Ernst & Ernst*.[305] These opinions resulted from an effort by the Public Interest Research Group (PIRG) to use FOIA to force disclosure of the terms of a settlement agreement between the Federal Deposit Insurance Corporation (FDIC), the trustee for the bankrupt Franklin National Bank, and its accountant, Ernst & Ernst.[306] PIRG launched this effort some two years after District Judge Jack B. Weinstein had entered an

299. 576 F. Supp. 739, 749 (D.D.C. 1983) (citing Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, at 362 n.24 (1979)).
300. *See, e.g.*, Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).
301. 5 U.S.C. § 551(1)(B) (1982).
302. *See* Tigar & Buffone v. Department of Justice, 590 F. Supp. 1012, 1014 (D.D.C. 1984).
303. *See* United States v. Charmer Indus., Inc., 711 F.2d 1164, 1170 n.6 (2d Cir. 1983).
304. 92 F.R.D. 468 (E.D.N.Y. 1981).
305. 677 F.2d 230 (2d Cir. 1982).
306. *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 471.

order, at the parties' request, sealing the settlement documents and commanding the parties to maintain the confidentiality of the terms of the agreement.[307] PIRG first presented its request for information about the settlement to the FDIC, invoking the FOIA.[308] Relying on the court's order, the FDIC rejected the request.[309] Thereafter, PIRG petitioned Judge Weinstein to vacate the order sealing the documents and compelling confidentiality.[310]

The court rejected PIRG's argument that "a court's order to a federal agency to withhold agency records from the public is limited to the reasons for withholding permitted in the FOIA."[311] Judge Weinstein reasoned that the goals of the FOIA are:

> not necessarily defeated when an agency obtains protection from a court which is broader than the FOIA exemptions. The Act was intended to circumscribe the discretion of agencies rather than that of courts. In the context of this case it cannot be said that the FDIC manipulated this court in order to avoid the agency's obligations under the FOIA. Rather, the court properly issued a not unusual protective order in aid of its own jurisdiction.[312]

In a subsequent section of the opinion Judge Weinstein emphasized that it was not the FDIC, but private litigant Ernst & Ernst, that insisted on the confidentiality provision in the settlement agreement and the court order sanctioning it.[313] The court might have been less confident about the implications of the FOIA for such a sealing order if the party who took the initiative and had the principal interest in seeking the order had been the federal agency that otherwise would have been constrained to disclose the terms of the agreement.

After rejecting the FOIA argument, the trial court considered the merits of PIRG's petition to modify the sealing order.[314] It balanced the interests that would be served by disclosure against those that had been advanced by sealing the settlement documents initially and those that would be harmed by withdrawing the protection of confidentiality after the parties had relied on it for two years.[315] This balancing analysis acknowledges that there might be some circumstances in which a court

307. *Id.*
308. *Id.* at 470.
309. *Id.*
310. *Id.*
311. *Id.* at 471.
312. *Id.*
313. *Id.* at 472.
314. *Id.* at 471-72.
315. *Id.*

could be persuaded to "unseal" a settlement agreement.[316] PIRG, however, failed to persuade the judge to exercise his discretion in favor of disclosure.[317] In conducting its balancing analysis, the court emphasized how much time and resources were saved by the settlement of this massive case and the fact that one of the private parties absolutely refused to enter a settlement unless its terms were sealed.[318] Thus, "[w]ithout secrecy of the terms, a settlement would not have been consummated."[319]

When Judge Weinstein turned to the interests that would be harmed by disclosure after the fact, he found substantial additional grounds for denying PIRG's request. He noted:

> The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.[320]

In sum, the trial court found that "the strong public policy favoring settlement of disputes, particularly in complicated cases, and the importance of the stability of judgments and settlements" outweighed the interests that would be advanced by disclosure.[321]

On appeal, the Second Circuit upheld Judge Weinstein's refusal to modify the original sealing order "essentially for the reasons stated" in his opinion.[322] The appellate panel agreed that courts could order agencies to withhold documents even when no FOIA exemption covered the material in question.[323] More specifically, the Second Circuit held that "the FOIA does not apply to a court's order directing an agency not to reveal the terms of an agreement crucial to the settlement of an action."[324] The higher court also emphasized that after "a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification."[325]

A different panel of Second Circuit judges revisited this general sub-

316. Judge Weinstein explicitly confirmed this possibility in *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 770 (E.D.N.Y. 1984).
317. *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 472.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 231 (2d Cir. 1982).
323. *Id.* at 232.
324. *Id.*
325. *Id.*

ject three years later in *Palmieri v. State of New York.*[326] The FOIA was not involved in *Palmieri*. Instead, the issue was simply what kind of showing was required to compel modification of existing protective orders that had covered both settlement negotiations between private parties and the terms of the settlement itself.[327] What is particularly interesting about the *Palmieri* opinion is that it reflects considerable resistance to vacating such sealing orders even when the effort to penetrate the seal is being made by the Attorney General of the State of New York and a state grand jury for the purpose of developing evidence of possible criminal conduct arising out of the same circumstances that were the subject of the earlier settled civil antitrust action.[328] Even in this situation, the Second Circuit held that the persons seeking to vacate the sealing order must satisfy a demanding standard by showing either that the original order was "improvidently granted" or that "extraordinary circumstances" or a "compelling need" justified the modification.[329]

The appellate court went on to suggest that none of the required showings would be easy to make. For example, to establish that the sealing order had been improvidently granted, the state attorney general would be required to show that the issuing judge "reasonably should have recognized a substantial likelihood that the settlement would facilitate or further criminal activity."[330] If the attorney general failed to carry this burden, the parties' reliance on the sealing orders, "as evidenced by their unwillingness to engage in settlement negotiations without the protections afforded, raises a presumption in favor of upholding those orders."[331] Finally, the appellate panel pointed out that the attorney general's ability to make the required showing of a "compelling need" would be compromised, although not necessarily fatally, by the fact that the government and the grand jury had at their disposal "special investigatory powers not available to private litigants."[332]

In sum, the tone of the *Palmieri* opinion is not hospitable to efforts to vacate orders that created the environment of secrecy that was essential to conducting settlement negotiations and concluding an agreement. Not surprisingly, the Second Circuit is not so inhospitable to such requests when targets of criminal investigations attempt to use sealing orders to prevent disclosure of corporate records that existed before litigation commenced, before any protective order was sought, and before settlement negotiations commenced.[333]

326. 779 F.2d 861 (2d Cir. 1985).
327. *Id.* at 862.
328. *Id.* at 863.
329. *Id.* at 866.
330. *Id.* at 865-66.
331. *Id.* at 865 (citing Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982)).
332. *Id.* at 866.

A recent opinion by a divided panel of judges from the Third Circuit contrasts sharply with the Second Circuit opinions in *Palmieri* and *FDIC v. Ernst & Ernst.* As no governmental agency was involved in *Bank of America v. Hotel Rittenhouse Associates,*[334] the party seeking disclosure of settlement documents could not rely on the FOIA. The two judges who formed the majority in *Hotel Rittenhouse,* however, focused on a doctrine that the Second Circuit opinions had ignored: The "common law right of access to judicial records and proceedings."[335] In fact, the majority relied on this doctrine to overrule the District Court's refusal to unseal settlement documents and other papers filed in a civil proceeding.[336] In so doing, the court not only reversed the presumptions favoring sealing orders that are reflected in the Second Circuit opinions, but went much further by holding that the interests advanced by promising litigants that their settlement will remain confidential cannot outweigh, at least absent some extraordinary showing, the common-law right of public access to court documents.[337] As the majority phrased it, "the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."[338] Thus the majority made it clear that "the presumption of access" that attaches to sealed court documents is very strong and that a party seeking to overcome this presumption, and thus to maintain the confidentiality of such sealed documents, bears a heavy burden indeed.

Because Judge Sloviter's opinion for the two-judge majority in *Hotel Rittenhouse* is so explosive in implications and so inconsistent with recent opinions from the Second Circuit, it is necessary to understand the context in which it arose. This context may expose a basis for distinguishing the case from situations more commonly arising in civil litigation. By looking carefully at the context, one also can develop practical suggestions for lawyers that should enable them to avoid the outcome reflected in the *Hotel Rittenhouse* case.

Two aspects of the background against which *Hotel Rittenhouse* was

333. *See* United States v. Davis, 702 F.2d 418 (2d Cir. 1983).
334. 800 F.2d 339 (3d Cir. 1986), *cert. denied,* 107 S. Ct. 921 (1987) (case captioned Bank of Am. Nat'l Trust and Sav. Assoc. v. FAB III Concrete Corp.).
335. *Id.* at 343.
336. *Id.* at 344.
337. *See id.*
338. *Id.* at 346.

decided seem to have been most important to the court's decision: (1) the parties who entered the settlement decided to file the agreement, under seal, and thus to make it formally a record in the case;[339] and (2) after filing the settlement agreement under seal, the parties began disputing its meaning and, most importantly, each filed motions petitioning the court to interpret and enforce the contract.[340] The District Court permitted the parties to conduct their enforcement litigation entirely under seal: their motions, cross-motions, responses and replies remained under wraps, even when the court entered a judgment compelling one of the parties to pay the other more than thirty-eight million dollars pursuant to the contract and ordered the marshall to sell the subject commercial property.[341] In the meantime, the concrete subcontractor for the project was pressing an 800,000-dollar claim for work done on the property.[342] This contractor filed an action in state court charging that the two parties to the federal action had conspired to defraud him and that the sealing of the settlement action was one of the acts they committed in furtherance of their fraudulent scheme.[343] The contractor's petition to unseal the settlement agreement and the subsequent motion papers led to the *Hotel Rittenhouse* opinion.[344]

The Court of Appeals emphasized the fact that the parties had voluntarily elected to file their settlement in the District Court and then had sought to use that court to achieve their private enforcement ends.[345] Judge Sloviter noted that the parties had an alternative that probably would have enabled them to protect the confidentiality of their agreement. "[I]t is likely," she wrote, "that had [the parties] chosen to settle and file a voluntary stipulation of dismissal, as provided in Rule 41(a)(1) of the Federal Rules of Civil Procedure, they would have been able to prevent public, and even [the cement subcontractor's], access to these papers."[346] But the filing of the settlement documents, even under seal, made them part of the court record and, as such, "subject to the access accorded such records."[347]

339. *Id.* at 344-45. The parties apparently took this step because they feared compliance problems, and they wanted to improve the odds that the court would help them enforce the terms of the contract in expeditious proceedings; they did not want to have to file a separate action on the settlement contract and wait in line for trial of that matter.
340. *Id.* at 341, 344.
341. *Id.* at 341.
342. *Id.* at 340-41.
343. *Id.* at 341.
344. *See id.* at 340.
345. *Id.* at 345.
346. *Id.* at 344.
347. *Id.* at 345.

In distinguishing the Second Circuit's opinion in *Federal Deposit Insurance Corp. v. Ernst & Ernst*,[348] Judge Sloviter emphasized two factors. The first, and apparently the more important, was that in the *Hotel Rittenhouse* case, unlike in *Ernst & Ernst*, "there were *motions* filed and *orders* entered that were kept secret, in direct contravention of the open access to judicial records that the common law protects."[349] Driving the point home, the court declared that "[h]aving undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements."[350] Judge Sloviter also distinguished *Ernst & Ernst* by pointing out that it implicated interests of much greater public import and of a much larger number of people than did the *Hotel Rittenhouse* matter.[351] But because the cases were dissimilar, the two judges who made up the majority in *Hotel Rittenhouse* refused to decide whether the kind of showing of particularized need to maintain confidentiality that had been made in *Ernst & Ernst* was sufficient to "override the strong presumption of access."[352]

From the structure of the court's opinion in *Hotel Rittenhouse*, it appears that there are virtually no circumstances in which Judges Sloviter and Aldisert would uphold the confidentiality of settlement documents and related papers when such materials have been the subject of litigated motions, orders, and judgments. The odds that these two judges would vote to preserve confidentiality appear to be somewhat better—but still not good—when there has been no litigation about the terms of the agreement and thus when the only court document that would remain under wraps is the settlement contract itself.

The lesson to be learned from *Hotel Rittenhouse* should be clear: lawyers practicing in the Third Circuit must decide whether preserving the confidentiality of the terms of their clients' agreement is more important than improved ability to enforce its terms. If preserving confidentiality is the more important consideration, counsel in the Third Circuit should not file their agreement. Instead, they should file a stipulated dismissal and rely on a separate action, sounding in contract, for enforcement purposes.

Two additional points about the majority opinion in *Hotel Rittenhouse* remain to be made. The first arises from Judge Sloviter's emphasis

348. 677 F.2d 230 (2d Cir. 1982).
349. *Id.* (emphasis in original).
350. *Id.*
351. *Id.* at 345-46.
352. *Id.* at 346.

that there might be two independent bases on which a party could seek disclosure of sealed settlement documents.[353] The basis on which the majority ruled in *Hotel Rittenhouse* was the "common law right of access to judicial records and proceedings."[354] This common-law right gave rise to the test used in the court's opinion: a balancing analysis in which the scales are heavily weighted in favor of disclosure. Thus, the party seeking to preserve confidentiality must overcome the "strong presumption" in favor of access.[355]

The second point to note is that the majority intimated, but refused to formally decide, that the first amendment might offer parties a separate, and independently sufficient, predicate for attacking the sealing of settlement documents.[356] Moreover, Judges Sloviter and Aldisert suggested that the "test" to which the first amendment might give rise in situations like this might be even more difficult for parties resisting disclosure to survive.[357] That test apparently would parallel the "compelling state interest" test developed by the Supreme Court for analyzing statutes that restrict core political speech on the basis of its content.[358] Vigorously applied, this test is virtually impossible to pass. The significance of all this is that the court intentionally left open the possibility that even if its reasoning under the common-law right of access were to be rejected at some point in the future by the Supreme Court, it would have another, even more powerful, doctrine to invoke to support the same conclusion.

Judge Sloviter's reasoning has at least two vulnerabilities that could be used by counsel in other jurisdictions to persuade their courts not to follow *Hotel Rittenhouse*. The first "soft spot" in Judge Sloviter's reasoning is her unpersuasive effort to distinguish the Supreme Court's opinion in *Seattle Times Co. v. Rhinehart*,[359] in which the High Court held that the first amendment did not prevent a District Court from entering a protective order sealing certain discovery documents. The *Hotel Rittenhouse* court argued that discovery "is ordinarily conducted in private" and that the public somehow has a less powerful interest in access to discovery documents than to a settlement agreement that is filed under seal.[360] In many courts, of course, discovery documents are routinely filed and accessible to the public. Moreover, a number of settlement

353. *Id.* at 342-43.
354. *Id.* at 344.
355. *Id.* at 344-46.
356. *Id.*
357. *Id.* at 344.
358. *Id.*
359. 467 U.S. 20, 36-37 (1984).
360. *Hotel Rittenhouse Assoc.*, 800 F.2d at 343.

agreements contain confidentiality clauses. As a general proposition, there may be a greater expectation of privacy with respect to the terms of settlement than there is with respect to discovery documents. For these reasons, Judge Sloviter's effort to distinguish *Seattle Times* remains unpersuasive.

The second problem with Judge Sloviter's opinion is her reliance on the "common law right of access." This is a controversial, ill-defined and unevenly supported doctrine, especially as it applies to civil litigation.[361]

Lawyers searching for help in efforts to challenge the reasoning of *Hotel Rittenhouse* may look to the essentially contemporaneous opinion by the Supreme Court of Minnesota in *Minneapolis Star & Tribune Co. v. Schumacher*.[362] Like *Hotel Rittenhouse*, *Schumacher* dealt with settlement documents that had become part of the record of a civil action and did not address unfiled settlement agreements. After considering the relevant precedents from the United States Supreme Court, the Supreme Court of Minnesota decided in *Schumacher* that "no first amendment right of access exists" in settlement documents.[363] In reaching this conclusion, the high court of Minnesota relied heavily on its perception that "[h]istorically, the majority of settlements entered into between parties have been private" and on its belief that allowing public access to settlement documents might jeopardize the important policy objective of encouraging consensual disposition of lawsuits.[364]

The *Schumacher* court went on to acknowledge, however, that even though the first amendment gives rise to no general right of access to settlement documents that are made a part of the record in civil actions, the common law creates a presumption in favor of such access that can be overcome only by showing "strong countervailing reasons why access [to the filed settlement documents] should be restricted."[365] The court promptly softened the implications of this position, however, by (1) announcing that the standard of review for decisions by trial judges over whether to grant access to sealed settlement documents is abuse of discretion, and (2) holding that the trial judge had not abused his discretion

361. For a thorough and illusion-puncturing examination of the history and underpinnings of this doctrine as it applies to discovery materials, I recommend Professor Richard L. Marcus' article, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).
362. 392 N.W.2d 197 (Minn. 1986). The *Schumacher* opinion was issued on August 8, 1986, exactly one month before the opinion in *Hotel Rittenhouse*. There is no reason to believe that the Third Circuit panel that produced *Hotel Rittenhouse* was aware of the *Schumacher* opinion.
363. *Id.* at 204.
364. *Id.* at 204-05.
365. *Id.* at 205-06.

in refusing to permit a newspaper to have access to "settlement and distribution papers" and transcripts of settlement hearings in five wrongful death actions against an airline that was being sued by other victims of the same accident.[366] In affirming the trial judge's action, the Supreme Court noted that the "historical and philosophical privacy of settlement documents, along with the relevant facts and circumstances of this case, demonstrate that the privacy interests asserted by the litigants were strong enough to justify restricting access."[367]

It is arguable that the effect of relying on the "historical and philosophical privacy of settlement documents" is to eviscerate the strong presumption in favor of access that the court purported to acknowledge. If the court permits the historical privacy of settlement to offset the presumption in favor of access, the "test" that emerges is an open balancing (that is, not weighted in favor of any outcome). And if the scales are not tipped at the outset significantly in favor of disclosure, trial courts will enjoy considerable discretion in deciding whether or not to permit access to sealed settlement documents. In *Schumacher*, the trial court was satisfied by a showing that if the settlement documents were made public the plaintiffs might be subjected to harassment, exploitation, and intrusions on their privacy.[368] Neither the trial court nor the Minnesota Supreme Court ascribed much countervailing weight in the balancing process to the great public interest in the airline crash or to the pendency of other litigation arising out of the same incident. In fact, the Supreme Court used the level of public interest in the event and its aftermath to buttress its conclusion that disclosure of the terms of the settlements might lead to further intrusions on the privacy of the settling plaintiffs.[369]

In spirit, *Schumacher* and *Hotel Rittenhouse* could not be more antithetical. The Minnesota Supreme Court seems to be more sympathetic than the Third Circuit with the goal of promoting settlement and with the argument that affording real protection to the privacy of settlement contracts is essential to that goal. By contrast, the Third Circuit ascribes more weight to the importance of public access to records that show how civil proceedings were closed. Which of the competing assumptions that underlie these two approaches is wisest is a question to which we have no empirical answer. Thus, the debate will continue at least until the Supreme Court of the United States enters the fray.

366. *Id.* at 206.
367. *Id.*
368. *Id.* at 205, 206.
369. *Id.* at 205.

B. Side Agreements Under Seal

Janus Films, Inc. v. Miller,[370] a recent Second Circuit opinion, exposes a different kind of risk that lawyers face when they file a side agreement under seal in connection with a consent judgment or a settlement judgment. *Janus Films* was a copyright infringement action that the parties purported to settle in open court on the second day of trial. The proposed settlement included a concession of liability by the defendant, an agreement that judgment would be entered "for statutory damages, attorney's fees, and costs in the total amount of $100,000," and "a separate, confidential agreement, to be placed under seal, regarding 'the terms and conditions of collection' of the judgment."[371] The confidential side agreement permitted the defendant to satisfy the monetary aspect of the judgment by "payment of a sum considerably less than the $100,000 over an extended period of time."[372] Despite the defendant's subsequent change of mind and attempt to avoid the commitment he had made in open court, the trial judge entered a judgment that described the 100,000-dollar obligation and certain injunctive relief, but did not mention either the content or the existence of the side agreement.[373]

The Second Circuit panel was not comfortable with the way the trial judge had handled the side agreement. Noting that it was dealing with an issue of first impression, the Court of Appeals distinguished between:

> a judgment that concerns only the parties to the lawsuit being settled and a judgment likely to be of concern to others. The former, which might be called a "private judgment," is illustrated by a judgment that resolves the claims of all parties to a dispute involving a tort or a breach of contract. The latter, which might be called a "public judgment," is illustrated by the pending case, where a judgment resolves a dispute concerning a copyright that may be enforced against other members of the public besides the defendant in this litigation.[374]

Because the case did not involve a "private judgment," the appellate panel declined to consider whether courts should permit parties in such actions to terminate their suit through entry of a consent judgment or a settlement judgment accompanied by a separate side agreement that is filed under seal.[375]

With respect to "public judgments," however, the *Janus Films* court announced a new rule. Noting that "there is always the distinct risk that

370. 801 F.2d 578 (2d Cir. 1986).
371. *Id.* at 580.
372. *Id.*
373. *Id.* at 581.
374. *Id.* at 584.
375. *Id.* at 585.

either party may seek to induce others to settle similar disputes on terms exactly like or at least similar to the terms of the judgment," the Second Circuit held that parties who terminate litigation by having the trial court enter a consent judgment or a settlement judgment should be required to disclose the content of any side agreements that are part of the arrangement that concludes the suit.[376] This holding does not mean that parties cannot settle cases on confidential terms. As the *Janus Films* panel pointed out, litigants who have settled their dispute retain the option of forgoing entry of judgment, terminating the case by a stipulated dismissal, and "keeping confidential all aspects of their settlement."[377] If terms of disposition are "likely to be asserted against other[s]," however, the parties may not "secure a judicial imprimatur for an obligation that [they have secretly] agreed means less than its terms state."[378]

C. Federal Rule of Civil Procedure 68 and State Mediation Statutes

Attorneys who are especially concerned about preserving the confidentiality of offers or demands, or of statements made during negotiations, should consider proceeding under Federal Rule of Civil Procedure 68, or a state law analogue, like section 998 of the California Code of Civil Procedure, or turning to a "mediation" process that enjoys special state statutory protection.

The bar to admissibility that is articulated in Federal Rule of Civil Procedure 68, and in section 998 of the California Code of Civil Procedure, is virtually unqualified, in sharp contrast to the limited protection offered by Federal Rule of Evidence 408. Rule 68 flatly declares that evidence of an *unaccepted* offer that was made under the rule is "not admissible except in a proceeding to determine costs."[379] The language of section 998 of the California Code of Civil Procedure is similarly sweeping: "If such offer is not accepted . . . it . . . cannot be given in evidence upon the trial."[380] These prohibitions seem operative regardless of the purpose for which the evidence would be proffered at trial and thus avoid the limitations on the scope of rule 408.[381] Since neither rule 68 nor section 998 purports to extend protection to evidence of "conduct or

376. *Id.*

377. *Id.*

378. *Id.* at 584-85.

379. Evidence that a rule 68 offer was made could be introduced after judgment at trial, when the offeror attempts to recover his costs from a plaintiff who rejected a rule 68 offer that turned out to be larger than the award at trial.

380. CAL. CIV. PROC. CODE § 998 (West Supp. 1988).

381. *See supra* notes 57-124 and accompanying text.

statements made in compromise negotiations,"[382] counsel cannot be sure to what extent these rules of procedure can be invoked to protect communications that accompany and explain protected offers. Moreover, by their express terms, these rules apply only to offers that are not accepted.[383] It is unlikely that these rules would offer any protection in a case in which a person who was not a party to a settlement agreement is attempting to compel disclosure of settlement communications or terms.

As an alternative to simple two-party settlement negotiations, counsel could proceed with private mediations that are covered by recently enacted state confidentiality statutes with much greater confidence in the scope of the protection they afford. As one commentator has noted, recent "legislative enactments in several states have provided near-absolute protection for communications made in mediation, [thus greatly enhancing] the protection available to mediation under the traditional rules of evidence and contract."[384] Some of the most populous states in the country, including California, New York, and Florida, have enacted such laws.[385]

The California version of these statutes appears as section 1152.5 of the Evidence Code, which was added in 1985. Except for certain family law matters that are covered by other confidentiality provisions, this statute applies to any kind of civil dispute.[386] When parties "agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute," and when, before the mediation begins, they agree in writing to invoke the protections of the statute after setting forth the provisions of the statute in their agreement, the law prohibits admitting evidence "of anything said or . . . any admission made in the course of the mediation" or any "document prepared for the purpose of, or in the course of, or pursuant to, the mediation."[387]

382. FED. R. EVID. 408.

383. *See* FED. R. CIV. P. 68 ("An offer not accepted shall be deemed withdrawn and evidence therof is not admissable except in a proceeding to determine cost."); CAL. CIV. PROC. CODE § 998(b)(2) (West Supp. 1988) ("If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.").

384. Note, *supra* note 3, at 452.

385. *Id.* at 452 n.79; *see* CAL. EVID. CODE § 1152.5 (West Supp. 1988); *see also* MINN. STAT. §§ 572.31-.40 (Supp. 1987); MINN. STAT. § 595.02 (Supp 1987) (offering a shield of confidentiality to communications and documents connected with mediations except as needed in an action "to have a mediated settlement agreement set aside or reformed"); *see also Protective Order Limits Deposition of Privately Retained Mediators*, Alternative Dispute Resolution Rep. (BNA) 212-13 (Sept. 17, 1987).

386. CAL. EVID. CODE § 1152.5 (West Supp. 1988); *see* CAL. CIV. CODE §§ 4351.5, 4607 (West Supp. 1988); CAL. CIV. PROC. CODE § 1747 (West 1982).

387. CAL. EVID. CODE § 1152.5 (West Supp. 1988).

The Law Revision Commission's comment to the 1985 addition[388] makes clear that parties can waive their confidentiality rights under this section either by failing to object to a proffer at the time of trial or by mutual consent. The same comment points out that the purpose of this section is "to encourage this alternative to a judicial determination of the action" and that the justification for the confidentiality provision is the same as the justification for the much narrower provision contained in section 1152, which renders offers of compromise "inadmissible to prove . . . liability for the loss or damage or any part of it."[389] The Law Revision Commission's comment emphasizes that instead of attempting to limit the applicability of the statute through a definition of the term "mediation," the legislature decided that it would make the statutory protections available only when "the persons who will participate in the mediation (including the mediator) execute a written agreement before the mediation begins stating that Section 1152.5 of the Evidence Code applies to the mediation" and only when their agreement sets "out the full text of subdivisions (a) and (b) of Section 1152.5."

Thus, California practitioners who want to take advantage of the broad protections available through this statute should develop forms that recite all the relevant provisions of the statute and that expressly articulate the commitments to confidentiality that all parties and the mediator make. When they follow the proper procedure, California lawyers should be able to use this statute to fill virtually any gap left by section 1152 of the California Evidence Code, which applies only to "offers to compromise."[390]

There is no reason to believe that because a dispute is already the subject of litigation the protections of section 1152.5 are rendered inaccessible. There is reason to believe, however, that this more generous section would not apply to negotiations between the parties that did not involve a neutral third party. While the new statute does not purport to define "mediation," it clearly contemplates a process that involves the participation of a neutral person who must sign the confidentiality agreement. Counsel cannot simply change the label of direct settlement negotiations to "mediation" and assume that they will enjoy the protections of the new statute, but must involve a neutral person from the outset.

Before deciding to proceed under section 1152.5, counsel should consider the disadvantages that might derive from the breadth of its protections. As a commentator has pointed out concerning comparable statutes enacted in other states, proceeding under statutes that on their face bar use of evidence from mediations regardless of the purpose for which the evidence would be used could create extra difficulties for a party who subsequently seeks either (1) to enforce an agreement that resulted from the mediation or (2) to resist enforcement of an agreement that was the product of duress, fraud, mutual mistake, or overreaching.[391] Similarly, the broad language of a statute like section 1152.5 could impair efforts to redress wrongs arising out of violation of some specific duty relating to the conduct of negotiations, such as the duty to bargain in good faith in labor disputes, or the duty of an insurance carrier to consider in good faith reasonable settlement proposals.[392]

388. CAL. EVID. CODE § 1152.5 law revision commission's comment (West Supp. 1988)
389. *Id.*
390. CAL. EVID. CODE § 1152 (West Supp. 1988).

Apparently anticipating this problem, the Minnesota legislature explicitly provided that the promise of confidentiality that extends generally to communications made in connection with mediations does not apply when a party applies to a court "to have a mediated settlement agreement set aside or reformed."[393] Even though they acted a year later than their counterparts in Minnesota, California legislators failed to add any such caveat or qualifier to the promise of confidentiality in section 1152.5. Thus, counsel cannot be sure how California courts will respond when a party attempts to use material or statements made in connection with a mediation to enforce or to defeat a mediated settlement agreement. Given this uncertainty, counsel must assess separately the needs and risks presented by each specific situation that calls for some effort to reach a settlement, then either (1) choose from the pre-existing procedures[394] the one that best fits that situation or (2) attempt to create, through private contract, a mini-trial process that is specially tailored to meet the needs of the parties.

D. Private Caucus Settlement Conferences

A private caucus settlement conference hosted by a judge or magistrate offers two sources of protection for communications. In conferences structured on this model the parties have virtually no direct interaction. The person to whom they present the reasoning that supports their offers or demands, and to whom they divulge how far they might be willing to go in an effort to compromise differences, is the

391. *See* Note, *supra* note 3, at 452-54.
392. *See id.* at 452-54.
393. MINN. STAT. § 595.02 (1984).
394. Some of the alternatives include a judicially hosted settlement conference, a mediation, offers of compromise under rule 68 or section 998 of the California Civil Procedure Code, or traditional face-to-face negotiations by the lawyers.

judge—not opposing counsel. Furthermore, the parties can ask the judge to keep secret the admissions or concessions about which they are most sensitive, or the most potentially damaging reasons for the positions they are taking. An opponent who does not learn these things cannot attempt to introduce them at trial.

The second source of protection for communications made during judicially hosted settlement conferences is the difficulty an opponent would have compelling a judge who had hosted such a conference to testify at trial about what a party said to her in confidence during the negotiations. There may be circumstances under which this kind of testimony could be compelled, but the judicial community is likely to require a compelling showing before permitting a party to penetrate this sensitive arena.

E. Using Private Contracts to Extend Protection

Another tool that counsel might consider using to increase protection for their settlement communications is a contract with the opposition designed explicitly for the purpose of guaranteeing confidentiality. In such a contract, the parties might commit themselves not to attempt to introduce at a trial on the merits, for any purpose, any statements made during settlement negotiations. Such a contract clearly would reach farther than rule 408 and erect a stone wall instead of a split rail fence between settlement negotiations and trial. Such contracts, of course, cannot bind parties who do not sign them and may have little effect on the capacity of a non-party to discover or introduce at trial the settlement communications covered by the contract.[395]

Unfortunately, the enforceability of such contracts is not always clear. There is a risk, though probably small, that a federal judge would refuse to enforce such an agreement on the ground that it embodies a doctrine Congress refused to enact when it adopted the Federal Rules of Evidence. There also is a risk that a federal judge would view such a contract as invading a judicial prerogative—restricting the judge's power to make sure that all the evidence that will help the jury ascertain the truth is accessible. Clearly there is a substantial risk that a judge will refuse to honor such a contract if doing so would make it impossible to determine whether a subsequent settlement agreement should be enforced. To write such an agreement that purported to go this far would be unwise in most circumstances. Similarly, courts can be expected to

395. *See* Grumman Aerospace Corp. v. Titanium Metals Corp. of Am., 91 F.R.D. 84 (E.D.N.Y. 1981).

penetrate any such agreement when it is necessary to determine whether the parties engaged in illegal conduct or set up a relationship that violated public policy.[396]

Confidentiality contracts that threaten none of these more compelling public policies, however, may be enforceable, at least in instances when they are entered into by parties who are competent and represented by counsel, and between whom there are not dangerous differences in bargaining power. A California appellate court has upheld such a contract as it applied to a voluntary mediation.[397]

Lawyers looking for creative ways to use contracts to increase protection for the confidentiality of settlement communications might find interesting a suggestion in *United States v. Cook*.[398] In a footnote, a panel of Fifth Circuit judges indicated that they would be receptive to an argument that a party who promised—as part of a settlement contract in one case—not to use that settlement outside the action in which it was entered, should be estopped from introducing evidence from the settlement in a subsequent suit.[399] Defendants in a criminal trial that the government launched after it had settled an earlier civil matter with them argued that "the government was estopped from using the injunction documents [a consent decree that resulted from a settlement agreement] because of the specific prohibition they contained against their use for any purpose other than 'the purpose of this action.'"[400] Characterizing this argument as "persuasive," the *Cook* court went on to opine that in "simple equity, the government should not be allowed to induce or obtain a defendant's consent to settlement under specific terms, and later violate those terms."[401] This comment suggests that counsel should consider adding clauses that explicitly limit the permissible uses of settlement material to their settlement contracts or to agreements that fix the rules for settlement negotiations.

The caveat that courts will not enforce such agreements if their purpose or effect violates public policy is reflected in the opinion of the California Court of Appeal in *Mary R. v. B. & R. Corp.*[402] In that case, the

396. *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 14, § 5039, at 207-08.

397. Simrin v. Simrin, 233 Cal. App. 2d 90, 95, 43 Cal. Rptr. 376, 379 (1965). *See generally* Note, *supra* note 3, at 450-52 (focusing on the status of stipulations whose effect is to exclude relevant evidence); 21 C. WRIGHT & K. GRAHAM, *supra* note 14, § 5039 (same); 22 C. WRIGHT & K. GRAHAM, *supra* note 14, § 5194 (same).

398. 557 F.2d 1149, 1152 n.6 (5th Cir. 1977).

399. *Id.*

400. *Id.*

401. *Id.*

402. 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).

court refused to enforce a term of a settlement agreement that purported to prohibit the plaintiff, the alleged victim of child molestation by a physician, from revealing information to regulatory authorities.[403] While the facts of that case were unusual, the principle that emerges from it could apply in a wide range of more commonly occurring situations. In the securities area, for example, courts might well refuse to honor a contract, whether or not it led to a settlement agreement, in which the parties agreed that neither would share with the Securities Exchange Commission or anyone else information about insider trading that it learned during settlement discussions. Similarly, parties should not expect courts to enforce agreements between competitors that purport to prohibit disclosure or adn. sion at trial of communications whose purpose or effect was to promote anticompetitive activities, even if these communications occurred during settlement negotiations.

Moreover, courts that follow precedents developed in cases dealing with the enforceability of "stipulations" could find many different grounds on which to relieve a party of an apparent contractual commitment limiting the admissibility of communications made or acts committed during the course of settlement discussions. Courts may relieve a party from a stipulation because it was procured by fraud, because it was entered as a result of misrepresentation, mistake of fact, or excusable neglect, or because there has been such a substantial change in circumstances that binding the party to the stipulation would be unfair.[404] The significance of these grounds for relief from a stipulation lies in the fact that they also are commonly presented bases for relief from a settlement agreement. As explained earlier, rule 408 would not bar admission of communications made during settlement negotiations if the purpose for which they would be admitted is to prove that the settlement contract is unenforceable because it was procured by fraud, or was entered as a result of misrepresentation, mistake of fact, or excusable neglect.[405] Thus a party might be able to use the same ground both to escape a contractual commitment not to disclose communications made during negotiations and to defeat the settlement agreement itself.

One additional warning is in order here. When the basis for subject matter jurisdiction in federal court is diversity of citizenship, there is a possibility that state law, rather than federal common law, will determine whether or not a contract that enlarges the protections of rule 408—for example, by making communications during negotiations inadmissible

403. *Id.* at 316, 196 Cal. Rptr. at 876.
404. *See* People v. Trujillo, 67 Cal. App. 3d 547, 555, 136 Cal. Rptr. 672, 676 (1977).
405. *See supra* notes 108-19 and accompanying text.

for any purpose—is enforceable. Professors Wright and Graham suggest that courts deciding whether to enforce such contracts should consider doctrines developed in the law of procedure and doctrines developed in the substantive law of contract, arguing that procedural analysis should be based on federal common law in diversity cases, but that the substantive contract analysis should be based on the law of the relevant state.[406] In *Blum v. Morgan Guaranty Trust Co.*,[407] the Eleventh Circuit assumed, without conducting a detailed analysis under *Erie Railroad Co. v. Tompkins*[408] and its progeny, that in a diversity case the enforceability of stipulations whose effect is to limit the admissibility of evidence is a question to be resolved under state law.

Conclusion

Despite commonly made assumptions, and the apparent promise of Federal Rule of Evidence 408, there are many circumstances in which many courts would permit both the discovery and the admission at trial of confidential settlement communications. Given the unpredictability of judicial rulings in this area, and the unforeseeability of events that could result in disclosure or admission at trial of settlement communications, good lawyers have no choice but to proceed with caution in this area. If confidentiality is their client's paramount concern, counsel should not rely on the rules of evidence for protection and should consider taking some of the extra precautions described in the latter sections of this Article.

406. *See* 21 C. WRIGHT & K. GRAHAM *supra* note 14, § 5339.
407. 709 F.2d 1463, 1465 (11th Cir. 1983).
408. 304 U.S. 64 (1938).

The Boston Sunday Globe, March 10, 1991, [A31:1]

Renewed tension between right to privacy and the public's right to know

ARTHUR R. MILLER

To the person on the street, the American legal system often seems bewildering and overused, but nonetheless distant and unrelated to daily life. Consequently, most people would be outraged to learn that for less than $50, the fee for filing a lawsuit, a neighbor has the legal right to compel them to turn over all of their bank statements, medical records, income tax returns, religious documents, school records and other private information, so long as the information is likely to lead to other information that may be related to the lawsuit.

The outrage might intensify upon learning that the neighbor could then give or sell this information to gossips, the press, cdn artists, or any other buyers, unless the court issues an order prohibiting public disclosure, commonly called a protective order.

Should the courts have the authority to issue protective orders to keep private information confidential? Of course. If the court has the power to compel broad intrusions into private matters to resolve a lawsuit, it must also have the power to protect this same private information from further public disclosure outside of the lawsuit.

Although the answer may seem obvious, it is the source of controversy within the legal community and the media. This controversy has also caused consternation among members of the business community, who frequently are involved in litigation and who rely upon the courts' power to protect confidential trade secrets and other commercial information in order to maintain their competitive livelihood.

Behind this controversy are members of the media, and lawyers who handle personal injury cases, who claim that courts are using their power to protect information about public health and safety that the public has a right to know. To prevent courts from keeping information secret, these groups are lobbying state and federal legislatures to change the law. They want to restrict or eliminate the power of courts to keep private information produced in a lawsuit confidential.

Although Florida and Texas have acted precipitately and done so, there simply is no need to change the current system. Such an effort is under way in Massachusetts.

As any poor soul slapped with a lawsuit will tell you, courts must have the power to protect privacy when necessary.

There is no reason to believe that they have used that power to the detriment of the public's right to know. Courts have fine-tuned the classic tension between the right to privacy and the public's right to know for centuries. In recent years, this fine-tuning has led to greater public access. A few anecdotal cases have been put forth in the media, and by personal injury lawyers, allegedly demonstrating that courts have hidden information affecting public health and safety. Upon investigation, none of these war stories actually establishes a link between information kept confidential in court records and subsequent harm to the public.

Instead, investigation reveals that both the media and personal injury lawyers have an insatiable thirst for information – it is an essential fuel to their professional and financial well-being.

Those advocating reduced confidentiality in the courts undervalue competing privacy and property interests.

Although the public interest may be served when court proceedings are open, at times confidentiality serves equally important public interests. Arguably, restrictions on court authority to guarantee confidentiality might discourage someone from reporting instances of government fraud or corruption out of fear that his identity will be revealed in subsequent litigation, making retaliation against him possible.

Confidential news sources might dry up for similar reasons. Fear that prior medical treatment or marital difficulties might be disclosed publicly could cause some people to forgo legitimate legal claims altogether. Society is not served when the price of seeking civil justice is the sacrifice of the right to be let alone. This is a right of increasing importance to human dignity in a computerized society that provides instant and universal access to information once it has been captured.

To businesses involved in litigation, confidentiality is often the only means to protect million-dollar investments in trade secrets, intellectual property, and other proprietary information. Preventing this type of information from falling into the hands of business rivals is central to maintaining a competitive edge. Indeed, trade secrets and the like are considered property, and the protection of private property rights is one of most fundamental obligations of our legal system.

Finally, confidentiality is an important judicial tool that facilitates the resolution of a lawsuit by encouraging litigants to exchange information among themselves freely without fear that it will be disclosed publicly. Society's interest in the prompt, inexpensive resolution of legal disputes is compromised when we take these tools away from our already overburdened judiciary.

As the proponents of restrictions on confidentiality argue, the courts are public institutions. But this concept has meant that the courts are open to the public in order to resolve legal disputes and to allow the public to observe the justice system in action. Until this recent controversy, this concept never stood for the proposition that the courts are like fishbowls through which the public can observe the most intimate affairs of the litigants suspended in the civil justice process.

Lawsuits already are highly invasive and impose inordinate costs in both time and money. Legislatures should not raise these costs by restricting the power of courts to assure privacy and confidentiality when necessary.

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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

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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. ■



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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.

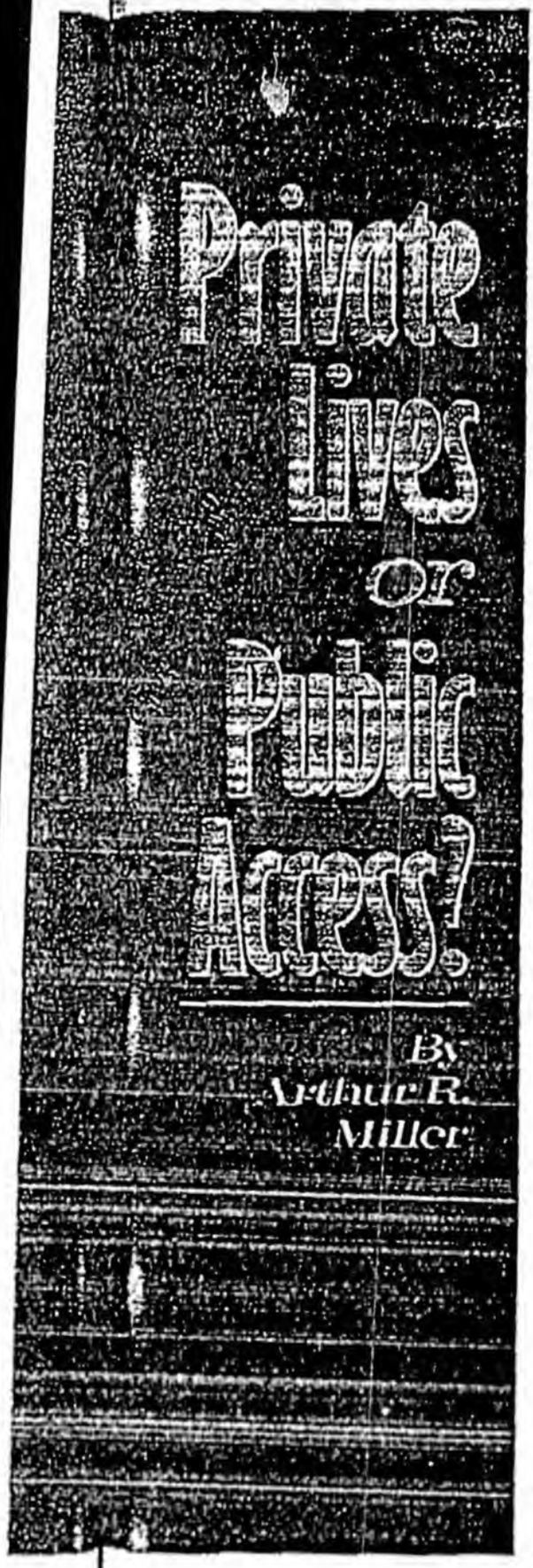
Consumers clearly need federal and state laws so judges will forbid secrecy if public safety or health is at stake.

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

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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-

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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 the early 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 those 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. ■

Ideas & Trends

Florida courts may not seal records on public hazards

A new Florida law that went into effect July 1 prohibits courts from sealing records that contain information about a public hazard. The first comprehensive law of its kind in the nation, the legislation was opposed by automobile manufacturers and pharmaceutical companies, frequent targets of product-liability suits. Manufacturers have often insisted that court records and information related to product-liability litigation be kept secret as part of settlement agreements.



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NCSL OCT. 1990

Oversight, Phase I: Keeping Records of Doctors With Records

By PHILIP J. HILTS

THE mutually protective relationship that has long existed between doctors and hospitals began to grow less cozy this month when the National Practitioner Data Bank — more popularly known as "docs in a box" — began collecting information on medical malpractice.

On Sept. 1 computers began recording the names of doctors, dentists, psychotherapists and other licensed health-care practitioners who have been seriously reprimanded by hospitals, state medical boards and professional societies. The system will make note of medical licenses, hospital privileges or society memberships that have been suspended for 30 days or more. It will also record malpractice settlements. This is especially important because many settlements — including some involving the biggest and most egregious cases — have been hidden by court-sealed secrecy agreements.

Doctors may see their own files and write rebuttals, but otherwise the information may be read only by official regulatory bodies like hospital peer review boards, state licensing boards and professional societies.

For consumer groups, the establishment of the data base is a step toward giving the public access to the information. For the medical profession, which has long insisted on policing itself, the data bank already goes far enough. Moves have already begun to cut back the information that will be recorded in the system.

Hospitals have commonly dealt with troublesome practitioners by letting them quietly resign. Fears of lawsuits provided a powerful incentive for keeping information about medical transgressions under wrap. As a result, many doctors forced to leave one institution easily found work in another.

Now this symbiotic relationship has been severed, with all hospitals, as well as medical boards, medical societies and insurance companies, required by Federal law to submit reports on disciplinary actions and settlements. Hospitals must also search the data bank each time they hire a new practitioner, and every two years to monitor those already on staff.

Dr. Robert Harmon, chief of the Health Resources Services Administration, which administers the data bank, said he expected 50,000 to 60,000 reports to be logged annually. Payments in medical malpractice settlements or judgments may account for 30,000 to 40,000 of the entries. In addition to 6,000 civilian hospitals, those operated by the Defense Department will also be affected. The Health Resources Services Administration is still trying to negotiate an agreement with the Department of Veterans Affairs, which has more than 100 hospitals and thousands of doctors.

The American Medical Association, which initially opposed the data base, now says it supports it — with reservations. Both the A.M.A. and the American Hospital Association would like to find ways for "nuisance suits" to be settled off the record.

An official of the A.M.A., who insisted on anonymity, said the data bank could make doctors less willing to avoid court action by settling unwarranted claims for small sums. "It is true there will be more fighting," the official said. "It was more convenient and cheaper in the end to settle nuisance suits, but now those will go into a doctor's files. Doctors really do not want that, so more cases will be taken to the mat. The defense costs will go up. Malpractice premiums may go up."

The Health Resources Services Administration has the option, after one year of operation, to set a lower limit for reporting settlements. The A.M.A. has suggested not reporting anything under $30,000, a move that consumer groups oppose.

The A.M.A. also says that it has been common for doctors to accept judgments from hospital peer review boards at least partly because they were kept private. "I would advise doctors not to resolve these cases so quickly, not to agree to a quiet settlement," the A.M.A. official said. That could lead to more conflicts with the hospitals.

> A wedge in relations between hospitals and physicians.

The official noted that the hospitals "have lost one option" in dealing with doctors they don't want. They can no longer just let them resign. The law that established the data bank requires that hospitals report resignations that take place after an investigation has begun.

One supporter of the new system is Dr. Ron D. Anderson, the chief executive officer of Parkland Hospital, a 940-bed public hospital in Dallas.

"We are taking this very seriously," he said. "We will really have to document our background checks on doctors. With 800 full-time faculty and 1,200 clinical faculty members, that is a lot of work."

In Dallas and some other places, he said, hospitals have created verification centers to keep records, check backgrounds of doctors, and to handle the flow of information between the hospitals and the national data bank.

Hospitals have also had to review their habits and procedures for punishing doctors, Dr. Anderson said, to make sure that any suspension of 30 days or more "is serious and is intended to protect the patients, not just punish a staff member for not doing his charts or not being a good citizen in some other way in the hospital."

Both doctors and hospitals are looking over their shoulders at what they fear more than "docs in a box" — a movement to open the system to the public. The Health Research Group of Public Citizen Inc., a consumer advocacy group, supports public access, as does Representative Ron Wyden, the Oregon Democrat who sponsored the data bank legislation.

With the possibility that the system might someday be open [illegible] years pursual, doctors can be expected to fight [illegible] any hard against black marks on their [illegible] keep doctors from suing hospitals for damages. [illegible] the law setting up the data bank [illegible] medical providers immunity.

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.

ATRA American Tort Reform Association

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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
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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

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

American Tort Reform Association

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

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

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

TABLE OF CONTENTS

Executive Summary 1

Scope of the Problem 5

Introductory Remarks 9

Justice for Whom: The Case For and Against Secrecy 13

Public Courts, Private Justice 21

Testing the System:
Balancing Public Interest and Privacy Rights 31

Closing Plenary: Making New Rules 39

Appendices

Luncheon Address 45

Witness Testimony 49

Texas Rules of Civil Procedure 57

Florida Legislation 63

Panelists and Speakers 65

Organizations Represented 67

Sponsors 71

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

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

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

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

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*

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.

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 public 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.

he history of lawsuits over omax, asbestos, post-menopausal strogens and cancer, Dalkon hields, seat belts, heart valves, nd DES provides evidence that ourt-ordered secrecy helps neither cience nor the public.

. 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 he 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

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

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 upon 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.

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

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

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 ... 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 relations.

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.

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.

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

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? So 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."

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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."

Remarks by Moderators and Closing Plenary Chair

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.

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

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

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

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

James Miller, Father of Accident Victims

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.

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.

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Trial Lawyers for Public Justice

Art Buchwald
Syndicated Columnist

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U.S. District Court, Colorado

Mary Cheh
Professor, George Washington University
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Joan Claybrook
President, Public Citizen

Alfred W. Cortese
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Dr. Devra Davis
Scholar in Residence,
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Texas Supreme Court

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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)

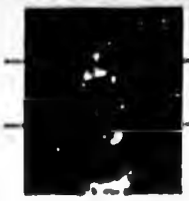
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Torts

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 same 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:

1. 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.

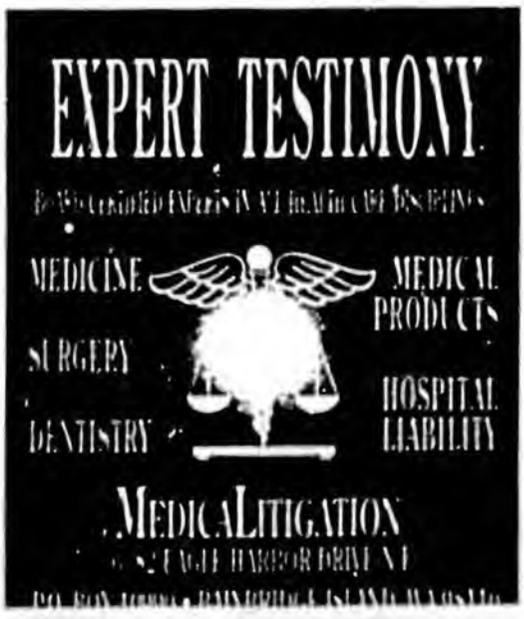
6. The model act contains a public-notice provision. If litigants or any other "interested person" are going to fight over secrecy, the public is given notice of the battle and an opportunity to attend.

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.



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Alaska Bankruptcy Reports

Protective and Secrecy Orders

Time for Change

Eugene I. Pavalon and Thomas G. Alvary

Protective orders and secrecy agreements in products liability actions continue to prevent public access to vital health and safety information, despite growing pressure to keep court files open. Court orders sealing information are of two basic types: protective orders controlling dissemination of materials that are or will be produced during discovery, and secrecy agreements that seal court files and records pursuant to settlements. Although protective orders are easily challenged, they continue to be entered by agreement. Defendants have successfully maintained secrecy by securing judicial cooperation in approving agreed-upon secrecy orders, buying the cooperation of plaintiffs to conduct discovery privately and seal court records following settlement.

The law has recognized the public's interest in access to materials produced in litigation and has long disfavored the sealing of court records. But the legal system has not yet adequately addressed the public policy implications of secrecy orders. Our adversarial system does not easily function as a clearinghouse for important information regarding public health and safety.

Manufacturers have successfully obtained protective orders denying public access to critical information by capitalizing on the plaintiffs' interests in settling or pursuing actions. Judges have not been free to ignore litigants' interest in favor of the broader interest of other plaintiffs and the public, who might suffer from court-imposed secrecy.

The law on protective and secrecy orders is relatively clear. Federal Rule of Civil Procedure 26(c) and similar provisions in court rules throughout the states presume that discovery materials are open to the public unless the party seeking protection can show good cause to close them.[1] In products liability actions, for example, a manufacturer must show the need to protect a trade secret or other proprietary information whose disclosure would cause the defendant economic harm.[2] Proof of good cause requires particularized, specific examples of the competitive harm disclosure would cause.[3]

Most reported cases deal with challenges to protective orders entered either by agreement of the parties or without the careful judicial scrutiny of the good-cause requirement. Once an order is challenged, its existence carries no presumptive weight. The burden is on the party seeking the order to show good cause to avoid vacation or modification of the order.[4] The proper test is not merely to balance the right of access with contravening confidentiality interests; the party seeking protection must make a threshold showing of good cause to continue protection.[5] The procedural posture of the reported cases highlights the degree to which these orders are entered without judicial scrutiny of the clearly established substantive basis for protection.

Secrecy orders once entered are not inviolate. They remain subject to modification by the trial court. Protective orders are unlikely to be challenged by parties to the original action but may be challenged by an intervening party long after conclusion of the case.[6] Secrecy orders may also be challenged by interested third parties.[7]

Plaintiffs in other lawsuits who would be forced to duplicate discovery that is protected by order have well-established grounds for challenging and removing the protective order, since shared discovery falls squarely within the purposes of the federal rules.[8] Judicial economy resulting from saving both time and resources by discovery sharing is consistent with the truth-seeking process of our adversary system, and the practice is over-

Eugene I. Pavalon, a senior partner in Pavalon & Gifford, is a past president of ATLA and of the Roscoe Pound Foundation. Thomas G. Alvary is an associate in Pavalon & Gifford. *©Eugene I. Pavalon.*

whelmingly approved by the courts.[9]

Protective orders entered in the early stages of discovery typically result from a predictable initial course of discovery. A plaintiff seeks discovery of internal records on a product or hazard. The defendant's attorneys often reply that they have a variety of information, some of which could be trade secrets or proprietary business information protectable from competitors.

The plaintiff is then offered one of two options for continued discovery. Option one involves a line-by-line review by the defense of every document it is asked to produce for trade secrets and other privileged business information. This lengthy process is followed by motions to prevent disclosure of the allegedly protectable information, briefs, arguments, and a protracted judicial review of all the defendant's discovery in a struggle over all important information.

Option two is presented to the plaintiff as a good-faith effort to expedite the process by agreeing to a protective order covering all materials produced by the defendant. This is a subterfuge in which the defendant says that avoiding a lengthy and detailed review by the defendant's attorneys will help the plaintiff's attorney quickly and economically evaluate all the defendant's information. As presented to the plaintiff, option two will apparently save time and resources—especially when clear liability has yet to be established.

Consenting to such protective orders results in a serious tactical disadvantage for most plaintiffs. The plaintiffs' experts also must agree in advance to nondisclosure of the discovered information. This impairs their ability to discuss the material with representatives of similarly situated parties or other knowledgeable experts. It also alerts the defendant to the identity of the plaintiffs' consultants. Protective orders create an island of information within lawsuits, prohibiting the broader development of each case that could result from cooperation among similarly situated plaintiffs. Maintaining secrecy throughout discovery also prevents publicizing the case to the legal community and the general public. This may conceal from aggrieved parties the existence of claims arising from similar injuries and prevent procedures to eliminate a hazard.

Clients who understand the public harm that may result from protective orders and sealed settlements will be more likely to oppose them.

Despite the disadvantages of protective orders, plaintiffs' attorneys often agree to them. Mistakenly they believe that they will receive information to which they might not be entitled if the protection issue is litigated or that the defendant will more forthrightly answer discovery requests. Many are also intimidated by the threat of much valuable time lost to motion practice, briefs, and argument.

Another effect of successive protective orders in a series of cases involving the same product is the seeming de jure enoblement of the defendant's claim of trade secrets, even though most protective orders do not provide a substantive basis for protection. Thus, a defendant who has obtained such agreed protective orders in litigation in other jurisdictions involving the same product will be able to refer to the entry of such orders as

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substantive basis, or lack thereof, for the entry of similar orders in other pending cases.

Orders sealing court records pursuant to settlement also allow defendants to limit public dissemination of information relating to consumer safety. Defendants rarely claim that protectable interests are involved; they simply buy the silence of plaintiffs and their attorneys by offering a generous settlement in return for secrecy.

In such cases, the full exercise of plaintiffs' legal rights is brought into conflict with the public's interest in full disclosure. Impecunious plaintiffs with substantial disability cannot be expected to defer to the public's need at their own expense and their family's expense. A plaintiff's consent to a sealed settlement agreement under circumstances like these is understandable.

Sealing orders pursuant to settlement agreements are often entered without the judge's considering the public interest in access to information. In a products liability action for personal injury, the public interest is not represented. Secrecy agreements are obviously in the defendant's interest of avoiding disclosure. The plaintiff's direct interest in the value of a settlement that is conditioned on silence and the court's interest in fair resolution of the action and judicial economy prevail over the public interest in the accessibility of the court documents. The plaintiff's attorney has a primary duty to promote the client's interest and is not free to impose a civic duty on the client at the client's expense.

Early Settlement Offers

Another emerging tactic of defendants is to offer settlement before responding to discovery requests. When a defendant is seeking a protective order in response to discovery requests seeking internal documents, safety reports, or corporate knowledge of product defects, the defendant may offer a substantial settlement to avoid disclosure. If the case is settled before discovery, the defendant is protected from the collateral attack of a secrecy order entered after compliance with discovery.

The lack of publicity about the pendency of litigation further protects the defendant from the adverse effects of wider public awareness that the product is defective and a public hazard. In such cases, courts, collateral litigants, and public interest groups have no opportunity to challenge the secrecy. By settling each case without even responding to discovery, a defendant-manufacturer allows statute of limitations periods to expire and prevents public disclosure of the hazard.

Premium for Silence

Combating the adverse effects of protective and secrecy orders requires considering the public interest within the context of an action between private parties. It also involves considering the degree to which plaintiffs' attorneys and judges may act in the public interest when doing so may damage plaintiffs' interests. When defendants are prepared to pay a premium for silence or when contests regarding protective orders will be protracted and burdensome to the plaintiff, the attorney's responsibility to the client may require consent to the order.

One technique counsel can use to avoid the effectiveness of a sealing order is to promptly disseminate all materials received during discovery to other attorneys representing plaintiffs in similar actions and to attorney information exchanges. Theoretically, this is an effective approach to preventing sealing of court documents at the conclusion of litigation, but practically, little sensitive information is likely to be produced because of the defendant's efforts to maintain secrecy.

An attorney has no specific ethical duty to disclose to the client intent to disseminate such information. There is, however, a question as to whether the general provisions of Canon 4 of the ABA Model Code of Professional Responsibility, Rule 1.6 of the ABA Model Rules of Professional Conduct, or similar state rules require the attorney to clear any such disclosure with the client before providing the information to other persons.

The most effective way for a plaintiff's attorney to avoid the onus of a protective or secrecy order is to inform the client about all issues concerning such orders, including settlement advantages and the public interest, and to secure the client's consent to oppose the entry of such orders. It is our experience that clients who understand the public harm that may result from protective orders and sealed settlements will be more likely to oppose them.

When agreeing to a protective or secrecy order, every effort should be made to limit the scope of its provisions. Plain-

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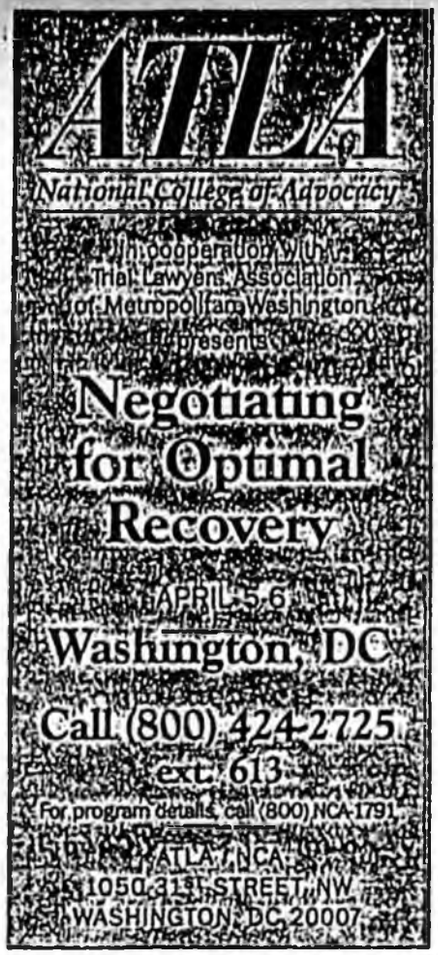
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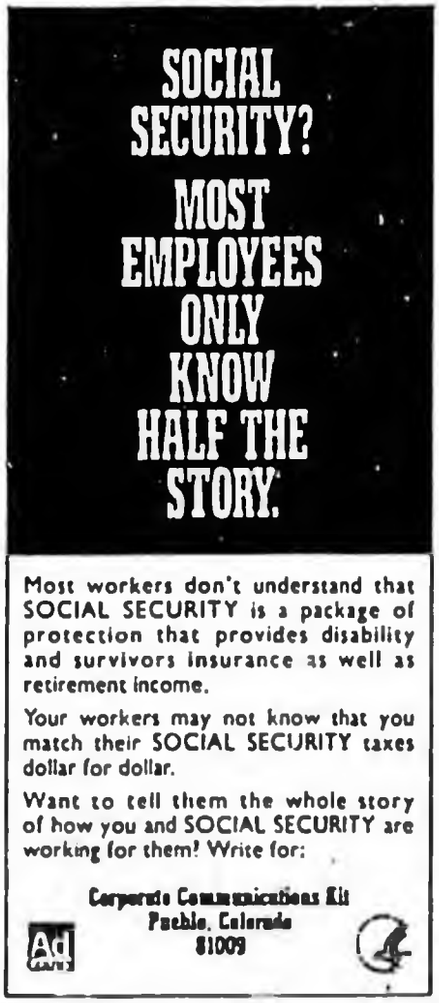
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tiffs' counsel should avoid being prohibited from discussing anything but the designated protected materials with other attorneys, plaintiffs in similar situations, and the press.

Judicial involvement in these orders also raises serious questions about the proper role of courts in determining whether the public interest requires a judge to interfere with the interests of parties to the litigation. Although the public interest in access to court records is well-recognized, the judiciary has little guidance in deciding whether to thwart a settlement agreement that requires secrecy when the public interest may be affected.

Since agreed-to protective orders remain subject to collateral attack and further modification by the trial court, interested nonparties can always challenge such orders. In the absence of interested intervenors, however, a trial judge is at a disadvantage to determine the impact a protective order will have on the public interest.

Typically, settlements that include a secrecy provision are generous to the plaintiff and include a consideration for the plaintiff's agreement to seal court records and production documents. Under such circumstances, a court that is independent of specific guidelines is not likely to judge ad hoc that the public interest outweighs the parties' interest in settling for a fair amount—or the ever-present judicial interest in the economy and the expediency of the settlement process.

State Statutes

In response to this judicial guarding, two states have recently adopted guidelines for the sealing of court records. Texas Rule of Civil Procedure 76(a) provides a detailed standard for the sealing of court records, requiring that good cause be shown for every order. It requires the judge to consider the strong public policy interest long recognized in common law for granting general access to court records.[10]

The Texas rule essentially clarifies and requires active judicial participation in decisionmaking about protective and secrecy orders. But Florida's Sunshine in Litigation Act weighs more heavily on the side of disclosure, removing the protection of secrecy of "information or materials necessary or useful to the public regarding the public hazard," irrespective of the commercial value of such information.[11] Enacted in 1990, the Florida act prevents courts from entering orders concealing information concerning any public hazard regardless of whether the information constitutes a trade secret.[12]

The procedures of both states effectively protect the public and blunt the economic and practical leverage exerted by defendants for imposing protective and secrecy orders. Both reiterate the long established purpose of court secrecy as a device to protect competitive economic interests only, rather than to avoid liability for defective and hazardous conditions by perpetrating public ignorance of their danger. By clarifying the judicial responsibility for court secrecy and placing public safety and interest paramount, both the Texas and the Florida procedures provide sound and reasonable standards for sealing court records.

Rule 26(c) of the Federal Rules of Civil Procedure and corresponding state provisions should be similarly amended. Uniform recognition by court rules of the important interest of the public's access to information regarding defective products and hazards generated through discovery procedures will limit court-imposed secrecy to its originally intended purpose. □

Notes

1 In re Agent Orange Prod. Liab. Litig., 104 F.R.D. 559 (E.D. N.Y. 1985).
2 Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179-81, *reh'g denied*, 717 F.2d 963 (6th Cir. 1983).
3 Parsons v. General Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980); Waelde v. Merck, Sharp and Dohme, 94 F.R.D. 27, 29 (E.D. Mich. 1981).
4 In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig., 81 F.R.D. 482, 486 (E.D. Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981); American Tel. & Tel. v. Grady, 594 F.2d 594, 596 (7th Cir.), *cert. denied*, 440 U.S. 971 (1979).
5 Wilson v. AMC, 759 F.2d 1568, 1571 (11th Cir. 1985).
6 *See, e.g., id.*; Olympic Ref. Co. v. Carter, 332 F.2d 260, *cert. denied*, 379 U.S. 900 (1964).
7 Mokhiber v. Davis, 537 A.2d 1100 (D.C. Cir. 1988).
8 Williams v. Johnson & Johnson, 50 F.R.D. 31, 32 (S.D. N.Y. 1970); Patterson v. Ford Motor Co., 85 F.R.D. 152 (W.D. Tex. 1980).
9 Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Cipollone v. Liggett Group, Inc., 113 F.R.D. 86, 92-93 (D. N.J. 1986) *aff'd*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); In re Halkin, 598 F.2d 176 (D.C. Cir. 1979), *aff'd*, Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).
10 TEX. R. CIV. P. 76 (a)(1). For a detailed discussion of Rule 76 (a), see Duggett, *Keeping Court Records in the Open—Texas Supreme Court Adopts New Rule*, TRIAL, July 1990, at 62.
11 FLA. STAT. §69.081 (7) (1990).
12 *Id.* at 69.081.

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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

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.

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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.

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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

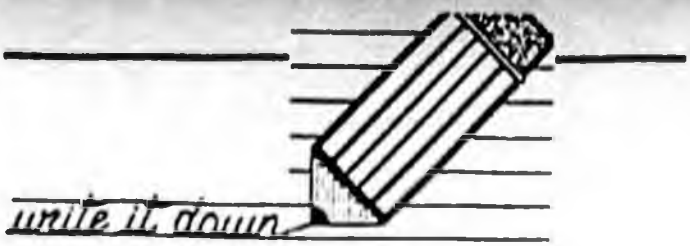
More Bills Introduced in the House. On October 8th and October 17th, 1991, similar bills to provide economic incentives to promote the development of alternative dispute resolution systems for medical malpractice claims were introduced in the House and Senate, respectively. The bills -- H.R. 3516 and 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.

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- please limit your notice to 50 words or less
- include your name and phone number
- we will list your notice in the next issue



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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
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Charles Coe	Laurel Peterson
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THE ALASKA TRIAL LAWYER

Volume 7, Number 10 | Published by The Alaska Trial Lawyers | December 1991

PRESIDENT'S COLUMN

by Paul Cossman

I recently got a call from an editor at the Anchorage Times seeking information about tort reforms. Apparently, they will be publishing some opinion pieces about the 1987 initiative proposal to limit contingency fees. For those of you who may have forgotten, that part of the tort reform initiative was stricken by Lt. Governor Steve McAlpine as unconstitutional. The Citizens Coalition for Tort Reform filed a lawsuit in which we intervened. After prevailing through the Supreme Court, we were awarded attorney's fees against the Citizens Coalition for Tort Reform.

The Citizens Coalition for Tort Reform is now known as Alaskans for Liability Reform. Their acting Executive Director is Al Tamagni. Tamagni was one of the original founders of the Citizens Coalition back in 1985-86. I went to one of the board meetings of the Citizens Coalition back in '86 and found him to be one of their most rigid doctrinaires.

This would all be ancient history except for the fact that the tort reformers are again trying to sway public opinion through the media. Why are they bringing up such a dead issue?

The most likely scenario is that the tort reformers are gearing up for a major offensive in the event that redistricting presents us with a Republican majority in both houses of the Legislature. Our marching orders appear to be pretty clear. First, we must make sure that the House retains its Democratic majority. Second, we much once again ready ourselves for a public opinion fight on the issue of tort reform.

TRUST REPORT:

SUNSHINE IN LITIGATION: AN IDEA WHOSE TIME HAS COME

by Russ Winner, Chair

Trial Lawyers for Public Justice initiated a national campaign against secrecy in the courts in October of 1989 by seeking public access to documents under seal in a landmark $5.7 million all-terrain vehicle (ATV) case in Oregon. Announcing the establishment of "Project Access" to fight court secrecy nationwide, TLPJ challenged a protective order in Oberg v. Honda, Case No. A8709-05897 (Cir. Ct. Ore. February 21, 1990), the first case to award punitive damages against an ATV manufacturer. Project ACCESS has since helped injured consumers, their lawyers, the press and the public gain access to information about dangerous products, environmental hazards and other matters of public significance.

Here in Alaska, the House Judiciary Committee, chaired by Representative Dave Donley (D., Anchorage), introduced HB 171 last session, a bill restricting court orders and certain private agreements relating to the concealment of public hazards. The bill is currently before the House State of Affairs Committee. Representative Gene Kubina (D., Valdez) is chair of that committee. As would be expected, big business, industry and oil companies and civil defense lawyers have voiced opposition to this bill. Paul Cossman, a Trust steering committee member, and I met recently with Representative Kubina to discuss our reasons for supporting this bill.

In an opinion piece for the Anchorage Times this past May, Mary Nordale, representing the interests of the American Insurance Association, wrote that HB 171 would "destroy the courtroom as a place in which to settle disputes. It would lead to...blackmail against target defendants." She even went so far as to predict that passage of the bill would close "the local hardware store" and people would lose jobs. A little extreme? Read on.

Kathryn Kolkhorst, representing the Motor Vehicle Manufacturers Association and Lawyers for Civil Justice, testified before the House State Affairs Committee last session in opposition of the bill. Ms. Kolkhorst testified that passage of HB 171 would interfere with the state court system and tie the hands of judges and that the real reason behind this legislation was to allow plaintiff's lawyers to perpetuate the litigation explosion and generate additional contingency fees.



continued on page 3

The Alaska Trial Lawyer

Alaska Academy of Trial Lawyers

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EDITOR'S NOTE

Articles contributed to *The Alaska Trial Lawyer* are welcome at any time. Please submit to:

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The Alaska Academy of Trial Lawyers publishes its current contributors in *The Alaska Trial Lawyer* in recognition of their commitment to the goals of the Academy. To inquire about becoming a monthly contributor, contact Debra Gravo, Executive Director, at 258-4040.

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Do you know anyone who is a member of the Alaska Academy of Trial Lawyers, but not an ATLA member? If so, please encourage them to join ATLA. It is ATLA and its energized membership and consumer group allies that prevent the erosion of important legal and civil rights. For more information and an ATLA application, call Debra Gravo at 258-4040.

Got a complaint? A compliment? A clarification? A burning issue to discuss? Write us! Letters to the editor are encouraged and welcome. We reserve the right to edit for space considerations. Send your comments to: The Alaska Academy of Trial Lawyers, P.O. Box 102323, Anchorage, Alaska 99510.

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 pu' lic 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 lim 't 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.

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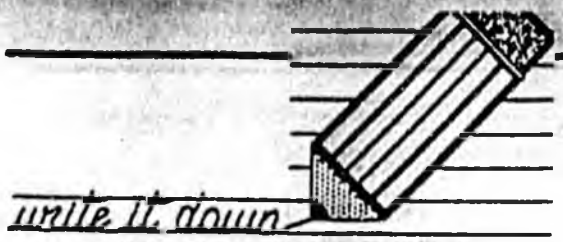
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ATLA Winter Convention
January 12-16, 1992
Boca Raton Resort
Boca Raton, Florida

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

IF YOU SEE THESE MEMBERS, STOP THEM AND SAY "THANK YOU"

Preserving the jury system, promoting victims' rights and protecting our ability to practice personal injury law carries with it a big price tag. The Alaska Action Trust could not exist without the generous monthly contributions and commitment of the following members. To inquire about becoming a monthly contributor, contact Debra Gravo, Executive Director, at 258-4040.

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MOMENTUM GAINED FOR PRODUCT LIABILITY

Product liability reform has been upstaged by solvency, the single biggest insurance issue of the year.

Although lost in the midst of congressional and consumer calls for greater scrutiny of insurers, product liability reform nevertheless remains a perennial battle.

Reform proponents, including businesses and many of their insurers, call for passage of House and Senate bills that would pre-empt state product liability laws and establish federal rules.

Would-be reformers face an uphill march in the 12-year-old battle. Introduced often, reform, despite its formidable corporate backing, has never gained enough votes to pass because of overwhelming consumer opposition.

"Federalizing products law is not a good idea," said Roxanne Barton Conlin, president-elect of the Association of Trial Lawyers of America. "It's a bad law. It's just not going anywhere. No chance. The federal product liability bill is an effort on the part of manufacturers to get themselves exempted when they make defective products that hurt people."

For instance, Senate Bill 640, the Product Liability Fairness Act of 1991, calls for the victim to pay attorney fees and costs of the opposing party if the victim refuses a settlement offer that turns out to be greater than that awarded in a verdict. Furthermore, the bill increases the victim's burden of proof by requiring "clear and convincing" evidence that the defendant's conduct "manifested a conscious, flagrant indifference" to public safety.

The bill also establishes a defense against punitive damages for drugs and medical devices that have government approval, as long as there was no fraud in obtaining the approval and no bribery of government officials, according to a summary of the bill prepared by the Product Liability Alliance, a coalition of businesses.

WELCOME!!!

The Alaska Academy of Trial Lawyers welcomes Jeffrey Mayhook and David Weber as new sustaining members.

A BANK WITH LOTS OF INTEREST

Our Deposition Bank is an invaluable tool to the trial lawyers, but we need your help to keep us up to date.

Send us your latest briefs and most recent transcripts on experts — doctors, economists, engineers, etc.!!!

The Academy currently has copies of depositions of the following individuals:

- John William Aker — manager of the Yakutat Fisherman's Cooperative
- Martha Andrew — rehabilitation consultant
- William Bell — family practice physician
- David Bickerstaff — Milliam & Robertson Inc.; casualty actuarial team
- Joe Blackard — road builder
- Richard Block — director, Division of Insurance, Department of Commerce & Economic Development for the State of Alaska
- Freda Marie Borchick — property owner in Juneau
- J.C. Borchick — property owner in Juneau
- George Brown — orthopedic surgeon
- Charles Chandler — d/b/a Chandler Sporting Goods & Hardware in Juneau
- Virginia Collins — certified rehabilitation nurse and certified rehabilitation counsellor
- Lawrence Dempsey — neurosurgeon
- William Maurice Dickson — biology, commerical fishing, guiding, flying, mostly land development (Stephan, et al. v. Nelson, et al.)
- Edward J. Dierick — State Department of Transportation & Public Facilities, superintendent of airport and highways in Yakutat
- J. Paul Dittrich — orthopedic surgeon
- Betty Eneboe — registered nurse
- Paul Eneboe — family practice physician
- Ken Fallon — social worker at the Langdon Clinic
- Terrance Gallagher — Magistrate for the State of Alaska at Yakutat, cook for the Yakutat School System, commercial fisherman
- George Gates — orthopedic surgeon
- Karl A. Hahn, Jr. — claims superintendent for State Farm
- Frank Harrison — Chancellor at UAA
- Christopher Horton — orthopedic surgeon
- Gregory Jerue — d/b/a Capital Decorators, contractor in Juneau
- Sidney Michael Johnston — controller for Stephan and Sons, Inc. (Stephan, et al. v. Nelson, et al.)
- Vincent Jolivet — financial and economic consultant (two volumes)
- William Judson King — accident reconstructionist and human factors expert
- David R. Knowles — consulting ecooomist
- Donald Koch — Division of Insurance
- J.R. Langdon — psychiatrist
- William C. Lange (Vols. 1 and 2) — businessperson (Petro Marine Service v. Lange, et al.)
- Tina Long — works at the Airport Lodge
- Richard Maness — cashier at the Bank of Columbia Falls, Columbia Falls, Montana
- John McCarthy — dentist
- Polly March — claims representative for State Farm
- Lana Martin — firearms expert
- Ronald A. Martino — psychiatrist and neurologist
- Mary Moran — vocational counsellor for worker's comp claims
- Thomas Mungle — homeowner in Juneau (Paddock v Ulery)

- Bill Nelson — d/b/a Nelson and Associates (Stephan, et al. v. Nelson, et al.)
- Michael Newman — orthopedic surgeon
- T.O. Paddock — d/b/a T.O. Paddock, contractor in Juneau
- Thomas Parke — Chief of the Fisheries Tax Division, Department of Revenue for the State of Alaska
- Dr. David E. Peach — physician of internal medicine
- Lynn Ravsten — professor of psychology
- Donald R. Rogers, M.D. — pathologist
- Irvin A. Rothrock, M.D. — child and forensic psychiatrist
- William B. Ruger — President of the Sturm Ruger Company Inc, manufacturers of firearms
- David D. Sandberg — licensed psychological associate for Ohlson Psychological Services
- Joseph A. Shields, M.D. — orthopedic surgeon
- Gary D. Sloan, Ph.D. — human factors and ergonomics expert in Washington state
- Douglas Grant Smith, M.D. — orthopedic surgeon
- Reid H. Smith, — President of Norther Adjusters (court transcript, Vol. IV in Weiford v State Farm)
- David J. Sperbeck, Ph.D. — clinical and forensic psychologist
- Dennis Spurrier — police officer
- Craig Stewart — first grade teacher for the Yakutat City School
- John Talbott — forensic engineering expert (three volumes)
- Daniel R. Ulery — general contractor, in partnership with Greg Jerue
- Thomas P. Vasileff — orthopedic surgeon
- Edward M. Voke, M.D. — orthopedic surgeon
- Thomas R. Wickwire — attorney for the Attorney General's Office, Civil Section in Fairbanks

Other documents include:
Documents relating to roll-over protection.
Plaintiff & defendant exhibits in the Weiford case.
Jury instructions in the Weiford case.
McClellan: briefing on a motion to compel plaintiff to appear for a psychiatric exam in a personal injury case.
Dunaway: briefing on joint & several liability in Alaska and concurrent tortfeasors as indispensable parties; we also have an order from a case in southeast Alaska (Owens) which addresses the interpretation of the new several liability statute and comes to conclusions slightly different than those arrived at by Judge Fabe in this case.
Racine: briefing on punitive damages and lost profits in a tort claim for breach of a professional contract of employment.
Kulawik: Supreme Court briefs dealing with the question of (1) recovery of lost inheritance damages in wrongful death cases and who may recover those lost inheritance damages, and (2) the application of the income tax rules in Beaulieu to wrongful death cases.
Matlock: briefing on official immunity.
Vincent: application of Alaska's good Samaritan statute to a hospital emergency room.
Mellott: briefing on the statute of limitations discovery rule in medical negligence cases.
Davis: Superior Court brief on discretionary immunity for road design decisions involving crosswalk striping and warning signs.
Chi: briefing on an insurer's reservation of rights triggering the insured's right to independent counsel.
Shaw: briefing on a motion to compel plaintiff to submit to Rule 35 examination.
OK-Sun B. Preisinger: briefing in insurance bad faith case where defendant seeks unrestricted medical release from plaintiff.
George: defenses to liability under 42 U.S.C. section 1983 based on (1) the fact that state law affords an adequate remedy and (2) qualified immunity.
Baptiste v. Blumenshine: recent 1st Judicial District DWI case with various trial court rulings pertinent to personal injury cases, in particular, the automobile case; trial court decisions and orders re: punitive damages, comparative negligence, comparative negligence - punitive damages; discovery and discovery sanctions, evidence and hedonic damages.
Hughes v. Harrelson: briefings on statutory interpretation of A.S. 28.20.440 in conjunction with A.S. 2[illegible].89.020 and 28.22.010(d); the argument made is that the statutory language of these statutes compels payment of prejudgment interests in addition to the face amount of the policy.

LETTER TO THE EDITOR

Dear Editor:

Re: Pre-trial rulings in Baptiste v. Blumenshine

This recent First Judicial District DWI case was an opportunity to secure trial court rulings from Judges Carpeneti and Weeks on a number of issues common to personal injury cases, in particular, the automobile case. Some of the issues were unsettled in Alaska, others were more limited and unique to the facts.

The issues and holdings [are summarized below] . . .

Pleadings

1. Punitive Damages:

   A defendant's conduct in driving while intoxicated is so reckless and wanton that plaintiff is entitled as a matter of law to plead and argue to the jury a claim for punitive damages.

2. Comparative Negligence:

   Defendant's conduct in driving while intoxicated is not so reckless and wanton that he is prohibited from arguing plaintiff's comparative negligence. Plaintiff argued under McLemore v. Harris (a pre-Kaatz case) that pure comparative negligence was not applied when a defendant's conduct was wanton, reckless or intentional.

3. Comparative Negligence - Punitive Damages:

   Even though one pure comparative negligence is applied in a DWI case and a defendant can argue plaintiff's negligence, if any, in the accident, the negligence of a plaintiff is not applied to reduce a punitive damages award.

4. Discovery:

   Plaintiff was entitled to:

   a. All insurance company records (except those pertaining to liability and settlement value of the case) before defense counsel advised plaintiff he was representing the defendant. The insurance company had on-going contacts with the attorneys in the defense firm for several months, but none of these attorneys, including the future defense attorney, advised plaintiff they were representing defendant or the insurer. All insurance company records generally (with the exception previously noted) therefore had to be produced, until the defense noticed its representation.

   b. Plaintiff was entitled at deposition to inquire whether the defendant ever talked to another lawyer independent of his then attorney regarding an offer of judgment made by plaintiffs.

5. Discovery Sanctions:

   Defendant's seat belt expert was struck as a witness for failure to release the expert's report until the day of the deposition. Plaintiff has been asking for the report for almost a year and defense counsel had expressly denied in pleadings and on the record at a deposition that no such report existed.

6. Evidence:

   Defendant's history of driving while intoxicated was admissible on the issue of culpability when the jury considered whether to award punitive damages. However, defendant was entitled to introduce rehabilitation evidence after the collision to establish that an award of punitives was not appropriate.

7. Hedonic Damages:

   Stan Smith, an economist and plaintiff's hedonic damages expert, was admitted over defense objection and allowed to testify to the value of a human life to assist the jury in addressing pain and suffering damagers (loss of enjoyment of life). Plaintiff's psychologist, however, was not permitted to testify on the degree (or percentage) to which plaintiff's loss of enjoyment had been impaired as a result of permanent injuries from the collision.

Very truly yours,

Loren Domke

The above materials are available at the Academy office.

WORKERS' COMPENSATION EXCLUSIVITY: IS IT HERE OR IS IT GONE?

by Vivian Senungetuk

"Workers' compensation claimants have sued compensation insurers in more than 30 states, alleging a panoply of torts, including willful failure to pay compensation, unreasonable delay designed to force an unfair settlement, intentional infliction of emotional distress, malice, deceit, misrepresentation, and outrageous conduct and conspiracy in the handling of claims.

Compensation insurers defend on the ground that the exclusive remedy provisions in the state workers' compensation statutes preclude these actions. They argue that all disputes between injured employees, employers and compensation insurers must be presented to the state board or commission that administers the workers' compensation system and makes the award. They contend that the penalty provisions of the statutes provide the remedy for both intentional and unintentional denial or delay in the payment of benefits.

Courts hold that mere delay in the payment of compensation benefits is indeed a matter to be addressed within the workers' compensation system. When, however, claimants allege malice and outrageous conduct that causes physical damage or emotional distress, the courts are in disagreement. In some jurisdictions, tort actions may lie against the workers' compensation insurance carrier. In others, suit against a carrier is barred, except when it commits an unlawful or egregious act, such as breaking into the claimant's home or dating the claimant to obtain personal information.

There does not appear to be a national trend, either toward permitting a common law action or toward barring one. Most of these cases have appeared in the last few years, although there is a relevant decision in New York as early as 1935. Suit is permitted in some jurisdictions when damage to the plaintiff appears minimal; in others, it is barred when damage is severe. In jurisdictions where suit is barred, the courts declare their intention to preserve the integrity of the workers' compensation system. In jurisdictions where suit is permitted, the courts simply allow an alternative forum for the aggrieved claimant."

The above paragraphs are taken from an article published in the October 1991 issue of the Defense Counsel Journal.

The 16 page article is a national survey which attempts to cite and describe every reported bad faith claim against a workers' compensation carrier, through 1990. It lists thirty-two states and two federal statutes. The case law covers such fascinating topics as:

- whether a bad faith claim can defeat subrogation of a recovery for a manufacturing defect (Alaska): it can.
- the reliability of motion picture evidence (California): pretty good.
- differences in the standard of care in first party v. third party claims against insurers (Colorado): significant.
- the exclusivity bar in asbestos cases (Delaware): allege collusion.
- a carrier's duty to raise available defense to a garnishment for child support (Georgia): deadbeats from hell.
- third party action under the Structural Work Act (Illinois): potential.
- Insurer's conspiracy with physicians (Arkansas, Florida, Indiana and New York): tell it to the Board.

The article concludes:

"Even in jurisdictions in which courts are attempting to uphold exclusivity provisions of the workers' compensation system, when employees present evidence of truly egregious conduct by workers' compensation insurers, bad faith claims are being recognized. What may strike one court as egregious may not impress another in the same way. In California, for instance, it's an investigator filming his date at Disneyland. In Arizona it's a carrier defying the order of an administrative law judge.

Within this decade of the 1990s, the exclusivity barrier may be broken in every jurisdiction. But the barrier is not falling like the Berlin Wall. An employee usually must present compelling evidence of bad faith before a first party claim against a compensation carrier will be recognized, and it still will be recognized as an extraordinary remedy."

Copies of Vivian Senungetuk's entire 16 page article can be obtained from the Academy office by calling 258-4040.

AMERICAN HEALTH CARE IN CRITICAL CONDITION

The cover story of the November 25th issue of gets to the heart of what troubles and costs Americans the most right now: health care.

The article recites several mind-boggling facts. For example, Americans spend $23,000 a second on medical care, more than $2 billion a day, $733 billion a year. Last year General Motors spent more on medical coverage than on steel. And the subject of health care has become a litmus test of American politics.

After a diagnosis of several troublesome areas, the article offers 10 solutions to 10 of the most important problems surrounding the American way of medical care.

In addition to pertinent problems like medicaid and medicare, fraud and abuse, disappearing doctors, the hospital glut, fairness and waste, two problems are particularly noteworthy. They are, physician compensation and unnecessary care.

The Problem: Physician Compensation

In the days when patients paid doctors from their own pockets, doctors were cautious about the amount of medical service prescribed and the charges levied. Doctors knew their decisions could devastate a family's finances. Besides, patients balked at unreasonable prices. However, over the past 40 years, as vast insurance pools were created through company benefits plans and the huge Medicaid and Medicare systems, cost concerns diminished.

Under such circumstances, insurance is like a blank check. Research shows that doctors paid in fee-for-service programs order 50% more electrocardiograms and 40% more X-rays than physicians in managed-care groups. Some doctors attend seminars on "creative billing," where they learn to describe medical treatment in terms that will yield the highest prices. When auto-repair shops or lawyers do that, it's called padding the bill. For doctors, it's known as "unbundling." Some maintain that physician "unbundling" is done in the spirit of Robin Hood, overcharging people with good insurance in order to charge less for the treatment of poorly covered patients. In any event, it seems the medical establishment is winning the accounting war.

The Solution: Cap Physician Fees (or Managed Care)

The authors contend that group insurance providers should insist that doctors treating their patients be paid salaries or flat fees. Such a system is already employed by many HMOs, which charge group-insurance plans an annual fee for treatment and produce dramatic savings. Treating over 40 million Americans last year, HMOs cost an average of 17% less than the cost of traditional indemnity plans.

The Problem: Unnecessary Care

The article contends that unnecessary care is fueled by "fear of malpractice lawsuits" which in turn drives doctors to perform many extra procedures to protect themselves against accusations of negligence. The A.M.A. estimates that defensive medicine adds $21 billion to the U.S. health-care bill every year. Others believe the cost is several times that. Some reformers insist that juries in malpractice cases share the blame by punishing doctors not only for shoddy practice but also for their human limitations.

On the other hand, many doctors and hospitals overtreat patients simply because they have a blank check to do so under many insurance programs. Some figures contend that 20% of all medical procedures and treatment is completely unnecessary. Many doctors challenge such findings, arguing that it is better to be safe than sorry.

The Solution: Cap Non-Economic Awards

The article advocates capping non-economic awards in malpractice cases. The authors cite California has having one of the lowest malpractice premiums in the U.S. because of placing a limit on such awards in 1975 ($250,000 cap on pain and suffering). No data is given to back up that claim however.

NEW STUDY SETS RECORD STRAIGHT ON PUNITIVE DAMAGES AWARDS

A landmark empirical study on punitive damages awards in products liability cases has confirmed that punitive damages rarely penalize corporations that take reasonable precautions.

The study, *Setting the Record Straight*, was conducted by Michael Rustad, professor of law at Suffolk University, and Thomas Koenig, professor of sociology at Northwestern University. The research was supported by a grant from the Roscoe Pound Foundation, which is publishing the results this year.

Rustad and Koenig tracked punitive damages verdicts in products liability litigation during the last 25 years. They analyzed the relationship between amounts awarded by a court and those actually received by a plaintiff. They found that few manufacturers were assessed punitive damages unless they had prior knowledge of a known risk that they failed to correct.

"The typical plaintiff was pennanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous," note the authors.

A conclusion that can be drawn from the study is that the impact of punitive damages on competitiveness is minimal. According to the authors, the collected data show that "punitive damages are rarely awarded, even more rarely collected, and in the vast majority of cases, richly deserved."

The Academy hopes to have these findings available to interested members the beginning of the new year.

COULDN'T ATTEND DEFENSE CONFERENCE '91? THE COURSE MATERIALS CAN STILL BE YOURS!

Just because you couldn't make it to the Criminal Defense Conference this year doesn't mean the course materials are off limits. For $75 a complete copy of the materials are available to you. But hurry! We have already received many requests for copies, and more are sure to follow.

Each binder includes the following:

- "Opening Statements by a Defense Attorney in a Criminal Case" and "Cross Examination," by Terence F. MacCarthy.
- "Motions Hearings: A Million Questions to Ask and the Legal Authority to Back You Up," by Linda Hotes.
- "Client Preparation and Direct Testimony" and "Acting For Lawyers - Welcome to the Theater of the Absurd," by Dale T. Cobb.
- "Experts: Can You Use Them or Only Abuse Them?" by Bert Nieslanik.
- Class Materials for Lecture by Charles V. Morton (Forensic Scientist)
- Class Materials for Lecture by Dennis G. Fitzgerald (Lawyer, Investigator)

Call the Academy office at 258-4040 for your notebook today!

Invite a Friend to Join The Academy

THE ALASKA TRIAL LAWYER

MAKE A DIFFERENCE . . .

VOLUNTEER!

The second session of the 17th Legislature begins Monday, January 13th, 1992. During every legislative session the Academy office receives numerous inquiries from legislators and their staff, requesting input from trial lawyers on various pieces of draft legislation. Typical areas of concern are: civil liability issues, workers' compensation, auto insurance issues, insurance reform in general, secrecy orders, medical malpractice issues, criminal law issues and changes in rules of civil procedure. Oftentimes, the legislator wants to have a one-on-one conversation with a trial lawyer. Other times, written or verbal testimony regarding the bill and/or issue is needed. The Alaska Academy of Trial Lawyers and Alaska Action Trust are looking for volunteers within the two organizations to provide this invaluable input. If you are interested in making a difference in the legislative process, please call Debra at the Academy office, 258-4040, and sign up to be a volunteer.

Our January dinner speaker will be Dr. Paul Craig. Dr. Craig will talk about the mechanics of brain injuries, recognizing when a client has brain injuries, the treatment of brain injuries and presenting evidence of brain injuries. This should be an informative evening so plan now on attending.

Attorney challenging constitutionality of Alaska's new "Pot Law" wants to hear from others who have or plan to – for exchange of ideas and research. Contact Dan Wayne, 130 Seward Street, Juneau, Alaska, 99801. Telephone 907/586-2770.

FEAR McCARRAN REPEAL WILL JAR INSURANCE TRADE

According to a recent article in the *Journal of Commerce*, congressional scrutiny of the insurance industry's regulatory framework has prompted some industry groups to back off from their long standing opposition to changes in the McCarran-Ferguson Act.

However, the National Association of Independent Insurers, an industry group representing about 560 property/casualty insurance companies nationwide, will not follow suit. It refuses to accept any modifications in the act, the 46-year old legislation providing the industry with state regulation and a limited antitrust immunity.

Examination of the insurance industry's regulatory status began with the publication of a report issued in November 1989 by the General Accounting Office. The report seriously questioned whether the state regulatory system adequately safeguards consumers.

As evidence to support its case, the GAO cited an alarming escalation in insurance company insolvencies throughout the last decade.

A congressional research agency, the GAO issued two additional reports this past May that added momentum to the effort to re-regulate the industry. Both were harshly critical of state procedures to regulate insurers for solvency.

EXPERT WITNESS FILE NEEDS YOUR CONTRIBUTIONS!!!

The Alaska Academy of Trial Lawyers is in the process of updating our expert witness file. The file currently consists of several local and out of state experts.

We are asking members to submit names of experts they have used in litigation and/or know to be reliable. We are seeking experts in a wide variety of areas: medicine, economics, all areas of engineering, automotive and marine design, highway safety, aviation, product liability, etc.

If you know of expert witnesses who might like to be listed in our file, please submit the following form to:

The Alaska Academy of Trial Lawyers
P.O. Box 102323
Anchorage, AK 99510

Each expert will be contacted to ensure that s/he is willing to be included in the file before any referrals are given.

EXPERT WITNESS REFERRAL FORM

Name of Member Making Referral _____

Name of Expert _____

Type of Expert _____

Expert's Phone Number _____

Expert's Address _____

City, State, Zip _____

Area(s) of Expertise _____

_____

Comments _____

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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

USA TODAY 1/30/92

Release of information 'never tells full story'

Defense attorney James Morris wants to know: "How public do you consider your diary? Or your medical records? Or your sexual habits?"

He considers that information "highly personal" and thinks the same privacy should apply to some court records of corporations and individuals.

"There is absolutely no constitutional right in this country" to information such as trade secrets, psychiatric records, tax, credit and business records or other personal data that could provide additional facts in a lawsuit simply because individuals or corporations become involved in litigation, Morris says.



Morris

He points to the silicone gel breast-implant controversy as an example of why such information — called "discovery information" — "never tells the full story and seldom tells the truth."

"When you look at the thousands of documents that will eventually be revealed, just releasing information piecemeal without hearing the whole story creates a potential prejudice to the public.

"Many plastic surgeons are upset over this limited information being revealed about the implants when thousands of women are exercising their free choice," he says.

The Richmond, Va., lawyer adds that it is judges who make the decision to seal court records, and not corporations or individuals. Among the things judges consider, he says, is whether the information is a danger to the public.

Morris agrees that there is information the public has a right to know, and says federal agencies are already in place to gather this type of information. But he argues that its dissemination should not tie up the courts and interfere with justice.

"If we can't have protective orders in civil justice cases and have to argue every single document of tens of thousands rather than agreeing to make them confidential, nobody would get the cases tried."

— Sharon Shahid

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 if 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 1/20/92

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.

Alaska State Legislature

need fn

April 3

House of Representatives

House Judiciary Committee

Chairman Dave Donley

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

MEMORANDUM

TO: Representative Gene Kubina, Chair
House State Affairs Committee

FROM: Representative Dave Donley, Chair
House Judiciary Committee

RE: Request for hearing on HB 171, prohibiting secrecy agreements in lawsuits.

DATE: March 1, 1991

I would greatly appreciate it if you would schedule HB 171 for a hearing at the earliest possible opportunity. 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.

Thank you for your attention to this request.

DD/hk

REPRESENTATIVE
MARK BOYER

VICE CHAIRMAN
HOUSE FINANCE COMMITTEE

Alaska State Legislature

House of Representatives

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January 31, 1992

P. Dennis Maloney
Maloney & Haggart
405 West 36th Avenue, Suite 200
Anchorage, AK 99503

Dear Dennis,

Thank you for your recent letter regarding HB 171, prohibiting sealing of certain court records. I hope that everything is going well with you.

As you are aware, this is a controversial issue in the legal profession. The bill is still in the House State Affairs Committee, its first committee of referral. The committee heard testimony on HB 171 last year but has not yet scheduled it for additional hearings this session. In speaking with Representative Kubina, he does intend to bring it back before the committee in February.

This legislation will not be coming through the House Finance Committee, of which I am a member. So at this point I can't comment on the merits of the bill. However, from your letter it sounds to me like a fairly straight forward consumer right-to-know bill and ought to move. Dennis, I know that you've written to other members and hopefully interested others in moving the bill along. I'll do what I can to stimulate the debate.

Thanks again for sharing your opinion with me.

Sincerely,

Mark Boyer
Representative

cc: Representative Dave Donley
Representative Gene Kubina

FAIRBANKS 20B

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

Breaking the seal on product liability

The civil court system, publicly funded and operated, often participates in keeping secret details of out-of-court settlements that involve products and companies that present risks to the public safety. Legislation to break the seal and bring such consumer-safety information into the light of public scrutiny is not only welcome but overdue.

Often, the victims of mistakes and products of the companies against whom they bring suit must risk the expense and stress of a trial and the prospect of winning nothing, or settling for at least something by agreeing to keep the details of the settlement secret.

If they do settle and the court seals the records of that settlement, what of the other people who have been or will be victims of the same mistakes and products?

Rep. Marlin Appelwick, D-Seattle, is sponsoring legislation that would allow Washington to lift the veil of secrecy from product liability settlements.

The legislation would essentially require the civil courts to shift from an assumption of secrecy to an assumption of openness. The assumption would be that no information would be sealed unless it passed two fundamental tests.

The first would be that the sealing would involve no issue of repeated risk to the public. The second would be that in a case that does involve such risk the information to be sealed is not relevant to the risk, thus protecting purely proprietary information from competitors.

The "public's right to know" may seem a tattered cliche, but surely the public has the right to product safety information garnered through its court system.

The Boston Sunday Globe, March 10, 1991, [A31:1]

Renewed tension between right to privacy and the public's right to know

ARTHUR R. MILLER

To the person on the street, the American legal system often seems bewildering and overused, but nonetheless distant and unrelated to daily life. Consequently, most people would be outraged to learn that for less than $50, the fee for filing a lawsuit, a neighbor has the legal right to compel them to turn over all of their bank statements, medical records, income tax returns, religious documents, school records and other private information, so long as the information is likely to lead to other information that may be related to the lawsuit.

The outrage might intensify upon learning that the neighbor could then give or sell this information to gossips, the press, con artists, or any other buyers, unless the court issues an order prohibiting public disclosure, commonly called a protective order.

Should the courts have the authority to issue protective orders to keep private information confidential? Of course. If the court has the power to compel broad intrusions into private matters to resolve a lawsuit, it must also have the power to protect this same private information from further public disclosure outside of the lawsuit.

Although the answer may seem obvious, it is the source of controversy within the legal community and the media. This controversy has also caused consternation among members of the business community, who frequently are involved in litigation and who rely upon the courts' power to protect confidential trade secrets and other commercial information in order to maintain their competitive livelihood.

Behind this controversy are members of the media, and lawyers who handle personal injury cases, who claim that courts are using their power to protect information about public health and safety that the public has a right to know. To prevent courts from keeping information secret, these groups are lobbying state and federal legislatures to change the law. They want to restrict or eliminate the power of courts to keep private information produced in a lawsuit confidential.

Although Florida and Texas have acted precipitately and done so, there simply is no need to change the current system. Such an effort is under way in Massachusetts.

As any poor soul slapped with a lawsuit will tell you, courts must have the power to protect privacy when necessary.

There is no reason to believe that they have used that power to the detriment of the public's right to know. Courts have fine-tuned the classic tension between the right to privacy and the public's right to know for centuries. In recent years, this fine-tuning has led to greater public access. A few anecdotal cases have been put forth in the media, and by personal injury lawyers, allegedly demonstrating that courts have hidden information affecting public health and safety. Upon investigation, none of these war stories actually establishes a link between information kept confidential in court records and subsequent harm to the public.

Instead, investigation reveals that both the media and personal injury lawyers have an insatiable thirst for information – it is an essential fuel to their professional and financial well-being.

Those advocating reduced confidentiality in the courts undervalue competing privacy and property interests.

Although the public interest may be served when court proceedings are open, at times confidentiality serves equally important public interests. Arguably, restrictions on court authority to guarantee confidentiality might discourage someone from reporting instances of government fraud or corruption out of fear that his identity will be revealed in subsequent litigation, making retaliation against him possible.

Confidential news sources might dry up for similar reasons. Fear that prior medical treatment or marital difficulties might be disclosed publicly could cause some people to forgo legitimate legal claims altogether. Society is not served when the price of seeking civil justice is the sacrifice of the right to be let alone. This is a right of increasing importance to human dignity in a computerized society that provides instant and universal access to information once it has been captured.

To businesses involved in litigation, confidentiality is often the only means to protect million-dollar investments in trade secrets, intellectual property, and other proprietary information. Preventing this type of information from falling into the hands of business rivals is central to maintaining a competitive edge. Indeed, trade secrets and the like are considered property, and the protection of private property rights is one of most fundamental obligations of our legal system.

Finally, confidentiality is an important judicial tool that facilitates the resolution of a lawsuit by encouraging litigants to exchange information among themselves freely without fear that it will be disclosed publicly. Society's interest in the prompt, inexpensive resolution of legal disputes is compromised when we take these tools away from our already overburdened judiciary.

As the proponents of restrictions on confidentiality argue, the courts are public institutions. But this concept has meant that the courts are open to the public in order to resolve legal disputes and to allow the public to observe the justice system in action. Until this recent controversy, this concept never stood for the proposition that the courts are like fishbowls through which the public can observe the most intimate affairs of the litigants suspended in the civil justice process.

Lawsuits already are highly invasive and impose inordinate costs in both time and money. Legislatures should not raise these costs by restricting the power of courts to assure privacy and confidentiality when necessary.

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School.



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 same 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:

1. 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.

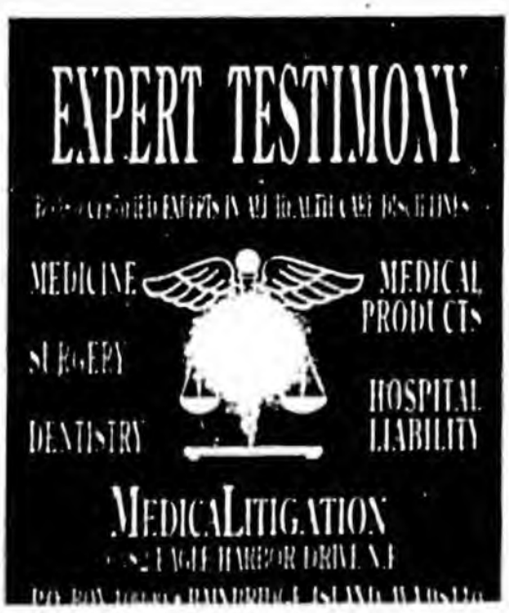
6. The model act contains a public-notice provision. If litigants or any other "interested person" are going to fight over secrecy, the public is given notice of the battle and an opportunity to attend.

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.



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NOTES

CIVIL PROCEDURE—ACCESS TO SEALED SETTLEMENT DOCUMENTS GRANTED BASED ON COMMON LAW RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS—*Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*, 800 F.2d 339 (3d Cir. 1986).

INTRODUCTION

The common law right of public access to civil and criminal judicial proceedings includes the public's right to copy and inspect judicial records.[1] Although the United States Supreme Court has recognized that the right of access to judicial proceedings and records is not absolute, the Court has not articulated specific substantive and procedural guidelines by which to define this particular right.[2] Instead, the Court has adopted the position that the factors to be weighed in determining access should be left to the discretion of trial courts.[3]

Lacking clear direction from the Supreme Court, lower federal courts have looked to differing standards, procedures, and factors in granting or denying access to various civil documents.[4] Generally, courts have justified their decisions to restrict access based on the confidential, sensitive, or privileged nature of the documents at issue.[5]

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1. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (American courts recognized common law right to copy and inspect judicial records and documents). *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) (plurality opinion) (civil and criminal trials historically have been presumptively open to public); E. JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th rev. ed. 1967) (all judicial trials open to public in England from time immemorial). *See generally* Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311, 337-46 (1979) (discussion of historical development of common law right of access).

Courts have upheld the right of access because it permits the public to scrutinize the fairness and integrity of the judicial process and to participate in and serve as a check upon that process. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (public access promotes integrity of fact-finding and respect for and scrutiny of judicial processes); *see also* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068-70 (3d Cir. 1984) (comprehensive discussion of historical justifications and benefits of public access to civil proceedings).

2. *See Nixon*, 435 U.S. at 598-99 (quoting *In re* Caswell, 18 R.I. 835, 836, 29 A. 259, 259 (1893)) (because courts have supervisory power over their records, lower courts relying on case's particular facts and circumstances could deny access to records that might be harmful to others)).

3. *Nixon*, 435 U.S. at 599.

4. *See* Valley Broadcasting Co. v. United States Dist. Court, 798 F.2d 1289, 1293-94 (9th Cir. 1986) for a discussion of the various views of the nature and scope of the common law right of access to judicial records among the United States Courts of Appeals.

5. *See, e.g.*, Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 462 (10th Cir. 1980) (party's common law right of access to docketing statement, appellate briefs, and appendix filed with court in antitrust litigation outweighed by interest in preserving attorney-client privilege and work product

In Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.) ("*FAB III*"),[6] the United States Court of Appeals for the Third Circuit held that the district court erred in denying a third party's motion for access to a sealed settlement agreement and to the postsettlement documents filed with the court to enforce the agreement.[7] The court found that a generalized interest in encouraging settlements, without a showing of additional supporting factors, was insufficient to outweigh the public's common law right of access.[8]

This note analyzes the policy considerations and balancing approach used by the Third Circuit to determine that the settlement agreement and postsettlement documents in *FAB III* should have been unsealed.[9] This note then examines the substantive interests and factors balanced by courts in denying or granting access to sealed civil documents.[10] Finally, this note proposes procedural guidelines for trial courts to apply when determining whether to allow sealing of settlement agreements and similar civil documents.[11] The proposed guidelines seek to protect both the public's interest in access to judicial proceedings and the parties' reliance interest on secrecy once a document has been sealed.

I. *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*

The dispute in *FAB III*[12] arose out of litigation between the financier of a construction project and the project's developers.[13] In 1981, the Bank of America National Trust and Savings Association ("the Bank") entered into a contract with Hotel Rittenhouse Associates ("HRA") and other developers to finance the construction of a hotel in Philadelphia, Pennsylvania.[14] FAB III Concrete Corporation ("FAB III") was the concrete contractor for the project.[15] In June 1983, before the building was completed, the Bank filed suit against HRA in the United States District Court for the Eastern District of Pennsylvania to foreclose on the property and to collect on a construction loan.[16] The parties reached a settlement in January 1985, after the case went to trial but before it went to the jury.[17] The settlement agreement was then filed with the court and sealed at the parties' request, even though all prior proceedings had been open to the public.[18] Due to a disagreement about the settlement, the Bank and HRA later sought court assistance to enforce the agreement.[19] Accordingly, a series of motions and orders were filed and sealed by the trial court during March and April of 1985.[20]

FAB III initiated a number of legal actions in an effort to obtain the sealed settlement agreement itself and other documents filed to enforce the agreement.[21] Following a meeting with the district court in April 1985, in which FAB III and other creditors of HRA were denied access to the settlement documents, FAB III filed a motion two months later in district court to unseal the documents.[22] The district court again denied that motion on the basis that the

immunity), *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 101 F.R.D. 34, 44 (C.D. Cal. 1984) (public's common law right of access may be limited where trade secrets are at stake), *In re* Application of KSTP Television, 504 F. Supp. 360, 362-63 n.2 (D. Minn. 1980) (media's common law right of access to video tape showing preliminary acts of rape victim and perpetrator outweighed by victim's privacy interests).

6. 800 F.2d 339 (3d Cir. 1986).

7. *Id.* at 346. The court, in reversing the district court's denial of the motion to unseal documents, did not cite a reported opinion on this matter by the district court. The district court, however, did publish an opinion when it partially granted the Bank's motion for summary judgment against HRA in its action to foreclose on the mortgage and recover on a promissory note. *See* Bank of Am. Nat'l Trust v. Hotel Rittenhouse, 595 F. Supp. 800 (E.D. Pa. 1984).

8. 800 F.2d at 346.

9. *See infra* notes 35-62 and accompanying text for a discussion of the balancing approach used by the *FAB III* court for determining whether to grant access to the sealed documents.

10. *See infra* notes 75-128 and accompanying text for a discussion of substantive factors and interests relied on by courts in determining the public's right of access to sealed civil documents.

11. *See infra* note 162 and accompanying text for a discussion of proposed procedural requirements for restricting access to settlement documents.

12. 800 F.2d 339 (3d Cir. 1986).

13. *Id.* at 340.

14. *Id.*

15. *Id.*

16. *Id.* HRA is a Pennsylvania limited partnership. *Id.* at 339. The suit was filed against HRA, its general partners, and other individuals, although the court referred to the defendants collectively as "HRA." *Id.* HRA counterclaimed on numerous state and federal law grounds. *Id.* These claims included violations of the Bank Holding Act, the federal securities laws, the Racketeer Influenced and Corrupt Organizations Act, and the Equal Credit Opportunity Act. *Id. See* Bank of Am. Nat'l Trust v. Hotel Rittenhouse, 595 F. Supp. 800, 801 (E.D. Pa. 1984) (discussion of basis of initial action filed by Bank against HRA).

17. 800 F.2d at 341.

18. *Id.*

19. *Id.* The court noted that the Bank and HRA filed their settlement agreement with the court expressly because they anticipated such a disagreement. *Id.* at 344.

20. *Id.* at 341. On March 11, 1985, HRA filed a motion to enforce the settlement agreement. *Id.* The Bank filed a similar motion on the following day. *Id.* The district court entered a judgment against HRA for over $38,000,000 on one count of the Bank's initial claim and dismissed all other counts and counterclaims. *Id.* The district court ordered the property in dispute to be sold and fixed the terms of the sale, the terms of payment for the sale were ordered and filed on April 12, 1985. *Id.* An entry on the district court's docket sheet for April 26, 1985 stated that the "Order of Court is Filed Under Seal and Not to be Opened Until Further Order." *Id.* Although the subject of this order was not explained, FAB III assumed that it related to another part of the district court's judgment. *Id.*

21. *Id.* Prior to commencing its action against the Bank and HRA to obtain the settlement documents, FAB III also began a separate action solely against the Bank to collect money allegedly owed to it by the Bank. *Id.* at 340-41. FAB III had filed suit in federal court against the Bank in April 1984, seeking over $800,000 for work performed on the HRA project. *Id.* at 340. The Bank allegedly agreed to pay FAB III directly for its work on the project. *Id.* at 340-41. The Bank's motion to dismiss FAB III's claim on the basis that HRA was an indispensable party to the action and that joinder would destroy diversity had not been decided at the time of the appeal to the Third Circuit. *Id.* at 341.

22. *Id.* When the court denied the initial informal request, FAB III filed a motion in federal court to submit its prior separate dispute against the Bank to the American Arbitration Association. *Id.* The district court stayed the federal proceedings initiated in April 1984 while arbitration proceeded. *Id.* At the time of the appeal, the arbitration was still pending. *Id.*

FAB III also filed a complaint in state court in July 1985 alleging that the Bank and HRA entered into a continuing conspiracy to withhold payment on the construction project. *Id.* As evi-

"public and private interests in settling disputes" outweighed both FAB III's private interests and the public's interest in access to judicial records.[23]

On appeal, the United States Court of Appeals for the Third Circuit considered the question whether the district court abused its discretion in denying FAB III's motion to unseal the settlement agreement and the postsettlement motions, documents, and orders related to the agreement.[24] In an opinion written by Judge Sloviter, the Third Circuit held that the district court had abused its discretion, and reversed the trial court's decision denying FAB III's motion to unseal the settlement documents.[25]

Because FAB III based its claim for access to the sealed documents on the common law right of access rather than on the first amendment, the court initially addressed the scope of the common law right.[26] The court first stated that the United States Supreme Court had held that there was a common law presumption in favor of access to judicial records and documents.[27] The court then noted that the Third Circuit had relied on the Supreme Court's reasoning in previous decisions when it held that the common law right of access applied to

dence of such a conspiracy, FAB III pointed to the agreement between the Bank and HRA to seal portions of the federal court proceedings that were otherwise public. *Id.* (citing Joint Appendix at 45a, *FAB III*, 800 F.2d 339 (3d Cir. 1986) (No. 85-1753)). Shortly after it filed the state complaint, FAB III filed the motion subject to this appeal. 800 F.2d at 341.

23. *Id.* (citing Joint Appendix, *supra* note 22, at 89a-90a).

24. *Id.* at 342. The Bank and HRA argued that an appeal of an order sealing portions of court records was improper. *Id.* at 341 n.2. The court noted that in the Third Circuit, orders granting or denying access to sealed records have been subject to appeal. *Id.* (citing United States v. Smith ("*Smith II*"), 787 F.2d 111, 113 (3d Cir. 1986) (order denying access to transcripts of sidebar and chambers conferences appealed); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (order closing hearing appealed); United States v. Criden ("*Criden I*"), 648 F.2d 814 (3d Cir. 1981) (order denying access to tapes introduced into evidence appealed)). The court pointed out that the order and notice of appeal were captioned in both the Bank-HRA suit and the FAB III-Bank suit. *Id.* Therefore, the court reasoned that because it had jurisdiction to hear the appeal in the Bank-HRA suit, it would dismiss the appeal in the pending FAB III-Bank action. *Id.* at 342 n.2.

The Bank and HRA also challenged FAB III's standing to appeal the order in the Bank-HRA suit because FAB III did not file a motion to intervene in that action. *Id.* The court assumed that FAB III did not intervene because it was already a party to one of the suits in which the motion to unseal was filed. *Id.* The court concluded that it was unnecessary for FAB III to file as an intervenor in the Bank-HRA case in order to appeal because the district court implicitly granted FAB III intervention status when it denied its motion to unseal the records. *Id.* (citing United States v. Criden ("*Criden II*"), 675 F.2d 550, 552 n.2 (3d Cir. 1982) (district court implicitly grants intervention status to movant by denying access to requested documents)).

25. 800 F.2d at 346. Chief Judge Aldisert joined the majority opinion while the third member of the panel, Judge Garth, wrote a dissenting opinion. Circuit Judges Adams, Becker, Weis, and Stapleton would have granted a rehearing en banc. *Id.* at 340.

26. *Id.* at 342-43. Because the court found that the common law right of access applied, it declined to decide whether the first amendment right of access applied to the settlement agreement and documents at issue. *Id.* at 343. Therefore, the court concluded that decisions denying access on first amendment grounds were inapposite. *Id.* (citing Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1174-75 (3d Cir. 1986) (en banc) (first amendment right of access applies to investigative records of state environmental agency); First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 472 (3d Cir. 1986) (en banc) (first amendment right of access applies to records of judicial inquiry board)).

27. *Id.* at 343 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978))

tapes played during a criminal trial, and to transcripts of sidebar and chambers conferences.[28] Relying on these prior decisions, the court concluded that the common law right of access encompassed the settlement agreement and the subsequent motions filed in the district court in the Bank-HRA litigation.[29]

In reaching this conclusion, the court rejected the defendants' argument that a settlement agreement is not a public aspect of litigation and may, therefore, be sealed from those who were not parties to the agreement.[30] The court noted that HRA and the Bank relied on *Seattle Times v. Rhinehart*,[31] in which the United States Supreme Court held that because pretrial discovery is ordinarily private in the federal system, products of that discovery were not accessible under the first amendment.[32] The *FAB III* court, however, distinguished *Seattle Times* from the instant case by concluding that a settlement agreement and motions filed with the court, unlike discovery materials, are public components of civil litigation.[33] The court also pointed out that the public has a right to know of and to scrutinize a trial judge's approval of a settlement or rulings on motions.[34]

Although the Third Circuit concluded that the common law right of access applied to the documents at issue, the court also emphasized that the right of access is not absolute, regardless of whether it is grounded on the common law or the first amendment.[35] According to the court, the district court may exer-

28. *Id.* at 343 (citing United States v. Smith ("*Smith II*"), 787 F.2d 111, 115 (3d Cir. 1986) (access right articulated in *Criden I* applies where evidentiary or substantive rulings are made at sidebar or in chambers); United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984) (factors establishing presumption of access in *Criden I* support granting access to transcripts of tapes introduced into evidence); Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1066-71 (3d Cir. 1984) (both common law and first amendment grant public and press right of access to civil hearings and transcripts of proceedings); *Criden I*, 648 F.2d 814, 823 (3d Cir. 1981) ("strong presumption" of access exists with respect to materials introduced into evidence at criminal trial)).

29. 800 F.2d at 343. As a preliminary matter, the court concluded that the district court's order denied both the unsealing of the settlement agreement as well as the unsealing of documents filed on record to enforce the agreement. *Id.* at 342.

30. *Id.* at 343 (quoting Brief for Appellees at 12, *FAB III*, 800 F.2d 339 (3d Cir. 1986) (No. 85-1753)).

31. 467 U.S. 20 (1984).

32. 800 F.2d at 343 (citing Seattle Times v. Rhinehart, 467 U.S. at 37 (first amendment right of access does not override protective order preventing publication of civil discovery information by party litigants)).

33. 800 F.2d at 343-44.

34. *Id.* at 344. The court distinguished other cases on which HRA and the Bank had relied to support a denial of access to the settlement documents because those cases involved discovery materials. *Id.* at 344 n.3 (citing Cipollone v. Liggett Group Inc., 785 F.2d 1108, 1118-20 (3d Cir. 1986) ("good cause" rather than first amendment standard applies to party seeking protective order of pretrial discovery information), *cert. denied*, 107 S. Ct. 907 (1987); New York v. United States Metals Ref. Co., 771 F.2d 796, 803 (3d Cir. 1985) (protective order restraining dissemination of pretrial information not violative of first amendment)).

35. 800 F.2d at 344. The court noted that Third Circuit opinions suggest that different standards are applied in determining the right of access depending on whether the constitutional or common law right of access is asserted. *Id.* (quoting *Publicker Indus., Inc.*, 733 F.2d at 1073). The court stated that the standard applied by the Third Circuit in common law cases requires the party seeking to restrict access to demonstrate that the interest in confidentiality outweighs the strong

cise discretion to weigh the factors for and against access by applying a balancing test.[36] Moreover, the court concluded that the issue of whether the district court abused its discretion in applying the balancing test was within its scope of review.[37]

The court pointed out that the district court denied access based on the judicial policy of encouraging settlements in civil litigation.[38] The court agreed that there is a strong public interest in promoting settlements and added that both the Federal Rules of Civil Procedure and Evidence encourage settlements by prohibiting the admission of settlement offers as evidence.[39] The court noted, however, that the method used by HRA and the Bank to settle their dispute did not serve the purpose of that policy.[40] The court explained that HRA and the Bank did not settle privately and then file a voluntary stipulation of dismissal of their suit, but instead chose to invoke the judicial process in anticipation of their reliance on the court's authority to enforce their agreement.[41] The court noted that the parties' use of the judicial process to interpret and enforce a settlement agreement abrogates the private nature ordinarily attributed to settlement agreements made outside the judicial process.[42] The court emphasized that in the instant case, motions and orders were filed in secrecy in direct violation of the common law protection of open access to judicial records.[43] In such circumstances, the court concluded, a settlement agreement filed with the court becomes a judicial record subject to the public's common law right of access.[44]

Having decided that the judicial process was utilized to settle the dispute between HRA and the Bank, the court articulated two policy interests that weigh in favor of access to records resulting from judicial proceedings.[45] First, the court stated that public access "promotes 'informed discussion of governmental affairs by providing the public with [a] more complete understanding of the judicial system.' "[46] Second, the court added that access promotes the "public perception of fairness" by allowing the public to observe the workings of the court system.[47] The court concluded that disclosing settlement documents allows the public to monitor the integrity of the judicial process.[48] These two interests were no less important, according to the court, merely because FAB III was a third party seeking to serve its private interests rather than those of the public.[49]

Finally, the court considered whether the district court had erred in relying on a decision in which the United States Court of Appeals for the Second Circuit denied access to sealed settlement documents.[50] In *Federal Deposit Insurance Corp. v. Ernst & Ernst*,[51] the court noted, the Second Circuit refused to set aside an order maintaining the confidentiality of a settlement agreement between a large bank and an accounting firm.[52] The court explained, however, that *Ernst & Ernst* was distinguishable from the instant case for several reasons.[53] The court stated that both the district court and the circuit court in *Ernst & Ernst* emphasized that settling the complex litigation served the interests of both the parties and the public because continued litigation would be costly, would engage the judicial process for a long time, and would inconvenience the jurors.[54] In addition, the court pointed out that the parties in that case stated unequivocally that settlement was contingent on confidentiality.[55] The court also emphasized that the action seeking to modify the confidentiality order was initiated two years after the settlement was filed; therefore, the *Ernst & Ernst* court made its decision not to unseal only after an additional showing of the need for continued secrecy was made by the parties opposing access.[56] Thus, the majority concluded that *Ernst & Ernst* was distinguishable, and that consequently the

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presumption in favor of access. 800 F.2d at 344 (citing United States v. Criden ("*Criden III*"), 681 F.2d 919, 921 (3d Cir. 1982) (strong presumption favoring access is outweighed only by showing that information sought would inflict "intensified pain" on third parties); *Criden I*, 648 F.2d 814, 818 (3d Cir. 1981) ("strong presumption" of access must be balanced against factors weighing against access))

36. 800 F.2d at 344 (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978) (decision to grant access is best left to discretion of trial court to consider relevant facts and circumstances of each case))

37. *Id.* at 344. Although discretionary decisions of the trial court are generally subject to a narrow scope of review, the court found that where first-hand observations are not at issue, a narrow standard of review is not required. *Id.* at 344 (citing *Criden I*, 648 F.2d at 818 (decision to release tapes was not dependent on first-hand observation of trial court and therefore was not accorded the ordinary narrow review of discretionary matters))

38. *Id.* at 344.

39. *Id.* (citing FED. R. EVID. 408 and advisory committee note (offers to compromise are inadmissible evidence); FED. R. CIV. P. 68 (evidence of offer to settle inadmissible))

40. *Id.* at 344.

41. *Id.* (citing FED. R. CIV. P. 41(a)(1) (plaintiff may dismiss action without prejudice by filing consent signed by all parties)). The court noted that had HRA and the Bank used this procedure, the documents would not have been subject to public access. 800 F.2d at 344.

42. *Id.* at 345.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (quoting *Smith II*, 787 F.2d 111, 114 (3d Cir. 1986) (citing *Criden II*, 675 F.2d 550, 557 (3d Cir. 1982) (societal interest favoring public access to trials articulated by Supreme Court are served by permitting first amendment access to criminal pretrial proceedings)))

47. 800 F.2d at 345 (quoting *Smith II*, 787 F.2d at 114 (citing *Criden II*, 675 F.2d at 557)).

48. *Id.* (citing *Smith II*, 787 F.2d at 114 (open access to court proceedings serves as a "check on corrupt practices by exposing the judicial process to public scrutiny"); Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (quoting Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983) (decision to grant access to civil judicial records must focus on public's right to scrutinize the integrity of system))

49. 800 F.2d at 345.

50. *Id.*

51. 677 F.2d 230 (2d Cir. 1982) (per curiam).

52. 800 F.2d at 345.

53. *Id.* at 345-46. Judge Garth particularly relied on *Ernst & Ernst* as justifying the denial of access. *See infra* notes 63-74 for a discussion of Judge Garth's analysis of *Ernst & Ernst* and his rationale for applying its principles to *FAB III*.

54. *Id.* at 345-46 (citing *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 470 (E.D.N.Y. 1981) (factors showing protracted trial and litigation expenses and loss of insurance protection for defendant were sufficient to deny public access), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982)).

55. 800 F.2d at 345-46.

56. *Id.* The court also noted that the appellants in *Ernst & Ernst* based their claim of access on the Federal Freedom of Information Act rather than on the common law right of access. *Id.* at 345.

district court had erroneously relied on the decision.[57]

The court further concluded that both the *Ernst & Ernst* district court and Second Circuit had weighed substantial and articulable factors against the presumption of access.[58] In *FAB III*, however, the court found that the district court had instead relied merely on a generalized interest in promoting settlements.[59] The court held that such a generalized interest alone was insufficient to overcome the common law presumption of access.[60] Therefore, the court considered it unnecessary to determine whether FAB III had sufficient particularized interests in the settlement documents to further tip the balance in its favor.[61] Because the court found that the district court had abused its discretion in denying FAB III's motion to unseal the settlement documents, the court reversed the district court's order and remanded the case.[62]

In a lengthy dissenting opinion, Circuit Judge Garth criticized the majority's opinion on several grounds.[63] First, Judge Garth noted that the majority did not acknowledge the difference between sealing and unsealing documents.[64] Judge Garth maintained that the cases relied on by the majority distinguished acts of sealing from acts of unsealing, and that those cases established different standards and burdens of proof which the majority had disregarded.[65] Second, Judge Garth stated that the majority failed to give proper weight to the public's interest in settling disputes and to the parties' subsequent reliance on secrecy.[66]

Relying on the Supreme Court's discussion of the common law right of public access in *Nixon v. Warner Communications Inc.*,[67] Judge Garth explained that where a document has been entered into the public record without the parties relying on it remaining secret, the interests of third parties seeking access to that document must be weighed in view of a presumption of openness.[68] Judge Garth pointed out, however, that where a third party seeks to

57. *Id.* at 346.

58. *Id.* at 345-46.

59. *Id.* at 346.

60. *Id.*

61. *Id.* at 346 n.4.

62. *Id.* at 346. The district court was ordered to enter an order consistent with the Third Circuit's opinion. *Id.* FAB III's appeal against the Bank was dismissed. *Id.*

63. 800 F.2d 339, 346 (Garth, J., dissenting).

64. *Id.* Judge Garth stated that the proper issue on appeal was whether the settlement agreement, negotiated in private and entered into contingent on the agreement remaining secret, should be unsealed because the district court allegedly erred in initially sealing it. *Id.* at 347. He maintained that the majority, although acknowledging this unsealing issue, addressed only the circumstances under which a document should be sealed in the first place. *Id.* Judge Garth believed the majority should not have considered this issue because the documents were already sealed. *Id.*

65. *Id.* at 348 & n.3.

66. *Id.* at 347. Judge Garth strongly criticized the majority for essentially imposing a *per se* rule that the interest in settling disputes can "never" be sufficient to overcome the presumption of access. *Id.* Furthermore, Judge Garth maintained that the majority's decision lends short shrift to the parties' reliance interest in the agreement remaining secret, particularly where a document is entered into the record solely because the court agreeds to grant a protective seal. *Id.* at 348.

67. 435 U.S. 589 (1978).

68. 800 F.2d at 348 & n.3. In *Nixon*, the Court articulated that trial courts must apply a balancing approach and weigh the relevant facts and circumstances in determining whether public access to judicial records is appropriate. 435 U.S. at 599. Judge Garth pointed out that the *FAB III* district court applied the *Nixon* Court's balancing test and determined that the settlement agreement at issue should not be disclosed. 800 F.2d at 348-49 n.3.

69. *Id.* at 348 (citing FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) (confidentiality order may be modified only after showing of "compelling need" or "extraordinary circumstance")).

70. 800 F.2d at 349. Although Judge Garth acknowledged that *Ernst & Ernst* was not controlling, he believed it was a well reasoned decision that should have been applied in *FAB III*. *Id.* at 348.

71. *Id.* at 348 & n.3. Judge Garth criticized the majority for characterizing the sealing of the documents as a "secret judicial proceeding" tending to "overturn centuries of tradition of open access." *Id.* at 348 n.3. He stated that this characterization "is not an adequate substitute for reasoned judicial analysis." *Id.* at 349 n.3.

72. *Id.* at 352-53.

73. *Id.* at 353. Judge Garth noted that there is a long-standing acceptance of a trial court's right to use its discretionary powers to encourage settlements in order to manage its docket effectively. *Id.* at 352. Additionally, he stated that the majority's decision removes the district court's discretion to accept a settlement agreement under seal either to promote expeditious case resolution or to protect the interests of the parties to the settlement. *Id.*

74. *Id.* at 353.

75. *See Ex parte* Drawbaugh, 2 App. D.C. 404 (1894) in which the court refused to grant a motion to seal the pleadings of an appeal of a patent determination, stating that "[a]ny attempt to maintain secrecy, as to records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records . . ." *Id.* at 407-08. *See also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978) (American decisions do not condition right of access to records on a proprietary interest in documents); *Ex parte* Uppercu, 239 U.S. 435, 440 (1915) (public has right to view judicial records regardless of its interest); *In re* Sackett, 136 F.2d 248, 249 (C.C.P.A. 1943) (court has no

unseal documents filed solely because of a reliance on secrecy, the presumption and burden should shift to require that party to show a "compelling need" or "extraordinary circumstance" as articulated in the Second Circuit's opinion in *Ernst & Ernst*.[69] Applying the *Ernst & Ernst* standard, Judge Garth found that FAB III had not met its burden to establish a "compelling need" to unseal the documents and concluded that the interest in settling disputes was sufficient to outweigh that presumption of access.[70]

Judge Garth criticized the majority for not acknowledging the differences between sealing and unsealing in relation to the parties' reliance interest on secrecy, and for attempting to distinguish rather than to apply *Ernst & Ernst*.[71] In addition, Judge Garth pointed out that regardless of whether the *Ernst & Ernst* standard was applied, the decision to seal or unseal documents should be left to the discretion of the trial court.[72] Judge Garth concluded that the district court properly balanced the competing interests and exercised its discretion.[73] Therefore, he would have affirmed the district court's decision refusing to unseal the settlement documents.[74]

II. Restricting the Common Law Right of Access to Judicial Documents

As early as 1894, courts have recognized the common law right of all citizens to examine judicial records regardless of the interest of the person seeking access.[75] Generally, the right of access is deemed to be inherent in our demo-

cratic form of government[76] and serves the purpose of assuring public confidence in the fair and effective administration of justice.[77] Alternatively, courts have restricted access under certain circumstances to serve important purposes, such as the promotion of judicial economy, the protection of privacy interests of litigants and third parties, and the preservation of the doctrines of attorney-client privilege and work-product immunity.[78]

When sealed settlement agreements and other types of documents claimed to be confidential are the subject of access claims, courts face the difficult task of balancing the competing interests, because both sides claim harm will result from an unfavorable decision.[79] Moreover, courts must wrestle with the determination of an appropriate standard to apply in gauging these competing interests.[80]

A. Reliance Interests

In *Federal Deposit Insurance Corp. v. Ernst & Ernst*,[81] the United States Court of Appeals for the Second Circuit held that when parties enter into a settlement agreement and rely on its remaining secret, a motion to unseal should be denied absent a showing of compelling need or extraordinary circumstances.[82] As the *Ernst & Ernst* district court pointed out, the settlement agreement was contingent on confidentiality at the insistence of one of the defendants, Ernst & Ernst.[83] The district court stated that it would be unfair to the litigants, and future settlements conditioned on secrecy would be discouraged, if the court, after inducing reliance, refused to support the parties later when this

power to seal records of patent appeal); Comment, *supra* note 1, at 337-38 (common law right of access to judicial records necessarily extends from the right to open courts).

76. United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (access to judicial records is "fundamental" to democratic state).

77. *See Richmond Newspapers*, 448 U.S. at 592-97 (Brennan, J., concurring) (access serves as check on judicial abuse and assures fair adjudication). *See also supra* note 48 for federal court decisions reflecting policy considerations in support of access to judicial records.

78. *See, e.g.*, *Nixon*, 435 U.S. at 598 (citing *In re* Caswell, 18 R.I. 835, 836, 29 A. 259, 259 (1893) (access may be denied where records may be used to satisfy spite or promote scandal)); *In re* Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983) (substantial damage to property rights in trade secrets justified denial of access); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 907 (E.D. Pa. 1981) (sensitive commercial information sufficient to seal documents). *See also infra* notes 80-129 and accompanying text for discussion of other court decisions denying or granting access to records.

79. *See infra* notes 94-120 and accompanying text for a discussion of federal court decisions balancing claims of confidentiality against the public's right of access.

80. *See, e.g.*, Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (court required showing that denial of access served "compelling government interest"); Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1073 (3d Cir. 1984) (court required showing of "countervailing interest" to deny access); FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) (court required showing of "compelling need" or "extraordinary circumstances" to grant access).

81. 677 F.2d 230 (2d Cir. 1982).

82. *Id.* at 232.

83. *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981) (memorandum opinion), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) (per curiam opinion).

secrecy was challenged.[84] In denying the motion to modify the sealing order, the district court considered the parties reliance on confidentiality along with other factors, including notification to the press and the public of the imminency of settlement and the parties' intent to seal the terms of any settlement reached prior to the actual sealing order.[85]

In a more recent decision, the Second Circuit again weighed the parties' reliance interests against the general policy of granting access. In *Palmieri v. New York*,[86] the litigants in a private civil antitrust action agreed to enter into settlement negotiations and a subsequent agreement only after a federal magistrate had agreed to grant a protective order to facilitate settlement.[87] When the state sought the settlement records for its own use in an ongoing criminal investigation of antitrust law violations, the defendants objected on the basis that the information sought would not have existed without the magistrate's assurance of secrecy.[88] The state asserted on appeal that entering into a settlement agreement following a grant of a protective order in a private civil antitrust matter was an act which would ultimately further criminal activity.[89] In response, the court stated that if the magistrate should have known that his sealing order would aid criminal violations of the antitrust laws, his action would be improvident.[90] As a result, the court concluded that where a sealing order is granted "improvidently," no amount of judicial encouragement to enter into a confidential settlement agreement or subsequent reliance by the parties would "substantiate an unquestioning adherence" to the order.[91] Consequently, the *Palmieri*

84. *Id.* Additionally, the district court noted that the agreement resulted in substantial monetary payments and induced significant changes in positions of many of the parties relying on the secrecy. *Id.*

85. *Id.* The district court pointed out that this litigation involved a multitude of parties, protracted litigation, jury inconvenience, and large legal fees. *Id.* In addition, defendants' insurance coverage would be exhausted without settlement, leaving the injured party without an enforceable monetary judgment. *Id.*

86. 779 F.2d 861 (2d Cir. 1985).

87. *Id.* at 866. In 1982, Palmieri, a concrete contractor, initiated a private antitrust suit against several individuals and corporations involved in the ready-mix concrete industry in New York, alleging antitrust violations. *Id.* at 862-63. The matter was assigned by the district court to a federal magistrate to supervise pretrial discovery. *Id.* at 863. The magistrate subsequently participated in settlement negotiations with all parties. *Id.* Because the alleged violations were also the subject of an ongoing state criminal antitrust investigation, the defendants in the private action moved for a protective order of all discovery matter. *Id.* In December 1983, the magistrate granted this motion and specifically ordered the nondisclosure of discovery to any government agency. *Id.* Moreover, the magistrate included in the order that the defendants intended to provide information only in reliance upon the protective order. *Id.* Discovery proceeded and a settlement was reached with additional sealing orders entered throughout the process. *Id.* at 893-94.

In October 1985, after the settlement was reached, the State Attorney General filed a motion to intervene to modify the sealing orders to permit disclosure and testimony to the grand jury. *Id.* at 864. After a series of court actions, the district court granted the motion, subject to a stay pending appeal to the Second Circuit. *Id.*

88. *Id.* at 865.

89. *Id.*

90. *Id.*

91. *Id.* The court noted that even though the parties' reliance on the sealing order established a heavy burden for the state and raised a presumption in favor of maintaining the seal, the order could

court reversed and remanded the case to the district court to determine whether the state met its burden to prove a compelling need or improvidence to justify modification of the sealing order.[92]

Thus, in *Ernst & Ernst*, the Second Circuit required proof of a "compelling need" before permitting access to sealed documents when the parties had relied on the documents remaining confidential. Moreover, in *Palmieri*, the Second Circuit also recognized that if the lower court acted improvidently, the reliance interests of the parties may not be sufficient to justify restricting public access.[93]

b. Privileges

Litigants have also asserted that the attorney-client privilege and work-product immunity outweigh the presumption of access to judicial records. In *Joy v. North*,[94] the Second Circuit held that a special litigation committee report submitted for use in adjudicating a motion to dismiss the suit could not remain under seal as a private document.[95] The court reasoned that adjudication was a government act subject to public scrutiny.[96] The defendant corporation in *Joy*, opposing the lifting of the sealing order, asserted reputational harm, work-product immunity, and the attorney-client privilege as factors outweighing the common law right of access.[97] The Second Circuit concluded that submission of the report for the court's consideration on a motion for a judgment waived the attorney-client privilege.[98] The court also dismissed the claim that access would produce reputational harm, concluding that it was an insufficient basis on which to restrict public access to court documents.[99] The court reasoned that confidence in the administration of justice would be weakened if the public was not permitted to scrutinize material relied on for adjudication in derivative actions.[100]

These same privileges were addressed by the Tenth Circuit in *Crystal Grower's Corp. v. Dobbins*.[101] In *Crystal Grower's*, the plaintiff-appellant sought to maintain a seal on discovery documents and documents produced in the liti-

be modified if it could be shown that the magistrate should have recognized that the settlement would further criminal activity. *Id.* at 864-66.

92. *Id.* at 866.

93. *Id.* at 865. *See supra* notes 86-92 and accompanying text for a discussion of reliance interests in *Palmieri*.

94. 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

95. *Id.* at 894.

96. *Id.* at 893-94. The court noted that the report was used in the adjudication of the case and although it revealed corporate misconduct, the report did not reveal trade secrets that, under certain circumstances, would justify sealing. *Id.* The *Joy* court concluded that, absent exceptional circumstances requiring confidentiality, special litigation committee reports utilized in the adjudicative stages of derivative suits should be subject to public scrutiny. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 894. The court reasoned that since a claim of reputational harm would become stronger as corporate mismanagement increased, protection for such an interest would lead to absurd results. *Id.*

100. Id. at 893.

101. 616 F.2d 458 (10th Cir. 1980).

gation of its suit involving a merger dispute.[102] Unlike the Second Circuit, the *Crystal Grower's* court held that the interest in preserving the doctrines of attorney-client privilege and work-product immunity outweighed the public interest in scrutinizing the judicial process.[103] The *Crystal Grower's* court qualified its holding, however, stating that the asserted doctrines justified retaining the documents under seal only for a limited time.[104] Moreover, the court reasoned that this result would not harm the public's interest in overseeing the integrity and fairness of the judicial process because oral arguments on the motion were public.[105] Furthermore, the court concluded that a contrary decision would threaten open communication between lawyers and clients and would ultimately impair the ability of attorneys to adequately prepare clients' cases.[106]

The *Joy* and *Crystal Grower's* courts viewed the documents claimed to be protected by the privileges in relation to the judicial proceedings themselves. Thus, in circumstances where the documents at issue are material to the judicial resolution of the disputes, the public's right to scrutinize the judicial decision-making process may outweigh the privileges.[107]

C. Reputational Harm and Third Party Privacy Interests

When weighing a party's interest in the protection of its business reputation against a claim of access to commercial information, courts have had to consider two competing interests as well: whether consumers would be harmed by being denied the information, and whether disclosure of the business information

102. *Id.* at 459-60. Following a merger with a company involved in antitrust violations, Crystal Grower's Corporation brought suit against the new corporation's former directors and the law firm participating in the merger. *Id.* at 459. The trial court directed the plaintiff, Crystal Grower's, to produce discovery documents, including premerger communications between itself and its attorneys. *Id.* Although the district court recognized that the documents might have been subject to the attorney-client privilege and work-product immunity, it reasoned that Crystal Grower's put these documents in issue when it filed suit, and had, therefore, waived its right to assert those privileges. *Id.* at 460. The trial court subsequently entered summary judgment in favor of defendants. *Id.*

On appeal of the merits of the summary judgment of the securities law violations, the circuit court granted plaintiff's request to seal the amended docketing statement, joint appendix, and appellate briefs. *Id.* After the parties reached a settlement, the appeal was dismissed and the sealed trial record was returned to the district court. *Id.* The appellate documents that were filed, which contained reference to privileged communication, were to be unsealed twenty (20) days following dismissal. *Id.* at 460-61. Crystal Grower's filed a motion to reconsider the timing of the unsealing. *Id.* at 461.

103. *Id.* at 461-62.

104. *Id.* at 462. The court ordered that the sealed documents allegedly subject to the attorney-client privilege and work-product immunity were to remain sealed for an additional five years. *Id.* The court reasoned that, because the appeal was dismissed without determining whether the documents were immune from disclosure, lifting the seal immediately would essentially decide that issue *sub silentio*. *Id.* Therefore, the court delayed the unsealing of the appellate documents for five years to allow the pending litigation to proceed without the disclosure of the sealed documents. *Id.*

105. *Id.*

106. *Id.* at 461-62.

107. *See supra* notes 94-106 and accompanying text for a discussion of attorney-client privilege and work-product immunity claims that outweigh the public's right of access.

would violate a third party's privacy interest.[108] In *Brown & Williamson Tobacco Corp. v. FTC*,[109] for example, the Sixth Circuit vacated a district court's order sealing FTC records despite the fact that the agency made an agreement with Brown & Williamson to keep certain information in their investigatory records confidential.[110] The court rejected Brown & Williamson's claim that the information would harm the company's reputation if it was disclosed.[111] The court explained that interests implicating certain privacy rights, trade secrets, or national security are the only recognized exceptions to the common law right of access,[112] and concluded that protecting the company from reputational harm was not a recognized exception.[113] In contrast to these interests, the court pointed out that the public had a strong interest in obtaining the health information contained in the agency's records.[114] Moreover, the court also recognized that the stronger the desire for the company to hide its operations from the public to prevent disclosure of prejudicial information, the greater the public's need to know.[115]

The protection of third party privacy interests was also addressed by the Sixth Circuit in *In re Knoxville News-Sentinel Co.*[116] In *Knoxville*, the court held that the privacy interests of a bank's borrowers in avoiding public disclosure of their financial affairs, outweighed the right of the public and press to have access to two financial exhibits filed in a civil action between the bank and the FDIC.[117] The court explained that sealing trial exhibits from the press was not intended to protect the business reputation of the bank, but rather, that the action was to protect the privacy of the depositors who were not responsible for

108. *See infra* notes 109-20 and accompanying text for a discussion of Sixth Circuit cases addressing reputational harm and third party privacy interests.

109. 710 F.2d 1165 (6th Cir.), *cert. denied*, 465 U.S. 1100 (1983).

110. *Id.* at 1179-80. Brown & Williamson Corporation brought an action to enjoin the FTC from publishing statements disclaiming, among other things, the accuracy of the "tar" and nicotine yields of Brown & Williamson's Barclay cigarettes. *Id.* at 1167-69. Previously, the FTC solicited information from Brown & Williamson and four other tobacco manufacturers with the agreement that the information would be confidential. *Id.* at 1180. The district court sealed the agency records and documents pending decisions on several issues. *Id.* at 1168-69. On appeal, jurisdictional and substantive issues were resolved and the agency's records were ordered to be released to the public. *Id.* at 1169.

111. *Id.* at 1179-80.

112. *Id.* at 1179.

113. *Id.* at 1179-80.

114. *Id.* at 1180.

115. *Id.* The court stated that in order not to undermine the tradition of accessible courts, records should be sealed only in those circumstances where trade secrets are involved. *Id.*

116. 723 F.2d 470 (6th Cir. 1983).

117. *Id.* at 477-78. Tennessee Newspapers intervened in a lawsuit between a bank and the FDIC in an effort to obtain access to records that the bank was permitted to remove from the court's files. *Id.* at 471. The newspaper argued that the litigation between the bank and the FDIC was of public interest, and, therefore that the media should have access to the exhibits placed under seal. *Id.* at 472. The lawsuit between the FDIC and the bank was subsequently dismissed and the protective order lifted except as to the two exhibits that were returned to the bank. *Id.* The exhibits in question contained a list of questionable loans made to bank customers and the bank's defenses to those loans. *Id.*

initiating the litigation.[118] Recognizing the importance of the rights involved, the court stated that both the public and the press must be given a reasonable opportunity to voice their objections to a protective order before a court may deny the presumptive right of access.[119]

Thus, at least in the Sixth Circuit, claims of commercial reputational harm are insufficient to outweigh the public's right of access, especially where innocent third parties' privacy interests are implicated. The *Brown & Williamson* and *Knoxville* decisions reflect the strong interest in protecting the public's right to beneficial consumer information, as well as the interest in protecting third parties' privacy from the public.[120]

D. Judicial Economy

In order to promote judicial economy, facilitating settlement agreements between litigants may justify restricting public access to the agreements. Confronting this issue in *Wilson v. American Motors Corp.*,[121] the Eleventh Circuit held that the district court abused its discretion in sealing all trial records to facilitate settlement in a public proceeding.[122] In reaching this result, the *Wilson* court evaluated the district court's emphasis on promoting settlement agreements.[123] In order to deny access, the *Wilson* court required a showing that denial of access was "necessitated by a compelling governmental interest" and "narrowly tailored" to meet that interest.[124] The court found that although encouraging settlements is an important judicial function, settlements only result in payment of money to an injured party which is not a compelling interest entitled to consideration in determining whether to seal public records.[125] The *Wilson* court also concluded that the promotion of judicial economy in encouraging settlement was not served in this case because the jury had already considered some evidence when the settlement was reached.[126]

The common denominator of federal court decisions granting access to

118. *Id.* at 477. The court reasoned that bank customers had an expectation of privacy that warranted protection by the court. *Id.*

119. *Id.* at 475. The court suggested that a reasonable approach to protect the right to be heard is to require sealing motions to be docketed with the clerk of the district court. *Id.* at 475-76. The court ultimately concluded that the district court properly exercised its discretion in removing the two exhibits from public access. *Id.* at 477.

120. *See supra* notes 109-20 and accompanying text for a discussion of the public's right of access to public interest information and the public's right to be heard prior to restricting access.

121. 759 F.2d 1568, 1571 (11th Cir. 1985).

122. *Id.* at 1569.

123. *Id.*

124. *Id.* at 1571 (citing Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (first amendment right of access to criminal trials may be denied by necessity of compelling governmental interest narrowly tailored to meet interest))). The *Wilson* court relied on the common law right of access in reversing the district court's sealing order. 759 F.2d at 1570. The court, however, proceeded to analyze the issues by applying the first amendment standard cited in *Globe Newspaper* and relying on authorities that applied first amendment rather than common law analysis. *Id.* at 1570-71.

125. *Id.* at 1571 n.4.

126. *Id.* at 1571.

sealed documents is on emphasis on a single primary policy consideration: maintaining the integrity of judicial proceedings by protecting the public's access interest.[127] Alternatively, courts denying public access have done so by emphasizing the litigants' and third parties' privacy and reliance interests.[128] In order to overcome the public's right of access, however, courts have generally required parties to make a specific showing of the rights and interests at stake.[129] This requirement ultimately becomes the foundation on which courts justify their decisions.

III. A Procedural Analysis

In *Bank of America National Savings & Trust v. Hotel Rittenhouse Associates (Appeal of FAB III)*,[130] the United States Court of Appeals for the Third Circuit held that a generalized interest in encouraging settlements was insufficient to outweigh the common law presumption of access to a judicially sealed settlement agreement, as well as posttrial motions and orders filed to enforce the agreement.[131] A review of cases addressing similar access claims supports the majority's decision that, at least in this case, neither the interest in settling disputes and promoting judicial economy, nor the reliance on secrecy by the settling parties justified denying access to the agreement.[132]

A. Promoting Judicial Economy—A Timely Request

The majority in *FAB III* acknowledged the public interest served by encouraging settlements of private litigation.[133] As the court pointed out, settlements reduce litigation costs and conserve judicial resources.[134] Nevertheless, the majority rejected the judicial economy argument by the parties in this case.[135] Instead, the majority focused on the fact that the *FAB III* litigation proceeded to a full jury trial, was settled only before the jury had an opportunity to render a verdict, and, finally, was returned to court on motions by the settling parties to enforce the agreement, thereby negating any argument that judicial economy and the interest in settling disputes were served by sealing the agreement.[136] Under these circumstances, the *FAB III* court properly concluded that

127. *See, e.g.*, *Smith II*, 787 F.2d 111, 114 (3d Cir.) (public access serves as check on corrupt practices by permitting public scrutiny of court process), *cert. denied*, — U.S. —, 107 S. Ct. 469 (1986); *Brown & Williamson*, 710 F.2d 1165, 1178 (6th Cir.) (public access provides accountability thereby minimizing judicial errors and misconduct), *cert. denied*, 465 U.S. 1100 (1983).

128. *See, e.g.*, *Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (public access may be restricted absent extraordinary circumstances once sealing order is entered and relied on).

129. *See supra* notes 75-126 for a discussion of the courts' requirement that the parties' interests be specifically demonstrated.

130. 800 F.2d 339 (3d Cir. 1986).

131. *Id.* at 346.

132. *See supra* notes 51-126 and accompanying text for a discussion of these competing interests.

133. 800 F.2d at 344.

134. *Id.*

135. *Id.* at 345.

136. The Bank and HRA wanted the best of both worlds: each wanted the benefit of the forum and authority of the court process, but at the same time each desired the privacy usually afforded only to litigants who settle their disputes before incurring the public expense in using the resources of the judicial system. *See supra* notes 38-62 and accompanying text for the *FAB III* court's discussion of these issues.

the interest in promoting judicial economy by settling disputes was insufficient to outweigh the public's right of access.

Judge Garth criticized the majority for adopting what he describes as a "*per se* rule that the interest in settling cases [by assuring secrecy] can never outweigh the public's right of access."[137] Rather than create a per se rule, however, the majority instead distinguished a point in time at which restricting access no longer serves the public's interest in judicial economy and therefore is not justified.[138] Acknowledging that the Federal Rules of Civil Procedure promote a generalized interest in settling disputes, the majority pointed out that the particular provisions expressly relate to pretrial conferences and discovery,[139] thus providing additional support for the majority's time-framed distinction. Accordingly, in order to justify denying access to promote settlement agreements on the basis that the public's interest in judicial economy is served, settlement needs to be reached before incurring the time and expense of judicial proceedings.

B. Distinguishing Between Sealing Documents and Sealing Proceedings

The *FAB III* court focused on the documents at issue and their relationship to the court proceedings involving those documents in its determination whether to grant access. For example, the court emphasized that in the instant case, "*motions* filed and *orders* entered . . . were kept secret."[140] The court stated that denying access under these circumstances would essentially sanction "secret judicial proceedings."[141] This suggests that the court viewed the documents under seal as an integral part of the proceedings themselves. It may be that access was granted not upon consideration of the specific nature of the documents, but rather on the basis that the documents evidenced judicial action *per se*, which is more clearly subject to public access.[142]

A similar reasoning was applied by the Eleventh Circuit in *Wilson v. Ameri-*

137. 800 F.2d at 347.

138. *Id.* at 344. The majority pointed out that had the Bank and HRA settled and chosen to file a voluntary dismissal provided for in the Federal Rules of Civil Procedure, it was likely that they would have prevented FAB III and the public from gaining access to their documents. *Id.*

Fed. R. Civ. P. 41(a)(1) provides in pertinent part:

> [A]n action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

139. 800 F.2d at 344 (citing *Fed. R. Civ. P.* 68 (settlement offer not accepted is inadmissible evidence at trial)).

140. *Id.* at 345.

141. *Id.*

142. *See* Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) (public access may not be denied where document is used for adjudication which is formal act of government subject to public scrutiny), *cert. denied*, City Trust v. Joy, 460 U.S. 1051 (1983).

can Motors Corp.,[143] in which the court stated that the interest in promoting settlement is not sufficient to justify denying access to trial records when the parties, prior to reaching their settlement agreement, proceeded to the point in the trial where the jury at least partially considered the evidence.[144] The court emphasized that suppression of public records under such circumstances can not be sanctioned because of the importance of access to the judicial process itself.[145] The Second Circuit reached a similar result in *Joy v. North*.[146] There the court concluded that adjudication was a proceeding in the judicial system that was clearly subject to access, and therefore that materials used to aid the decision-making process could not be sealed from public scrutiny without weakening the public's confidence in the administration of justice.[147]

The *FAB III* decision, as well as the *Wilson* and *Joy* decisions, emphasize the importance of the public's right to scrutinize the judicial process for the purpose of maintaining a check on the integrity of the court system.[148] The nature of the document at issue is not the critical factor in granting or denying access. Instead, it is the impact of the documents on the judicial proceeding itself that implicates the tradition of open courtrooms. Consequently, when sealing documents essentially denies the public an opportunity to scrutinize the judicial decision-making process, courts have required parties seeking access to meet a considerable burden to justify restricting access.[149]

C. *Reliance Interests—Establishing a Right to Rely*

The majority in *FAB III* was sharply criticized by the dissent for giving short shrift to the parties' reliance interests.[150] Judge Garth emphasized that the litigants entered into the settlement agreement with the understanding that it would remain secret, and that only a showing of a compelling need or extraordinary circumstances as prescribed in *Ernst & Ernst* justified granting access.[151] Because Judge Garth concluded that both *FAB III* and *Ernst & Ernst* turned on the litigants' reliance interest, he would have applied the *Ernst & Ernst* standard in *FAB III* and protected the parties' reliance interests.[152]

When the *Ernst & Ernst* district court and court of appeals denied access based in part on the parties' reliance interests, however, the courts were confronted with a significantly different factual and procedural situation than that of *FAB III*.[153] For example, the *Ernst & Ernst* district court, in granting the sealing order, found that the public's interest, as well as that of the litigants, was served by secrecy.[154] Moreover, the *Ernst & Ernst* district court pointed out that the proposed settlement received significant publicity in the media.[155] Not only did the press report the imminency of the settlement, but the press also reported that the settlement would be sealed.[156] Consequently, the public was given actual notice and an opportunity to object before the court sealed the agreement.[157] Under these circumstances, the litigants had a right to rely on the secrecy of the agreement to the extent that any later motions to unseal would be granted only where extraordinary circumstances existed.[158]

In contrast to the *Ernst & Ernst* litigation, the record contained no evidence to explain the Bank and HRA's request for secrecy.[159] Essentially, the litigants in *FAB III* entered into a secret settlement agreement by which they agreed to contract away both the public and FAB III's right of access to judicial proceedings. Courts should not permit private litigants to exercise such power solely to further their own interests.[160] Moreover, because FAB III and the public had no notice of the agreement's proposed confidentiality, or an opportunity to be heard, the Bank and HRA had no right to rely on the documents' continued secrecy in the future if an interested third party, who was not aware of the initial

143. 759 F.2d 1568 (11th Cir. 1985) (common law right of access applicable to trial record sealed by court to facilitate subsequent settlement).

144. *Id.* at 1571. The *Wilson* court reasoned that many litigants would be receptive to negotiations for the sealing of records after hearing damaging testimony during trial. *Id.* at 1571 n.3. Although the court recognized that courts should encourage settlements, it emphasized that monetary compensation for an injured party is not an element entitled to consideration in deciding whether to seal a record. *Id.*

145. *Id.* at 1571.

146. 692 F.2d 880, 893 (2d Cir. 1982) (consideration must be given to the importance of documents to adjudication before granting sealing order). The *Joy* court lifted a sealing order on a special litigation report in a derivative suit despite privacy interests to the contrary, because the document was used to decide the matter at hand. *Id.* at 893-94.

147. *Id.* at 893.

148. The *FAB III* majority properly left open the question whether a sealed settlement agreement, entered into by the litigants under different circumstances, such as before a case proceeds to trial, may be unsealed by another party at a later date. *See supra* notes 38-44 and accompanying text for the *FAB III* court's discussion of the relationship between the sealed documents and the judicial proceedings.

149. *See supra* note 80 for standards applied to the circumstances asserted to outweigh the public's right of access.

150. 800 F.2d at 347-48.

151. *Id.* at 349 (citing *Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982)). Judge Garth objected to the majority's approach in distinguishing *Ernst & Ernst* on the basis that the effort to unseal the *Ernst & Ernst* records occurred two years after the agreement was sealed, whereas FAB III waited only five months. *Id.* at 348 n.3.

152. *Id.*

153. *See supra* notes 50-62 & 68-74 and accompanying text for a factual comparison between *FAB III* and *Ernst & Ernst*.

154. *See In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981) (consideration given to public's interest in expeditious disposition of litigation), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982). The court pointed out that had an agreement not been reached, a great deal of expenditures would fall on the litigants and judiciary. *Id.* Thus, the sealing order was essentially based on the interests in judicial economy and in minimizing the expense to the public. *Id.*

155. *Id.* at 472.

156. *Id.*

157. *Id.*

158. *Id. See supra* notes 81-85 and accompanying text for a discussion of the district and circuit courts' decisions in *Ernst & Ernst*.

159. *See FAB III*, 800 F.2d 339, 346 (3d Cir. 1986) (record void of articulable factors outweighing presumption of openness comparable to *Ernst & Ernst*).

160. *See Wilson*, 759 F.2d 1568, 1571 (11th Cir. 1985) (litigants do not have right to seal public records).

sealing motion, asserted a right of access. Under these circumstances, any reliance of the settling litigants in *FAB III* was not warranted. Thus, the weight allocated to reliance interests by the *FAB III* majority was justifiably different from the weight properly allocated to reliance interests in *Ernst & Ernst*. Although the majority did not articulate these factual differences between *FAB III* and *Ernst & Ernst*, it implicitly recognized the differences.[161]

D. Procedural Safeguards to Protect Competing Interests

In order to protect the right of the public and third parties to scrutinize the judicial process and also to protect the interests of the settling parties in maintaining secrecy once a motion to seal is made, certain procedural safeguards at the trial court level have developed from prior access cases and should be adopted in all circuits.[162] First, the court should give the public notice and an opportunity to be heard regarding the sealing of the documents, particularly where interested third parties can be readily identified at the time the motion to seal is considered. Second, the court should state specific, articulable facts which justify sealing. Third, the court, in balancing the public and private interests at stake, should consider whether the sealing of documents indirectly closes the proceedings as well by preventing the public from examining the judicial decision-making process.

Providing the public with an opportunity to object to sealing documents tends to serve the same policy considerations as maintaining access—it permits the public to scrutinize the integrity and fairness of the judicial process. Additionally, the litigants establish a right to rely, which warrants protection, only after there has been an opportunity for the public and interested third parties to object to a sealing motion.

161. *See supra* notes 50-62 and accompanying text for a discussion of the factual differences between *Ernst & Ernst* and *FAB III* noted by the *FAB III* majority.

162. *See, e.g., In re Knoxville News-Sentinel Company*, 723 F.2d 470, 473-74 (6th Cir. 1983) (public's right to be heard requires sealing order to be docketed with clerk of district court). *See supra* notes 116-20 and accompanying text for the Sixth Circuit's discussion of the procedural requirements necessary for sealing records.

In Publicker Indus. Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984), which involved the media's constitutional claim of access to a civil hearing and transcripts of an in camera proceeding, the Third Circuit set forth formal procedures for restricting access. *Id.* at 1071-72. The *Publicker* court only required that the trial court articulate countervailing interest to access, and after considering alternatives to closure, make specific findings for a need to close the proceedings. *Id. See also* Note, *Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts—Publicker Industries, Inc. v. Cohen*, 58 TEMP. L.Q. 159, 184-92 (1985) (discussion of procedural requirements beyond those articulated by circuit court).

Procedures for docketing sealing motions in criminal proceedings have been developed in the Third Circuit. *See, e.g.*, United States v. Raffoul, No. 86-3605, slip op. at 2 (3d Cir. Aug. 14, 1987) (procedures articulated in *Criden II* apply to motions for closure during criminal trials); *Criden II*, 675 F.2d 550, 560 (3d Cir. 1982) (motions for closure of pretrial hearings must be docketed, alternatives considered, and statement of reason for closure put on record).

CONCLUSION

In *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*,[163] the United States Court of Appeals for the Third Circuit held that a district court abused its discretion in denying a third party's motion to unseal both a settlement agreement and post-settlement motions and orders filed with the court.[164] The *FAB III* court found that a generalized interest in encouraging settlements, without a showing of additional factors, was insufficient to outweigh the public's common law right of access.[165] In reaching this conclusion, the court emphasized that the litigants relied on the judicial process not only to reach the settlement, but also to enforce the agreement.[166] Because the documents under seal included motions and orders evidencing judicial proceedings, the court refused to deny access.[167] Courts considering sealing orders should not deny the public's right of access without providing a reasonable opportunity for the public to oppose sealing or without determining that sealing documents do not indirectly seal judicial proceedings.[168] To do otherwise leaves the public without a remedy to a well defined and recognized presumptive common law right of access to judicial proceedings.

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163. 800 F.2d 339 (3d Cir. 1986).

164. *Id.* at 346.

165. *Id.*

166. *Id.* at 345.

167. *Id.*

168. *See supra* notes 133-60 and accompanying text for a discussion of the procedural factors relied on by courts in determining whether to restrict public access to documents.

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Renewed tension between right to privacy and the public's right to know

ARTHUR R. MILLER

To the person on the street, the American legal system often seems bewildering and overused, but nonetheless distant and unrelated to daily life. Consequently, most people would be outraged to learn that for less than $50, the fee for filing a lawsuit, a neighbor has the legal right to compel them to turn over all of their bank statements, medical records, income tax returns, religious documents, school records and other private information, so long as the information is likely to lead to other information that may be related to the lawsuit.

The outrage might intensify upon learning that the neighbor could then give or sell this information to gossips, the press, con artists, or any other buyers, unless the court issues an order prohibiting public disclosure, commonly called a protective order.

Should the courts have the authority to issue protective orders to keep private information confidential? Of course. If the court has the power to compel broad intrusions into private matters to resolve a lawsuit, it must also have the power to protect this same private information from further public disclosure outside of the lawsuit.

Although the answer may seem obvious, it is the source of controversy within the legal community and the media. This controversy has also caused consternation among members of the business community, who frequently are involved in litigation and who rely upon the courts' power to protect confidential trade secrets and other commercial information in order to maintain their competitive livelihood.

Behind this controversy are members of the media, and lawyers who handle personal injury cases, who claim that courts are using their power to protect information about public health and safety that the public has a right to know. To prevent courts from keeping information secret, these groups are lobbying state and federal legislatures to change the law. They want to restrict or eliminate the power of courts to keep private information produced in a lawsuit confidential.

Although Florida and Texas have acted precipitately and done so, there simply is no need to change the current system. Such an effort is under way in Massachusetts.

As any poor soul slapped with a lawsuit will tell you, courts must have the power to protect privacy when necessary.

There is no reason to believe that they have used that power to the detriment of the public's right to know. Courts have fine-tuned the classic tension between the right to privacy and the public's right to know for centuries. In recent years, this fine-tuning has led to greater public access. A few anecdotal cases have been put forth in the media, and by personal injury lawyers, allegedly demonstrating that courts have hidden information affecting public health and safety. Upon investigation, none of these war stories actually establishes a link between information kept confidential in court records and subsequent harm to the public.

Instead, investigation reveals that both the media and personal injury lawyers have an insatiable thirst for information – it is an essential fuel to their professional and financial well-being.

Those advocating reduced confidentiality in the courts undervalue competing privacy and property interests.

Although the public interest may be served when court proceedings are open, at times confidentiality serves equally important public interests. Arguably, restrictions on court authority to guarantee confidentiality might discourage someone from reporting instances of government fraud or corruption out of fear that his identity will be revealed in subsequent litigation, making retaliation against him possible.

Confidential news sources might dry up for similar reasons. Fear that prior medical treatment or marital difficulties might be disclosed publicly could cause some people to forgo legitimate legal claims altogether. Society is not served when the price of seeking civil justice is the sacrifice of the right to be let alone. This is a right of increasing importance to human dignity in a computerized society that provides instant and universal access to information once it has been captured.

To businesses involved in litigation, confidentiality is often the only means to protect million-dollar investments in trade secrets, intellectual property, and other proprietary information. Preventing this type of information from falling into the hands of business rivals is central to maintaining a competitive edge. Indeed, trade secrets and the like are considered property, and the protection of private property rights is one of most fundamental obligations of our legal system.

Finally, confidentiality is an important judicial tool that facilitates the resolution of a lawsuit by encouraging litigants to exchange information among themselves freely without fear that it will be disclosed publicly. Society's interest in the prompt, inexpensive resolution of legal disputes is compromised when we take these tools away from our already overburdened judiciary.

As the proponents of restrictions on confidentiality argue, the courts are public institutions. But this concept has meant that the courts are open to the public in order to resolve legal disputes and to allow the public to observe the justice system in action. Until this recent controversy, this concept never stood for the proposition that the courts are like fishbowls through which the public can observe the most intimate affairs of the litigants suspended in the civil justice process.

Lawsuits already are highly invasive and impose inordinate costs in both time and money. Legislatures should not raise these costs by restricting the power of courts to assure privacy and confidentiality when necessary.

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President's Page

Demolishing the Wall of Secrecy

During a question-and-answer session at the ATLA secrecy conference last spring, a gentleman in the audience stepped up to the microphone and told the sad story of his wife's premature death in 1988. Her doctors thought she was suffering from an irregular heartbeat. Actually, the artificial valve that was implanted in her heart years before had failed. She died in spite of open-heart surgery to replace the valve once the true cause of her condition was known.

Her husband was angry. He and his wife had had no idea that the Bjork-Shiley convexo-concave heart valve could fracture and fail. They had never been warned by their doctors or by Shiley, the valve's manufacturer, although problems with the valves first appeared in 1978. Last summer Shiley finally announced an effort to contact about 20,000 North Americans who had been given the valve and warn them of the potential problem.

For years, Shiley had hidden this important safety information from the public behind protective orders and confidential settlements. Other manufacturers and their insurers, notably in Dalkon Shield and all-terrain vehicle litigation, have done the same. As a result, consumers have paid a tragic human cost. These victims are why ATLA has mounted a vigorous campaign against secrecy in the courts.

Right to Know

The people's right to know about matters of public concern is the foundation of our constitutional house. Without the free exchange of ideas and information, the structure would surely crumble. Recognizing this, the founders enshrined freedom of speech, assembly, and the press in the first amendment. These freedoms ensure the public's right to have access to information that vitally affects their health and safety.

Secrecy orders fly in the face of these principles. When a defendant in a case insists that a plaintiff keep mum about critical safety matters in exchange for settlement, it chips away at the ideal of an informed public.



Judges, of course, must approve or deny corporate requests for secrecy. In May 1989, the ATLA Board of Governors adopted a resolution urging judges to demand clear proof of a legitimate need for secrecy before they lock up information of life-and-death importance and throw away the key.

Fortunately, a few states have taken the lead in ending the irresponsible use of protective orders. Virginia passed the first law promoting openness in the judicial process in 1989. Florida's "Sunshine in Litigation" Act, which went into effect last July, prohibits judges from concealing any "public hazard." The Rhode Island legislature passed a similar measure, but the governor vetoed it.

Change can also come from within the judiciary. Last year, the Texas courts adopted a new rule of civil procedure (Rule 76a) that says that all civil court records are presumed to be open. Anyone wishing to seal records must prove that secrecy is necessary and that the need outweighs the public's interest in the information. [*See* Doggett, "Keeping Court Records in the Open," TRIAL, July 1990, at 62.]

Scare Tactics

Not surprisingly, our courtroom adversaries are resisting the movement toward openness. Corporate defendants claim that giving the public greater access to court records threatens economic competitiveness by revealing trade secrets. And they cynically raise the specter of Big Brother peering into the private lives of any individual who becomes involved in litigation. These are nothing more than scare tactics—straw men designed to divert attention from the central issues in the debate.

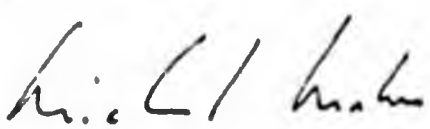
Trade Secrets

We have no objection to the courts protecting legitimate trade secrets. But defendants frequently resort to the trade-secret umbrella to shelter information that evidences negligence or product defects and impacts on the health and safety of many others. Attempts by defendants to wrap incriminating information in the cloak of trade secrets must be strenuously resisted.

The alleged threat to personal privacy is an even redder herring. We're not talking here about the private details of the parties' personal lives. *We do not challenge individual privacy in juvenile justice, sexual abuse cases, domestic relations, or other legitimately private matters.* However, courts have never recognized a comparable right to privacy for corporations. It is particularly outrageous for a corporation to claim a right to privacy when its product or behavior imperils the health and safety of the public.

The bottom line is that secrecy almost always protects the wrongdoer and almost never serves the public. Every secrecy agreement lays another brick on the wall that separates the public from vital health and safety information. The taller that wall becomes, the longer the shadow it casts on a judicial system that was intended to be a public institution, with disputes resolved in the bright light of day.

And as that shadow lengthens, it will overtake more people like the widower at the conference who watched, confused and helpless, as his wife's life was snuffed out by a corporate mistake that should have been made public knowledge long before.



Michael Maher

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?"

COMMON LAW OR FIRST AMENDMENT RIGHT OF ACCESS TO SEALED SETTLEMENT AGREEMENTS

CHERYL LYNNE COON

THE RIGHT TO seal settlement agreements is a vital force in negotiations.[1] Parties may wish to avoid publicity and scandal and to protect their privacy.[2] In products liability cases or mass torts, such as airplane crashes, parties may want to prevent other potential plaintiffs from using information from one particular case in other cases.[3] Parties feel this is justified because one claim may be clearly well-grounded or clearly invalid, and it may or may not be relevant to other potential plaintiffs' claims. Perhaps the particular lawyer handling one plaintiff's case was either very good or very poor at unearthing evidence before the settlement.[4] Others may agree to sealing to obtain an increased settlement. For whatever reason, the

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[1] *See infra* notes 204-220 and accompanying text for a discussion of the value of encouraging settlement and confidentiality in some cases.

[2] *See, e.g.*, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986) (discussing the families' rights to keep their grief and financial affairs private by sealing plane crash settlement agreements). One article, *Sealed Lawsuits Shelter Wealthy, Influential*, lists several other reasons for sealing records: "The secret treatment of the lawsuits, according to plaintiffs lawyers, most frequently stems from attempts to avoid personal embarrassment or professional disrepute, to discourage additional lawsuits, or to coerce large settlements from defendants in return for confidentiality." Dallas Morning News, Nov. 22, 1987, at 1A, col. 5.

[3] *See infra* notes 81-98, 111-129, and accompanying text for example of cases dealing with access of sealed settlements in products liability or mass tort cases.

[4] *See infra* notes 111-129, 201-250, and accompanying text for a discussion of some distinctions between settlements and court records, and the necessity of confidentiality in settlements.

right to seal settlement records is frequently crucial.[5] Yet, the right to seal records is not absolute. In fact, the right may be largely illusory and uncertain, and is often the subject of abuse.[6]

Despite the value of sealing settlements, however, access is often desirable in certain situations. For example, in institutional reform litigation such as in civil rights or employment situations where absent parties are potentially affected by the outcome of a suit, sealing of consent decrees or settlements is arguably improper and full access should be accorded.[7] Addressing the recent notoriety of the access issue to everything from settlements to sealed discovery documents, one article notes that "'[f]or

[5] *See, e.g.*, Palmieri v. New York, 779 F.2d 861 (2d Cir. 1985) (without active court participation and promise of confidentiality, settlement would never have occurred). For a discussion of *Palmieri*, see *infra* notes 143-151.

[6] *See infra* notes 49 and 191 and accompanying text for a discussion of potential problems in right of access cases. An investigation in Dallas, Texas, for example, revealed that courts had sealed eighty cases despite the fact there were no formal court orders authorizing the sealings. *See* Dallas Morning News, Nov. 22, 1987, at 21A, col. 3. The paper interviewed a state district court judge, Judge John Marshall, who stated that the abuse stemmed, in his opinion, from a "'good ol' boy system'" between judges and favored lawyers. *Id.* Further, as Judge Marshall stated, parties waive their privacy concerns when they bring their disputes into the judicial system. *Id.* "You are asking the government to come into your life. It's not like the government is coming in here as an unwelcome visitor." *Id.* at 25A col. 4. As a means of controlling such abuse, Judge Marshall issued guidelines and form orders for all the district court judges to use in the future when parties request a sealing. *Id.* at 25A, col. 2. Several months later, Judge Marshall adopted a "good cause" standard for parties to meet if they desire to close records, based on the common law right of access. Dallas Morning News, Aug. 17, 1988, at 26A, col. 3-6.

[7] *See* Thornburg, *Litigating the Zero Sum Game: The Effect of Institutional Reform Litigation on Absent Parties*, 66 Or. L. Rev. 201 (1987) (discussing institutional reform litigation and its affect on third parties). The article explains that "[i]nstitutional reform cases aim to restructure certain units of society. In so doing, these cases affect institutions and individuals that are not before the court. Courts, commentators, and politicians have therefore expressed concern that the rights of the absent parties and institutions not be ignored in the remedy-creation process." *Id.* at 251. Thus, one factor should be availability of full review to all potentially affected. Unfortunately, this has not always been the case. *See, e.g.*, EEOC v. Strasburger, Price, Kelton, Martin & Unis, 626 F.2d 1272 (5th Cir. 1980); Southern Methodist University Association of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) (two related cases on discriminatory hiring practices which settled on the stipulation that all materials remain confidential for a specified time period).

a number of years nobody thought much about secrecy or about third parties who were not litigants . . . . Now we see more concern for the public interest and a recognition that some cases affect a lot of people and not just the parties.'"[8] Another article cites not only abuses of sealing and protective orders but the emerging device for complete withdrawal of all the papers and documents of a case from the record "leaving no trace that the lawsuit ever existed" and giving the parties the ultimate protection sealing orders do not.[9] Especially prevalent in products liability cases or mass accidents, such practices prevent "in the rush to secrecy . . . the early warning signals about defective products or questionable conduct [that] emerge during open court proceedings."[10] Thus, the practice may prevent the public and state review boards from receiving notice of malpractice or unprofessional conduct cases with the result that a psychologist or doctor sued, perhaps repeatedly, continues in a thriving practice.[11]

The Supreme Court has recently decided several cases dealing with the public's right of access to criminal trials

[8] *Should A Court Keep Secrets*, Nat'l L.J., Vol. 11 No. 6, 1, 22 (Oct. 7, 1988) (discussing recent access cases and problems they create) (quoting Cornish F. Hitchcock of the Public Citizen Litigation Group).

[9] *Secrecy Rules Hide Dangers*, Dallas Times Herald, Oct. 23, 1988, at A-1, A 18. The article lists the following practices as reasons for the abuse which results in "secret" law: protective orders, negotiated settlements requiring secrecy in exchange for more money, sealing orders, and withdrawal orders. *Id.* at A-18, col. 2-3. Thus, each potential plaintiff not only has to repeat exact work done by past plaintiffs throughout the case, but may never relate an injury to an event or have adequate warning to prevent the harm from occurring. Arguably, this is not an efficient allocation of society's resources.

[10] *Id.* at A 18, col. 3. As the article suggests:

> In local and federal courthouses across the country, there are confidentiality orders in hundreds of cases that allege safety problems with widely used products and facilities. Every day, someone gets into a car, takes a drug, sees a doctor or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order.

Id.

[11] *Id.* at A 18, col. 3-4. Some judges may be reluctant to grant sealing orders because of the significant public interests, one judge stating that "[w]hen parties litigate, they're using a public process." *Id.* at col. 5 (quoting Judge Leonard Braman of the Washington D.C. Superior Court).

and criminal records.[12] The source of the public's right of access to both the trial and records in civil cases, however, is uncertain.[13] Presently, two bases exist for potential access to court records, including settlement agreements. Some courts find a public right of access in the first amendment, others under the common law right of access.[14] Even among courts basing decisions solely on the common law right of access, however, differences of opinion exist as to the proper standard of review and the proper test for granting a request to seal or unseal materials.[15]

The focus of this comment is the public's right of access to sealed civil settlement agreements which were discussed in open court or filed with the court, thus formally

[12] *See* Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) (access to criminal pretrial proceeding); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (allowing access to voir dire in criminal proceeding); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (access to criminal trial); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (public access to criminal trial under the first amendment); *see also infra* notes 20-31 and accompanying text for a discussion of *Richmond Newspapers*.

[13] *See In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985). *In re Reporters* discusses the differences between civil and criminal trials, pretrial and trial material, and access to courts and records. *Id.* at 1330-1341; *see also Minneapolis Star & Tribune*, 392 N.W.2d at 205-06 (discussing the many factors and uncertainties which come into play in right of access cases as they relate to access of settlement agreements). For a discussion of the differences between pretrial materials and trial records or evidence, see Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983), *see infra* notes 230-250.

[14] *Compare Palmieri*, 779 F.2d 861 (case resting on common law right of access and further separating original sealing from later unsealing) *with* Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (adopting a first amendment standard to justify closure for products liability settlement sealing request). For a discussion of these and other related cases see *infra* notes 83-203. Another issue is the difference between pretrial, nonpublic and evidentiary materials, discussed at *infra* notes 120-125, 230-250 and accompanying text. Settlement agreements are similar to pretrial materials because they are "private" contracts reached with no court or public supervision in most cases. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-36 (1984); *In re Reporters*, 773 F.2d at 1331-37.

[15] *See* Bank of Am. Nat'l Trust v. Hotel Rittenhouse Assoc., 800 F.2d 339 (3d Cir. 1986) (disagreement between the majority and dissent as to the proper standard); Times Herald Printing Co. v. Jones, 717 S.W.2d 933 (Tex. Ct. App.), *vacated*, 730 S.W.2d 648 (Tex. 1986) (appellate decision split on relocating *en banc*, subsequently vacated for lack of jurisdiction).

becoming part of the court's records.[16] Access cases raise several issues under either a first amendment or common law basis, each apparently with no "clear" answer, such as the difference between access to court records versus access to the trial itself[17] and the difference between granting the original seal and later attempts by a third party to unseal the agreement.[18] Also, the issue of how much weight courts should give to the value of encouraging settlements in the various balancing tests used in determining a right of access arises.[19] The comment addresses the first amendment right of access, followed by a discussion of the common law right and the value of encouraging settlements. Finally, the comment discusses potential solutions suggested by authorities for solving the access dilemma until a conclusive answer comes.

[16] *See infra* notes 186-193, 230-250, and accompanying text for a discussion of the issue of whether filing an agreement with a court changes the nature of the material because a court may rely on the material in forming its judgment. Some commentators indicate that if a court does rely on material, the public's need for access increases so that the public can fully understand the judicial determination. *See* Marcus, *supra* note 13, at 49 (discussing a court's reliance on material as the proper basis for determining a right of access to material).

[17] *See infra* notes 20-31 and accompanying text for a discussion of the differences; *see also In re Reporters*, 773 F.2d at 1331 (distinguishing between access to records and access to trials); Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659, 691-92 (1982) (noting the Supreme Court's distinction between a right of access to trials and records).

[18] *See infra* notes 142-203 and accompanying text for a discussion of the cases discussing this issue. Courts apply several factors in the various balancing tests used for determining whether a right of access exists in a particular case. The factors arose, however, in criminal access cases. *See, e.g., Richmond Newspapers*, 448 U.S. at 555. Thus, an additional issue in right of access cases is whether these factors apply equally to civil proceedings. For a discussion of this issue, see Gannett Co. v. DePasquale, 443 U.S. 368, 386-87 n.15 (1979) (discussing the application of these factors to civil trials) and Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415 (1981) (in-depth analysis of the factors presented in the *Richmond Newspapers* case and their application to civil trials).

[19] *See, e.g., Times Herald*, 717 S.W.2d at 933 (demonstrating the various views vividly by contrasting the majority, concurring and dissenting opinions and discussing the value of encouraging settlement).

I. First Amendment Right of Access to Civil Court Records

The Supreme Court has not directly decided whether a first amendment right to attend a civil proceeding exists.[20] In *Richmond Newspapers, Inc. v. Virginia*,[21] however, the Court held that the first amendment grants the public a right to attend criminal proceedings.[22] Thus, in order to close a criminal case, a party must show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[23]

The *Richmond Newspapers* Court adopted a two-prong historical/functional test, based on the historical openness and importance of criminal proceedings and the functional value of openness to a democratic government.[24] The Court listed several values advanced by

[20] *See Richmond Newspapers*, 448 U.S. at 580 n.17 (noting that the case did not answer the question for civil trials since the issue was not raised); Fenner & Koley, *supra* note 18, at 415 (discussing the extension of *Richmond Newspapers* to civil proceedings).

[21] 448 U.S. 555 (1980) (plurality opinion). In *Richmond Newspapers*, the press sought to vacate an order closing a murder trial. *Id.* at 560. The trial court judge held that, because the trial was the fourth trial for the defendant, caution was necessary in order to prevent the jurors from hearing details outside the courtroom. *Id.* at 561.

[22] *Id.* at 580. The Court stated that the "First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.* at 576. Moreover, the first amendment implicitly requires access to assure the public's right to gather information. *Id.* at 575-76. The Court explained that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77. Justice Rehnquist, however, in the dissent, expressly rejected a public right of access under the first or fourteenth amendments as long as the parties and the judge agree to closure. *Id.* at 604-06.

[23] *See Press-Enterprise Co.*, 464 U.S. at 510 (closing of criminal voir dire proceeding); *Globe Newspaper*, 457 U.S. at 606-607. The *Globe Newspaper* Court held that in a criminal case a party must show an important governmental interest and that no less restrictive means exists to protect that interest to justify closure of either the trial or records. 457 U.S. at 606-07.

[24] *Richmond Newspapers*, 448 U.S. at 564-78; *see also* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (discussing the factors and using the two prong test in a decision extending the first amendment right of access to civil proceedings). For a discussion of *Publicker Industries* see *infra* notes 48-59 and accompanying text.

open trials.[26] These include: increasing the public's confidence in the judicial system; enhancing the quality of the system by subjecting proceedings to public view; increasing public information about important social issues; and educating the public about how the judicial system operates.[26] If these historical and functional values of openness outweigh the particular parties' benefits from closure, sealing is improper.[27]

This first amendment balancing test, requiring a strong showing to prevent access, is in fact very similar to the common law right of access balancing test. Under the common law test, each case is similarly decided on a balancing of the cases's particular facts and circumstances, but with a lesser showing required to restrain access.[28] In fact, courts use the same reasons, such as increasing public confidence in the judiciary, as balancing factors under both tests.[29]

After *Richmond Newspapers*, several courts extended the first amendment right of access to civil proceedings using the historical/functional test.[30] From this extension, some courts further held that a first amendment right of access to civil court records exists, including settlement agreements filed with a court under seal.[31]

[25] *Richmond Newspapers*, 448 U.S. at 564-78.

[26] *Id.*

[27] *Id.*

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

[29] *See, e.g.*, *Nixon*, 435 U.S. at 602; *Minneapolis Star & Tribune*, 392 N.W.2d at 202-03 (discussing balance and value of factors under common law test).

[30] *See* Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985). While *Wilson* did not expressly adopt a first amendment basis, the court did adopt the increased standard of proof necessary in first amendment cases to justify closure. Thus, the court required demonstration of an important interest as a strict prerequisite to restricted access to information. *Id.* at 1570; *see also Publicker Indus.*, 733 F.2d at 1070-71; *In re* Continental Ill. Sec. Litig., 723 F.2d 1302 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983).

[31] *See infra* notes 32-100 for some of the cases extending a right to civil records. The courts, however, did not discuss the differences between the right of access to trials and the right of access to records, which is a legitimate question potentially

A. *Extension of the Richmond Newspapers Test to Non-Settlement Materials*

One of the first cases to extend the first amendment right of access to civil records was *Brown & Williamson Tobacco Corp. v. FTC*.[32] In *Brown & Williamson*, the Public Citizen Health Research Group, desiring to publish information in Federal Trade Commission (FTC) reports regarding tar levels in Brown & Williamson's cigarettes, intervened in a suit to modify an order sealing reports Brown & Williamson submitted to the FTC.[33] The citizen's group asserted three bases for its right of access: the Freedom of Information Act,[34] a common law right of access, and the first amendment.[35] The *Brown & Williamson* court, using the *Richmond Newspapers* historical/functional test, held that a first amendment right to the documents

affecting a determination of the access issue. *See In re Reporters*, 773 F.2d at 1331. The Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867, 871-72 (Fla. 1979) (pointing out the differences between closing a trial and closing records and finding no first amendment right allowing a court to unseal records which have been properly sealed); Note, *supra* note 17, at 691 (noting the difference and that public access is fulfilled solely by the right to attend a trial). *In re Reporters* stated that the first amendment does not create a right of access to civil trials, "much less to access to *records* in civil trials — or, for that matter, even records in criminal trials." 773 F.2d at 1331.

[32] 710 F.2d at 1165.

[33] *Id.* at 1169. The group was a non-profit organization engaged in research and publication of health and safety information. *Id.* The plaintiff, Brown & Williamson, was a cigarette manufacturer whose tar levels were under investigation by the FTC after the FTC received complaints alleging that the FTC's testing methods produced erroneously low tar levels due to the special design of the plaintiff's cigarettes. *Id.* at 1168. Thus, public health was potentially adversely affected. *Id.* After determining the test results were incorrect, the FTC proposed to publish the information, at which point Brown & Williamson sought a preliminary injunction to stop the press release. *Id.*

[34] 5 U.S.C. § 552 (1982). The Freedom of Information Act allows any person to request from any federal governmental agency information ranging from agency opinions and records to statements of policy and staff manuals in order to prevent "secret" government. *Id.*

[35] *Brown & Williamson*, 710 F.2d at 1169. During the investigation, the FTC requested comments from five major cigarette companies, including Brown & Williamson. *Id.* The FTC also agreed to seal all the information from the administrative proceeding. *Id.* at 1176. The court dismissed the Freedom of Information claim because the statute expressly exempts courts from its application. *See* 5 U.S.C. §§ 551(1)(B), 552(b)(2) (1982).

existed.[36] Thus, Brown & Williamson failed to satisfy the increased burden of proof necessary to obtain closure.[37] Moreover, the court noted that in certain civil proceedings, such as those with government agency involvement, the public's interest and need for access are as high as in criminal proceedings.[38]

Echoing the *Richmond Newspapers* Court, the *Brown & Williamson* court discussed the fact that widely publicized trials allow the public to see the government in action, permit expression of public concerns on important issues and venting of emotions, increase the quality of judicial proceedings by public scrutiny, and increase the public's confidence in the fairness of the judicial system.[39] Although the court noted that these factors arose in criminal access cases, it held that the factors apply with equal force to civil trials.[40] The court, however, did not discuss the differences between criminal and civil proceedings.[41]

Ultimately, the *Brown & Williamson* court held that there are only two categories of material exempt from public access, which are: matters related to keeping order in the courtroom and matters related to the content of the information.[42] Under the first category, the court held that a

[36] *Brown & Williamson*, 710 F.2d at 1177-78.

[37] *Id.*

[38] *Id.* at 1178. For example, the court listed antitrust, government regulation actions, bankruptcy cases, and discrimination actions as instances in which public interest is very high. *Id.* Public interest increases because the outcome of the trial may affect citizens directly. *Id.*; *see, e.g., In re* San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) (allowing access to pretrial discovery material in a civil rights case on a restricted basis).

Other suits where public interest is high include physician malpractice or sexual misconduct, environmental contamination suits, and products liability cases. *See* Dallas Morning News, Nov. 22, 1987, at 1, col. 4. A major concern is that professionals escape review by state regulatory boards by sealing records, which means that physicians may have many instances of complaints against them yet no record for the public to check. *Id.* at 25A, col. 6.

[39] *Brown & Williamson*, 710 F.2d at 1177-78.

[40] *Id.*

[41] *Id.*; *see also* Fenner & Koley, *supra* note 18, at 430-32 (discussing the factors and their application to civil proceedings).

[42] *Brown & Williamson*, 710 F.2d at 1179. Under the second category, trade secrets, national security, and protecting the privacy of third parties justify closure. *Id.*; *see also In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476-77 (6th Cir.

party must demonstrate a compelling governmental interest to override the traditional presumption of access.[45] Under the second category, the court employed a balancing test weighing the parties' interests in closure against the public's interest in openness.[44] Additionally, the court stated that a company's desire to keep commercially harmful information from the public is not a factor for consideration in the balancing test.[45] In the court's opinion, the result of giving weight to the private parties' desires for secrecy would lead to abuses and a "norm" of closure rather than openness.[46]

In 1984, the Third and Seventh Circuit Courts of Appeal also extended the first amendment right of access to civil court records.[47] In *Publicker Industries, Inc. v. Cohen*,[48] the issue was whether the first amendment protected the public's right of access to a confidential company report entered as evidence during a trial.[49] Only the portion of

1983) (allowing the sealing of FDIC records to preserve privacy because the material contained financial information of both parties and nonparties); *In re* Estate of Hearst, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977) (closure, for a temporary period only, to prevent serious threats to the lives and property of trust beneficiaries). *But see* United States v. Posner, 594 F. Supp. 930 (S.D. Fla. 1984) (permitting access to defendant's tax returns which had been entered as evidence and discussed in open court, thereby becoming part of the open court record and waiving the right to privacy). The *In re Estate of Hearst* court clearly favored openness and stressed the fact the closure was purely temporary. 136 Cal. Rptr. at 821. *In re Estate of Hearst*, therefore, was arguably an early indication of the trend toward increased public access.

[43] *Brown & Williamson*, 710 F.2d at 1179.

[44] *Id.* The presumption in favor of disclosure tips the balance in favor of openness under this category. *Id.* This balancing test, "weighing in" the presumption of openness, is similar to the test used in determining the common law right of access. The major difference between the two balancing tests is that the first amendment test is weighted more heavily in favor of openness due to its constitutional basis. *See infra* notes 99-203 and accompanying text for a discussion of the common law test.

[45] *Brown & Williamson*, 710 F.2d at 1179.

[46] *Id.* For examples of present abuses of sealing, see Note, *Publicker Industries v. Cohen: Public Access to Civil Proceedings and a Corporation's Right to Privacy*, 80 Nw. U. L. Rev. 1319, 1324 n.36, 1350-51 (1987).

[47] *See Publicker Indus.*, 733 F.2d at 1061-70; *Continental*, 732 F.2d at 1302.

[48] 733 F.2d at 1061.

[49] *Id.* at 1064-65. The report concerned the company's use of an enzyme in the production of its Scottish whiskey. *Id.* Disclosure of this practice threatened adverse economic consequences to the company, and the entire scotch industry as well, due to the widespread practice of blending different scotch whiskeys. *Id.*

[50] *Id.* The problem regarding the closure was that, by Publicker's own admission, at least one-third of the closed transcript did not contain truly confidential information. *Id.* Further, the sealing was not by mutual agreement but solely at the request of Publicker in order to protect its commercial reputation. *Id.*

[51] *Id.* at 1066. Because the information was technically public at the time of the trial, the court first had to determine whether the issue of access was moot. *Id.* at 1065. The court held that because the question was one which was likely to occur again and which due to the short duration of trials could not normally be litigated before a trial ended, the court had jurisdiction to determine the issue. *Id.* The information was already "public" because the company released the material in the report to its stockholders during the pending appeal. *Id.*

[52] *Id.* at 1067; *see also supra* notes 20-31 and accompanying text for a discussion of *Richmond Newspapers* and its test.

[53] *Publicker Indus.*, 733 F.2d at 1070.

[54] *Id.* at 1067-71.

[55] *Id.* at 1070-71.

the trial concerning the confidential report was closed to the public.[50] The court, finding that the common law right of access clearly applied, noted that a first amendment right of access is not yet explicitly recognized in civil cases.[51]

The court, however, extended the first amendment right of access to civil records and adopted the two-prong historical/functional test from *Richmond Newspapers*.[52] *Publicker Industries* held that the balancing factors, although originating in criminal access cases, logically apply with equal force to civil cases. For example, the court stated that openness would increase the quality of trials and educate the public in civil as well as criminal trials. The court also noted that, historically, civil trials were as open to the public as criminal proceedings.[53] Further, in the court's opinion, openness in civil trials is just as necessary for the democratic process as it is in criminal trials.[54] Therefore, *Publicker Industries* held that a party must show a compelling governmental interest and the unavailability of a less restrictive method to protect that interest to justify closure.[55] Yet, while the court held that a first amendment right of access exists, it failed to critically analyze the distinctions between civil and criminal trials, or between access to a trial versus access to records.

Publicker Industries, however, did note that the right of access is not absolute under either the first amendment or the common law.[56] According to the court, the party seeking closure bears the burden of proving a "clearly defined and serious injury," such as that which occurs upon disclosure of a trade secret to close a record.[57] The reason for closing the *Publicker Industries* trial was proper because, if the public attended a confidentiality hearing, the material would necessarily not be confidential.[58] The problem, however, was that the district court abused its discretion by closing the entire record instead of narrowly tailoring the closure to fit the needs of the case.[59]

Similarly, in *In re Continental Illinois Securities Litigation*,[60] the Seventh Circuit Court of Appeals extended the first amendment right of access not only to civil trials but also to civil records.[61] In *Continental*, the press sought to obtain a special litigation committee report entered as evidence in open court during a motion to terminate shareholder derivative suits,[62] basing its claim on the common law right of access.[63] The company responded

[56] *Id.* at 1070.

[57] *Id.* at 1070-71. *Publicker Industries* held that interests such as trade secrets, attorney-client privilege, or a binding contractual duty not to disclose information could justify closure. *Id.* at 1073. This raises the question of whether a binding agreement as part of a settlement justifies closure, an idea which some courts have rejected. *See, e.g.*, *Wilson*, 759 F.2d at 1568 (allowing access to sealed settlement which was sealed by mutual agreement of all parties); *Times Herald*, 717 S.W.2d at 938 (holding that an agreement between the parties to deny access is not binding on a court).

[58] *Publicker Indus.*, 733 F.2d at 1063. Moreover, the court held that the injury must be specific in order to qualify for consideration. *Id.* at 1071. Thus, the company's desire to keep information pertaining to its poor management practices from the public did not qualify. *Id.* at 1074.

[59] *Id.* at 1072-73. Another problem was that the district court failed to make an adequate record for review. *Id.* at 1073. The *Publicker Industries* court also held that a district court should make specific findings on the record concerning access decisions in order to facilitate review. *Id.*

[60] 732 F.2d at 1302 (7th Cir. 1984).

[61] *Id.* In *Continental*, shareholders were attempting to force the company to pursue certain legal claims. *Id.* at 1301. The company, in response, hired lawyers to investigate the merits of the claims. *Id.* The law firm then hired an accounting firm to investigate the company's auditors. *Id.*

[62] *Id.* at 1304.

[63] *Id.* at 1308.

by asserting attorney-client privilege.[64] The court, however, began the opinion by stressing that a presumption of openness attaches once material is entered in the court records as evidence and relied on by the court in its decision.[65]

While the *Continental* court did not expressly adopt a first amendment basis for the right of access, the court did adopt the more stringent first amendment standard requiring a compelling interest or extraordinary circumstances to justify closure.[66] *Continental* focused on the fact that if a judge relies on material, public access is necessary for the public to fully understand the judicial opinion.[67] The court also held that if parties discuss material in open court, the information becomes part of the open court record and subject to the presumption of openness.[68] Like the *Brown & Williamson* and *Publicker Industries* courts, however, the *Continental* court failed to discuss the distinctions between access to records and access to trials or the differences between civil and criminal proceedings.[69]

Further, Continental's argument that other parties

[64] *Id.* at 1304-05. The company also asserted that the material was protected by work product immunity and that the protective order covering the report prevented disclosure. *Id.* at 1310. The court held, however, that once a party introduces material as evidence in open court, he waives these defenses. *Id.* at 1311-15. The court indicated that the report was an important determinant of whether it was proper to terminate the claims. *Id.* at 1307. In fact, the district court judge expressly indicated his reliance on the material. *Id.*; *see also* FED. R. CIV. P. 26.

[65] *Continental*, 732 F.2d at 1308-09. The court listed factors such as improved public confidence and better quality of court proceedings arising from openness which weigh in favor of disclosure, along with court reliance. *Id.* Additionally, the court held that due to the nature of the suit, involving the securities market, public interest was high and thus weighed in favor of openness. *Id.* at 1308 n.9. Following the *Brown & Williamson* and *Publicker Industries* courts, the *Continental* court used a balancing test weighing the parties' interests in closure against the public's interests in openness. *Id.* at 1313.

[66] *Id.* at 1313. The balance must weigh clearly in favor of closure, thus a court resolves any doubts in favor of disclosure. *Id.* Additionally, the court advocated the use of specific findings on the record at the trial court level in order to avoid the necessity of remanding cases when proper review is impossible. *Id.*

[67] *Id.* at 1313.

[68] *Id.* at 1313-14.

[69] *Id.* at 1308-12; *see also supra* notes 32-59 and accompanying text for a discussion of the *Brown & Williamson* and *Publicker Industries* cases.

would use the material against it in other lawsuits did not persuade the *Continental* court to maintain closure.[70] The *Continental* court expressly rejected the contention that, absent a claim of clear and significant present danger to the party, potential future harm can prevent disclosure.[71] Moreover, the court stated that heightened scrutiny is necessary in closure cases because less scrutiny could lead to abuses and a decrease of public confidence in the judiciary.[72] The court did recognize, however, that allowing access to the report would hamper the free flow of information which makes special litigation committees effective.[73]

Thus, based on *Continental* and similar cases, there is an apparent trend to extend the first amendment right of access to both civil trials and civil records, based largely on the historical/functional *Richmond Newspapers*' test.[74] When dealing with evidentiary materials, courts seem to apply the *Richmond Newspapers*' factors equally to civil and

[70] *Continental*, 732 F.2d at 1315.

[71] *Id.* Further, the *Continental* court stated:

> Continental also argues that confidentiality is required because otherwise the report will be used against it in other litigation . . . . We have some reason to doubt that the question whether third parties may use the report in litigation against Continental is, in strict contemplation, legally relevant to the decision whether the report should be disclosed. Whether the material is damaging is a consideration apart from attorney-client privilege or work product immunity. And there is no general privilege, analogous to the fifth amendment's protection against self-incrimination, that protects against disclosure of information that may lead to civil liability.

Id.

[72] *Id.* at 1314. The court stated that "[w]hile sealing one document in one case may not have a measurable effect on confidence . . . , the effect of a consistent practice of sealing documents could prove damaging." *Id.*

[73] *Id.* at 1314-15. The court, however, clearly refused to adopt a *per se* rule in favor of disclosure. *Id.* Rather, the court held that each case would turn on the balancing of its unique factors. *Id.* The dissent, however, noted that the report was submitted as evidence under seal and therefore was never really part of the open court record. *Id.* at 1320 (Pell, J., dissenting). Further, the dissent believed that the effects of the decision on special litigation committees deserved more weight than the majority attributed to the issue. *Id.* at 1316.

[74] *See supra* notes 32-73 and accompanying text for a discussion of some cases which extended the right.

criminal cases.[75] In civil or criminal cases, a court's reliance on material in forming a judgment on the merits necessitates access so that the public may fully comprehend the judicial determination.[76] A major problem with the trend, however, is the fact that the cases do not provide an in-depth analysis of the distinctions between civil and criminal trials.[77] Further, some cases fail to discuss the differences between access to records and access to trials or between pretrial and evidentiary materials.[78]

For example, the *Brown & Williamson* case demonstrates the difference between access to non-settlement evidentiary material and access to settlement agreements.[79] The case centered on an administrative agency and its actions[80] and dealt with significant public health issues.[81] Thus, public interest in disclosure weighed heavily in the balance. By contrast, most settlement agreements normally concern only private individuals, do not relate to public issues, are not evidentiary, and occur in private with no rules regulating behavior or directing results.[82]

[75] *See supra* notes 21-27, 65-68 and *infra* notes 230-242 and accompanying text for a discussion of factors which courts consider and the effect of court reliance on access.

[76] *Id.*

[77] *See, e.g., Publicker Indus.*, 733 F.2d at 1059; *Continental*, 732 F.2d at 1032; *Brown & Williamson*, 710 F.2d at 1165.

[78] *See Publicker Indus.*, 733 F.2d at 1059.

[79] *See infra* notes 114-129, 230-242, and accompanying text for a discussion of some of the differences.

[80] *Brown & Williamson*, 710 F.2d at 1180. One difference is that Brown & Williamson's competitors had ready access to the information due to the previous administrative proceeding. *Id.* Thus, any threat of harm to Brown & Williamson rested solely on release to the general public. *Id.*

[81] *Id.* at 1168. Because the FTC determined that the tar levels were erroneously low for Brown & Williamson's cigarettes, public safety and health were expressly implicated. *Id.* Additionally, the court held that the FTC's promise of confidentiality did not bind a federal court in subsequent litigation. *Id.* at 1180; *see also* 5 U.S.C. § 552b-2(d)(2) (1987) (stating that disclosure of material from confidential agency documents is governed by court rules or orders).

[82] *See infra* notes 230-242 and accompanying text for a discussion of the differences between settlement agreements and evidentiary materials. Perhaps the largest difference concerns court reliance on evidentiary material to form a judgment, thus increasing the need for public access so that the public may fully understand judicial decisions, an issue discussed at *supra* notes 64-68 and accompanying text.

B. *Extension of First Amendment Right of Access to Settlement Agreements*

Thus far the cases adopting a first amendment standard for a right of access to civil trials and records have not dealt with settlement agreements, which are arguably similar to nonpublic pretrial materials.[83] The cases did, however, establish a foundation which later courts used to permit access to settlements. In *Wilson v. American Motors Corp.*,[84] for example, the plaintiff sought to invoke nonmutual collateral estoppel[85] against American Motors and, therefore, wanted to unseal a previous settlement agreement between Wilson and American Motors.[86] After discussing the common law right of access, *Wilson* noted that the Supreme Court has not extended the first amendment right of access to civil trials or records.[87] The *Wilson* court also noted the varying standards and uncertainty among appellate courts regarding access to civil records.[88] Ultimately, after analyzing the cases, *Wilson* held that in view of the strong presumption of openness of courts and records, a party must show a "compelling governmental interest" in order to close either a trial or

[83] *See supra* notes 32-81 and accompanying text for a discussion of these cases.

[84] 759 F.2d 1568 (11th Cir. 1985).

[85] Nonmutual collateral estoppel compares to res judicata in that a litigant may rely on a previous determination of an issue if a party had a full and fair opportunity to litigate the issue in a previous suit. *See* LANDERS & MARTIN, CIVIL PROCEDURE 933-53 (1981).

[86] 759 F.2d at 1569. Both plaintiffs were injured by the same model jeep manufactured by American Motors. *Id.* The plaintiff asserted both a common law and a first amendment basis for the right of access. *Id.*

[87] *Id.*

[88] *Id.* at 1570. The court referred to the *Publicker Industries* and *Brown & Williamson* cases which extended the first amendment right to access to civil evidentiary materials. *Id.* The *Wilson* court further noted that the Fifth Circuit Court of Appeals held that there is no constitutional right of physical access to courtroom exhibits. *Id.* The Fifth Circuit ruling bound the *Wilson* court since the Eleventh Circuit adopted as precedent all Fifth Circuit decisions prior to October 1, 1981. *Id.* (referring to Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981)). Therefore, the *Wilson* court separated the materials sought by the plaintiff into two groups: those related to the court records, such as pleadings, docket entries, and transcripts; and courtroom exhibits. *Id.*

records.[89] It thereby adopted the more stringent first amendment standard.[90] Thus, because the original party did not demonstrate "exceptional circumstances," the court held that the order granting the original seal was invalid.[91] Additionally, *Wilson* held that a company cannot prevent disclosure merely by asserting that release will harm its commercial reputation.[92]

Moreover, *Wilson* held that the need to encourage settlements cannot justify closure although recognizing that it is a valid concern.[93] While recognizing the existence of public and private interests in encouraging settlements, the court stated that "the payment of money to an injured party is simply not 'a compelling governmental interest' . . . ."[94] The court's major concern was that if courts give weight to parties' desires for "secrecy" many parties would agree to close records, thus leading to abuses of the system.[95] *Wilson* raises questions, however, of fairness

[89] *Id.* at 1571.

[90] *Id.* Adopting the standard from criminal access cases, the *Wilson* court also held that closure must be narrowly tailored to suit the particular situation. *Id.* (referring to *Globe Newspaper*, 457 U.S. at 606-07). *Wilson* differs from some cases in that although the court sealed the entire record, the trial itself was open to the public. *Id.* at 1569. Thus, the plaintiff or anyone could have attended the trial. *Id.* Further, the *Wilson* parties settled only after the jury answered special interrogatories, as opposed to other cases which settle before the trial or at least before the case reaches the jury. *Id.*

[91] *Id.* The court, however, failed to distinguish and discuss the differences between access to a trial and access to records, simply noting that the public could have attended the trial. *Id.* For a discussion of these distinctions, see *infra* notes 108-110 and accompanying text. *Wilson* listed as examples of "exceptional circumstances" protection of trade secrets, national security, and privacy of third parties. 759 F.2d at 1570. The court even indicated that if material is relevant to another case, access is desirable in order to save costs and time for both the court and the parties. *Id.* at 1571 n.3.

[92] *Id.* at 1571-72. Further, the court stated that a "desire to prevent the use of [the] trial record in other proceedings is simply not an adequate justification for its sealing." *Id.*

[93] *Id.* In fact, the *Wilson* court noted that the district court judge actively participated in the settlement, and stated that "[t]here is no question that courts should encourage settlements." *Id.* at 1571-72 n.4.

[94] *Id.*

[95] *Id.* The court stated that:

> [T]he payment of money to an injured party is simply not 'a compelling governmental interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record. We feel

to the parties because settlements depend largely on the skills and efforts of counsel and the varying desires of the parties rather than upon established objective standards.[96] Thus problems arise from the *Wilson* court's failure not only to distinguish civil and criminal cases, but to separate settlement agreements from evidentiary court materials.[97] Yet, the *Wilson* decision follows the trend toward increased public access based on the first amendment and extends the right to include settlement agreements filed or discussed in a court during products liability cases.[98]

II. The Common Law Right of Access

The common law right of access test is essentially the same balancing test as the first amendment test except the balance is not tipped as greatly in favor of access. In fact, courts cite many of the same reasons for access in common law cases. For example, both civil and criminal trials have traditionally been open to the public with a corresponding presumption of openness attaching to the court records.[99]

certain that many parties to lawsuits would be willing to bargain (with the adverse party and the court) for the sealing of records after listening to or observing damaging testimony and evidence. Such suppression of public records cannot be authorized. The situation here is further aggravated by the attempted suppression of a jury verdict because it might adversely affect American Motors in other judicial proceedings. Such action is contrary to the most basic principles of American jurisprudence.

Id.

[96] *Id.* at 1568. The danger lies in the fact that the factors relied on as supporting access arose in criminal actions. Moreover, a settlement is a private contract in contrast to evidence because evidence forms the basis of a court's judgment and is "public" information. *See supra* notes 20-31 for a discussion of *Richmond Newspapers* and *infra* notes 230-242 for a discussion of court reliance and its relationship to public access.

[97] *Wilson*, 759 F.2d at 1568-72.

[98] *See supra* notes 32-82 for a discussion of this trend and cases following it.

[99] *See* Craig v. Harney, 331 U.S. 367 (1947); United States v. Edwards, 672 F.2d 1289, 1290 (7th Cir. 1981); Note, *supra* note 17; Fenner & Koley, *supra* note 18; Note, *supra* note 46. The *Craig* court emphasized that a "trial is a public event", thus making what transpires in the courtroom public property. 331 U.S. at 368. Another court stated that "[o]nce the evidence has become known to the members of the public . . . it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence . . . ." *In re* National Broadcasting Co. v. United States, 635 F.2d 945, 952 (2d Cir. 1980) (criminal case concerning access to tapes played as evidence during open court). The *National Broadcasting* court noted, however, that if the evidence had been offered under a properly granted seal the case would have been entirely different because that portion of the trial would not have been open to the public. *Id.* at 952 n.4.

In *Nixon v. Warner Communications, Inc.*,[100] concerning the press's efforts to gain access to the actual Watergate tapes, the Supreme Court clearly acknowledged a common law right of access to court records.[101] The Court stated that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[102] Further, the Court held that a party does not need a proprietary or evidentiary interest in the material in order to enjoy this right.[103]

Nixon also stated, however, that the common law right of access is not absolute and that courts retain supervisory powers over their records.[104] Thus, a court may deny access in order to prevent use of the material for "improper purposes" such as sensationalism or promoting public scandal.[105] Additionally, a court may deny access if the party seeking the information may use the material to

[100] 435 U.S. 589 (1978). The tapes were played as evidence in open court. *Id.* The public and the press, however, already had transcripts of the tapes. *Id.* Thus, as the Court noted, only physical access to the tapes themselves remained unavailable. *Id.* at 599.

[101] *Id.* at 597. The Court held that the common law right exists although its exact historical origins are unclear and there are no cases directly on point delineating the exact scope of the right. *Id.*

[102] *Id.* (footnote omitted).

[103] *Id.* For instance, *Nixon* stated that a citizen's desire to inspect the records merely to check on and observe the workings of the government justifies access. *Id.* at 598.

[104] *Id.* at 598.

[105] *Id.* The *Nixon* Court indicated that the proper test balances the factors favoring access, adding the presumption of openness, against the factors weighing against disclosure. *Id.* at 602. This test is very similar to the first amendment test yet without the increased burden of proof necessary to overcome the presumption of openness. *See also supra* notes 20-98 and accompanying text for a discussion of the first amendment standard and cases using it.

harm the commercial standing of a competitor.[106] Ultimately, the *Nixon* Court indicated that decisions regarding disclosure rest in the trial court's discretion and depend on the weight of the particular facts of each case.[107]

Significantly, the *Nixon* decision further stated that neither the first nor the sixth amendments support a right of access to court *records*.[108] The Court, noting the differences between access to a trial and access to records, stated that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."[109] Thus, the *Nixon* Court expressly rejected the

[106] *Nixon*, 435 U.S. at 598.

[107] *Id.* at 599. The Court suggested factors which trial courts should weigh in the balance, including: the value of allowing the public to view the judicial process; the value of informing the public about important events; the importance of the event in question; the parties' right to privacy; the need to protect privacy of third parties; and the use for which the material is sought. *Id.* at 600-02. The Court, however, decided the issue based on the Presidential Recordings Act, making the discussion of the common law right of access dictum. *Id.* at 603-07; *see also* Presidential Recordings Act of 1978, 44 U.S.C. §§ 101, 2107-2108, 2201-2207 (1982). Indeed, the fact the decision does not rest on the common law right of access causes uncertainties among courts and commentators regarding the proper standard of review and the strength of the presumption of openness. Uncertainty about the standard of review arises from the Court's statement, after discussing the balancing factors, that "[a]t this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." *Nixon*, 435 U.S. at 602. One view holds that a reviewing court should grant the lower court's decision a high degree of finality, using the normal abuse of discretion test. The other view states that a reviewing court should reweigh the factors, granting the lower court's decision only a slight degree of finality because of the *Nixon* Court's statement. *See* Note, *supra* note 17, at 683-85 (advocating the use of the slight degree of finality standard).

[108] *Nixon*, 435 U.S. at 608-10 (emphasis added). Some authorities argue that there is also an implicit right of access under the first amendment because the public cannot physically attend every trial. *See, e.g.*, Note, *supra* note 17, at 691. The note states:

> It is possible, however, that the right to attend criminal trials, as a practical matter, does not satisfy the public's right to freedom of information . . . . In order to guarantee the implicit constitutional right of [the] public and press to attend criminal trials to obtain information, the Supreme Court could recognize another implicit, indispensable right to inspect and copy evidentiary tapes . . . .

Id. The note, however, concludes that this implicit right does not exist and further, that the right of access is satisfied by the right to attend trials. *Id.* at 692.

[109] *Nixon*, 435 U.S. at 610. Some courts have noted the *Nixon* Court's failure to establish a first amendment right of access to civil records, as well as the uncertainties concerning access. *See Belo Broadcasting*, 654 F.2d at 431 (criminal case dealing with access to audiotapes played as evidence). The *Belo Broadcasting* court, referring to access cases, stated:

> In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights. With all due respect, we find such standards to be misreadings of the Supreme Court's directives, and we decline to apply them here.

Id.

[110] *Nixon*, 435 U.S. at 608-10. The Court stated:

> Respondents claim that [the first amendment] guarantees the press 'access' to — meaning the right to copy and publish — exhibits and materials displayed in open court.
>
> This argument misconceives the holding in *Cox Broadcasting*. Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records *open to the public* . . . . The First Amendment generally grants the press no right to information about a trial superior to that of the general public.

Id. at 608-09 (emphasis added) (referring to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)) (dealing with the first amendment right of access to names of criminal victims)). Further, the Court stated:

> Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial. They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes . . . .
>
> The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

Id. at 610; *see also* Hagenbach, *Sealed Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access*, 16 IND. L. REV. 861, 882 (1983) (noting the uncertainty of a first amendment basis for a right of access to records and advocating adoption of clear guidelines to allow lower courts to more effectively use the common law right of access); Note, *supra* note 17, at 691 (distinguishing the right of access to trials from access to records and discussing the *Nixon* Court's apparent refusal to find a first amendment basis for a right of access to records).

[111] *See supra* notes 100-110 and accompanying text for a discussion of *Nixon*.

argument that the first amendment supports access to criminal court records, much less to civil records or settlement agreements.[110]

A. *Application of the Common Law Right of Access to Settlement Agreements*

Nixon firmly implanted the common law right of access to criminal judicial records in most cases.[111] Yet, *Nixon*

left unanswered several questions, such as the proper standard of review, the strength of the presumption in favor of openness, and how far the decision extends to civil trials or records.[112] Lower courts, however, have attempted to delineate the scope of the right and create standards for applying the balancing test to actual situations.[113] For example, in *Minneapolis Star & Tribune v. Schumacher*,[114] the issue was whether the court should unseal five settlement agreements arising from an airplane crash.[115] The appellate court granted access to the documents, focusing on the fact the parties discussed the terms of the settlements in open court.[116] Further, the appellate

[112] *See infra* notes 243-250 and *supra* notes 108-110 and accompanying text for discussion of these questions and possible answers. The uncertainties arise mainly from the fact that the case ultimately rested on grounds other than the common law right of access, as well as the Court's statements about the standard of review and presumption of openness. Regarding the presumption of openness, the Court stated that "[a]lso on respondents' side is the presumption — *however gauged* — in favor of public access to judicial records." *Nixon*, 435 U.S. at 602 (emphasis added).

[113] *See infra* notes 111-203 and accompanying text for a discussion of some courts' attempts.

[114] 392 N.W.2d 197 (Minn. 1986).

[115] *Id.* at 200. Galaxy Airlines, Inc. operated the plane which crashed. *Id.* An additional factor in the case was that state law *required* the parties to file the agreements with the court because minor heirs were involved. *Id.* at 200 n.1 (referring to MINN. STAT. § 573.02 (1984)). Therefore, the case is different from the majority of settlements in which filing with the court is voluntary. *Id.* For another products liability case allowing access to settlement agreements, but under a first amendment right, see *infra* notes 84-98 and accompanying text.

[116] Minneapolis Star & Tribune Co. v. Schumacher, 383 N.W.2d 323, 327 (Minn. Ct. App. 1986). The appellate court stated that once material becomes part of an open court record only "compelling governmental interests" can justify closure. *Id.* at 328. Thus, the appellate court adopted the heightened scrutiny standard normally used in first amendment cases. *Id.* The dissent, however, disagreed, stating that the first amendment standard applies only to criminal cases. *Id.* at 328 (Wozniak, J., dissenting). Further, the dissent stated that the majority's prior restraint analysis was not proper because the public never had the information and no one was prohibiting dissemination of public material. *Id.* at 329. Even though the hearings were open to the public, no one but the parties attended. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200. Moreover, the dissent noted that the only information that the press did not have was the amount and terms of the settlements. *Minneapolis Star & Tribune Co.*, 383 N.W.2d at 329-30. The dissent believed that publication of this information would not serve any of the traditional factors used to justify access, such as increasing the quality of the judicial proceedings by public scrutiny. *Id.* at 330.

court held that encouraging settlements, even in a mass tort situation, was not a "weighty" enough factor to overcome the presumption of openness because this factor is present in all litigation.[117]

The Minnesota Supreme Court, however, noted that while some courts have extended the first amendment right of access to include civil trials and records, most have not.[118] Thus, the court chose to adopt a standard requiring a party to demonstrate "strong countervailing reasons" or "compelling reasons" for closure.[119] Turning to the balancing test under the "compelling reasons" standard, the court stated that the majority of settlement agreements take place in private with the court exercising no control over the events.[120] Further, as the court observed, courts are not involved at all in typical settlements because the parties normally move for voluntary dismissal

[117] *Id.* at 328. The dissent, however, pointed out that the majority did not analyze the distinctions between criminal and civil trials before adopting the first amendment standard, which arose from criminal cases. *Id.* In the dissent's opinion, settlement agreements are not public parts of any trial. *Id.* at 330. Additionally, the dissent noted that settlements take place in private without the participation of the court and emphasized the fact that filing in the present case was not voluntary. *Id.*

[118] *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203. The court also noted the absence of a decision by the Supreme Court on the issue and that most courts elect to base access on the common law right. *Id.*

[119] *Id.* at 202. One of the problems in right of access cases is the varying standards among courts using the common law right of access, in addition to the confusion as to whether a first amendment claim also exists. The court expressly limited its decision, however, to apply only to settlement documents "or transcripts made part of a civil court file by statute," thus implicitly recognizing that different materials may need different tests and standards. *Id.* at 203.

[120] *Id.* at 201. The court stated:

> Historically, the majority of settlements entered into between parties have been private. The parties agree to settle in private, outside of the courtroom and without the participation of the court. The court is only involved by accepting a stipulated agreement in which the parties inform the court that there has been a settlement and ask that the case be dismissed. The court, however, does not approve, or even inquire into, the terms of the settlement. The historic privacy of settlement agreements is borne out by the fact that settlements, offers to settle, and statements made during settlement negotiations are all inadmissible under the Rules of Evidence to prove liability.

Id. (referring to MINN. R. EVID. 408).

after reaching an agreement.[121] Moreover, the court noted that the present filing was not voluntary.[122] Finally, the value of encouraging settlements, especially in cases with several potential suits like this one, was a significant factor which the court weighed in the balance.[123] The court stated that release of the information would not only impede further settlements between Galaxy and potential plaintiffs, but could also "chill" future settlements in other unrelated cases.[124] This "chilling effect" on settlements would then increase the time and costs of litigation, both to the parties and the courts.[125]

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[121] *Id.* Certain exceptions to this rule, such as class action suits, require courts to approve the settlement. *See* FED. R. CIV. P. 23(e), 23.1 (class actions and shareholder derivative suits).

[122] *See supra* note 115 and text for a discussion of the state's filing requirement.

[123] *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205. Another factor noted by the court is the fact that parties cannot use settlement terms as evidence in trials. *Id.* at 204. In the court's opinion, this restriction demonstrates the private nature of settlements. *Id.*; *see also* FED. R. EVID. 408. Further, *Minneapolis Star & Tribune Co.* noted that a major reason parties settle is to avoid publicity. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204-06. The court also held, however, that parties cannot escape access simply by agreeing among themselves to seal the settlement. *Id.* Rather, the decision rests with the court and depends on the particular balance of all the factors of each case. *Id.*

[124] *Id.* at 205. The court indicated that by adopting a standard permitting easy access to sealed settlements, future litigants would hesitate to settle if confidentiality was a key element because confidentiality could not be guaranteed. *Id.* The court stated:

> The philosophical reasoning behind allowing private settlements also leads to the conclusion that such agreements should remain private. This court has often stated that it favors the settlement of disputed claims without litigation . . . . To allow public access to settlement documents filed with a court may circumvent this policy. One of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public . . . . It would therefore be inconsistent with our public policy encouraging settlement to allow the settlement documents in this case to be made public. Such reasoning would tend to discourage settlements rather than encourage them.

Id. The court feared that allowing access would hamper negotiations between Galaxy and plaintiffs whose suits were still pending. *Id.*

[125] *Id.* at 204, 205. Other factors the court weighed included the privacy of the families, their right to grieve in private, and their right to have their financial affairs private. *Id.* at 206. Additionally, disclosure of the settlement amount could increase the likelihood of theft and vandalism. *Id.* As the dissent in the appellate decision stated:

> [T]he privacy interests of the grieving families in these cases is compelling. They have a right to be left alone. They have a right not to have their tragedy thrust into the public eye without their consent and with no redeeming public purpose except the satisfaction of the public's idle curiosity. They have a right not to have their personal financial affairs splashed across the pages of a newspaper. They have a right to be free from burglary, harassment, and intimidation, instances of which have already been documented in these cases.

Minneapolis Star & Tribune Co., 383 N.W.2d at 330 (Wozniak, J., dissenting).

[126] *See Minneapolis Star & Tribune Co.*, 392 N.W.2d at 197; *Minneapolis Star & Tribune Co.*, 383 N.W.2d at 323.

[127] *See infra* notes 201-250 and accompanying text for a discussion of the value of encouraging settlements.

[128] *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205.

[129] *See supra* notes 120-125 and accompanying text for a discussion of the distinctions between settlements and other trial materials, and *supra* notes 32-98 and accompanying text for a discussion of cases in which these distinctions were not recognized.

[130] *See, e.g., In re San Juan Star Co.*, 662 F.2d at 108 (allowing access to pretrial discovery materials in a civil rights case because of the high public interest); *see also supra* notes 38 and 65 and accompanying text for types of cases with great public interest. Another example of a topic of great public interest is Aids, a deadly viral infection recently sparking public controversy. One judge refused to seal court records in a suit involving a pediatrician alleged to have the Aids virus, in spite of the fact that the publicity could, and did, ruin the physician's practice. *See* Dallas Morning News, Nov. 22, 1987, at 24A, col. 1.

[131] 329 So. 2d 333 (Fla. Dist. Ct. App.), *cert. denied*, 342 So. 2d 1100 (Fla. 1976).

Thus, contrasting the *Minneapolis Star & Tribune* appellate and supreme court opinions reveals the conflict and uncertainty over right of access cases and the proper basis for access.[126] Even though the court rejected a first amendment basis, it nonetheless confused the outcome by adopting a compelling need standard to justify closure. The value of the case, however, lies in its recognition and discussion of the importance of encouraging settlements.[127] For example, the supreme court recognized the increased value of encouraging settlement in situations like plane crashes where there are multiple plaintiffs.[128] Finally, the court recognized the distinction between settlement agreements and other court materials — a factor which courts should analyze but often neglect.[129]

Yet another problem arises when, due to the identity of the parties or the nature of the lawsuit, significant public interest in disclosure exists.[130] For example, in *Miami Herald Publishing Co. v. Collazo*,[131] the Miami Herald sought ac-

cess to a sealed settlement between the city of Miami and Collazo, who was the victim of a police shooting.[132] The trial, however, was open to the public except for the portion in which the parties discussed the settlement terms.[133] The trial court denied access to the sealed settlement, stating that "the amount of money involved was no one's business but those of the parties involved themselves."[134] The Miami Herald appealed, asserting a first amendment right of access to the settlement.[135]

The appellate court, however, focused on the common law right of access rather than the first amendment.[136] One significant factor to the court was the involvement of a governmental unit as a party.[137] The court stated that the public had a substantial interest weighing in favor of disclosure because the suit involved city funds obtained from public taxes, which were used for the city's insurance, salaries and the cash settlement.[138] Balancing the

[132] *Id.* at 334. The police shot and paralyzed Collazo during a burglary investigation. *Id.* Collazo's suit alleged that police misconduct and improper police training were the causes of the injury. *Id.*

[133] *Id.* The trial lasted only two days before the parties settled. *Id.*

[134] *Id.* at 335.

[135] *Id.* Collazo and the city defended by asserting a right to privacy and the right to reach a private agreement. *Id.*

[136] *Id.* at 336-38. The court stated that it was "unaware of any specific constitutional or statutory provision giving the press or the public a right to attend a judicial proceeding." *Id.* at 337. Further, the court enunciated that an open court is "an indispensable part of our system of government and our way of life" and that "what transpires in the courtroom is public property." *Id.*

[137] *Id.* at 338. The court stated that the value of open courts in a representative form of government is great and, therefore, with the city's involvement as a party the presumption in favor of openness increased. *Id.* at 336. Also, after reviewing criminal and civil cases, the court stated that the two justifications for closure are significant privacy concerns and the need to guarantee an impartial and fair trial. *Id.* Privacy concerns cited by the court included certain juvenile proceedings, adoption, and custody actions. *Id.*

[138] *Id.* at 338. The court stated:

> Further, appellants' right to know the terms of the settlement agreement is particularly compelling here because of the nature of the issues being litigated, i.e., alleged police misconduct and improper police training involving a City of Miami police officer acting in his official capacity. These issues created a substantial monetary liability for the City and influenced its insurance rates for the future, which costs must be borne by the taxpayers. Moreover, the activities complained about are by their very nature newsworthy.

factors of the case, the court therefore held that the trial court abused its discretion by granting the request to seal the settlement.[139]

Collazo provides a good example of how the common law balancing process can work to provide an acceptable answer if courts consider all the factors, including the nature of the suit and the identity of the parties.[140] Thus, the proper balancing of the factors should act to eliminate potential abuses of closure requests while adequately protecting both public and private interests because the balancing process takes in all relevant factors, ranging from privacy interests to potential decreases in court costs and time if settlements are encouraged by guaranteeing confidentiality.[141] Because the court balances the factors, and not the parties, the potential for abuse is limited.

B. *Distinguishing Between Sealing and Unsealing*

While the balancing tests under the common law right of access works, albeit with some confusion, other factors besides the identity of the parties or nature of the suit come into play. Another factor which some courts recognize in right of access cases is that courts may need to apply a different standard when determining the appropriateness of later attempts by unrelated third parties to unseal settlements. This difference is important because the original parties may have relied on confidentiality in reaching the settlement agreement.[142] In *Palmieri*

Id. The insurance company had already indicated that premiums would increase due to the city's claim experience. *Id.* at 336.

[139] *Id.* at 338-39. Further, the court declared that the city's fears that the information would affect pending litigation against the city was not a factor to weigh in the balance. *Id.* at 337. This reason did not rise to the level of being a "cogent reason for sealing" and the city failed to show "any immediate threat to the administration of justice" to justify the closure. *Id.*

[140] *See supra* notes 123, 130-139, for cases in which the balance arguably works well regardless of the circumstances.

[141] *See supra* notes 46, 50, 95 and *infra* note 177 and accompanying text for examples of abuses.

[142] *See infra* notes 142-203 and accompanying text for a discussion of the issues of parties' reliance and fairness.

v. New York,[113] for example, the court drew a distinction between the original sealing of the settlement and the later attempt to unseal it.[114] In *Palmieri*, the state of New York intervened in a private antitrust action between Palmieri and DIC Concrete Corp. to modify the order sealing the settlement so that the district attorney could use the information in grand jury proceedings against the parties.[115] After the district court granted the motion to unseal, Palmieri appealed to the Second Circuit Court of Appeals.[116]

Recognizing the differences between sealing and unsealing, the Second Circuit adopted a standard requiring a party seeking *disclosure* to show "extraordinary circumstances or compelling need," the opposite of the test for sealing.[117] Thus, *Palmieri* held that when parties rely on a settlement's confidentiality, the party seeking access must satisfy the greater burden of proof.[118] Indeed, the court stated that a party's reliance "raises a presumption in favor of upholding [the sealing] orders."[119]

In *Palmieri*, the court was faced with two competing in-

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[113] 779 F.2d 861 (2d Cir. 1985).

[114] *Id.* at 863. The parties and the court acknowledged the great overlap between the state's antitrust action and the parties' case. *Id.* In fact, this is one reason the state sought to unseal the settlement agreement. *Id.* at 864-65.

[115] *Id.* at 864.

[116] *Id.* at 862. The parties' main argument was that they were deprived of legal rights because they had relied heavily on the sealing order in reaching the settlement. *Id.*

[117] *Id.* at 866. This standard is the exact opposite of the usual standard which requires the party seeking *closure* to demonstrate compelling need. *See supra* notes 99-125 and accompanying text for a discussion of the usual standard.

[118] *Palmieri*, 779 F.2d at 865. One factor the court noted was the magistrate's very active role in achieving the settlement due to the parties concern that the Attorney General would obtain the information. *Id.* Thus, it would be unfair for the court to first encourage and actively assist in settlement only to then allow access to the material which the court promised would remain sealed. *Id.* The magistrate even stated that the settlement would have been extremely hard, if not impossible, without the promise to seal the agreement. *Id.* at 864. Earlier, the Attorney General used information from a sealed agreement against DIC Concrete Corp., which led to the parties' fears in *Palmieri*. *Id.* at 865.

[119] *Id.* Additionally, the court stated:

> As appellants have argued, here the very papers and information that the Attorney General seeks apparently would not even have existed but for the sealing orders and the magistrate's personal assur-

terests: (1) the state's interest in criminal investigation and obtaining evidence for grand jury proceedings; and (2) the interest in promoting settlement.[150] The court first noted that, in a previous decision, it held parties are entitled to rely on protective orders to prevent third party access even if the third party is a governmental unit.[151] Also, the court stated that a state begins the battle against any private litigant with a distinct advantage due to its extensive investigative power.[152] Thus, while a party's reliance would not automatically foreclose unsealing, the court held the decision whether to unseal a settlement agreement is best left to the trial court's discretion.[153] The court further stated that the trial court should decide based on the unique facts of each case with a view toward *maintaining closure* in cases where the parties relied on confidentiality.[154]

Times Herald Printing Co. v. Jones[155] also demonstrates the uncertainty and conflicting views regarding the right of access to judicial records and settlement agreements and the value of encouraging settlements, although the case was later vacated for lack of jurisdiction.[156] The Times Herald attempted to unseal a settlement agreement, court orders, and non-discovery materials to publish the mate-

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> ances of confidentiality, upon which the appellants apparently relied in agreeing to enter closed-door settlement negotiations.

Id.

[150] *Id.* at 861.

[151] *Id.* (referring to Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979)). Thus, by analogy a party should be entitled to rely on an order sealing settlement documents as neither order deals with evidentiary materials. In *Martindell*, the court held that a party must show compelling need or extraordinary circumstances to overcome a protective order regardless of whether the party seeking access was a governmental unit. 594 F.2d at 296.

[152] *Palmieri*, 779 F.2d at 866.

[153] *Id.* at 866.

[154] *Id.* (emphasis added). The court remanded the case to the district court after developing the new standard for unsealing. *Id.* The court also held that if the state could demonstrate a compelling need, such as the impossibility of obtaining the information by any other means after a good faith effort, disclosure would be proper. *Id.* at 866-68.

[155] 717 S.W.2d 933 (Tex. Ct. App.), *vacated*, 730 S.W.2d 648 (Tex. 1986).

[156] *Id.* at 933-38.

rial arguing that the public needed the facts to evaluate a judge seeking re-election.[157] The trial court had sealed the record upon the requests of both parties after the parties settled before the actual trial began.[158] The Times Herald argued it had a right of access under the common law, first amendment, and the Texas Constitution.[159]

After disposing of the other two claims, the *Times Herald* court accepted the existence of the common law right of access based on *Nixon*.[160] The court reiterated, however, that the right is not absolute[161] and stressed the discretion of the trial court in the balancing test.[162] Thus, the court held that closure is proper if the information sought contains a trade secret; pertains to national security; involves the privacy of third parties; or if there is a binding contractual duty not to disclose the information.[163] Significantly, the court analyzed the difference between unsealing, which raises questions of the parties' reliance on confidentiality, and sealing.[164] Thus, like the *Palmieri* court, the *Times Herald* court held that a party seeking to

[157] *Id.* at 934-35. The original suit involved physician misconduct. *Id.* at 935. The newspaper did not seek access to discovery materials, which both the parties and court stated were non-public parts of the trial process. *Id.* at 938 n.1. However, settlement agreements are also arguably non-public aspects of a trial. For a discussion of the special nature of settlement agreements, see *infra* notes 230-242 and *supra* notes 114-129 and accompanying text.

[158] *Times Herald*, 717 S.W.2d at 934. The fact the case never went to trial refutes some courts' fears concerning abuse. For example, one court stated that everyone would agree to settle after hearing damaging evidence and therefore closure would become the "norm". *Wilson*, 759 F.2d at 1571.

[159] *Times Herald*, 717 S.W.2d at 934. The court rejected the Texas constitutional claim, stating that the only case law pertained to criminal cases. *Id.* at 936. The court similarly rejected the first amendment claim after noting that it also only applied to criminal cases and that the Supreme Court had rejected a first amendment right of access to *records* in the *Nixon* decision. *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 939. The court also stated that private agreements alone, however, will not bind a court, a view similar to the *Wilson* and *Minneapolis Star & Tribune* courts. *Id.* at 938; *see also supra* notes 84-98, 114-129, for a discussion of the two cases.

[163] *Times Herald*, 717 S.W.2d at 938.

[164] *Id.* The court referred to *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), which supports the presumption of maintaining closure and distinguishes between unsealing and sealing. *Times Herald*, 717 S.W.2d at 938.

unseal documents must show "extraordinary circumstances" in order to gain access to previously sealed material.[165]

Unlike some courts, however, *Times Herald* stated that the value of encouraging settlement is a significant factor which courts should consider in the balancing test in many cases.[166] The court indicated that a state has a great interest in encouraging settlements which weighs against the public's need to have access to settlement terms.[167] In the court's opinion, adopting a less stringent test would affect future settlements.[168] Impeding settlements would in turn increase the overload in trial courts because parties could not depend on lasting confidentiality when negotiating settlements.[169] Additionally, by allowing easy access to sealed material, a "chilling effect" on potential litigants could occur with the effect of nonlitigation of valid claims.[170] Finally, the *Times Herald* court noted that many of the common balancing factors which support public access do not apply to settlement agreements because of the private nature of the agreements.[171] Thus,

[165] *Id.*

[166] *Id.* at 938-40. The *Times Herald* court noted that the trial court's agreement to seal the settlement was a significant factor in the parties' attaining settlement. *Id.* at 940.

[167] *Id.* at 939.

[168] *Id.*

[169] *Id.* The court stated:

> In our litigous society, for us to take the position that private litigants, who have settled their dispute before calling upon a court or jury to find true the facts alleged in the pleadings, and who have settled in reliance upon the court's agreement to seal the record from public disclosure, have no right to expect the confidentiality to which they agreed and to which they were assured, would seriously impair the settlement process and would increase the trial overload which presently exists in our judicial system.

Id.

[170] *Id.* Denying confidentiality would deter people from pursuing valid legal claims because one reason people settle is to avoid publicity. *Id.* Moreover, the public, as well as the state, has an interest in encouraging settlement because of the increased time and costs of litigation compared to settling disputes. *Id.*

[171] *Id.* at 940. The court noted that most settlement agreements occur in private with no court supervision and reflect the private desires of the particular parties. *Id.* Therefore, the argument that openness serves to increase judicial quality by public scrutiny does not apply to settlements. *Id.* at 939-40.

the majority held that the newspaper did not meet its burden of proof and denied access to the sealed settlement.[172]

Yet, the *Times Herald* decision was strikingly far from unanimous.[173] The concurring opinion emphasized the value of encouraging settlements and stated that neither the press nor the public has a right to unlimited gathering of information.[174] The dissenting opinion, focusing on the Supreme Court cases establishing a first amendment right of access to criminal trials and the two-prong *Richmond Newspapers* test, however, believed a first amendment right of access exists for civil trials and records.[175] The dissent stated that many of the factors pertaining to the value of openness in criminal proceedings apply equally to civil trials, especially when the nature of the suit itself concerns the public directly or indirectly.[176] Finally, the dissent stated that the more significant concerns are the parties' rights to privacy rather than the value of encouraging set-

[172] *Id.* The court stated that "the trial court's action in sealing the records was within his [sic] discretionary authority, that there was a substantial basis for the court's refusal to unseal the records, and no abuse of discretion is shown." *Id.*

[173] *Id.* at 940. The court, sitting *en banc* on rehearing, tallied seven members in the majority, one concurring opinion, and five in the dissent. *Id.*

[174] *Id.* at 941 (Whitham, J., concurring). Judge Whitham stated that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* Further, Judge Whitham indicated that even if the first amendment supports access, the value of encouraging settlement is so significant that the balance would still tip in favor of nondisclosure. *Id.*

[175] *Id.* at 943-44 (Howell, J., dissenting). The dissent distinguished *Nixon* as a case of special access because the public already had written transcripts of the tapes and the press was seeking the actual tapes. *Id.* The dissent relied heavily on *Richmond Newspapers*, stating that "a new day dawned" with the decision. *Id.* Judge Howell interpreted the case as establishing constitutional protection for the acquisition of newsworthy material. *Id.* at 943; *see supra* notes 20-31 for a discussion of *Richmond Newspapers* and *supra* notes 108-110 for a discussion concerning the distinction between access to the trial and access to records, which indicates the dissent's reliance may have been misplaced.

[176] *Times Herald*, 717 S.W.2d at 944 (referring to factors such as increasing the quality of trials). Further, the dissent stated that the majority failed to critically analyze potential differences and/or similarities between criminal and civil cases before adopting the factors from criminal cases. *Id.* Judge Howell referred to environmental, products liability, and discrimination cases, which potentially can have a great impact on the public. *Id.* Thus, in these cases public interest in access would weigh heavily in the balance. *Id.*

tlements, and that even these rights might not tip the balance in favor of closure.[177]

Other cases further demonstrate the uncertainties over access to sealed settlements. In *Bank of America National Trust v. Hotel Rittenhouse Association*,[178] FAB III, a concrete contractor, requested access to a sealed settlement agreement between the Bank of America and Hotel Rittenhouse (HRA).[179] The Bank and HRA settled the dispute before jury deliberations on the condition that the court seal the agreement.[180] FAB III, a creditor of HRA, alleged that the Bank and HRA had engaged in a conspiracy to prevent public access to "otherwise public proceedings."[181] The district court denied the motion to unseal in a "one-paragraph order" stating that the private and public interests in settling disputes outweighed the public's interest in disclosure of the information.[182]

On appeal, the Third Circuit Court of Appeals adopted

[177] *Id.* at 946-47. The dissent stated:

> [T]he primary factor set forth in opposition of access is the parties' agreement to seal the records. This should be given little weight. The public has an independent interest in the record that the parties may not foreclose by mere agreement. If the matter were left entirely to the litigants and disclosure forbidden unless at least one party consented to public access, the vast majority of civil records would be screened from the public view. A drastic diminution of the stock of information available to those who pay for the creation and operation of the courts would inevitably result.

Id. at 946 (citations omitted). Further, the dissent pointed out that in the present case the court sealed the entire record instead of the legitimately confidential portions. *Id.* at 947. Thus, the closure exceeded the limit necessary to protect the privacy interests of the parties. *Id.* at 934, 947. The dissent also disagreed with the majority's valuation of encouraging settlement, ranking it as a very minor factor. *Id.* at 946.

[178] 800 F.2d 339 (3d Cir. 1986).

[179] *Id.* at 340-41. The Bank contracted with HRA to finance the construction of the hotel, a relationship which ended in a suit for foreclosure. *Id.* at 340.

[180] *Id.* The trial itself, however, was open to the public. *Id.* at 341. FAB III did not want evidence from the trial, only the settlement, even though the settlement itself was never "public information." *Id.*

[181] *Id.* FAB III did not assert a first amendment right of access, thus the court did not address the issue. *Id.* at 343.

[182] *Id.* For a discussion of the abuses of sealing records, see *supra* notes 46, 50, 95, and accompanying text. Other courts hold that the lower court must make a specific record for review to prevent waste of time and abuses. *See also supra* notes 59 and 66 and accompanying text for a discussion of the requirement of a record.

the common law balancing approach from *Nixon* and placed the burden of proof on the party seeking closure to overcome the presumption of openness.[183] According to the majority, the issue before the court was "whether the district court abused its discretion in holding that the judicial policy of promoting the settlement of litigation justifies the denial of public access to records and proceedings to enforce such settlements."[184] The Bank and HRA argued that settlement agreements are non-public aspects of trials.[185] The court, however, distinguished between a settlement which is not filed with a court and one like the settlement between the Bank and HRA.[186] According to the court, when the Bank and HRA filed their settlement with the court, the settlement technically became part of the judicial record.[187] Therefore, *Bank of America* held that once parties file an agreement with the court, the settlement takes on the same qualities as evidence or court rulings with a corresponding public

[183] *Bank of Am.*, 800 F.2d at 344. The court refused to apply the more stringent first amendment test. *Id.* The court also emphasized the fact that the common law right of access was not absolute. *Id.*

[184] *Id.*

[185] *Id.* at 343. The Bank and HRA relied on *Seattle Times*, a case concerning the press' right of access to names and addresses of donors and members of a religious organization. *Id.* (referring to Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)). In *Seattle Times*, the press wanted to publish information obtained during discovery in a defamation suit between the newspaper and the organization. 467 U.S. at 23. The Supreme Court, in denying access to the information, discussed and emphasized the distinction of discovery as a non-public part of a trial. *Id.* at 32-33.

[186] *Bank of Am.*, 800 F.2d at 343-44. Moreover, the court stated that the parties could have avoided disclosure by not filing the agreement with the court and moving for voluntary dismissal. *Id.* at 344. The parties filed the agreement with the court anticipating future problems with compliance, thus hoping to avoid the need to initiate a new suit. *Id.*

[187] *Id.* at 343. The court stated:

> Similarly, unlike the civil discovery materials at issue in *Seattle Times*, a motion or a settlement agreement *filed with the court* is a public component of a civil trial. As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.

Id. at 343-44 (emphasis added).

right of access.[188]

Yet, the *Bank of America* court, like the *Times Herald* court, recognized the value of encouraging settlements to both the public and the courts.[189] After balancing the factors of the particular case, however,[190] the *Bank of America* court determined that the district court abused its discretion in granting the motion to seal.[191] The court, therefore, allowed access to the agreement and declared that such openness would promote an informed public; increase the public's confidence in the system and public understanding of the judicial process; act as a "check" on the system by subjecting the court to public view, thus promoting honesty and fairness within the courts; and prevent abuses of closure.[192] Finally, the court noted that the case was a single claim between two parties rather than a multi-district, multi-party, complex case in which

[188] *Id.* at 344.

[189] *Id.* at 344, 346. The court stated that by adopting a policy of encouraging settlements the public and courts could save time and costs, and mentioned that settlement agreements generally may not be used as evidence to prove liability. *Id.* (referring to FED. R. EVID. 408).

[190] *Bank of Am.*, 800 F.2d at 342-46. The factors included: the presumption of openness of trials and records; court reliance on filed materials such as settlement agreements requiring access for complete public understanding of the opinion; the private nature of settlements contrasted with "public" evidence; the fact the case was simple rather than complex; and the effects of access on future settlements. *Id.*

[191] *Id.* at 344, 346. In addition to the typical fears of abuse and secrecy related to access of court records, the court focused on the fact the parties filed the settlement with the court. *Id.* at 345. The majority stated:

> In the name of encouraging settlements, [the dissent] would have us countenance what are essentially secret judicial proceedings. We cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders.
>
> Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.

Id.

[192] *Id.* These benefits and factors are the same factors used in *Richmond Newspapers*' historical/functional balance for a first amendment right of access, discussed at *supra* notes 110-112. *Bank of America*, however, failed to distinguish between civil and criminal trials, or even between access to records and access to trials.

encouraging settlement becomes paramount.[193]

By contrast, the *Bank of America* dissent, as did the *Palmieri* and *Times Herald* courts, separated the original sealing and later unsealing of settlements and advocated two separate standards.[194] To Judge Garth, the real issue was "whether a privately negotiated settlement agreement, agreed to and entered into a court record *only on condition that it remain secret*, should now be *unsealed* because of the district court's supposed abuse of discretion in permitting it to be filed under seal."[195] The dissent advocated adopting a standard requiring a third party to prove extraordinary circumstances or a compelling need in order to unseal a record.[196] Further, the dissent stated that the effect of the majority's opinion was to create a *per se* rule in which the public's right of access would always prevail over the interest in settling the case and privacy.[197] Therefore, Judge Garth asserted that the majority decision would "impair seriously the efficacy of judicial efforts to encourage [the] settlement of many cases . . . ."[198]

In summary, therefore, there are two distinct situations which may arise in some jurisdictions in "unsealing" cases, varying with the parties' reliance.[199] If the parties

[193] *Bank of Am.*, 800 F.2d at 346. The dissent relied on *FDIC v. Ernst & Ernst*, to support its argument for the *unsealing* standard and necessity of encouraging settlement. *Id.* at 348 (referring to FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982)).

[194] *Bank of Am.*, 800 F.2d at 346-47 (Garth, J., dissenting).

[195] *Id.* at 347. The dissent also noted that *both* parties requested the sealing, as distinguished from cases in which only one party seeks closure. *Id.* at 346.

[196] *Id.* at 348 (referring to *Ernst & Ernst*, 677 F.2d at 232). The dissent noted that the settlement was never public information to start with because it was entered under seal. *Id.* at 347. This fact, according to the dissent, gave "rise to a new and different factor: the reliance of the parties on the initial and continuing secrecy of the settlement agreement." *Id.*

[197] *Id.*

[198] *Id.* Further, Judge Garth stated that the majority decision "utterly ignores the importance of, and the practical realities surrounding, the process of settling lawsuits." *Id.*

[199] *Id.* at 348. As the dissent in *Bank of America* stated, "[a]lthough the common law right of access must be given due regard, a court cannot operate in a vacuum. To apply mechanistically the same test no matter what the factual circumstances, is to risk doing injustice to parties before the court." *Id.*

have not relied on the confidentiality of the settlement agreement, the normal common law balancing test with the presumption in favor of openness applies.[200] If, however, the parties have relied on the confidentiality, the burden of proof for the third party rises to a level requiring a showing of extraordinary circumstances or compelling need in order to unseal the settlement agreement.[201] Recognizing such a two-level standard could alleviate the fear that emphasis on the value of encouraging settlements would result in secret trials.[202] Courts avoid such abuses because it is the *court's* weighing of all relevant factors which controls the outcome rather than the private parties' agreement.[203] Yet, in the already uncertain area of access, adopting another standard based on a factor such as reliance may create as many problems as it solves.

III. The Value of Promoting Settlement

Besides fairness and party reliance, which may support maintaining closure, the value of encouraging settlement may also support maintaining closure in some cases. There are several reasons why courts should give the value of encouraging settlements significant weight in the balancing tests — both from the public's and the courts' points of view.[204] One reason is the litigation explosion of recent years. This phenomenon has forced courts to increasingly advocate alternative means of dispute resolution.[205] To some courts and authorities, the increasing

[200] *See, e.g.*, *Times Herald*, 717 S.W.2d at 938. Normally, under the common law balance test the presumption of openness tips the balance in favor of disclosure, whereas here the balance shifts to favor maintaining closure if parties relied on confidentiality. *Bank of Am.*, 800 F.2d at 348.

[201] *See, e.g.*, *Bank of Am.*, 800 F.2d at 348; *Palmieri*, 779 F.2d at 862.

[202] *See, e.g.*, *Palmieri*, 779 F.2d at 865. In fact, the *Bank of America* dissent stated that "branding such an action [sealing the record] as a 'secret judicial proceeding,' with all that such a term may connote, and claiming that sealing practices will 'overturn centuries of tradition of open access' is not an adequate substitute for reasoned judicial analysis." *Bank of Am.*, 800 F.2d at 349 n.3.

[203] *See, e.g.*, *id.* at 348-49 n.3 (Garth, J., dissenting).

[204] *Id.* at 349.

[205] *Id.* Judge Garth noted that "[b]etween 1973 and 1983, new filings of civil cases in the federal district courts rose from 98,560 to 241,842, an increase of 145

use of alternative dispute resolution is evidence of the need to encourage settlements.[206] Additionally, an express goal of Rule 16 of the Federal Rules of Civil Procedure is to encourage settlement.[207] Other factors which support closure and the need to encourage settlement are: the avoidance of wasting courts' and parties' resources when settlement is successful; the fact that confidentiality is a key factor in many settlements; and the fact that settlement agreements may contain information which the parties legitimately desire to keep from the public but for which they cannot obtain a protective order.[208]

In re Franklin National Bank Securities Litigation,[209] cited by several courts in their attempts to balance factors pertaining to the right of access,[210] exemplifies the significant value of settlement in certain cases.[211] *Franklin* was a complex, multi-district case involving the insolvency of one of

percent." *Id.* (referring to Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L.J. 219, 227-29 (1985)).

[206] *Id.*; *see also* PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL JUDGES (1986). The increase has not only been in the number of suits, but also in the length and complexity of suits. *Bank of Am.*, 800 F.2d at 349. According to one authority, "[t]he federal courts held 213 trials lasting 20 days or more in 1973 [which] doubled to 426 by 1983." *Id.* (referring to Levin & Colliers, *supra* note 205). The judge stated that the majority of commentators and judges agree on "the value and necessity of a vigorous policy of encouraging fair and reasonable settlement of civil claims whenever possible," finding that "the literature . . . focuses not on whether settlement is desirable, but on how best to achieve it and how far a judge should go to encourage it." *Id.* at 350.

[207] *See* FED. R. CIV. P. 16. Rule 16 states that one purpose of a pretrial conference is to "facilitat[e] the settlement of the case," and that the parties may discuss at the conference "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." *Id.* at 16(a)(5), (c)(7).

[208] *Bank of Am.*, 800 F.2d at 350. Judge Garth pointed out in *Bank of America* that one study of ten federal courts showed that 88 percent of cases settle pretrial, with only nine percent actually reaching trial. *Id.* Thus, adoption of a policy which discourages settlement would increase the already existing overload without any new cases.

[209] 92 F.R.D. 468 (E.D.N.Y.), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982). This comment merely touches on the value of settlement as it may relate to the balancing tests in access cases.

[210] *See Bank of Am.*, 800 F.2d at 345, 348; *Palmieri*, 779 F.2d at 865; *Times Herald*, 717 S.W.2d at 938.

[211] *See supra* notes 166-177, 191-193, and accompanying text for a discussion of this issue.

the nation's largest banks.[212] Two years after some of the parties reached a settlement based on confidentiality, third parties sought to unseal the agreement.[213] The district court denied the motion, focusing on the parties' reliance on confidentiality in reaching the agreement and the enormous costs involved.[214] In fact, the court stated that the only reason the parties ever settled was due to their reliance on both protective orders and the sealing orders.[215] According to the court, without the settlement, the trial would have continued for at least six more months.[216] Continuing the trial would have forced an even greater investment by the parties and the court and consumed the balance of the insurance funds which protected both the defendants and their creditors.[217]

Moreover, in mass torts where problems are also complex, the value of promoting settlements is also substantial. As one authority, Judge Williams, noted, in a society where parties file an ever increasing number of mass tort lawsuits, "it is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems."[218]

[212] *Franklin*, 92 F.R.D. at 472.

[213] *Ernst & Ernst*, 677 F.2d at 231.

[214] *Franklin*, 92 F.R.D. at 472. The court noted that the case lasted over five years, contained volumes of discovery materials and documents, and cost the parties millions of dollars in legal fees before the parties settled. *Id.* at 469. Further, the court stated that "[h]ad the trial continued, many millions of dollars more would have been expended in legal fees, a trial court would have been heavily engaged for a long period, more appeals were inevitable and jurors would have been inconvenienced." *Id.* at 470.

[215] *Id.* at 472. The court stated:

> The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.

Id.

[216] *Id.*

[217] *Id.*

[218] *See* S. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983). Williams further noted that several current mass tort suits "[threaten] to

Williams separates mass tort cases into two categories.[219] He classifies the first category as mass products liability cases and the second as mass accident cases such as plane crashes.[220] Williams advocates using the class action device to alleviate some of the problems with certain mass torts, such as products liability cases.[221] Nevertheless, Williams also recognizes that mass accident cases are not normally suitable for class actions and that many courts persist in opposing the use of class actions in such cases.[222] Finally, Williams notes that "the cost of retaining experts, collecting medical or technical data and collecting hundreds of depositions and affidavits preclude[s] the vigorous maintenance of a complex product liability suit by an individual plaintiff."[223] Therefore, due to the high costs of suits and absence of alternatives such as class actions, settlement is possibly the most desirable and feasible alternative in mass accident cases.[224] Any actions hindering settlement, therefore, could be extremely costly.[225]

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last well into the next century." *Id.* He noted that according to the 1981 Annual Report of the Administrative Office of the United States Court, over 9,000 new products liability suits were filed in district courts, representing a 17 percent increase over the 1980 figures and following a trend which began in 1974. *Id.* at 324 n.2.

[219] *Id.* at 324 n.1.

[220] *Id.*

[221] *Id.* at 325.

[222] *Id.* at 329.

[223] *Id.* at 329 n.19.

[224] *See supra* note 222 and accompanying text for a discussion of the absence of alternatives.

[225] *See Franklin*, 92 F.R.D. at 472 and *supra* notes 209-217 and accompanying text for a discussion of mass torts, options and costs. One court stated:

> Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustment of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982) (quoting Aultra v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969)); *see also Times Herald*, 717 S.W.2d at 941-42. The *Times Herald* concurring opinion indicated that even if the court used the heightened scrutiny test from a first amendment basis for access that the substantial value of encouraging settlement to a state alone could tip the balance in favor of closure. *Id.* The concurring opinion further stated that the value of settlement is a "compelling governmental interest" and a trial court's order sealing an agreement is "no greater than [is] necessary or essential to the protection of the State's interest in encouraging and facilitating the settlement of lawsuits pending in its courts." *Id.* at 941.

[226] *See Minneapolis Star & Tribune*, 392 N.W.2d at 205 (access to settlement in plane crash case with pending suits).

[227] *Bank of Am.*, 800 F.2d at 351 (Garth, J., dissenting). The dissent stated that because the defendant has to look to the effect of any agreement on many cases, the defendant will be less likely to settle favorably with a party in the absence of confidentiality. *Id.* The dissent stated:

> Moreover, it is precisely in the context of mass torts with multiple plaintiffs such matters as air disasters, toxic injuries, and products liability claims — that the interest in settlement is particularly strong. Such cases are characteristically long, complex, and costly to try, and the savings in public and private resources achieved by settling them are immense. As one judge familiar with the trial of mass tort cases noted: 'Even saving one week of judicial time per case would, as most trial judges know, be substantial. For example, in the Dalkon shield litigation, the record disclosed that, if the usual percentage (90) of the 1000 member statewide class settled their case, the savings of judicial resources in the trial of the remaining 100 would amount to 400 weeks, or, roughly, eight years of trial time. In addition, there would be an estimated savings of $26 million in litigation expense to the parties and $7 million of court expenses.'

Id. at 352 (quoting Williams, *supra* note 218, at 323, 328).

[228] *See supra* note 225 for a discussion of why courts may need to supervise settlements because of party inequality; *see also* The Dallas Morning News, Nov. 22, 1987, at 8A, col. 2. The article, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, stated that court supervision and approval of settlements is necessary in some cases, as well as non-disclosure of the parties' names, if the parties are mentally retarded or children who may fall victim to frauds. *Id.* The article cited one case involving lead poisoning of mainly young children which resulted in a $20 million sealed settlement. *Id.* The plaintiffs' attorney agreed to seal the records to prevent exploitation of the children by "aluminum-siding people." *Id.*

Additionally, in mass tort lawsuits, encouraging settlement takes on an even greater value since the defendant cannot look solely at an isolated agreement but rather must consider the potential of many suits by many parties.[226] This requires the defendant to anticipate the effect of a single settlement agreement on all the possible suits.[227] Moreover, if settlement is the most desirable alternative in these cases court supervision and approval of settlements may protect the plaintiffs by "evening out the odds" between defendant corporations and individual plaintiffs.[228] Yet, ironically, court involvement also de-

stroys any opportunity for confidentiality in some jurisdictions.[229]

IV. Possible Solutions Amid the Uncertainty

Besides giving weight to the value of encouraging settlement, there are solutions and other considerations which could alleviate some of the confusion regarding access to settlement agreements. One consideration in settlement access cases, for example, should be the distinctions between pretrial versus trial proceedings or records, distinctions which are related to the "court reliance" factor.[230] In *In re Reporters Committee for Freedom of the Press*,[231] the court separated pretrial materials and trial records, stating that pretrial information is not part of the open court record upon which a court relies to form a judgment on the merits.[232] The court further stated that

[229] *See supra* notes 64-68, 186-191, and accompanying text for a discussion of the view that filing any material with a court makes the material part of the official court record and therefore subject to access.

[230] *See, e.g., In re Reporters*, 773 F.2d at 1335. This case concerns third party attempts to obtain sealed discovery documents used to support a motion for summary judgment in a civil defamation case. *Id.* Other authorities, however, have the opinion that any material, even settlements, become public property once the parties file a lawsuit regardless of whether a court relies on the material. *See* Dallas Morning News, Nov. 22, 1987, at 24A, col. 6. The article quotes David Anderson, professor of law at the University of Texas, as stating:

> [The parties have] invoked the public processes, and we pay for the court, we pay the judge's salary and we pay for that courtroom. It is not then their option to decide that having availed [themselves] of all these public resources [they can] now decide to make this a purely private matter.

Id.

[231] *In re Reporters*, 773 F.2d at 1334. The court reviewed the history of access to pretrial materials and the status of state and federal law regarding access to such materials. *Id.* The court held that as a general rule there is not a common law right of access to prejudgment records in civil cases. *Id.* Similarly, settlements are prejudgment, nonpublic parts of a trial.

[232] *Id.* Pretrial materials include pleadings and discovery materials — items not yet entered as evidence. *Id.* The court held that, since a court does not rely on pretrial materials for an ultimate judgment on the merits, public access will not serve to enlighten the public as to the rationale behind a decision. *Id.* at 1335. The court stated that:

> The factor most obviously distinguishing the request for records in the present case from the requests at issue in the vast majority of reported cases — and the factor that obviously caused the District Court to deny access without the document-by-document examination that ordinarily accompanies Rule 26(c) protective orders — was the pendency of the litigation at the time the request was made. We must consider, therefore, whether the tradition of public access includes pre-judgment access . . . . '[A] record or transcript brought into this court on appeal, *after judgment entered on the proceedings by the tribunal appealed from*, do [sic] not stand upon the footing of original papers placed in the files of a court of original jurisdiction, *and where there has been no trial had or judgment entered thereon*.'

Id. at 1333 (quoting an earlier opinion, *Ex parte* Drawbaugh, 2 App. D.C. 401 (1894)).

[233] *Id.* at 1335. The court drew an analogy to the fact that a party may not base a defamation suit on pretrial documents as pleadings because the material at this point is entirely private and the court has not heard nor acted upon the information. *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 1336-37.

[237] *Id.* The court stated:

> Even assuming, *as seems unlikely*, that these functions are as important in the context of civil suits between private parties as they are in criminal prosecutions, they are not greatly enhanced by access to documents (which, unlike live proceedings, do not contain unrecordable subtleties) *before judgment rather than after*.

Id. at 1337 (emphasis added). The *In re Reporters* dissent, however, focused more on a court's reliance rather than on a private/public analysis of pretrial materials. *Id.* at 1342-43 (Wright, J., dissenting). The dissent stated that once a party files any material with a court, regardless of the stage of litigation, on which the court subsequently relies to make any judgment, the right of access attaches to the material. *Id.*; *see also In re* Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig., 101 F.R.D. 34 (C.D. Cal. 1984) (holding that the right of access attaches when the documents are submitted in connection with any motion to the court).

pretrial materials are private efforts, occurring without court direction and with the content determined solely by the private individuals.[233] Thus, public access to pretrial material may not serve any of the functions usually cited to support access.[234] For example, access will not serve to increase the quality of judicial proceedings by placing the trial participants under public scrutiny.[235] Further, *In re Reporters* noted that the factors which plaintiffs cite in support of a right to access arose in criminal cases.[236] In the court's opinion, these factors do not apply equally to civil proceedings.[237]

Thus, to the extent settlement agreements are comparable to private, pretrial aspects of a trial upon which the

court does not rely to form a judgment, the value of a right of access should decrease.[238] Special problems arise, however, when a court must approve a settlement agreement.[239] This is because the approval requires court assessment, which in turn may support access based on the court's reliance to form a judgment.[240] One commentator noted this particular problem and advocated, as a solution to access problems, adopting an access test based on whether the material formed the basis of a decision on the merits.[241] In a case requiring court approval of a class action settlement, for example, one court dealt with the problem by holding that because the court opinion approving the settlement served to give the public enough indicia of the court's rationale, the court should deny access to the actual settlement.[242]

[238] *See supra* notes 230-250 and accompanying text for a discussion of the qualities of pretrial materials and why access is not as vital. Further, settlement agreements depend largely upon the desires of the parties and their counsels' skills. For example, settlement may only reflect a desire to avoid publicity or the time and costs of litigation, rather than any belief in guilt or innocence. *See supra* notes 117, 120-125, 171, and accompanying text for a discussion of the distinctions of settlements; *see also* FED. R. EVID. 408 advisory committee's note.

[239] *See* Marcus, *supra* note 13, at 49. Marcus discusses the right of access to pretrial materials and settlements and the distinctions of pretrial materials. *Id.* He stated that in pretrial situations, the court has not determined whether a "genuine dispute" exists. *Id.* Therefore, disclosure of the information would "provide little insight into the decision on the merits. . . . Moreover, a ruling that a party must disclose to the public all materials offered in connection with a motion for summary judgment that is ultimately denied could preclude later settlement conditioned on confidentiality." *Id.*

[240] *Id.* at 49 n.206. Marcus noted:

> Particularly difficult problems may result from a court's duty under rule 23(e) to approve any settlement of a class action. To do so, a court must conclude that the settlement is 'fair, reasonable and adequate', a process that requires some assessment of the evidence unearthed by the parties. If that material is covered by a protective order, the court's process of assessment may provide a basis for vacating the order. Yet, disclosure might preclude a settlement contingent on confidentiality.

Id. (citation omitted). Because Marcus feels that the critical issue justifying public access is the interest of the public in overseeing the judicial process, the test should focus on the court's reliance on the material occurring when the court enters a judgment on the merits. *Id.* at 49.

[241] *Id.*

[242] *See In re* Corrugated Container Antitrust Litig., 659 F.2d 1322 (5th Cir. 1981).

Other commentators have also proposed solutions to some of the problems generated by third party access to sealed settlement agreements and other confidential materials.[243] First, some suggest that courts should recognize the value of confidentiality in encouraging settlements and guarantee confidentiality in "good faith" cases.[244] For example, courts could give greater weight to the value of encouraging settlements in the balancing tests.[245] Alternatively, courts could determine if a court relied on the information in forming a judgment on the merits, thereby increasing the need for disclosure.[246] Additionally, courts could develop clearer guidelines delineating the proper inquiry and standards for granting sealing requests, which could not only make better records, but prevent abuses as well.[247]

[243] *See supra* notes 6, 59, 66, and accompanying text for a discussion of some problems and suggestions for reform.

[244] *See* Annual Judicial Conference, Second Judicial Circuit of the United States, 101 F.R.D. 161, 233 (1983) (Dean Edward A. Dauer speaking on the topic of "How Lawyers and Judges Can Use Alternatives to Litigation").

[245] *See id.* at 233. Dean Dauer stated:

> There are legitimate, good faith reasons for the parties who are trying to work out a solution to something like [a] toxic tort case to want their discussion to be private, immune both from later admission and immune from discovery by other potential plaintiffs' lawyers later down the road, maybe even from competitors, and I think there are good faith reasons for wanting that privacy. That confidentiality is a very large advantage that will, if it can be guaranteed, make [alternate methods of dispute resolution] even more useful as adjuncts to the judicial process than they already are.

Id.

[246] *Id.* Further, Dauer stated that "in the current state of the law in most jurisdictions, practically every place, we can't guarantee that degree of confidentiality that the parties would ideally like to have." *Id.* He concluded with the statement:

> We need a little evolution, I think, and maybe a little clarification of what the applicable law of privilege or confidentiality might be. Judges, I am told, don't make law, but they do adapt it to changing circumstances, and I think the development of [alternative methods of dispute resolution] is a changing circumstance.

Id.; *see also supra* notes 63-68, 230-242, and accompanying text for a discussion of reliance as the test for disclosure.

[247] *See* Note, *supra* note 46, at 1350-51. The author advocates clear guidelines in order to prevent "some of the harm from . . . hasty closures." *See also supra* notes 59 and 66, and accompanying text for a discussion of the related concern that lower courts fail to make an adequate record for review. Thus, one simple reform

Another authority suggests the adoption of the "clear and convincing" standard to justify closure. This standard avoids the uncertainties and inconsistencies until the Supreme Court rules on whether the first amendment supports access to civil trials or records and clarifies the standard which courts should use.[248] In any case, courts need to ultimately resolve the questions concerning the nature of settlement agreements.[249] If settlement agreements are non-public aspects of the trial process, courts must answer the question of whether voluntary filing, or discussion of the agreement in court, truly alters this private nature and justifies access.[250]

IV. Conclusion

The scope of the public's right of access to sealed settlement agreements is uncertain.[251] Yet, by adopting clearer guidelines and a uniform standard for all cases, courts could alleviate some of the uncertainties.[252] Most

is for lower courts to specify the exact factors and weight of each on the record to facilitate review.

[248] *See* Hagenbach, *supra* note 110, at 882. Hagenbach advocates the use of the clear and convincing standard instead of the more stringent first amendment test, which requires a party to show "compelling governmental interests." *Id.*

[249] *See* Marcus, *supra* note 13, at 29-41 (discussing the differences between pretrial materials and protective orders in view of the non-public nature of the information). Marcus stated:

> Many of the most troubling consequences of the public access approach result from the assumption that nonparties have some right to obtain discovery material. This attitude is likely not only to foster litigation over protective orders and preclude settlement, but also to sanction lawsuits designed to obtain information rather than judicial relief.

Id. at 29; *see also supra* notes 120-125, 230-242, and accompanying text for a discussion of the private nature of certain materials and records. Unless a suit actually goes to trial and the parties discuss the settlement in court, settlement is merely a private contract based on discovery materials.

[250] *See supra* notes 68, 230-243, and accompanying text for the view that filing or discussion makes the settlement part of the record and subject to access the same as evidentiary materials.

[251] *See supra* notes 13-242 and accompanying text for a discussion of the differing views and tests, ranging from a first amendment basis to a common law basis with two variations.

[252] *See supra* notes 107, 232-250, and accompanying text for a discussion of possible reforms.

importantly, courts should address critical issues in-depth. These issues include the differences between access to trials and access to court records, as well as the differences between civil and criminal proceedings.[253] Some courts, however, have not recognized these issues in the past.[254] This situation in turn causes much of the uncertainty in right of access cases. Unfortunately, the problems cannot be completely eliminated until the Supreme Court decides whether a first amendment right of access applies to civil proceedings and records.[255]

Furthermore, some cases raise legitimate questions about reliance of parties on confidentiality.[256] This should also be considered by the courts in an analysis of whether to grant public access to sealed settlement agreements.[257] The difference between the original sealing of a settlement and later unsealing is a valid concern. Yet, the solution of adopting two different standards for closure and access adds to the confusion by introducing subjective questions of the parties' reliance.[258] Reliance, in turn, raises additional questions such as how much reliance is necessary to justify continuing closure and how courts should measure reliance.[259]

[253] *See supra* notes 41, 117, 176, 238, and accompanying text for a discussion of the failure to discuss distinctions between civil and criminal proceedings and records. The civil/criminal distinction is significant because the factors which courts cite to support first amendment access arose in criminal cases. Another issue some courts neglect is a party's reliance on confidentiality in agreeing to settle. Without the sealing order, the very materials that the third party seeks would never have existed. *See supra* notes 142-203 and accompanying text for a discussion of party reliance.

[254] *See supra* notes 52-98 and accompanying text for a discussion of cases where courts failed to recognize or discuss issues such as the distinctions between access to trials and access to records, or between civil and criminal actions.

[255] *See supra* notes 99-110 and accompanying text for a discussion of the Supreme Court decision in this area and the distinctions between access to records and access to trials.

[256] *See supra* notes 142-203 and accompanying text for a discussion of cases discussing party reliance and later third party access. This is especially significant when the court actively encouraged settlement and guaranteed confidentiality.

[257] *Id.*

[258] *See supra* notes 142-203 and accompanying text for a discussion of the two tests.

[259] *Id.*

Additionally, courts must address questions regarding the unique nature of settlement agreements.[260] Courts recognize the private, non-public nature of pretrial discovery materials. Nevertheless, they sometimes fail to apply such distinctions to settlements which also occur in private and depend on many of the same factors. For example, if a public right of access rests in part on the public's need for access in order to understand the workings of the judiciary, courts should analyze whether release of settlements will really aid the public in its effort to understand court actions.[261] If courts do not rely on settlement agreements to form a judgment on the merits, the need for access should decrease because release will not facilitate public understanding of the judicial system.[262]

Also, the value of encouraging settlements is a factor which affects the balancing process.[263] Courts should, therefore, recognize the value of encouraging settlements as a means to decrease court overloads and the costs of lawsuits.[264] Yet, recognizing the value of encouraging settlements does not address the issue of *how much* weight courts should give the factor in the balancing tests.[265] Moreover, concerns such as whether allowing access to sealed agreements will prevent some litigants from pursuing valid claims in order to avoid publicity may have no clear, quantitative answer to "balance" in the various tests.[266] Another issue with no apparent conclusive answer is whether a policy of permitting access will truly impede settlements.[267] A possible effect could be to encourage faster settlement in order to avoid trial entirely. If the litigants could not rely on confidentiality of the settlement terms to shield them once a trial began or they filed the agreement with the court, they arguably might settle faster.[268]

Finally, courts should recognize the issues raised when they hold that voluntary filing of an agreement with the court determines accessibility.[269] A party may, for example, anticipate compliance problems and wish to avoid filing a completely new suit in the future.[270] Thus, the filing serves judicial efficiency and brings the settlement under the view of the court.[271] Filing could also act to even-out the odds when parties on opposite sides of a case are not equal in terms of power or resources.[272] Moreover, in mass tort cases, such as airplane disasters, the value of encouraging a settlement takes on a new dimension and may deserve more recognition and weight in the balancing tests.[273]

No easy or single solution appears, ultimately, to answer the issues raised by third party access to sealed settlement agreements.[274] A more critical analysis *recognizing* such issues should be the goal of both the parties and the

[260] *See supra* notes 117, 120-125, 185, and accompanying text for a discussion of the private nature of settlements as opposed to evidentiary materials.

[261] *See supra* notes 63-68, 187-237, and accompanying text for a discussion of the "public understanding" issue and court reliance on material necessitating release.

[262] *Id.* Moreover, if the court balances the value of encouraging settlement with all the relevant factors, the common law balancing process should adequately protect the parties and prevent abuses.

[263] *See supra* notes 114-129, 204-229, and accompanying text for a discussion of the need to encourage settlements, especially in mass tort cases.

[264] *Id.*

[265] *Id.* Other factors, such as party reliance, time, costs, and the number of potential suits, come into play. *Id.*

[266] *See supra* notes 120-125, 166-174, 204-250, and accompanying text for a discussion of the possible chilling effect when parties cannot rely on confidentiality.

[267] *See, e.g.*, *Bank of Am.*, 800 F.2d at 344.

[268] *Id.*; *see also supra* notes 223 and 228 for a discussion of the "inequality" issue.

[269] Inequality between the parties may suggest that courts should approve settlements, without the danger that approval will later enable third parties to gain access based on a "court reliance" theory.

[270] *See supra* notes 128 and 218-228 for a discussion of the value in mass torts. Yet, factors such as whether the case is a mass tort and how many potential plaintiffs exist also add to the complexity of the analysis.

[271] *See supra* notes 32-98 and accompanying text for a discussion of cases in which the courts failed to analyze issues in access cases.

Additionally, equitable concerns come into play if a court encouraged and actively participated in a settlement, agreeing to closure, while a later court overrules and permits access by third parties. Thus, not only party reliance but court participation may become a factor to weigh in the balance.

[272] *Id.*

[273] *Id.*

[274] *See supra* notes 42, 186-188, 230-242, and accompanying text for a discussion of cases holding that filing changes the nature of the material.

courts until the Supreme Court provides the conclusive answer. In the interim, lower courts could alleviate part of the problem and abuse by specifying the factors weighed and the weight given to each factor.[275] Until a conclusive answer comes, however, litigants should be aware of potential access and the false security of sealing settlements.

[275] *See supra* notes 59, 66, 182, and accompanying text for a discussion of this view and courts holding that a specific record is necessary.

THE REFORM OF JOINT AND SEVERAL LIABILITY THEORY: A SURVEY OF STATE APPROACHES

JAMES J. SCHESKE

I. INTRODUCTION

APPORTIONMENT OF DAMAGES between multiple tortfeasors has been the subject of much legal thought and, more significantly, recent legislative action. The most current popular movement in jurisprudence to sweep across the nation is commonly known as "tort reform."[1] Virtually each state's version of tort reform includes changes in apportioning or comparing joint tortfeasor responsibility.[2] This article attempts to characterize the various approaches, focusing on the responses affecting litigation involving the theory of joint and several liability. Moreover, this article includes recommendations for a model joint and several liability statute and concludes with discussions of alternatives to the current tort system.

[1] The primary purpose of this comment is not to present a discussion of the merits of tort reform or the evils of the insurance industry. This article includes numerous references to the scholarly thought on these important issues. *See, e.g., infra* notes 33-50 and accompanying text.

[2] *See infra* notes 63-175 for a discussion of state tort reform legislation; *see also* Talmadge and Petersen, *In Search of a Proper Balance*, 22 GONZ. L. REV. 259, 260 (1986) ("It will be no surprise when the 1986 tort reform legislation does not remedy the insurance crisis . . . . The only certainty surrounding this issue is that it emanates from multiple factors.")

an individual consumer, was spurious at best. In truth the lack of legal accountability by manufacturers undoubtedly contributed to indifference toward safety issues and favored economic considerations which tended to promote the marketability rather than the safety of products. Safety simply was not a priority. It was from this environment that the doctrine of strict products liability emerged.

The similarity between the legal environment for manufactured products thirty years ago and that of the computer industry today is striking. As with its manufacturing precursor, the computer industry has enjoyed a period of protectionism in its infancy. This period of incubation for the computer industry was necessary and desirable. So too, as computers have moved from their infancy to the mainstream of society, accountability is a necessary and inevitable part of its right of passage into adulthood. As computer usage proliferates and the purely experimental stage for computers passes, there is little danger that potential liability for the industry will seriously inhibit expansion and development of computer technology. Potential liability will, however, encourage greater care in program design, testing, and production. At present insurance for software is apparently unavailable, but software providers are in a position to spread the cost of liability through product pricing.

Conclusion

In spite of the specialized nature of many computer-based medical systems and the high cost of procuring them, the role of computers in medicine is expanding. Computer programs for treatment and monitoring are the ones most likely to be responsible for patient injury. Programs for diagnosis and information processing are intended as aids in decision making and will be subject to interpretation and override by the physician.

The legal system can no longer condone the insulation of the software provider from liability. As discussed above, warranty and negligence theories of recovery may be inappropriate or unattainable. Computer software should be subject to strict liability where that software is responsible for personal injury. The computer industry has matured, and it is now time for the industry to accept its share of the inevitable liability which will be generated as computers become more pervasive in society.

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Protective Orders and the Public Right of Access to Discovery

Richard P. Campbell

Introduction

Thirty years ago, it would have been unlikely to find a tort lawyer expounding on the United States Constitution. The tort lawyer of the fifties and sixties was busy with principles of negligence law and, of course, the rules of evidence. He left to his commercial litigation partner and the courts (typically in non-jury trials) the job of understanding and developing the law governing "trade secrets" and "confidential information." Similarly, when the American Bar Association initiated consideration of the uniform rules of civil procedure, it is likely that the distinguished panel of authorities convened for that purpose was dominated by legal scholars and corporate lawyers and included few, if any, personal injury trial lawyers. Certainly, it is highly improbable that any member of the Advisory Committee that drafted the rules of civil procedure (whether or not personal injury trial lawyers) envisioned the explosion of personal injury litigation that occurred in the last two or three decades.[1] And because "strict liability" and "second collision" (or "injury enhancement") liability was not really conceived until the mid sixties,[2] it is axiomatic that products liability (as corporate defendants now know it) played no part whatsoever in either the formation of the rules of civil procedure or the law "protecting" confidential information.[3]

It is not surprising, then, that application of the rules of civil procedure and the law regarding confidential information to products liability cases often produces results that are wholly unsatisfactory to the corporate defen-

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1. In 1985 alone, 160,660 civil lawsuits were brought by individuals in The United States District Courts. Of those, 29,152 cases were personal injury lawsuits based on diversity jurisdiction. WANT'S FEDERAL-STATE COURT DIRECTORY 135 (1987). Between 1975 and 1985, the number of product liability suits pending in The United States District Courts jumped from 2,768 to 22,111. STATISTICAL ABSTRACT OF THE UNITED STATES (107th ed. 1986).

2. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

3. Indeed, it seems probable that any corporate trial attorney interested in the development of the rules of civil procedure or the law governing trade secrets or confidential information would approach the subject with a view toward their application in commercial litigation (e.g., anti-trust, trade secrets, and breach of contract cases).

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dant. This is particularly true with respect to lawsuits over mass-marketed consumer goods, where industry now finds itself lined up against syndicates of contingency fee attorneys (e.g., American Trial Lawyers Association, Attorneys Information Exchange Group, etc.), self-proclaimed "public interest" groups (e.g., Trial Lawyers for Public Justice, Public Citizen Litigation Group, Center For Auto Safety, etc.), private industry lobby groups (e.g., Insurance Institute for Highway Safety), and the investigative press (e.g., 60 Minutes). A single lawsuit can place enormous amounts of proprietary information in the hands of an attorney whose sole mission in the litigation is to take as much money away from the corporate defendant as he possibly can. Obviously, it behooves that attorney to involve other attorneys, public interest groups, industry lobbyists, governmental agencies, and members of the press in review and republication of the proprietary information. In doing so, the plaintiff's attorney develops leads to other information, creates a network of potential referring attorneys, and exposes the corporate defendant to adverse publicity that may well taint the jury in his case.

Importantly, the same course of action results in dispersal of trade secrets and confidential information among an ill-defined and untraceable amalgam of adversaries. The privacy otherwise attendant to such information and documents is forever lost. Competitors and other antagonists have ready access to the internal decision-making and secrets of the company. And, in extraordinary cases, the viability of a product, a company, or even an industry is jeopardized. One need only consider the football helmet, the intra-uterine device, the all-terrain vehicle, and asbestos products in order to judge the ramifications of unfettered dissemination of proprietary information.

The proposition that protective orders should be obtained in every products liability case is certainly not a novel one. The content and breadth of the order, its timing and duration, and its form vary considerably among practitioners, however. More importantly for this discussion, the practical value of such orders in products liability suits in the face of vigorous assault on various fronts is certainly open to considerable doubt. The principal reasons for this doubt are the procedural framework for obtaining and enforcing protective orders and the willingness of many courts to find that members of the general public have statutory or Constitutional "rights" of access to discovery materials. This paper presents the procedural and Constitutional hurdles that corporate defendants in products liability cases confront in making their protective orders meaningful forms of protection.

A. The Applicable Rules of Civil Procedure

It seems reasonable to review the procedural rules that come into play when protective orders become an issue of heated litigation, although the applicable rules are probably obvious and the review possibly unnecessary.

Most lawyers would begin the discussion with Rule 26(c). On reflection, however, the more appropriate starting points are Rules 1 and 11, for they set the tone by which all other pertinent Rules are interpreted. Rule 1 instructs that the Rules of Civil Procedure ". . . shall be construed to secure the just, speedy, and inexpensive determination of every action." In Rule 11, the parties and their attorneys are admonished that their civil actions are not games or toys and that the United States District Courts are not their private sand boxes. Rule 11 mandates that:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by [the] attorney of record in the attorney's individual name . . . .

The Rule goes on to state:

> The signature of an attorney . . . constitutes a certificate by the [attorney] that [he] has read the pleading, motion, or other paper; that to the best of [his] knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law* or a good faith argument for the extension, modification, or reversal of existing law, *and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation*. (Emphasis added).

Restated, the corporate defense attorney is obligated (under threat of personal sanction) by both Rule 11 and Rule 26(g) to undertake a reasonable inquiry of the law and the facts pertinent to any discovery request and certify that the response filed on behalf of his client is well grounded and not interposed for such improper purposes as delay. Indeed, if he is also obligated to abide by Rule 1 (as undoubtedly many federal judges would so find), then the defense attorney must proceed in a manner consistent with the "just, speedy, and inexpensive determination of [the] action." These Rules have a significant bearing on applications for protective orders and, it is submitted, on any claims by non-parties of right of access to discovery materials or claims by parties of right of dissemination of discovery materials.

When responding to a discovery request, then, the defense attorney must first consider the breadth of discovery permitted by Rule 26(b). That Rule is intended to provide the plaintiff with a wide berth in searching out information in the possession of the defendant for use in proving his claim, opposing any defenses raised, and impeaching any witnesses. The Rule provides that objections regarding admissibility are not a proper basis for refusing discovery so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence" and is not privileged. The defendant's responses in most cases, consequently, mix admissible information

(which the jury and the general public may have occasion to see or hear) with inadmissible information (which the jury and the general public will never see or hear). More importantly, the defendant often produces the inadmissible material knowing that it is unlikely to be taken as evidence at the trial, because the defendant is obligated to do so by the Rules of Civil Procedure even though that defendant would probably prefer to keep the material within its private files.

Rule 26(c) is, of course, the source for any protective order that may enter. It grants the trial court considerable discretion in limiting the nature and scope of discovery sought by the plaintiff or in prohibiting discovery altogether. The Rule provides in pertinent part:

> Upon motion by a party . . . , and for good cause shown, the court . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

It is clear from the express language of the Rule that the discovery "rights" of the inquiring party may be terminated or substantially restricted by the court when "justice" requires. And justice may require the court's intervention when the responding party suffers "undue burden" or "oppression." Taken literally, the Rule permits the court to prohibit or terminate discovery even where the responding party suffers mere "annoyance" or "embarrassment." The plaintiff can be forced to proceed in a manner that is contrary to his preference (for example, he may be required to serve letters rogatory on a foreign defendant rather than taking a conventional deposition in the forum jurisdiction[3]). Similarly, the plaintiff may be instructed to avoid inquiry into a particular subject matter. The Rule explicitly sanctions the entry of a protective order to control disclosure of a "trade secret" or such lesser items as "confidential research" or "commercial information." It is equally clear that the Rule requires a showing of "good cause" before a protective order will

enter and the case law interpreting the Rule squarely places the burden on the moving party to prove that good cause exists.[4]

Under the rule, the moving party can show "good cause" for entry of an order if he demonstrates with sufficient factual data, that the material a party has requested through discovery is (1) a trade secret, or (2) confidential information. The fact that the opposing party will share the discovery with other attorneys in unrelated litigation is not in and of itself "good cause" for entry of a protective order.[5] Nor is the financial burden of discovery "good cause" for entry of a protective order.[6]

The requirement of showing "good cause" requires more than conclusory allegations.[7] "Broad allegations of harm unsubstantiated by specific examples or articulated reasoning" do not support entry of a protective order.[8] The movant who seeks a protective order must set forth specific examples of the competitive harm he will suffer without the order.[9] The motion must be accompanied by an affidavit that attests to particular and specific facts. The affidavit of counsel is never sufficient to establish good cause for entry of the protective order.[10] Given the strictures of Rules 1 and 11, an affidavit of counsel would be appropriate, however, to document for the court attempts to resolve discovery disputes informally.[11] It is also wise to include in the body of the motion itself a statement that reasonable attempts to resolve discovery disputes were made.

1. Trade Secrets

A trade secret is information known only to the defendant that, if divulged, would put that defendant at a great *competitive* disadvantage. While the defendant who owns a trade secret has a property right in the secret,[12] that property right is destroyed if the secret is made public. Importantly, some courts have held that once a product incorporating the alleged trade secret enters the marketplace, the trade secret is, *a fortiori*, made public and, consequently, lost.[13] An affidavit that seeks to establish that the requested

4. *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

5. *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980); *In re The Upjohn Company Antibiotic Cleocin Products Liability Litigation*, 81 F.R.D. 482 (E.D. Mich. 1979).

6. *Marshall v. S.K. William Co.*, 462 F. Supp. 722 (E.D. Wisc. 1978).

7. *United States v. Garrett*, 572 F.2d 1323 (5th Cir. 1978).

8. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

9. *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980).

10. *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971).

11. *Quaker Chair Corporation v. Litton Business Systems, Inc.*, 71 F.R.D. 527 (S.D.N.Y. 1976).

12. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

13. *Midline Ross Corp. v. Sunbeam Equip. Corp.*, 316 F. Supp. 171 (W.D. Pa), aff'd, 435 F.2d. 159 (3d Cir. 1970).

discovery material contains or constitutes trade secrets must set forth facts that will enable the court to consider the following:

a. the extent to which those outside the business know the alleged "trade secret;"
b. the number and positions of employees with knowledge of the "trade secret;"
c. the defendant's rules and procedures designed to protect the secret;
d. the value of the "trade secret" to the defendant or his competitors;
e. the effort and cost of developing the "trade secret;"
f. the ease or difficulty with which others could acquire or duplicate the "trade secret."

These criteria for determining whether information is a "trade secret" are set forth in Section 757 of the RESTATEMENT OF TORTS, and have been adopted by several courts.[14]

2. *Confidential Information*

The defendant can move for a protective order for information that may not rise to the level of a trade secret, but is nonetheless confidential. Confidential information is information that, if disclosed, will cause a "clearly defined and very serious injury to" the defendant's business.[15]

Some courts have held that outdated (or "stale") information does not deserve protection.[16] Other courts have held that even "old business data may be extrapolated and interpreted to reveal a business' current strategy, strengths, and weaknesses" and is therefore worthy of confidentiality protection.[17]

"Confidential information" is not defined under the Rules and courts therefore use criteria substantially similar to those used for identifying trade secrets to test whether the information requested is confidential. The factors set forth in *Parsons v. General Motors Corp.*,[18] are often cited as a standard for determining, *vel non*, the confidentiality of the information. In *Parsons*, the court concluded that the material General Motors sought to protect was not confidential by examining:

14. *See Woelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981); *Reliance Insurance Co. v. Barrons*, 428 F. Supp. 200 (S.D.N.Y. 1977), *United States v. International Business Mach. Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975). *See also* Uniform Trade Secrets Act, Section 1(4) (1979), which contains an expansive definition of the term.

15. *United States v. International Business Mach. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975); *Reliance Insurance Co., v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

16. *United States v. American Optical*, 39 F.R.D. 580 (N.D. Cal. 1966); *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

17. *Zenith Radio Corp. v. Matsushita Electric Industry Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981).

18. 85 F.R.D. 724 (N.D. Ga. 1980).

a. how many employees had knowledge of the information or worked on a confidential project;
b. how the secrecy of the information was maintained by the defendant;
c. how reproduction and circulation of the information is controlled or limited by the defendant;
d. the age of the information;
e. whether any of the information was required to be reported to the government.

It bears little note that in the typical products liability case, the defendant is often in the position that General Motors found itself in *Parsons*; i.e., trying to protect the confidentiality of information and data pertaining to a product that was prepared years before the product was finally assembled, years more before the product allegedly harmed the plaintiff, and even more years than that before the issue is presented to the court for resolution. Thus, it is no unusual for a defense attorney to find himself in the position of advocating the confidentiality of design drawings, design safety meeting minutes, and marketing data generated during the design and manufacturing process ten years before the suit was filed, seven years before the accident, and three or four years before the product was finally assembled.

3. *The Balancing Test*

The trial court decides whether to enter a protective order by comparing the burden imposed on the moving party if an order is *not* granted with the burden imposed on the party who requested the discovery if the protective order *is* granted.[19] The motion should recite, and the affidavit support, facts that show that the order will not particularly impede discovery and, moreover that the requesting party will not suffer undue prejudice by its entry.

The defendant should oppose entry of a protective order that would allow a plaintiff indiscriminately to disseminate protected information to third persons known only to the plaintiff on the representation that such persons will agree to be bound by the order. Not only does such an agreement depend on the diligent enforcement of the plaintiff's attorney, but third parties are likely to be beyond the jurisdiction of the court and, therefore, beyond the reach of its contempt powers.

Unfortunately, since many courts favor information sharing among plaintiffs in the interest of judicial economy, a trial court may be inclined to rely on self enforcement of a confidentiality order by the plaintiff and those with whom he shares the information.[20]

19. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620 (10th Cir. 1982).

20. *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987).

4. Summary

Returning to Rules 1 and 11, the defense attorney is obligated to do the following before he may properly move for a protective order:

1. Assemble the documents and information that are called for in the plaintiff's requests;
2. Review them with knowledgeable employees of the defendant with a view toward the nature and extent of any competitive harm that disclosure may cause;
3. Evaluate the efforts undertaken by the defendant to maintain the confidentiality of the information prior to the discovery request;
4. Determine which, if any, of the materials and information will be produced without the need of a protective order and, alternatively, which materials and information warrant the protection of the court;
5. Review the case law governing protection of these materials in the forum jurisdiction;
6. Produce the materials that are not subject to the claim of confidentiality;
7. Convene an informal discovery conference with the plaintiff's attorney in order to persuade him that the defendant is entitled to the order.

As discussed more fully below, the defendant and its attorney may be forced by the Rules to duplicate the same efforts *in the future* when and if the plaintiff, the plaintiff's attorney, the plaintiff's expert witnesses, other plaintiffs' attorneys, and such other persons as the press seek disclosure of the materials and information. With that unsettling possibility in mind, the defendant is well advised to maintain and periodically update its work product and continue in effect the internal and external controls governing the confidentiality of the materials that warranted the protective order in the first place.

The need for constant vigilance over the confidentiality of the otherwise discovered information is particularly acute in cases where the court has entered a blanket protective order as a means of avoiding the need for a document-by-document review of the materials and expediting trial preparation.[21] The Manual for Complex Litigation encourages use of umbrella orders and even recommends a specific form of order.[22] Other courts have held that blanket protective orders are overbroad and not permitted under the rule.[23]

21. *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866, 889 (1981); *Cippolone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986).

22. *See* Manual for Complex Litigation, § 21.43, reprinted in 1 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE (pt. 2) P. 21.43, at 48-50 (1986).

23. *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981); *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987).

B. The Plaintiff's "Right" of Access

1. The Constitutional "Right" of Access

Although courts sometimes confuse or combine the two, the public's purported right of access to discovery materials must be analyzed separately from the plaintiff's right to disseminate them. The first amendment to the Constitution of the United States provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

The source of the public's right of access, if indeed one exists, is found in the first amendment's protection of communication about the functioning of government and empowers everyone to be a judicial watchdog. While not articulated in the words of the first amendment, courts that discerned such a right found it by implication because it was supposedly necessary to enjoy the other, articulated first amendment rights.[24]

1. Right of the Access to Discovery Prior to the Federal Rules. Before enactment of the Federal Rules of Civil Procedure, little, if any, discovery preceded civil trials. State court rules marginally provided for depositions and written interrogatories, but both were used sparingly. Ambush and surprise were the marching orders of the day (much as burial by paper avalanche governs modern practice). In the federal courts, the Judiciary Act of 1789 provided for the taking of depositions, but only in cases where a deposition was necessary to preserve testimony (such as where the deponent was more than 100 miles from the court, about to leave the country, old or sick).[25] The Judiciary Act made no particular provisions regarding rights of access to discovery. Although the Act provided for depositions to be sealed prior to trial, that provision was not intended to protect confidentiality, but rather to insure that the transcript would not be altered before trial.[26] The only federal statute directly to address the question of public access to discovery materials prior to adoption of the Federal Rules was the Publicity in Taking Evidence Act of 1913. That statute specifically provided for public access to depositions in anti-trust actions. The fact that such a statute was required to make depositions public underscores the traditionally private nature of discovery.[27]

24. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

25. J. Wright & A. Miller, MODERN FEDERAL PRACTICE AND PROCEDURE, § 2001 (1970).

26. *Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601 (2d Cir. 1922).

27. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 38 (1983).

What little discovery existed prior to the enactment of the Federal Rules was not open to the public by custom either. Even without the benefit of a procedural device comparable to a Rule 26(c) protective order, a court sitting in equity could prevent public access to discovery through its equity powers. In fact, in 1912 a Massachusetts court sitting in equity barred the press and other members of the public from attending a deposition on the grounds that the deposition was not part of the formal trial and the testimony contained therein might not be admissible in evidence.[28]

2. *Conflict in The Circuits Before* Seattle Times. *Seattle Times* was decided at a time when there was a great deal of confusion among the circuit courts of appeal on the public's right of access to information generated in the course of criminal and civil litigation. The press and public were unable to claim a right of access to criminal trials based on the sixth amendment's right to "public trials" because that right existed only for the benefit of the criminal defendant.[29] However, the Supreme Court ultimately recognized a first amendment right of public access to criminal trials.[30] And in the same year that it decided *Seattle Times*, the Court extended first amendment rights of access in criminal cases to pretrial, voir dire proceedings.[31] Prior to *Seattle Times*, the Supreme Court had not ruled whether the public also had a right of access to civil trials, nor had the court decided whether pretrial documents produced in civil or criminal cases were subject to a Constitutional right of public access. The only Supreme Court case that had even addressed the impact of the first amendment on civil discovery had held that the first amendment prohibited the court from requiring disclosure of NAACP membership lists because such disclosure would have a negative impact on the members' first amendment freedom of association.[32]

Prior to *Seattle Times*, lower courts disagreed on the question of whether a right of access to discovery documents existed in civil cases at all and, if it did exist, whether it was rooted in the Constitution or in the common law. For example, the Seventh Circuit found a right of access to discovery documents under the first amendment.[33] The First and Third Circuits, on the other hand, held that denial of access to discovered information did not implicate first amendment rights in any way.[34]

28. *United States v. United Shoe Machinery Co.*, 198 F. 870 (D. Mass. 1912).

29. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

30. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

31. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

32. *NAACP v. Alabama*, 357 U.S. 449 (1958).

33. *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).

34. *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

3. Seattle Times v. Rhinehart. In *Seattle Times v. Rhinehart*, the Supreme Court held, in unequivocal terms, that a "litigant has no First Amendment right of access to information made available only for purposes of trying his suit."[35] The Court instructed that a litigant's power to compel another party to the suit to produce information was a product of legislative grace, not the Constitution, and consequently limitation or outright denial of that power did not impinge on Constitutional rights. Historically, this seems obvious. As set forth above, although the Constitution became law in 1787, there were no Federal Rules of Civil Procedure, and therefore no discovery procedures available, until 1938.

The protective order at issue in *Seattle Times* had been granted in favor of Keith Milton Rhinehart, the leader of a small religious group, who sued the Seattle Times for defamation and invasion of privacy. The Seattle Times had published a series of articles about Rhinehart, some of which focused on a six hour extravaganza he held at the Walla Walla State Penitentiary that included cash prizes and dancing girls.

During discovery, the trial court granted Rhinehart a protective order that prevented the Seattle Times from disseminating any discovered information pertaining to his financial affairs or to the identity of his followers or contributors. Since the Seattle Times was a media defendant, the protective order necessarily dealt with the rights (if any) of access to and dissemination of discovery materials and information of both a party to the litigation and such non-parties as the press.

On appeal, the Supreme Court of Washington held that the protective order did not violate the first amendment. Acknowledging the privacy interests of Rhinehart and his followers, the Washington court held that the trial court did not abuse its discretion when it entered a protective order. The holding of the Supreme Court of Washington was consistent with a then unambiguous ruling of the Second Circuit Court of Appeals that the first amendment did not inhibit a trial court's authority to restrict dissemination of discovery material.[36]

However, the Washington Supreme Court's holding that the protective order did not infringe on the newspaper's first amendment rights conflicted with two leading opinions by other circuit courts. The Court of Appeals for the District of Columbia had previously held that protective orders that restrict dissemination of discovery material were prior restraints on speech and, as such, were permissible under the first amendment only when the

35. 467 U.S. 20 (1984).

36. *International Products Corp. v. Koons*, 325 F. 2d 403 (2d Cir. 1963); *compare In Re Agent Orange Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), *cert denied*, 108 S.Ct. 289 (1987).

harm caused by the threatened dissemination was substantial and serious, the order was narrowly drawn and precise, and there were no less intrusive means of preventing the harm.[37] Although it agreed substantially with the rule of law fashioned by the Second Circuit in *In Re Halkin*, the First Circuit Court of Appeals held that so long as the trial court displayed a "heightened sensitivity" to first amendment concerns when entertaining an application for a protective order in a civil discovery dispute, the more stringent standard usually applied to review the validity of a prior restraint was not required.[38]

It is therefore apparent that the Supreme Court granted certiorari to resolve a conflict among the circuits as to the appropriate standard of review for protective orders. Although the *Seattle Times* court framed the issue before it as one involving a litigant's right to disseminate information learned in pre-trial discovery, it also resolved the conflict over any purported Constitutional right of access to discovery material. In noting that the right to gather information through discovery was not found in the Constitution, but only in legislation such as the federal rules of civil procedure and similar state counterparts, the Court explicitly rejected both the asserted first amendment rights of the party opponent and the press to otherwise private information uncovered by means of pre-trial discovery.

4. The Aftermath of Seattle Times. Despite the seeming clarity of the *Seattle Times* opinion, courts have continued to struggle with the issue of whether there exists a right of access to discovery materials. The lower courts concern over the issue probably reflects a deep seated belief that anything remotely connected with the administration of the judicial system should be open to public scrutiny. This concern is particularly acute in cases involving significant newsworthy events such as the Agent Orange class action. Perhaps the hesitancy of the lower courts to take the Supreme Court's words at face value is best exemplified by the First Circuit Court of Appeals which has read *Seattle Times* as foreclosing "any claim of any absolute public right to access to discovery materials,"[39] but regards the extent of the public's right to access to judicial proceedings as "still in the process of being defined."[40] That court went on to conclude that there was no right of access to pretrial discovery proceedings, based on their fundamental difference from other judicial proceedings to which a public right of access has been granted.[41]

37. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

38. *In re San Juan Star Co.*, 663 F.2d 108 (1st Cir. 1981).

39. *Anderson v. Cryovac, Inc.*, 805 F.2d at 6.

40. 805 F.2d at 10.

41. 805 F.2d at 13. *See also, In re Alexander Grant & Co. Litigation*, 802 F.2d 352, 355 (11th Cir. 1987) and *In re the Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985). The *Anderson* decision did find, however, that access to pretrial discovery could not be afforded selectively. 805 F.2d at 9.

Even the courts that previously found no first amendment right of access to materials obtained in discovery have suggested that such a right may attach at some later stage of the litigation, when the public interest in open court proceedings outweighs the need for the smooth functioning of the judicial process. Moreover, several courts have suggested that access should be granted to documents considered by a court in ruling on pretrial motions that are dispositive of the litigants' substantive rights.[42]

However, the First Circuit has characterized this position as being "at farthest reaches of the first amendment right to attend judicial proceedings,"[44] and the District of Columbia Circuit has flatly rejected it as being inconsistent with *Seattle Time*'s reference to the admission of evidence as the "touchstone" of a first amendment right of access.[45]

Similar concern is evident in the magistrate's opinion setting aside a blanket protective order after the parties reached a settlement, including an agreement to return all discovery materials to the defendants, in *In Re Agent Orange Product Liability Litigation*, an opinion which was affirmed by the district court (Weinstein, J.) and the Second Circuit Court of Appeals.[46] The United States Supreme Court denied defendant Dow Chemical's petition for cert on November 16, 1987. In discussing the "First Amendment Right of Access to Discovery Materials," Magistrate Scheindlin quickly concluded that in light of *Seattle Times* ". . . there can be no open question that the First Amendment does not require open access to discovery materials."[47] Later in the opinion, however, the magistrate substantially ignored her initial reading of *Seattle Times* and held the following:

> The Court in *Seattle Times* approved a limitation on First Amendment rights upon a showing of good cause. In the absence of such a showing, continued protection would violate the First Amendment, particularly in this case, which is of great interest to the public and the media.[48]

The Second Circuit Court of Appeals completely avoided any discussion of a purported Constitutional right of access to discovery materials and based

42. *In re Consumers Power Company Securities Litigation*, 109 F.R.D. 45, 55 (E.D. Mich. 1985). The court emphasized in denying the press access to the pretrial discovery materials that a much stricter test would apply for any exclusion of the public at later stages of the litigation. *Id.*

43. *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-10 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982).

44. 805 F.2d at 8; *Cf., Federal Trade Commission v. Standard Financial Management Corp.*, et al., 830 F.2d 404 (1st Cir. 1987).

45. 773 F.2d at 1338.

46. 104 F.R.D. 559 (E.D. N.Y. 1985), aff'd, 821 F.2d 139 (2nd Cir. 1987), *cert. denied*, 108 S.Ct. 289 (1987).

47. 104 F.R.D. at 566.

48. *Id.*, at 570.

its affirmance squarely on a right of public access arising (it concluded) by implication from Rule 26(c)'s requirement that a defendant make a showing of good cause before a protective order enter on its behalf.[49] The Court also opined in dicta that, because the blanket protective orders previously entered by the district court were improvidently granted (the defendants were never required to make a showing of good cause), it would have affirmed the modification of the orders in any event.[50] In its petition for certiorari, the defendants made this point:

> . . . [T]he conflict between *Seattle Times* and the decision below goes beyond the issue of public access and centers on the very nature of the discovery process. The *Seattle Times* Court noted that discovery is permitted 'for the sole purpose of assisting in the preparation for trial.' . . . The decision below authorizes use of discovery materials by non-parties for purposes unrelated to any litigation. The *Seattle Times* Court described use of discovery to gather information for public release as an 'abuse of its [a court's] processes.' . . . The decision below suggests that such use of discovery material is presumptively permitted. . . . These fundamental disputes about the nature of the discovery process are so central to our civil litigation system that this Court must act to resolve the conflict.[51]

In Re Agent Orange Product Liability Litigation stands in frank conflict with the position the Florida Supreme Court recently expressed in two cases (one civil and the other criminal) where the press sought access to pre-trial discovery materials. In the criminal case, over the objection of the prosecutor and the defendant, the press sought to be present at depositions and to obtain copies of deposition transcripts that either were not transcribed or not filed with the court.[52] Despite a long standing commitment to open judicial proceedings, and in reliance on *Seattle Times*, the court held that the press did not have a first amendment right to be present at discovery depositions or to obtain copies of deposition transcripts not filed with the court.[53] The Court went on to explain:

> There is no independent right outside the trial process to the information sought. Society in general, and the courts specifically, has a substantial interest in preventing abuse of judicially compelled discovery. Deposition proceedings are not public components of a trial unless made so by the parties. Such proceedings were not open to the public at common law and, as a matter of modern practice, are normally conducted in private. Thus, restrictions on discovered information which has not been admitted at trial are not restrictions on a traditionally public source of information.[54]

49. 821. F.2d at 146.
50. *Id.*, at 148.
51. Petition For Writ Of Certiorari, *The Dow Chemical Company, et al. v. Ryan*, et al., No. 87-224, filed August 7, 1987 (citations omitted); *see*, Section 3, infra.
52. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987).
53. *Id.*, at 382.

The court also advised that public access to pre-trial discovery materials presented "unacceptable hazards" to the Constitutional rights of the litigants (there the criminal defendant), at least in part because the discovery material often contains "irrelevant and inadmissible evidence" having a "substantial potential of hazarding the right to a fair trial [and] the privacy rights of both parties and non-parties. . . ."[55]

The Florida civil case, *Miami Herald Publishing Co. v. Grindley*,[56] presents an interesting contrast to the *Agent Orange* case in that it involved a matter of rather obvious public interest equal to or greater than the public interest in personal injury claims arising out of the use of herbicides during the Vietnam conflict many years beforehand; to wit, the personal health and integrity of an incumbent United States Senator then engaged in an election campaign. In *Miami Herald*, newspapers wanted to gain access to deposition transcripts and answers to interrogatories in a personal injury action brought by Senator Paula Hawkins against the corporate owner of a television station where, according to the Senator, she slipped and fell and sustained injuries. Four years after her fall, and at a time when she was seeking re-election, she filed a complaint for damages in which she alleged that she suffered physical handicaps as a result of the fall that impaired her ability to work. The press claimed that the Senator's health was a central issue in the election and that, contrary to the allegations of her complaint, she publically averred that she was physically fit to hold office.

The press believed that the discovery materials sought would probably expose one or more of the Senator's claims as untrue, bearing directly on her integrity. While resting their argument principally upon a so-called "presumptive" right of access arising out of Florida's equivalent to Rule 26(c), the press nonetheless postulated that "[a]ll members of the public have a right to monitor civil litigation to see if justice is being done."[57] The press went on to make this additional argument:

54. *Id.*
55. *Id.*, at 383.
56. 510 So.2d 884 (Fla. 1987).
57. Brief For Petitioners Miami Herald Publishing Company, Sentinel Communications Company, and Florida Publishing Company at 32. *Miami Herald Publishing Co. v. Gridley*, 510 So.2d 884 (Fla. 1987).

> Moreover, access to discovery process serves important public purposes. A large percentage of civil cases never go to trial because they are settled or dismissed. Discovery depositions are frequently left unfiled or even untranscribed. If parties are permitted to determine what discovery materials are available to the public by filing them selectively or not at all, the public will be denied any meaningful access to the judicial process. In this case, the proceedings involve claims of permanent impairment to a public official seeking re-election. The public's right to know should not be compromised in so important a matter merely because the parties or their attorneys choose not to file discovery materials with the court.[58]

The Florida Supreme Court flatly rejected the press' claims on the basis of its ruling in *Burk*.

It seems reasonably clear that the Florida Supreme Court is correct and that the equivocal opinions of other court's are simply wrong. Civil litigation is by definition a process of dispute resolution between private parties and, in fact, the overwhelming number of such disputes are resolved without the intervention of the courts. The mere existence of court rules and processes for assisting the parties in resolving their differences cannot possibly invoke the Constitutional rights of strangers to the dispute or any undefinable "public right to know." The parties should maintain their right to privacy, as well as their right to a fair trial in the event that settlement is not achieved, irrespective of the curiosity or business concerns of non-parties. Nevertheless, it has been argued that some information may be "so significant to the process of self governance . . . that it would violate the [first] amendment to keep that knowledge from the press and public," and that [s]ome level of first amendment inquiry is necessary."[60] The problem with this suggestion is that it makes every piece of discovery open to judicial scrutiny, if for no reason other than the need to determine whether the information achieves the level of significance required to implicate self-government. The parties' legitimate interest in the privacy of their documents and information is then subject to the whim of individual judges in deciding what is important for our "self-governance." And certainly, corporate defendants engaged in product liability claims have experienced the difficulty of dealing with capricious judges who involve themselves unfairly and intimately in discovery matters properly left to the parties to the suit.

2. *The Common Law Right of Access*

As mentioned above, the Supreme Court of the United States, along with many lower state and federal courts, has recognized a common law right

58. *Id.*, at 41-42.

60. Note, *Access to Pretrial Documents Under the First Amendment*, 85 COLUM. L. REV. 1813, 1833 (1984).

of access to judicial records and documents based on a "citizen's desire to keep a watchful eye on the workings of public agencies."[61] But as the cases involving proffered Constitutional rights of access show, the lines delineating "judicial" records and documents are vague.

There is general agreement that the common law presumption of access to judicial records (and court proceedings) does not extend to discovery materials.[62] Pretrial proceedings and depositions were not public components of civil trials at common law.[63] In *Anderson v. Cryovac, Inc.*,[64] the Boston Globe newspaper sought access to discovery documents produced by the defendants in a highly publicized toxic waste case where the plaintiffs alleged that the leukemia illnesses or deaths suffered by them or their descendents resulted from improper discharge of pollutants into a small river running near their homes. One ground asserted by the Globe as justification for such access was a common law right to documents submitted to the court below for its ruling on discovery motions. The First Circuit Court of Appeals affirmed the denial of access on that ground. It offered these reasons:

> The common law presumption that the public may inspect judicial records has been the foundation on which the courts have based the first amendment right of access to judicial proceedings. It is therefore not surprising that, like the constitutional right of access, the common law presumption does not encompass discovery materials. The courts have not extended it beyond materials on which a court relies in determining the litigant's substantive rights. *See In Re Reporters Committee for Freedom of the Press*, 773 F.2d at 1340, 1342 n. 3 (Scalia, J., writing for the District of Columbia Circuit, and Wright, J., dissenting, agree that the common law presumption does not go beyond evidentiary materials used in determining the litigant's substantive rights). And as we already have determined, discovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process. In view of these conclusions, we decline to extend to materials used only in discovery the common law presumption that the public may inspect judicial records.[65]

61. *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978).

62. *Cf. Seattle Times v. Rhinehart*, 467 U.S. at 20, 33; *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986).

63. *Seattle Times v. Rhinehart*, 467 U.S. at 20 (1984); *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d at 384.

64. 805 F.2d 1, 13 (1st Cir. 1986).

65. *Id.*, at 13; *see also Federal Trade Commission v. Standard Financial Management Corp. et al.*, 830 F.2d 404 (1st Cir. 1987).

3. *Statutory Right of Access*

In re Agent Orange Product Liability Litigation represents the best example of case law supporting the existence of a public right of access to discovery materials generated in the course of a private products liability lawsuit, where the right of access is found to arise out of a statute (Rule 26(c)) rather than the Constitution or the common law. *Agent Orange* was, of course, a class action suit brought by American veterans of the Vietnam war who claimed injury from contact with herbicides used to defoliate the jungles. It is important to keep in mind that, as a class action, the case may be unique and difficult to analogize to other products liability cases. After the class action was settled and during fairness hearings, a public interest group, the Vietnam Veterans of America, joined by several non-representative class members and one of the contingency fee attorneys for the plaintiffs, sought access to discovery produced by the Dow Chemical Company and other corporate defendants, manufacturers and distributors of the herbicide used by the government in Vietnam. An umbrella protective order previously entered by the district court during the early stages of the case prohibited dissemination of any discovery material to anyone other than the parties to the litigation. The order was found necessary (i.e., good cause was found to exist) because of the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the [trial date]."[66]

After concluding that neither the Constitution nor the common law provided the applicants with a sufficient basis for seeking access to the discovery materials (particularly because the principle movants were either non-parties or non-representative class members), the Magistrate focused on two rules of civil procedure: Rule 26(c) and Rule 5(d). First, the court looked at the Rule 26(c) requirement that a party seeking a protective order show with specific facts and articulated reasoning "good cause." The court reasoned that the procedural burden on the party seeking the closure order indicated a Congressional intent to make the materials and information generated by discovery open for public review and dissemination under normal circumstances.

> Fed.R.Civ.P.26(c) presumes that discovery materials are open to the public. The Rule's requirement that the proponent of non-disclosure prove that good cause exists to limit public access to discovery material demonstrates that, in the absence of such proof, the discovery is open to the public.[67]

66. *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 583 (E.D.N.Y. 1982).

67. *In re "Agent Orange,"* 104 F.R.D. 567.

The magistrate explained away *Seattle Times* by claiming that the Supreme Court "tacitly affirmed the validity of the statutory presumption" because it approved the trial court's exercise of discretion in finding that good cause had been proven.

In fact, the Supreme Court made no mention of any statutory presumption of public access but, instead, concerned itself with the legitimacy of controls over the newspaper-defendant's extra-judicial use of the information. Restated, the Supreme Court in *Seattle Times* was ruling on first amendment issues pertaining to a party to the litigation who already had possession of the confidential material; and it did so only after it explicitly held that the same party had no Constitutional right of access to the materials. The magistrate's reliance on *Seattle Times* as a source of support for her opinion that Rule 26(c) creates a statutory right of access for members of the general public is simply misplaced.

At best, Rule 26(c) may implicitly permit a party opponent to disseminate information obtained through discovery unless the producing party moves for and secures a protective order. But even that "right" is subject to other rules and limitations (e.g., Rule 11 sanctions in the event that the information was obtained for improper purposes unconnected to the litigation or, perhaps, money damages for its illicit, tortious use). There is no language in Rule 26(c) that permits *a non-party* to engage in discovery and, indeed, the foundational rule, Rule 26(a), specifically limits its applicability to "parties." A person otherwise unconnected to the case (for example, not a person contemplating perpetuation of testimony under Rule 27) has no discovery rights whatsoever, unless he becomes a party; and he is permitted to do so, if at all, only under the strictures of Rule 24.

One need only consider the magistrate's suggestion in the light of day-to-day trial practice to see that it is impractical and lacking in the type of common sense that makes the rules of civil procedure work. Under the magistrate's rule, the general public would have the right to attend any deposition, participate in product inspections and testing, and compel production of documents (which can number in the thousands). Since it is a statutory "right" according to the magistrate, the non-party's access is reasonably assured against applications for protective orders (particularly since the cost of producing discovery materials is typically an insufficient basis for such an order) even though the end effect is additional cost, unnecessary delays, and frustration and intimidation of witnesses and attorneys. What corporate employees would be willing to appear as Rule 30(b)(6) deponents for their employer if the local or national investigative press is expected to be in attendance at the deposition? How is such a ruling possibly consistent with Rule 1's admonition that the rules are to be interpreted "to secure the just, speedy, and inexpensive determination of every action?"

The Magistrate cited Rule 5(d) as a second ground for her opinion that

the non-party applicants had the "right" of access to the discovery materials produced by the product liability defendants. This ground is even more insubstantial than the implied right under Rule 26(c). Rule 5(d) provides as follows:

> All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions on oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

The problem with the court's reliance on Rule 5(d) as a basis for public access to discovery documents was that the materials produced in the *Agent Orange* litigation and subject to the non-parties' request for inspection were not filed with the court. Moreover, one reason that the materials were not filed, leaving aside the custom and practice of the trial bar to make the materials *available for inspection and copying* pursuant to the explicit language of Rule 34, was the existence of a local rule which was in force at the time and which mandated that discovery pleadings not be filed with the court.[68] The court found consolation and support for its position, despite the local rule and the fact that the materials in question were not filed, in the concluding phrase of the local rule that left open the possibility that the court could, in individual cases, order the parties to file discovery responses. The Second Circuit Court of Appeals approved this reading of Rule 5(d), relying in part on this comment by the Advisory Committee on Civil Rules: "[S]uch materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed.R.Civ.P.5(d) Advisory Committee Note.

Unless the court's order dissolving the protective order is seen as an order modifying the local rule and compelling the product liability defendants to file the discovery materials, the fact is that the court never exercised its power of supervision under the local rule by requiring such a course of action. Further, use of the court's power of supervision solely for the purpose of granting the public at large access to private information that the public was otherwise not entitled to have is patently capricious and a form of judicial tyranny. As the defendants have persuasively pointed out in their Petition for Certiorari to the Supreme Court, the decision makes no sense either as a reasonable interpretation of Rule 5(d) or as a statement of the actual practice of law in the federal courts.

68. S.D.N.Y., E.D.N.Y. Civ. R. (18a) (1983).

> Rule 5(d) states that all 'papers' that are 'required to be served' upon a party must be filed. There is a distinction between materia' that are filed with a court and thus may be public and those that are not filed with a court are presumed to be private. . . . There is no question that documents produced pursuant to Rule 34 are neither 'papers' nor 'required to be served.'
>
> Federal Rule of Civil Procedure 11 requires that every 'paper of a party represented by an attorney be signed by at least one attorney of record.' Because no one has ever suggested that documents produced in discovery must be signed pursuant to Rule 11, it is clear that they are not 'papers.' Moreover, Rule 7(b)(2) states that 'rules applicable to captions . . . apply to all motions and papers provided for by these rules.' Again, no one has ever suggested that all documents produced in discovery need a case caption. Indeed, the signing and captioning of all documents would serve no purpose and greatly increase discovery costs.
>
> If the position of the Court of Appeals is allowed to stand, and all materials produced in discovery are 'papers' under Rule 5(d), all such materials would have to be signed, captioned, served upon the other party and filed in court. The fact that none of these procedures is followed demonstrates how far the court below has strayed from established judicial practice.[69]

The Florida Supreme Court, on the other hand, has rejected the Second Circuit's finding of a statutory right of access to discovery material (founded on rules of procedure governing applications for protective orders and filing of "papers" with the court), just as it rejected finding a Constitutional right of access to discovery. In both *Palm Beach Newspapers, Inc. v. Burk* and *Miami Herald Publishing Co. v. Gridley*, the Florida Supreme Court was asked to recognize the general public's qualified right of access to discovery materials and information, subject to the parties' opportunity on a proper showing of good cause to obtain an appropriately structured protective order limiting or terminating that right. The proponents of this qualified right of access argued that the Florida equivalent to Rule 26(c) [Rule 1.280(c)] created a "presumptive public right of access" and, as well, that depositions and discovery documents were "judicial proceedings" and "judicial records."[70] The court reasoned as follows in rejecting the arguments:

69. Petition for Writ of Certiorari at 11-12, *The Dow Chemical Company, et al. v. Ryan, et al.*, No. 87-224 (filed August 7, 1987) (citations omitted).

70. Initial Brief of Petitioners Miami Herald Publishing Company, Sentinel Communications company, and Florida Publishing Company at 8-21 and 39, *Miami Herald Publishing Co. v. Gridley*, 510 So.2d 883 (Fla. 1987).

> Petitioners further urge that, notwithstanding the success or failure of their constitutional argument, they have a qualified right under Florida criminal and civil rules of procedure to attend discovery depositions and to obtain copies of unfiled depositions. Largely for the same reasons as set forth above, we do not agree that the press has a qualified right under the rules of procedure to attend deposition proceedings.
>
> . . . A deposition is nothing more than a statement of a witness taken under oath in accordance with the rules. As the Seattle Times Court said, '[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of litigated disputes.' . . . Open access would not serve this purpose. The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information may be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.[71]

Importantly, in the *Agent Orange* case, the magistrate, and the Second Circuit Court of Appeals in its affirming opinion, imposed a continuing burden on the protected party to prove good cause in order to keep the order in force. Acknowledging that protective orders are modifiable, the magistrate held that on a motion to modify a protective order, it is the party protected, *not* the party who seeks access, who bears the burden of showing that good cause continues to warrant the protective order.[72]

Prior to the *Agent Orange* case the Second Circuit had required the movant seeking to modify a protective order to show that a "compelling need" or "extraordinary circumstances" warranted the modification.[73] Other circuits have not imposed the burden of proof on the protected party in motions for modification. In the Eighth Circuit, the party seeking dissolution of a protective order bears the burden of showing that intervening circumstances have removed the potential prejudice.[74]

The burden imposed on a product liability defendant who has produced voluminous discovery documents by the court in the *Agent Orange* case is

71. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d at 383-384.

72. *See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34 (C.D. Cal 1984).

73. *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982).

74. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied sub nom Iowa Beef Processors, Inc. v. Smith*, 441 U.S. 907 (1979).

problematic to say the least. Under the decision, every member of the public has a statutory right of access to discovery and is entitled to force the court to convene a hearing *at any time* and to compel the defendant to justify its continuing need for the protection of the order. This is no small matter, especially when the court is required to consider among other issues the extent to which the materials and information have become stale. It seems unlikely that corporate documents and information about the design, manufacture, and distribution of products placed in the stream of commerce many years before the discovery process began can withstand a non-party's challenge on staleness grounds made months or years after the litigation has terminated. In the *Agent Orange* case, the magistrate referred to the dated nature of the discovery material at issue (twenty to thirty years old) as an "important factor in determining whether disclosure will cause competitive harm."[75] In addition, if the requirements of Rule 26(c) and Rule 11 are applied literally, the corporate defendant (as the protected party) must wade through all the discovery, document by document, to show good cause why each individual document still warrants protection. Mindful of Rule 11 and the requirement of reasonable inquiry, such document by document investigation could impose hours or weeks of labor on the defendant, followed by considerable effort by the court, years after the litigation is resolved. That is precisely what the *Agent Orange* court required, holding that the defendants had to prove that serious harm would befall their business or other interests and that "the time consuming and costly nature" of doing so was not a valid reason for continuing the protective order in force.[76]

It is simply incredible that any court would interpret Rule 26(c) so as to impose on parties to private disputes and the system itself a never ending responsibility to monitor discovery records and proceedings as if the materials and information were comparable to presidential papers and state secrets with significant historic value to our democracy. Such an interpretation clearly fails "to secure the just, speedy and inexpensive determination" of the action required by Rule 1 and runs afoul of the ever-pressing need in an age of shrinking budgets to manage the court's dockets in a way that produces reasonable access to the judicial system for all members of society.

The United States District Court for the District of Columbia, confronted with an application by the Washington Post and a non-party (The Reporters Committee for Freedom of the Press) for access to 3800 pages of deposition testimony and 425 pages of deposition exhibits generated during a libel action against the Post by the president of Mobil Corporation and his son, substantially refused to pursue a course of action like that adopted by the

75. *In Re Agent Orange Products Liability Litigation*, 104 F.R.D. at 575.

76. *In re "Agent Orange,"* 104 F.R.D. at 571.

Agent Orange court.[77] The documents in question involved Mobil's dealings in Saudi Arabia and its marine transport business and were all subject to a blanket protective order entered by the court in 1981. While Mobil conducted a renewed evaluation of the materials in light of the post-trial application to set aside the protective order and submitted an affidavit of counsel in support of its position that the order was still needed, the Post asserted that a document-by-document and line-by-line inspection of the materials and testimony was necessary to meet the burden imposed on Mobil by Rule 26(c). The Post also argued that the information was substantially in the public domain and, since it involved commercial events more than ten years old, was stale. The court agreed that the burden remained on Mobil to make a "present determination" of good cause but flatly rejected its claim that intense scrutiny of the materials was needed in a matter that was already tried to a conclusion.

> Furthermore, the Court must construe Rule 26(c) so as 'to secure the just, speedy, and inexpensive determination of every action.' . . . If the Court were to adhere to the rigorous standard urged by the Post, and force Mobil to demonstrate the likelihood of serious injury for each and every page and exhibit, the Court would be required to undertake that which it has already stated it had no intention of undertaking: a time-consuming review of the 3800 pages and 425 exhibits. Where, as here, the defendant Post obtained the full benefit of the discovery materials for trial preparation, and the material is no longer needed for trial, such an undertaking would be a waste of the parties' and the Court's resources.[78]

The court specifically ruled that the lawyer's affidavit, while not meeting "the standard of particularity required where a court is considering whether to enter a protective order initially," satisfied Mobil's burden of demonstrating good cause for maintaining a blanket protective order that had been in place for several years.[79]

There is little doubt that the *Tavoulareas* court approached the post-trial application to set aside the protective order in a far more practical manner than did the *Agent Orange* court. The latter court's willingness after a settlement or a trial to engage in costly and time consuming discovery matters is likely the result of the nature of the lawsuit, a highly publicized class action. In such a case, reasonable arguments for access to discovery material may be based upon the need of the court and members of the class to consider the material in an evaluation of the fairness of a proposed

77. *Tavoulareas v. Washington Post*, 111 F.R.D. 653 (D. D.C. 1986).
78. *Id.*, at 659.
79. *Id.*, at 659-670.

settlement. However, in its zeal to find grounds for setting aside the blanket protective order, the court has fashioned a rule of procedure that makes no sense and could impose unwarranted costs and hardships on the parties and the system.

Conclusion

Protective orders should protect parties subject to extremely liberal discovery from the irreparable harm that can accompany the publication of confidential business information and trade secrets. That purpose has been defeated by courts that have allowed private dispute resolution to become a public media event and by a plaintiffs' bar that has made a business out of selling confidential information obtained through discovery. In spite of Supreme Court decisions that hold there is no Constitutional right of access to confidential information produced during discovery, defendants in product liability litigation continue to face successful Constitutional challenges to protective orders from many fronts.

The Second Circuit has recognized a statutory presumption of public access to every ounce of information produced during discovery in a private lawsuit. The impact of that decision, coming as it does from one of the most respected of the federal circuits, has already been felt in complex litigation across the country. In January, 1988 a federal judge in Boston lifted a protective order that had been entered in *Palmer v. Liggett Group, Inc.*, thereby granting the American Cancer Society and others access to documents produced by a defendant tobacco company pursuant to discovery. The case, a failure to warn claim against a tobacco company alleging that the plaintiff's decedent's death was caused by smoking, had been dismissed by the First Circuit Court of Appeals earlier.[80] In another case, also in January, a district court judge granted a plaintiff's motion to lift a protective order in a DTP vaccine case after a verdict had been entered for the plaintiff. Once the protective order was removed, the judge created a "Wyeth Laboratories DTP Vaccine Litigation Library" from the trial transcript, exhibits, pleadings, depositions and other discovery documents produced in the case for the benefit of other DTP plaintiffs, "researchers, academics, institutions, consumer groups, members of the medical profession or associations, private or governmental, legal associations such as the ATLA and/or Defense Research Institute, and even law students."[81] The library is to be maintained by the court clerk.

80. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987) (on preemption grounds); No. 83-2445-MA (D. Mass. January 28, 1988) (order to modify protective order).
81. *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D. Mo. 1988) (order to modify protective order).

The presumption of a public right of access to material produced during discovery will change the face of complex litigat. . The umbrella protective order (a standard in multidistrict litigation), provided protection with relative ease of administration. Now the defendant must confront the document-specific protective order: a costly and time consuming way to obtain protection and one that is reviewable by motion of any member of the public at any time. The term "protective order" may be a misnomer.

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The Effectiveness of Warning Labels

Mark R. Lehto and James M. Miller

Introduction

During the last twenty years the duty to warn has been heavily emphasized in litigation regarding products liability. In accordance with this doctrine, manufacturers of products lacking explicit warning labels may be liable for damages under the theories of negligence (Noel, 1969) or strict liability (Sales, 1982). It has been suggested that such litigation has proliferated because of the relative ease of initiating tort actions based upon inadequate warnings, the difficulty in defending against such actions, and the "apparently" low cost of placing warnings on products (Twerski, et al., 1976).

In response to this proliferation of litigation based upon the duty to warn, many manufacturers have both increased and made more explicit the warning labels they provide with their products, often with the conviction that the hazards being warned against are minor. While this response may have increased the safety of certain products, the dangers of the indiscriminate provision of warnings have been noted by several authors (Twerski, et al., 1976; Schwartz and Driver, 1983). The noted concern is that all warning labels may lose effectiveness, if they "cry wolf" too many times.

Few individuals would argue against the idea that warning labels should be applied only when they are likely to reduce the frequency and severity of classes of product-related injuries. This idea underlies the "risk balancing" theory applied by the courts which recognizes that the benefits of applying a warning label are to be compared to its costs (Schwartz and Driver, 1983; Weinstein, et al., 1978; McCarthy, et al., 1982). However, clear, academically-based criteria that would guide the courts in evaluating the costs and benefits of particular warning labels have not been made available to the legal community. As a consequence, warning-related legal decisions are frequently based upon intuitive rather than scientific grounds. Little consideration has been given to the true complexity of the problem (Kantowitz and Sorkin, 1983). The result has been decisions that may have long-term implications counterproductive to safety (Twerski, et al., 1976; Schwartz and Driver, 1983).

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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

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.



CONFIDENTIAL
PROTECTED BY COURT-IMPOSED PROTECTIVE ORDER

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

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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, 1985, 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,

See COURTS, A31, Col. 4

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
SEALED	1:82-cv-00346	D	02/01/84	KAHN, ET AL V PHILLIPS, ET AL
SEALED	1:82-cv-00856	P	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-03581	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	1:83-m -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	03/01/88	SEALED v. SEALED
SEALED	1:88-cv-00578	dft	03/01/88	SEALED v. SEALED
SEALED	1:88-cv-00579	pla	03/01/88	SEALED v. SEALED
SEALED	1:88-cv-00579	dft	03/01/88	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-01438	pla	05/27/88	SEALED v. SEALED
SEALED AIR CORPORATION	1:88-cv-01438	dft	05/27/88	SEALED v. SEALED
SEALED DEBORAH	1:85-cv-00747	P	02/05/85	SEALED v. [illegible]
[illegible]	1:85-cv-03533	pla	10/18/85	WELLS [illegible]
[illegible]	1:85-cv-03523	[illegible]	[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."

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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.

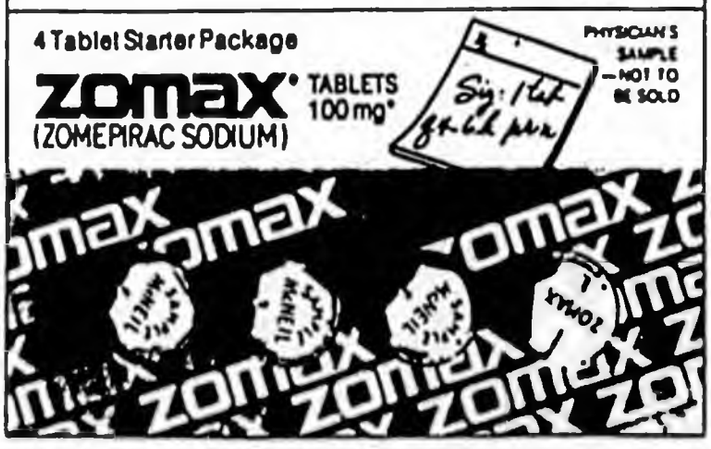
The Jan. 14, 1985, memo, written by McNeil legal aide Herman Lutz, listed 18 lawsuits that "presented McNeil with the most exposure or had sensitive problems." Many of the cases involved patients who had taken Zomax during periods when the company had decided to issue stronger warnings, but had not yet 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, A12, 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.

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.

Perez spent much of his time on the road in western Texas, visiting 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

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.

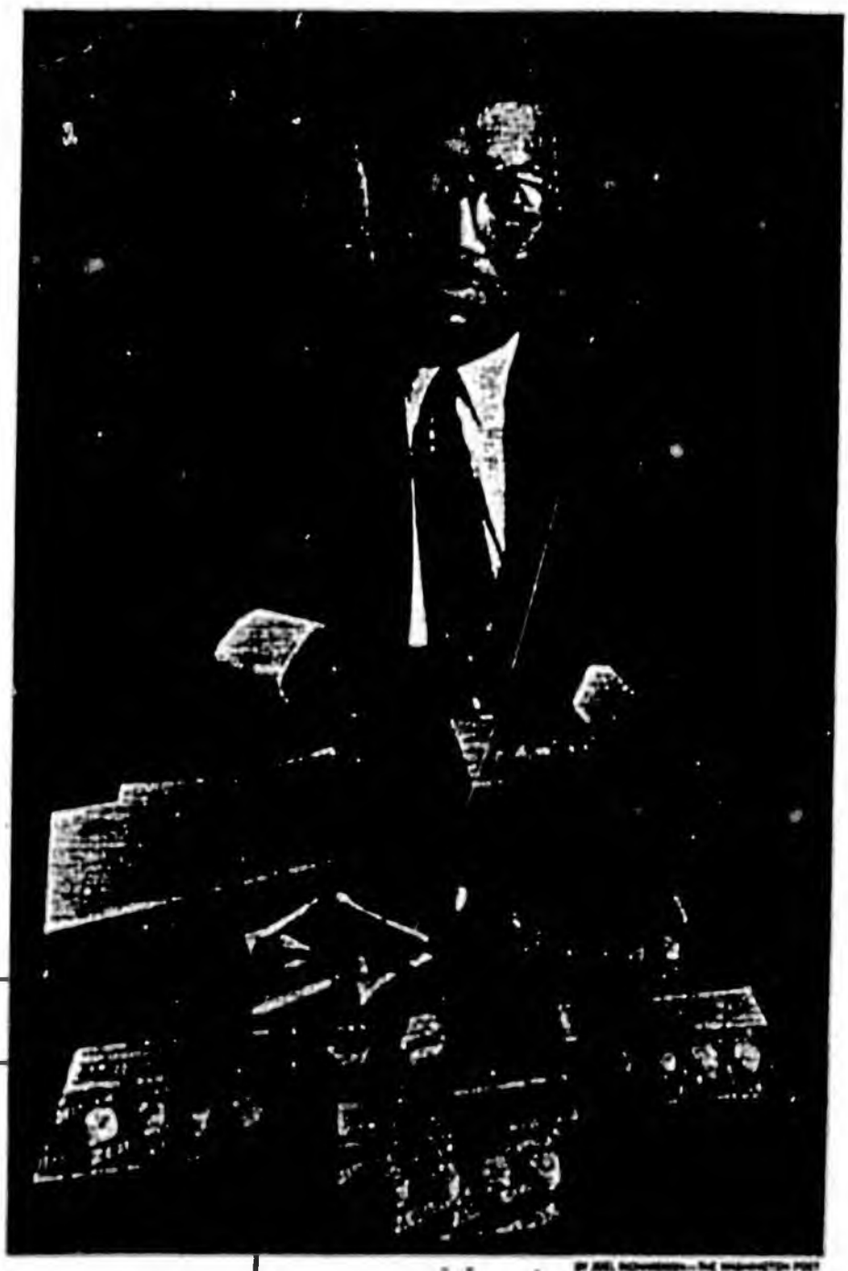
On July 1, McNeil gave Perez a $33-a-week raise, thanking him in a note for his help in "containing the Lubbock situation."

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



McNEIL PHARMACEUTICAL

May 21, 1982

TO: Jody N. 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 complaint problem situation in Lubbock. You have been the right person for us to have in that location at the right time. Dr. Stewart, Josh 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 support 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 affect 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

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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

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"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible."

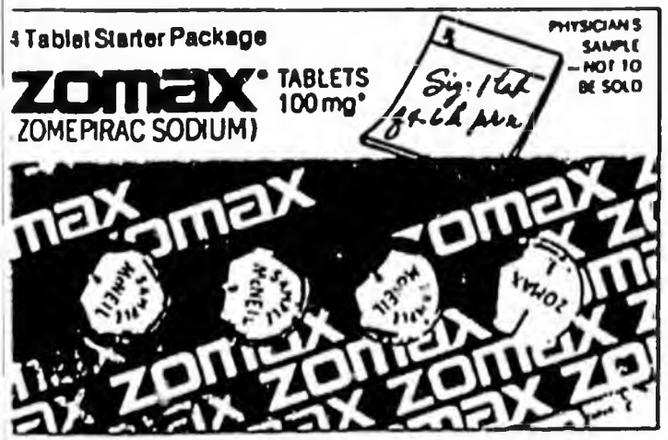
— Roger Fine, Johnson & Johnson associate counsel, who believes secrecy orders are needed to guard company formulas and marketing methods



FINE

Drug Label Warnings at Issue in Suits

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 ·ggestion that the company should have withdrawn Zomax sooner

OPERATION ONE-ELEVEN



Operation III
ZOMAX® Tactical Document
11 April

Battle Strategy: ZOMAX, "the ultra aseptic analgesic," should be promoted to capture the following strongholds beyond the range of aspirin:

Osteoarthritis	Painful Injuries
Musculoskeletal Pain	Post-Acute Fracture Pain
Post-Acute Surgical Pain	Painful Strains

Directions: These positions are currently held by Motrin and Naproxen-S 200. Pressing on Feldene won't help us meet our objective and may in fact help Pfizer reach theirs.

Tactical Support: Samples

An airlift operation is underway to provide additional samples by May 1. A second airlift will occur by June 1.

Literature

Two adjuncts are en route. By May 15 additional file cards and the One Year Symposium Highlights Brochure will be available to support your effort.

Mail

Several mailings will drop mailings to reinforce and communicate positions around the clock to support sampling and promotional efforts.

Journal Advertising

Backpages are currently in key strategic offshore locations. They will continue to bombard the physician universe reinforcing the ZOMAX "ultra aseptic" position.

CONFIDENTIAL PROTECTED BY COURT-IMPOSED PROTECTIVE ORDER

McNEIL PHARMACEUTICAL



"... 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

McNeil marketing strategy memo, left, has a military motif. The paper, sealed as part of a lawsuit, bears a "confidential" stamp.

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 surgery. 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 operation. 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.

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.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

The State Factor

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LEGISLATION TO LIMIT PROTECTIVE ORDERS: AN INVASION OF PRIVACY

by
The Civil Justice Task Force
of the
American Legislative Exchange Council

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LEGISLATION TO LIMIT PROTECTIVE ORDERS: AN INVASION OF PRIVACY

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.

— Justice Oliver Wendell Holmes (1917)/1

INTRODUCTION

Lawyers who represent plaintiffs in civil lawsuits are actively pursuing an agenda to restrict or even eliminate the ability of judges in this country to issue protective orders. Protective orders are issued by courts to protect confidential or propriety information, or to protect parties from undue burden or embarrassment. Protective orders often cover documents and information exchanged during the initial stages of a lawsuit to help each party investigate the case, but may not necessarily pertain to documents or information presented at trial. Plaintiffs' lawyers allege that courts are issuing protective orders with increasing frequency in order to keep secret vital information concerning dangerous products and practices, thus endangering the public. This allegation has helped the plaintiffs' bar find strong allies on this issue from consumerists and the media. Replacing the legal term "protective orders" with the emotionally volatile and misleading moniker "secrecy agreements," these allies have worked together to introduce legislation and propose rule changes to bar "secrecy agreements" from the courts.

But protective orders — the so-called "secrecy agreements" — are what help make the current U.S. civil justice system work. The civil justice system is often criticized for being too cumbersome and for taking too long to resolve disputes. It would be far worse without protective orders.

THE DISCOVERY PROCESS

Most state courts have modeled their rules of civil procedure after the Federal Rules of Civil Procedure used by the federal court system. Under these rules, the complaint which initiates the lawsuit may be drafted so broadly that neither party knows the precise grounds for the lawsuit, or indeed whether grounds for a lawsuit actually exist. The parties learn the facts of the case, and narrow the focus of the lawsuit, through the discovery process.

Because the purpose for discovery is to gather information, the discovery process can have a very wide scope. Rule 26(b) of the Federal Rules of Civil Procedure provides that the litigants may obtain from parties and nonparties alike, not only information relevant to the lawsuit, but also information which "appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b) allows a party to ask for almost any type of information based on the argument that the requested information may help the party discover something that would be admissible at trial. Under this rule, any person,/2 even one completely uninvolved with the lawsuit, may be required to turn over a broad range of material, including private or proprietary information. For example, in a lawsuit arising out of an accident, a court ruled that a newspaper must give a plaintiff copies of the paper's unpublished photographs of an accident scene./3

The design of the current United States civil justice system requires that parties be given wide latitude in the discovery process. The wide scope of this discovery process is tempered by the discretion of the judge to issue protective orders. Rule 26(c) of the Federal Rules of Civil Procedure grants the judge authority to issue protective orders at the request of the person asked to provide information, to protect him or her from "annoyance, embarrassment, oppression, or undue burden or expense."

Without protective orders, people with private or proprietary information to protect would fight vigorously through every available avenue against every discovery request . The protracted satellite litigation that would result would have a devastating impact upon the already overburdened judicial system.

Protective orders exist to encourage people, from whom documents and information are requested, to provide documents that they, because of privacy or proprietary reasons, would otherwise be reluctant to give up. In fact, to ensure the free exchange of information during discovery, parties will often agree that sensitive information shall be subject to a protective order. Without protective orders, people with private or proprietary information to protect would fight vigorously through every available avenue against every discovery request . The protracted satellite litigation that would result would have a devastating impact upon the already overburdened judicial system.

Courts have been issuing protective orders at least since the Federal Rules of Civil Procedure expanded the parties' right to obtain, or "discover," information in preparation for trial of a lawsuit. For more than forty years courts have consistently required the person asking for a protective order to prove that there is a good reason for the protective order.

Rule 26(c) does not permit the judge to issue protective orders on a whim. Rule 26(c) requires the person requesting a protective order to show that "good cause" exists for the issuance of such an order. Thus, Rule 26(c) creates a proper and proven balance between the competing interests of the litigants to gain access to sensitive but important information in their opponents' possession, and the interest of the person holding the information to protect private or proprietary information from unauthorized disclosure and dissemination./4

Courts throughout the country have addressed the types of information which parties can force others to provide. The Federal Food and Drug Administration has established a system in which drug manufacturers receive reports from doctors about potential patient reactions to drugs, to enable drug manufacturers to identify rare or unanticipated reactions. To encourage doctors to report, FDA maintains that the individual reports are confidential and may not be disclosed. A court has been asked to decide whether the names of reporting doctors, as well as information about their patients, should be provided to individuals suing the drug manufacturer and thereby made available to any other plaintiff's attorney./5

In the ground-breaking case involving court-ordered limits on release of information provided during discovery, the U.S. Supreme Court ruled that a religious group's membership and contribution lists, provided to a newspaper in the course of a civil suit, were not public information that the newspaper could publish./6 In many lawsuits, the plaintiff's medical records, and even the medical records of members of the plaintiff's immediate family, are provided to the defendants./7 This information may be of interest to the public and the media if the plaintiff is a well-known individual, such as a professional athlete, movie star, or politician, which leads the plaintiff to ask for a protective order limiting its distribution.

Another type of circumstance would be criminal investigations. For example, a court refused to allow a person convicted of tampering with over-the-counter drugs to receive reports of state and federal investigations of tampering incidents./8

ATLA'S PROTECTIVE ORDERS CAMPAIGN

ATLA's Purpose

At its annual meeting in 1989, the Association of Trial Lawyers of America (ATLA) launched a national campaign to severely limit the use of protective orders./9 ATLA's artful campaign is depicted as a battle between good and evil. The plaintiffs' bar, consumer groups and the media have cast themselves as the "good guys," looking after the hapless public whom the evil corporations are victimizing by purposefully hiding "public hazards" from the public eye. Although this is an attractive representation, and one that captures wide sympathy, it is not true.

It is not the responsibility of the plaintiffs' bar to police the community to ensure public health and safety. That is the function of government agencies. If ATLA was truly concerned for the public welfare, it would report information it believes indicates a public hazard to the appropriate government agency for regulatory action, rather than attacking the product or practice on a case-by-case basis.

Since it is in the plaintiffs'counsel's best interest to obtain as many judgments as he can in the least amount of time, and since the discovery process is the most time-consuming aspect of litigation, the ATLA-sponsored legislation would be a financial boon to the plaintiff's lawyer.

The truth underlying ATLA's campaign is that legislation restricting the use of protective orders would financially benefit ATLA's members. The plaintiffs' bar works almost exclusively on contingency fees, where the plaintiff's lawyer receives a percentage of his client's award. Since it is in the plaintiffs' counsel's best interest to obtain as many judgments as he can in the least amount of time, and since the discovery process is the most time-consuming aspect of litigation, the ATLA-sponsored legislation would be a financial boon to the plaintiff's lawyer. This is one of the reasons plaintiffs' attorneys spend money to advertise for clients suffering from the same alleged injury or to contact people injured in a mass disaster, such as an airplane crash. The race to the courthouse to represent large numbers of clients is illustrated in the upsurge of filings alleging injury from L-tryptophan, and the battle over whether silicone gel breast implant cases will be tried as individual cases or as class actions, and which attorneys will control the litigation. The legislation proposed by ATLA would remove the obstacle that impedes lawyers from using the information obtained through discovery in one case in subsequent similar cases.

In addition, the ATLA-sponsored legislation would assist its members in another area of their practice: sales of litigation kits. ATLA advertises "The ATLA Exchange" where, for a fee, ATLA will find attorneys with similar cases against the same or similar defendants./10 An attorney who has packaged the information and documents obtained in a case can receive a large fee as an "advisor" to attorneys involved in similar lawsuits nationwide. The protective order legislation would remove the obstacles that limit the sale of litigation kits. It would also encourage a proliferation of copycat lawsuits throughout the country.

The National Campaign

In Spring 1989, Virginia became the first state to enact protective order legislation./11 The Virginia statute allows access to documents covered by a previous protective order if the party requesting access agrees to be bound by the terms of the order. Soon after the enactment of the Virginia bill, identical bills began appearing in other states. ATLA's motivations were easily discernible from these subsequent bills, and the bills were easily defeated. The ATLA campaign then underwent a metamorphosis.

In Spring 1990, Florida enacted a bill that went into effect on July 1, 1991./12 The Florida statute

prohibits protective orders that have the purpose or effect of concealing 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 Florida legislation proved to be a brilliant strategy. ATLA gained allies from the consumer groups and the media. Protective orders were dubbed "secrecy agreements." In 1991, protective order legislation, mostly "public hazard" bills similar to Florida's, was introduced in twenty-seven states. All were defeated, but some only after hard-fought legislative battles, and one after a governor's veto. A similar battle is underway during the 1992 legislative session.

THE DELETERIOUS EFFECT OF LEGISLATION TO LIMIT PROTECTIVE ORDERS

Noted Harvard University Law Professor Arthur Miller highlighted an important aspect of legislation limiting protective orders when he stated before the United States Congress:

> *A legal system that does not recognize the right to keep private matters private would be...likely to lead to deleterious consequences—the evil of an Orwellian society where big brother knows all. 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.*[13]

Professor Miller went on to explain that the U.S. legal system recognizes a limited public right of access to information used in the courts to allow the public to monitor the functioning of our judicial system, but this limited right does not extend to access to private information about private individuals or organizations involved in civil litigation. Professor Miller's statement goes to the heart of the protective order controversy.

Discovery proceedings are distinct from trials, but protective order legislation, particularly "public hazard" bills, fails to recognize this distinction. "Public hazard" bills would prohibit the court from issuing protective orders to prevent public access to any information relating to a "public hazard." This prohibition would apply to all documents, including documents given to either party during the investigative phase of the law suit and settlement agreements, as well as court records.

Often information exchanged during discovery is fragmentary, and, taken out of context, can be misleading. Evidence admitted at trial is governed by strict rules that require the evidence to be both relevant and reliable. If a judge refuses to admit evidence at trial, it is because the court finds the information irrelevant to the issue in dispute, unreliable, or repetitive of information already presented. Much of the information exchanged during discovery fits into the "unreliable" category. Yet, this is precisely the information that the proponents of "public hazard" bills want disseminated to the public.

Further, in these bills the term "public hazard" is so broadly defined that the mere allegation that a product has caused injury would be sufficient to bring the product within the definition. In criminal law, this would be the equivalent of holding the accused guilty until proven innocent. Nevertheless, proponents of "public hazard" bills would have the public believe that allegations of harm, coupled with the fragmentary pieces of information exchanged during discovery, provide sufficient proof that a public hazard exists.

Proponents of "public hazard" bills portray themselves as the defenders of public health and safety. They are wrong. It is the function of the government agencies to prevent products and practices from harming the public. Further, proponents of "public hazard" bills believe they should be the ones to decide what information exchanged during litigation should be disseminated to the public. However, society has given judges the duty to make that decision.

The judge is the only impartial participant in the litigation, and he or she is in the best position to determine whether information relating to public health and safety is being hidden under the guise of a protective order. If the judge subsequently learns that the information subject to a protective order indicates that a danger to the public exists, the judge can modify the protective order and release the information to the public. As Justice Holmes stated earlier in this century,

> *...the judge who tries this case will know the secrets, and if in his opinion and discretion it should be advisable and necessary to take in others, nothing shall prevent his doing so.[14]*

Over the years that it has taken to develop our current civil justice system, courts have learned to balance the competing interests of adverse parties in litigation. Under current law, the judge has the discretion to weigh all the competing factors and to act in the public's best interest. It is a system that works, and it is a system that should be retained.

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This edition of The State Factor was written under the auspices of the ALEC Civil Justice Task Force, and edited by Matthew Bordonaro, Legislative Director of the Civil Justice Task Force. For further information, call (202) 547-4646.

END NOTES

1. E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917).

2. Consistent with general statutory construction, the term "person" includes both individuals and business entities, such as corporations.

3. Stickels v. General Rental Co. (D.C. E.Va., No.90-00263-R, November 9, 1990) reported in 18 Product Safety & Liability Reporter 1356 (1992).

4. Lawyers for Civil Justice, *Court-approved Confidentiality Orders: Why They are Needed*, 57 DEF.COUNS.J. 89, 90 (January 1990).

5. Biffle v. Eli Lilly & Co. (Texas Dist. Ct., No. 91-02496-A, January 14, 1992), reported in 20 Product Safety & Liability Reporter 117 (1992).

6. Seattle Times Co. v. Rinehart, 467 U.S. 20 (1984).

7. See, for example, Cantor v. Toyota Motor Sales USA, Inc. (Fla. Ct. App. No. 89-339, July 13, 1989), reported in 17 Product Safety & Liability Reporter 738 (1989).

8. Bowen v. U.S. Food and Drug Administration (9th Cir., No. 90-15065, February 21, 1991) reported in 19 Product Safety & Liability Reporter 291 (1991).

9. ATLA News, *Trial Lawyers Decry Secrecy in Courts: "Secrets That Can Kill" Hidden from the Public*, (July 17, 1989).

10. Lawyers for Civil Justice, supra at 90.

11. V.A. Code Section 801-42.01.

12. Fla. Stat. Section 69.081.

13. A. Miller, testimony before the Subcommittee on Courts of the U.S. Senate Judiciary Committee (May 17, 1990).

14. Du Pont de Nemours, 244 U.S. at 103.

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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

ACTION ALERT

April 15, 1992

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INVASION OF PRIVACY LEGISLATION IN ALASKA

ISSUE: Legislation is currently in the House State Affairs Committee and Senate Judiciary and Finance Committee that could open records of all civil actions and prohibit courts from applying protective orders to sensitive information. It would enable public officials and others litigants access to information produced by the parties and witnesses in personal injury and wrongful death lawsuits. Action must be taken on HB 171 and SB 411 because of the legal defects and the chilling repercussions that could ensue on the civil justice system as a result of these bills.

BILL: HB 171 (House Judiciary Committee) and SB 411(Rodey)

STATUS: HB 171 passed the State Affairs Committee and is currently in the House Judiciary and Finance Committee where it is said to pass favorably. SB 411 is currently sitting in the Senate Judiciary and Finance Committee awaiting its scheduled hearing.

DESCRIPTION:

HB 171 and SB 411 would require courts to allow much of the information produced in any lawsuit based on personal injury or wrongful death to be made public. The parties could not agree to keep the information private and the judge could not enter a court order ensuring confidentiality.

Witnesses and all of the people compelled by the court to provide information to the parties would not be able to keep that information private even if the information was not used in a trial.

Individuals or businesses, due to simply being named in a personal injury suit where negligence involving a defective product or environmental hazard is alleged, would be forced to go into court to try to maintain the basic privacy rights afforded defendants arid plaintiffs in civil suits under current law.

Complete strangers to the lawsuits, including the press, could have the right to challenge any privacy agreement between parties or any court order protecting information, before or after the underlying lawsuit has been resolved.

FACTS:

In 1991, twenty-nine states introduced similar Protective Order bills of which twenty-seven states' bills were defeated for the following reasons:

Protective Order legislation would interfere with the courts' settlement procedures. The courts, like the legislature, have established operating rules which include rules governing the issuance of protective orders. The enactment of this bill would only provide chaos between the trial lawyers arid the courts because of the vast discrepancies.

Legislation would mandate that the information obtained through the discovery process be accessible to the public where the repercussions may be detrimental. First off, much of the information disclosed during the discovery period is irrelevant to the case and as a result the information exposed could be destructive. Secondly, it would excuse trial attorneys when filing multiple copycat lawsuits who would no longer have to go through the discovery process.

The court system was designed to resolve civil disputes between private parties; not as a public safety regulator as the bill suggests. Court orders in private lawsuits do not interfere with the ability of government bodies to obtain the documents they need to investigate safety problems. Government agencies already have strong investigative powers.

Court workloads would become congested and litigation costs would increase dramatically.

It is a serious violation against the privacy of the individual or party involved because the bill would allow virtually anyone access to the information.

ALEC ALERT is published by the American Legislative Exchange Council for informational purposes only. This edition was written by Matthew Bordonaro, Director of ALEC's Task Force on Civil Justice. Samuel A. Brunelli, Executive Director.

Regulation and Statute	Description of Offense	Bail Forfeiture Amount
3 AAC 35.140 AS 45.75.380(a)(11)	No permit on vehicle; or, issuance cannot be readily verified	100
17 AAC 25.020(a) AS 45.75.380(a)(11)	Overwidth, 8' 6" maximum	50/ft. or fraction thereof
17 AAC 25.030(a) AS 45.75.380(a)(11)	Overheight, 14' maximum	50
17 AAC 25.030(b) AS 45.75.380(a)(11)	Overlength single vehicle (40' maximum)	50/ft. or fraction thereof
17 AAC 25.030(c AS 45.75.380(a)(11)	Overlength semi-trailer, 45' maximum (non-designated highways)	50/ft. or fraction thereof
17 AAC 25.030(c) AS 45.75.380(a)(11)	Overlength truck tractor-semi trailer, 70' maximum bumper to bumper (non-designated highways)	50/ft. or fraction thereof
17 AAC 25.030(d) AS 45.75.380(a)(11)	Overlength truck tractor and trailers, 75' maximum bumper to bumper (non-designated highways)	50/ft. or fraction thereof
17 AAC 25.030(e) AS 45.75.380(a)(11)	Overhangs — 3' front, 4' rear maximum	20/ft. or fraction thereof
17 AAC 25.030(f), (g) or (j) AS 45.75.380(a)(11)	Overlength semi-trailer or trailer, 48' maximum (designated highways)	50/ft. or fraction thereof
17 AAC 25.030(g) AS 45.75.380(a)(11)	Overlength truck tractor & trailers, 90' front of first trailer to rear of second trailer maximum (designated highways)	50/ft. or fraction thereof
17 AAC 25.030(h) AS 45.75.380(a)(11)	Triples prohibited (three cargo carrying units)	300
17 AAC 25.030(i) AS 45.75.380(a)(11)	Oversize sign required on combinations over 75 (designated highways)	50
17 AAC 25.030(k) AS 45.75.380(a)(11)	Overlength truck-trailer, 90 maximum, bumper to bumper (designated highways)	50/ft. or fraction thereof
17 AAC 25.035 AS 45.75.380(a)(11)	Reasonable access, 25 miles maximum	150
17 AAC 25.040(a) AS 45.75.380(a)(11)	Leaking load on highway	100
17 AAC 25.040(b) AS 45.75.380(a)(11)	Unsecure load	100
17 AAC 25.060(a)(1) AS 45.75.380(a)(11) & (b)	Overweight gross	.05/lb
17 AAC 25.060(a)(2) AS 45.75.380(a)(11) & (b)	Overweight axles	.05/lb
17 AAC 25.060(a)(3) AS 45.75.380(a)(11) & (b)	Overweight tires	.05/lb

(S.C.O. 849 effective October 1, 1987)

Rule 44. Rulemaking.

(a) **Uniform Policy.** The supreme court shall make and promulgate rules governing administration of all courts, and practice and procedure in civil and criminal cases in all courts. The rules shall be uniform throughout the Alaska Court System.

(b) **Request for Rulemaking.** Any person may propose new rules or changes in present rules to the supreme court. Each proposal must:

(1) Be in writing;

(2) Include the language proposed for change;

(3) Include the reason for the suggested rule or change;

(4) Be submitted to the court rules attorney at the Anchorage Office of the Administrative Director of Courts.

The court rules attorney shall review each proposal. If the proposal is unclear or in need of further documentation, the rules attorney shall contact the person submitting the proposal and seek clarification.

(c) **Preliminary Analysis.** The rules attorney shall then prepare a preliminary legal analysis of each proposal. This shall include an examination of the present Alaska rule including adoption and amendment history, as well as a comparison with the federal rule where appropriate.

(d) **Meritless Proposal.** In the unusual case where no further consideration seems merited, the rules attorney shall forward such opinion and the reason for it along with all pertinent supporting information to the chief justice. If the chief justice concurs, a letter shall be sent by the rules attorney to the person submitting the proposal stating the reason it was not accepted.

(e) **Notice.** In all other cases notice that a rule is being considered for change, including the nature of the proposed change, shall be published in the Monthly Activity Report of the appellate courts.

(f) **Major or Minor Change.** The rules attorney shall determine whether a proposal is a major or minor rule change. All proposals for new rules and all proposals affecting substantial rights of litigants are major. Minor rules changes are those which are technical in nature.

(g) **Minor Change.** Minor rules change proposals shall be submitted to the supreme court along with the preliminary legal analysis and appropriate orders in both signature and legislative form. The chief justice shall calendar a review of the proposal at an appropriate law conference. Following review, the supreme court may adopt or reject the proposal, or refer it to a standing or advisory committee to be treated as a major rules change.

(h) **Major Change.** Major rules change proposals shall be referred by the rules attorney to the appropriate standing or advisory committee. The committee shall review the proposal, determine if a draft should be circulated to the bar or other interested persons for comment, and prepare a written recommendation supporting or opposing the change. If no circulation was made, the reason for this decision shall be stated in the recommendation. Where appropriate, the recommendation shall also include proposed orders in signature and legislative form, as well as advisory notes suitable for publication stating the rationale for the rule change. All committee written recommendations shall be forwarded to the supreme court. The chief justice shall calendar a review of the recommendation at an appropriate administrative conference. Following review, the supreme court may adopt or reject the proposal in whole or in part, or refer the proposal to the same or a different committee for further study or additional circulation.

(i) **Public Information.** The original proposal, preliminary legal analysis, circulation material, proposed order and advisory notes shall be made available to the public upon request. Committee minutes, reporter's notes, and other preparatory drafts or memoranda shall not be made public.

(j) **Standing and Advisory Committees.** Standing committees shall be established to review Civil Rules, Criminal Rules and Appellate Rules. The administrative senior staff shall act as the standing committee to review Administrative Rules. Advisory committees shall be appointed as needed to review all other rules. All committees shall receive major rules change proposals from the rules attorney or the supreme court. In addition, the standing committees shall carry on a continuous study of the operation and effect of the rules of procedure and administration. When specific proposals for change initiate in a committee, notice that the proposal is being considered must be published in the Monthly Activity Report under subsection (e) of this rule. Changes to those rules found by the committees to promote: 1) Simplicity in procedure; 2) Fairness in administration; 3) The just determination of litigation; and 4) The elimination of unjustifiable expense and delay, shall be periodically recommended to the supreme court for its consideration.

(k) **Appointment.** The chief justice shall appoint such members of the judiciary, Alaska Bar Association, and other qualified persons to the committees as it deems advisable. Nominees shall be considered from any source, but solicitation for nominee recommendations shall also be made to the board of governors of the state bar association and the statewide court clerks conference. Where possible, terms of the committee members will be staggered to preserve committee continuity. The members of the committees shall serve without compensation. However, with prior approval the members may be reimbursed for per diem and travel expenses incident to their duties as members of the committees.

(l) **Emergency Rule Action.** Whenever the supreme court determines that an emergency exists requiring the immediate promulgation of a procedural or administrative rule, the court may take any action required by the circumstances. The court shall follow all of the requirements of this rule consistent with meeting the nature of the emergency circumstances.

(m) **Effective Date.** The effective date for each rule change order shall be stated in the order. Normally, the effective date shall be the same as the publisher's distribution date, in order to provide adequate notice to those affected by the rule change. Where this is not possible, the effective date shall be set as determined by the supreme court. When this occurs, the supreme court shall determine what additional notice, if any, shall be provided to those affected by the rule change. Adoption or rejection of a rules change proposal shall be published in the Monthly Activity Report.

(n) **Rule Application.** All rules and orders in effect on the date of the adoption of this rule remain in effect.

(Added by SCO 630 effective September 15, 1985; amended by SCO 656 effective September 15, 1985; and by SCO 858 effective December 16, 1987)

Rule 45. Concurrent Jurisdiction.

(a) **Mandatory Filing.** A civil action that falls within the concurrent jurisdiction of the superior court and the district court shall be filed in the district court (except for a petition for injunctive relief under AS 25.35.010 or 25.35.020).

(b) **Amount in Controversy.** The amount in controversy is first determined by reference to the plaintiff's complaint. Jurisdiction is established by the pleading of claims as they appear at the time of filing of the complaint or other claim. Claims must be pled in good faith. Interest due at the time of filing may be included in the claimed amount. Properly joined claims may be aggregated. When a compulsory counterclaim is filed in an action in excess of district court jurisdiction, the district court judge shall order referral of the case to the superior court. When a permissive counterclaim is filed in an action in excess of district court jurisdiction, the district court judge shall either order referral of the case to the superior court or order severance of the clain to be proceeded with separately.

(c) **Transfer by District Court.** When it appears from the pleadings that the amount claimed for recovery exceeds $50,000.00 exclusive of costs, post-filing interest, and attorney fees, then the district court judge shall upon motion or the court's own motion refer the case to the superior court.

(d) **Transfer or Retention by Superior Court.** When it appears from the pleadings, filed documents,

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,

Rep. Gene Kubina

Representative Gene Kubina, Chairman
House State Affairs Committee

A FAX

Alaska State Legislature

P.O. Box V
Juneau, Alaska 99811

Date: April 10, 1991

To: Rita Graf - Law Firm of Covington and Burling Washington, D.C.

629

Phone Number: 202-662-5031 **Fax Number:** 202-662-5031

From: House State Affairs Committee, Alaska House of Representatives

Phone Number: 907-465-4859

Re: Witness Register from April 5, 1991 meeting regarding HB 171

Following this page, please find 4 page(s). If this does not reach you in full, please inform us as soon as possible.

Thank you!

* HJR 31: Relating to pollution prevention, waste reduction, and recycling.

PASSED OUT OF COMMITTEE WITH INDIVIDUAL RECOMMENDATIONS

HCR 17: Establishing a Task Force on Governmental Roles.

PASSED OUT OF COMMITTEE WITH INDIVIDUAL RECOMMENDATIONS

HB 188: "An Act relating to the issuance of citations and medals to members of the armed forces serving in the conflict with Iraq."

CS PASSED OUT OF COMMITTEE WITH INDIVIDUAL RECOMMENDATIONS

WITNESS REGISTER

Representative Dave Donley
Chairman of Judiciary Committee
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811
Phone: 465-3892
Position Statement: HB 171 sponsored by Judiciary Committee

Representative Richard Foster
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811
Phone: 465-3789
Position Statement: Prime Sponsor of HB 188

Representative Fran Ulmer
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811
Phone: 465-4947
Position Statement: Prime Sponsor of HJR 31

Representative Niilo Koponen
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811
Phone: 465-4457
Position Statement: Prime Sponsor of HB 225

HOUSE STATE AFFAIRS COMMITTEE
April 5, 1991
8:00 a.m.

MEMBERS PRESENT

Rep. Gene Kubina, Chairman
Rep. Tom Moyer, Vice Chairman
Rep. Max Gruenberg
Rep. Dave Choquette
Rep. Betty Bruckman
Rep. Mike Miller
Rep. Larry Baker

MEMBERS ABSENT

None

COMMITTEE CALENDAR

* HB 138: "An Act making special appropriations to the Department of Environmental Conservation for solid and hazardous waste management programs and for a grant to the Pacific Northwest Pollution Prevention Center and to the Department of Administration for equipment and computer software; and providing for an effective date."

NOT HEARD - NO ACTION TAKEN

* HB 225: "An Act allowing retirement credit for the unused sick leave of an employee participating in the public employees' retirement system."

HEARD AND HELD

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)."

HEARD AND HELD

HB 167: "An Act relating to absentee voting."

NOT HEARD - NO ACTION TAKEN

Representative Mark Boyer
Vice-Chairman of Finance Committee
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811
Phone: 465-3466
Position Statement: HCR 17 sponsored by Finance Committee

Mary A. Nordale
American Insurance Association
P.O. Box 21211
Juneau, AK 99811
Phone: 586-5340
Position Statement: Opposed to HB 171

Kathy Kolkhort
Association of Vehicle Manufacturers
P.O. Box 34338
Juneau, AK 99802
Phone: 789-7558
Position Statement: Opposed to HB 171

Dave Stout, Retirement Supervisor
Division of Retirement and Benefits
P.O. Box CR
Juneau, AK 99811
Phone: 465-4470
Position Statement: Opposed to HB 225

Karen Mahurin
P.O. Box 1073
Kenai, AK 99611
Phone: 283-4697
Position Statement: In Favor of HB 225

Richard Barlow
HCR 2 Box 7550 A-2
Palmer, AK 99645
Phone: 745-2157
Position Statement: In Favor of HB 225

Susan Erickson
Staff for Representative Fran Ulmer
P.O. Box V
Juneau, AK 99811
Phone: 465-4947
Position Statement: Spoke on behalf of Representative Ulmer, Prime Sponsor of HJR 31

Jeff Mach, Chief
Hazardous and Solid Waste Management Section
Department of Environmental Conservation
P.O. Box O
Juneau, AK 99811
Phone: 465-2671
Position Statement: In Favor of HJR 31

John Cyr
P.O. Box 780
Palmer, AK 99645
Phone: 746-1139
Position Statement: In Favor of HB 225

Susan Annis
2118 Cushman
Fairbanks, AK 99701
Phone: 452-9474
Position Statement: In Favor of HB 225

MaryLou Brent
P.O. Box 80074
Fairbanks, AK 99708
Phone: 479-4435
Position Statement: In Favor of HB 225

Bruce Garrett
1218 MaCuffee Lane
Kodiak, AK 99615
Phone: 486-8239
Position Statement: In Favor of HB 225

Jacquelin Steeves
1205 E. International Airport, Suite 101
Anchorage, AK 99518
Phone: 562-1183
Position Statement: In Favor of HB 225

Carol Burton
825 College Road
Fairbanks, AK 99701
Phone: 456-5412
Position Statement: In Favor of HB 225

Paul Cossman
310 K Street, Suite 600
Anchorage, AK 99501
Position Statement: In Favor of HB 171

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: April 1, 1992

PLACE: Capitol Room #102

SUBJECT OF MEETING:
HB 171-Relating to Prohibit Sealing of Certain Court Records
HB 528-Relating to Public Works Contr/Wage Increases
HB 404-Relating to Filing Deadline for Certain Candid
*HB 564-Relating to Salaries for Non-Covered State Employees
HB 565--Relating to Approp: Contr. Settlement Costs

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
John Abshire	DOL	Juneau		465 2701		Quest-1 (Y)	N	#529
Kathryn Falkenhorst	Lawyers for civil justice	Juneau		789-0047		(Y)	N	171
Mike McMullen	DOA	Box 110201 Juneau Ak	99811	465-4423	465-4430	Quest (Y)	N	HB 64, 565
Laura Glaiser	Elections	PO Box 110017 Juneau	99811	4617 →		Y	N	HB #404
Cheryl Frasca	OMB					Y	N	HB 564, 565
MARY NORRIS ALTE	Gen. Svs. Assn	PO Box 21211, Juneau	99802	586-3340 →		(Y)	N	HB 171
						Y	N	
Ross Winner		900 W 5th Ave, Ste 700 Anch AK 99501		272-0313	277-9522	(Y)	N	HB 171
Hayden Kaden	Rep. Dowdy Rep. Tuckerman	Rm. 120 - St. Cap.			4990	(Y)	N	HB 171
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: April 3, 1992

PLACE: Capitol Room #102

SUBJECT OF MEETING:

*HB 412 - Relating to Disclosure by Certain Fiscal Officers
HJR 63 - Relating to Support Military at Fort Richardson
SB 185 - Relating to Legislative Ethics
HB 171 - Relating to Prohibit Seal'g of Certain Court Records

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
MARY NORDALE	Am. Jus. Assn	PO Box 21211, Juneau	99802		586-3340	(Y)	N	HB171
Kathy Kolkhorst	Lawyers for Civil Justice	Box 34338 Seattle	98103		789-0047	(Y)	N	HB 171
C.S. CHRISTENSEN	ALASKA COURT SYSTEM	303 K ST ANCHORAGE	99501		264-8225	(Y)	N	HB 171
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: April 5, 1991

PLACE: Capitol, Room 102

SUBJECT OF MEETING:
HCR 17 - Relating to Task Force on Governmental Roles
*HB 171 - Relating to Prohibit Sealing of Certain Court Records
*HB 225 - Relating to Retirement Credit for Unused Sick Leave

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
MARY A. NORDALE	AIA	POBox 21211, Juneau	99802		586-5340	(Y)	N	HB 171
Kathy Kolkhorst	Non vehicle manfcths	PO 34773 Juneau	99802	789-7553	789-0347	Y	N	HB 171
BOB STALNAKER	DIV. OF RETIREMENT	P.O. BOX CR			4470	(Y)	N	HB 225
KAREN MATHURIN	KPESD/AFA	Box 1073 Kenai	99611	283-4697	283-4826	(Y)	N	HB 225
Richard Barlow	MAT-SU CEA AIEA	Hco 2 Box 7550 M-2 Palmer Ak	99645	7452784	7452157	(Y)	N	HB 225
Rose Palmquist	Self-	Box 870294 Wasilla	99687	376-2274		(Y)	N	Abs. Voting
Susan Crocker	Usmer	PO Box ✓	95811			Y	N	HJR 31
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: April 5, 1991

PLACE: Capitol, Room 102

SUBJECT OF MEETING:

*HJR 31 - Relating to Pollution Prevention, Waste Reduction, and Recycling
HB 167 - Relating to Absentee Voting
*HB 138 - Relating to Approp: Clean Water Fund/Waste Mgt Loans

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
JEFF MACH	AKDEC	P.O. BOX O Juneau			2671	(Y)	N	HJR 31 HB 138
Bob Mitchell	DOA	AS 0226 JNO			4803	(Y)	N	HB 138
Susan Erickson	HJR 31	PO Box V			4917	(Y)	N	HJR 31
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

DATE: April 3, 1991

PLACE: Capitol, Room 102

SUBJECT OF MEETING:
*HB 1.. - Relating to Prohibit Sealing of Certain Court Records
*HB 188 - Relating to Citations/Medals for Persian Gulf Vets
*HJR 29 - Relating to Persian Gulf Conflict
HCR 17 - Relating to Task Force on Governmental Roles

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
MARY ANDRACHS	AIA	POBox 21211 Juneau 99802			586-3340	(Y)	N	HB171
Larry LaRoche	Rep Foster	611 Court Bldg 99811			465-3789	Y	N	HB188
Jeff Morrison	DMVA	POBox L Juneau 99811			465-4600	(Y)	N	HB188
John Walsh	Foster				3789	(Y)	N	HB188
Tom Brice	Mayor					(Y)	N	HJR29
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House State Affairs Committee
Representative Gene Kubina, Chair

SUBJECT OF MEETING:

DATE:

PLACE:

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Kathy Kolkhorst	Arctic Vehicle Manufacturing	Box 34338 Juneau AK	99803	789-7557	789-0344	(Y)	N	HB171
TONY YOST	Pharmaceutical Manufacturers	5251 DTC Parkway #1090 Englewood Co. 80111	80111	(303) 749-6246	(303) 740-8554	(Y)	N	HB171
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	