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179

F USE COMMITTEE REPOR

(7)

Date Referred: February 27, 1991 FURTHER REFERRALS: Judiciary

Date of Committee Action: 4/3/92

The STATE AFFAIRS Committee considered: HB 171

HOUSE BILL NO. 171 PROHIBIT SEALING OF CERTAIN COURT RECORDS

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

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

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[Y] no recommendations

[ ] individual recommendations

[X] additional referral to the FINANCE Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[X] fiscal impact Court System

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

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

Eugene A Kubina
CHAIRMAN'S SIGNATURE

KEEPING SECRETS

Justice on Trial

Report of the
Conference
on
Courtroom
Secrecy

**Society of
Professional Journalists**

and

**Association of
Trial Lawyers of America**

KEEPING SECRETS
Justice on Trial

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EXECUTIVE SUMMARY

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

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

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

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

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

Right to Know vs. Right to Privacy

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

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

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

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

Legal Ethics

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

Cost of Secrecy

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

Trade Secrets

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

Judges' Role

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

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

Solving the Problem

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

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

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

Justice Lloyd Doggett,
Texas Supreme Court

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

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

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

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

SCOPE OF THE PROBLEM

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

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

Forms of Secrecy

There are three major forms of secrecy:

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

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

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

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

Paul McMasters, Society of Professional Journalists

Process of Secrecy

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

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

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

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

Dianne Jay Weaver,
Plaintiff's Attorney

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

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

First Amendment and Freedom of Information Concerns

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

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

Extent of Secrecy

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

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

Elsa Walsh, *Washington Post*

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

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

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

Additional Issues for Consideration

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

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

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

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

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

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

Harold Jacobson,
Defense Attorney

INTRODUCTORY REMARKS

Why Trial Lawyers Urge Openness

Russ Herman, President, Association of Trial Lawyers of America

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

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

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

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

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

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

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

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

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

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

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

Ed Keller, Accident Victim

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

Erosion of Our Right to Know

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

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

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

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

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

Michael Gartner, President, NBC News, and Keynote Speaker

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

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

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

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

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

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

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

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

JUSTICE FOR WHOM:

THE CASE FOR AND AGAINST SECRECY

Members of the Panel:

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

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

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

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

How Secrecy Appears to a Scientist and a Victim

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

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

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

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

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

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

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

— Dr. Devra Davis, National Academy of Sciences

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

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

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

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

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

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

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

What One Newspaper Did About Secrecy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Case for Privacy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

James Morris, Defense Attorney

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

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

Implement the Laws We Have

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

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

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

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

Eugene Pavalon, Plaintiff's Attorney

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC COURTS, PRIVATE JUSTICE

Members of the Panel

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

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

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

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

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

How Secrecy Hurts Consumers

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

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

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

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

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

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

Joan Claybrook, President,
Public Citizen

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

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

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

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

Ethical Dilemma of Lawyers

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

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

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

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

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

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

Destroying Confidence in the Courts

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

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

Why is information produced in litigation valuable?

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

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

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

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

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

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

Alfred Cortese,
Defense Attorney

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

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

Public Responsibility of the Court System

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

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

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

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

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

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

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

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

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

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

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

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

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

Of course no such agreement was forthcoming.

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

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

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

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

Secrecy vs. Safety

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How Should Protective Orders Be Limited?

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

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

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

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

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

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

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

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

TESTING THE SYSTEM:

BALANCING PUBLIC INTEREST AND PRIVACY RIGHTS

Members of the Panel

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

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

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

Conflict Between Openness and Reporters' Privilege

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

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

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

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

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

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

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

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

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

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

Prevalence of Sealed Records

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

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

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

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

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

Elsa Walsh, *Washington Post*

His response was one we found all over the country.

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

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

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

The Case for Maximizing Openness

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

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

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

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

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

Arthur Bryant, Trial Lawyers for Public Justice

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

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

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

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

Changing Perceptions of the Public Interest in the Civil Justice System

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

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

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

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

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

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

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

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

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

Enforcing the Right to Openness

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

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

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

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

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

Protecting the Privacy of Litigants

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

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

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

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

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

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

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

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

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

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

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

When Secrecy Is Unethical

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

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

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

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

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

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

ARTHUR BRYANT: What ought the rules to be?

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

ALICE LUCAN: On a good showing?

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

CLOSING PLENARY: MAKING NEW RULES

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

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

Justice Lloyd Doggett, Texas Supreme Court

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

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

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

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

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

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

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

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

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

Justice Lloyd Doggett,
Texas Supreme Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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."

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.

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Michael C. Maher, Plaintiff's Attorney

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

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

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

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

LUNCHEON ADDRESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WITNESS TESTIMONY

James Miller
44 years old
Printer
Carlsbad, California

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

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

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

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

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

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

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

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

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

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

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

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

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

James Miller, Father of Accident Victims

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

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

Ed Keller
43 years old
Disabled former electrician
Hughesville, Maryland

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

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

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

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

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

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

Ed Keller, Accident Victim

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

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

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

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

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

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

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

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

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

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

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

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

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

Fred Barbee, Husband of
Heart Valve Victim

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Devra Davis, Scientist and Victim

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

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

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

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

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

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

Rule 76(a). Sealing Court Records

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

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

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

(1) this presumption of openness;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applicable Portions of Related Rules

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

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

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

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

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

Rule 120(a). Special Appearance

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

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

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

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

Sunshine in Litigation Act

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

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

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

69.081 Sunshine in Litigation; Concealment of Public Hazards Prohibited.

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

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

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

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

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

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

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

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

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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
National Law Center

Joan Claybrook
President, Public Citizen

Alfred W. Cortese
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Dr. Devra Davis
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National Academy of Sciences

Justice Lloyd Doggett
Texas Supreme Court

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U.S. Department of Justice
U.S. House Judiciary Committee
U.S. Medicine
U.S. Senate Judiciary Committee
U.S. Subcommittee on Courts, Intellectual Property, and the Administration of Justice
U.S. Subcommittee on Technology and the Law
U.S. Subcommittee on the Constitution
U.S. Public Interest Research Group
USA Today
Wagner, Cunningham, Vaughan & McLaughlin

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

KEEPING SECRETS
Justice on Trial

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

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

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

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

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ANTI-SECRECY AGREEMENT ACTIVITY:
A National Perspective

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

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

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

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

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

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

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

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

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

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

SECRECY HURTS CONSUMERS

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

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

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

- Ralph Nader

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

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

- Jim Miller
Victims Group Opposed to
Unsafe Restraints

SECRECY HURTS PATIENTS

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

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

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

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

SECRECY HURTS WORKERS

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

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

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

- Louis Beliczky
Director of Industrial Hygiene
United Rubber Workers

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

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

- Jan Chatten-Brown, Coordinator
WORKSAFE!

SECRECY HURTS SENIOR CITIZENS

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

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

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

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

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

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

- Howard Owens, President
Congress of California Seniors

SECRECY HURTS THE ENVIRONMENT

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

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

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

- Michael Picker, Director
National Toxics Campaign

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

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

- Michael Paparian, Director
Sierra Club of California

Summary of Developments on Secrecy Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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