

**ALASKA**

**LEGISLATURE**

**COMMITTEE**

**FILES**

**1991-1992**

**8672**

**7244**

**HOUSE STATE**

**AFFAIRS**

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

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

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

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

15 **Sec. 09.25.250. DEFINITIONS FOR AS 09.25.230 - 09.25.250.** In AS 09.25.230 -  
16 09.25.250,

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

20 (2) "public hazard" means an instrumentality that has caused injury to a person  
21 or property, and includes a device, instrument, person, procedure, or product, and a condition of  
22 a device, instrument, person, procedure, or product.

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

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

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

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

# Dangers Insurance Companies Hide

*'The Blood of Thy Neighbor'*

Morton Mintz

**I**magine a manufacturer who discovers that one of his products has a defect that is causing grave injuries to unsuspecting consumers. If he promptly warns them, halts production, and recalls the product, he will be obeying a moral obligation that is deeply rooted in our religious and ethical heritage. The obligation is expressed this way in Leviticus 19:16: "Neither shalt thou stand idly by the blood of thy neighbor."

Now imagine a house bordering an alley. From a second-floor window, X sees Y lay a nearly invisible wire across the alley and then run away. Moments later, X sees Z—an unsuspecting stranger to whom he has no special tie—walking toward the wire. X's moral obligation to

warn Z is also his duty under the laws of a dozen foreign countries. In the United States since 1973, 27 states and the District of Columbia have enacted some version of the so-called "Good Samaritan" statute.

In a final scenario, our manufacturer neither warns of the defect nor recalls the product. Figuratively, he lays a nearly invisible trip wire and flees. Watching him do it from the window, and then sitting in silence as consumers are ambushed, is the manufacturer's products liability insurer. He is above it all. He sounds no warning. Unlike X, however, he claims that his conduct is morally right—even though, unlike X, he is not a "stranger" to Z since the insurer profits from the consumer, and even though, unlike X, he in essence enabled Y to lay the trip wire by underwriting the effort.

His conduct, he points out, is required by the courts. They have ruled that an insurer has no affirmative duty to warn the public or to facilitate a recall of a product it insures. "Indeed, under the laws of, I think, every state," Craig A. Berrington, general counsel of the American Insurance Association, told me, "the insurer has an absolute obligation

to provide a defense for that policyholder against claims that arise, and the insurer can be sued when policyholders believe that insurers are not vigorous enough in providing that defense."

## Lie-ability Insurance

"My primary concern," Berrington said, is that no standard be established under which

insurers essentially become police officers or reporting officials—an arm of the government . . . or that insurers do the work of government and be blamed when government fails in its responsibility to make judgments as to what products ought not to be on the market. . . . A legal duty to disclose with regard to a product that the insurance company has covered would be contrary to the insurer's statutory and contractual obligations today and place the insurer in a terrible bind.

Berrington has a point about the role of government, but through him the insurance industry makes an argument for preserving the confidentiality of a commercial relationship no matter the cost in human life. It's an argument that government, which has no higher mis-

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*Morton Mintz, an award-winning investigative reporter for the Washington Post, now retired, is the author of At Any Cost: Corporate Greed, Women, and the Dalkon Shield (Pantheon 1985). This article is reprinted with permission from The Washington Monthly (January/February 1991). © The Washington Monthly Company, Washington, D.C.*

sion than public safety, must not compel insurers to divulge information that would protect us from massive, continuing disease, injury, and death. It's an argument that would surely astound most Americans were they aware of it; but through a quiet accretion of court rulings, and without congressional debate, this privileged position asserted by products liability insurers has evolved into national policy. It's an argument that in essence is an excuse for the insurance industry to stand by the blood of its neighbors.

Meanwhile, the neighbors in the marketplace and the workplace have been shedding lots of blood. Consider the dreadful catastrophes caused by only two products: the Dalkon Shield, the defective intrauterine contraceptive device (IUD), and asbestos, the deadly mineral.

#### New Year's Eve Irresolution

The Dalkon Shield was sold in the United States from January 1971 to June 1974, when the manufacturer, pressed by a worried Food and Drug Administration (FDA), ended domestic sales (but continued foreign sales until at least April 1975). During those three-and-one-half years, physicians implanted an estimated 2.2 million of the devices in the United States and 800,000 in some 100 other countries. For at least a decade after the sales halt, according to recently available court documents, the liability insurer joined the manufacturer in suppressing knowledge of the IUD's hazardous defects.

The foreseeable and preventable result was that tens if not hundreds of thousands of women suffered life-threatening pelvic infections, which commonly impaired or destroyed their ability to bear children. In addition, hundreds of children were born with injuries inflicted by the Dalkon Shield while it was their companion in the womb, causing blindness, cerebral palsy, and mental retardation. Eighteen deaths have been reported, but the toll is certainly much higher, if only because in Third World countries no one was counting.

The insurer was Aetna Casualty & Surety Company. ACS is wholly owned by Aetna Life & Casualty Company, one of the world's largest providers of insurance and financial services. In its corporate publications, Aetna acclaims itself a "good corporate citizen." Notably, it was an ACS senior claims adjuster who, on New Year's Eve of 1981, writ-

ing in the margin of a complaint filed by a Dalkon Shield victim, raised the rarely asked question: "*What is duty of an insurer to the public when it has knowledge of serious product defects which are likely to cause injury?*" [Italics added.]

That William D. McGehee had asked the question did not become known for more than six years; whatever the answer, it isn't on the record. So I asked Aetna for an answer, and a spokesman assured me I'd get one. Several days later, Aetna backed out, giving an interesting reason: The information I was seeking concerned the industry as a whole, and therefore I should talk to Berrington, the insur-

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*The courts equate an insurer of wounding and lethal products with a priest who hears the sacramental confession of a serial murderer.*

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ance association counsel.

About 21 million U.S. workers have been exposed to asbestos, and several hundred thousand of them are expected to die of asbestos-induced cancer over the next quarter-century. In *Outrageous Misconduct*, Paul Brodeur wrote: "By 1981, many of the nation's insurers had known for decades that asbestos workers were dying early, but had kept silent while their underwriters wrote policies for workmen's compensation and comprehensive general liability as fast as they could put pen to paper."

Proving to a fare-thee-well that they had known the truth from their own "actuarial tables, ratings schedules, physicians' reports, workmen's compensation claims, underwriting guidelines, and safety-and-engineering manuals," Brodeur wrote:

If at some point along the way, Aetna, Travelers, Commercial Union, Liberty Mutual, INA, Hartford, Home, Lloyd's, or any of the other major insurers of the asbestos industry had gone public with their inside knowledge, they might well have been able to save tens of thousands of lives and untold suffering and pain.

Why did insurers conceal their knowledge and continue to provide coverage? Disclosure, Brodeur explained, would

have encouraged claims and damage suits, and run counter to basic insur-

ance-company practice, which is to write as much coverage as possible, and as cheaply as possible, in order to reap a rich harvest of premiums that, when invested, will return enough money to pay for future claims and make a profit for the company.

As Ralph Nader put it in a 1987 article in the *Suffolk Law Review*, insurance companies "have become predominantly cash flow financial institutions. . . . More and more attention is being paid to increasing investment income through premium volume."

Such a casino philosophy too often has led to industry indifference to loss prevention and advocacy for health and safety, which, as some insurers often brag, are historical objectives of insurance. Thus, Aetna's top officers piously stated in their 1989 annual report that "the best way to keep premiums down is to work with clients to prevent or minimize losses." Yet, while the Aetna Life and Casualty Company foundation made \$6.8 million in grants in 1985, Nader wrote in 1987, "the only safety contribution was \$5,000 to an Indianapolis, Indiana, Volunteer Fire Department, according to the annual report of the company and the foundation."

The downside of loss prevention for the industry was described in a 1971 study by Herbert S. Denenberg, the former insurance commissioner of Pennsylvania. Loss prevention, he wrote, "might encourage self-insurance and might otherwise lessen the need for insurance [and] lower premiums, and decrease . . . income and cash flow."

Robert Hunter, president of the National Insurance Consumer Organization (NICO), said in an interview, "It's a shocking thing that what the industry knows from its files could save lives [but] is never tapped." He cited an example: The National Highway Traffic Safety Agency (NHTSA) test-crashes cars equipped with dummies to find out how safe—or unsafe—they are, while insurers refuse to release the data on millions of cars that have crashed with real people in them.

"Even repeated litigation arising from well-known and identical hazardous product models or services has not prompted the insurance industry to insist on elimination of possible dangers," Nader wrote. "The insurance industry's indifference to loss prevention has been a significant contributor to the 'insurance crisis' of the 1980s, which hit consumers and businesses with skyrocketing premiums."

Was the conduct of insurers in the Dalkon Shield and asbestos cases an aberration? "It happens routinely," Denenberg told me. "They don't come forward and say, 'Hey, world, look out for this!'" Fortunately, some firms break the mold. In 1970, for example, Charles K. Cox, president of the Insurance Company of North America (INA), said that INA "will no longer insure the company that knowingly dumps its wastes."

Early in the Reagan administration, NHTSA voided an automobile safety standard that required air bags or other automatic restraints and would have saved thousands of lives annually. In what Nader hailed as a "luminous exception" to the industry norm, the huge State Farm Mutual Automobile Insurance Company fought NHTSA's action up to the Supreme Court and was vindicated in 1983 when the court held the action illegal.

However admirable, such exceptions provide no clue as to how many deaths and injuries insurers could have prevented through the years, or could prevent from now on, by dedicating themselves to loss prevention and by disclosing their knowledge of dangerous defects in products and needless workplace hazards. Brodeur found that insurers could have saved the lives of tens of thousands who fell victim to only one product, asbestos.

So it's a fair question: What did the insurers know and when did they know it about hazardous defects identified after marketing in, say, automobiles? Aircraft? Athletic gear? Building materials? Butane lighters? Drugs and vaccines? Food additives? Playground equipment and toys? Toxic chemicals? No one asks the insurers to reveal everything they know. And they shouldn't, says NICO's Hunter. "But in the case of a product that kills they have a duty to warn."

#### Robins's Hoods

Aetna became deeply involved in the Dalkon Shield episode 16 years ago in Wichita, Kansas, where the manufacturer, A. H. Robins Company, was the defendant in an early, seemingly routine personal injury trial. To that point Robins had sold more than 4.5 million Dalkon Shields, claiming that in preventing pregnancy the device had a stunningly low failure rate of 1.1 percent per year. All along, however, Robins—but not Aetna—had known that the claim was based on studies that were unreliable at best and fraudulent at worst: The true failure rate of the Dalkon Shield was later deter-

mined to be about 5.5 percent.

In February 1975, near the end of the trial, a leading plaintiffs' lawyer, Bradley Post, introduced a smoking-gun internal Robins memo. In the memo, which was written exactly four days before the company bought rights to the Dalkon Shield in June 1970, a Robins medical executive revealed that the developer of the device had admitted to him that he knew the pregnancy rate to be well over 1.1 percent. The memo erased any possible doubt at Aetna that the claim was false, devastated the defense, and led the jury to make the first award of punitive damages to a Dalkon Shield victim.

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*A Congress that can compel disclosure by accountants can also compel disclosure by insurers who learn of avoidable hazards in products and the workplace.*

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The amount of the award was relatively small—\$75,000. But the defeat and its implications infuriated Aetna and William A. (Skip) Forrest, Jr., general counsel of Robins. They blamed Roger L. Tuttle, the Robins in-house counsel in charge of Dalkon Shield products liability litigation. Soon afterward, Tuttle testified—and Forrest denied—that Forrest ordered him to arrange the destruction of hundreds of "troublesome" documents (some of which Tuttle secretly saved). In short order, Aetna forced Tuttle's dismissal from Dalkon Shield legal matters. Forrest replaced him with what is now McGuire, Woods, Battle & Boothe, Virginia's second-largest law firm, which would coordinate as many as 150 Dalkon Shield defense law firms around the country.

A development of supreme importance followed in a few weeks. According to hitherto unreported Aetna internal memos, by November 1974 ACS had, or was trying to take, "complete control" of Dalkon Shield litigation from Robins. Through McGuire, Woods, ACS in March 1975 clearly assumed complete control. From that day forward, McGuire, Woods was getting its marching orders from the insurer, not the manufacturer.

In the process, Aetna had to, and did, learn what Robins knew and what plaintiffs' attorneys would soon demonstrate with overwhelming scientific evidence:

the longer a Dalkon Shield remained in the body, the greater the risk of pelvic infection or pelvic inflammatory disease (PID). As far back as 1956, articles in scientific literature had warned that nylon rotted upon long-term exposure to body fluids. Robins's IUD was the only one with a retrieval string that was not only made entirely of nylon, but also consisted of hundreds of tiny filaments encased in a sheath. As the nylon rotted, bacteria that penetrated the spaces between the filaments were wicked into the normally germ-free uterus, where they caused PID.

Robins did not test the Dalkon Shield for safety until after it began to sell the device worldwide. Aetna knew this. In October 1975, a meeting was held at Aetna to discuss "problems of defense" in Dalkon Shield lawsuits. One of the problems, claims adjuster Ronald Szeremeta said in a memo, was "lack of testing prior to marketing." In February 1976, an ACS internal memo acknowledged inadequate testing. But later in 1976, Aetna was still reassuring other companies providing coverage to Robins. Yes, an Aetna official told one of them, Aetna was "completely satisfied with Robins's testing and marketing program."

#### Incriminating Experiments

The first experiments incriminating the Dalkon Shield string were reported in 1974 by IUD expert Howard J. Tatum. Aetna then began to fund numerous string studies through McGuire, Woods, using the lawyer-client relationship to cloak the results. An early, ominous report came in December 1975, when the law firm told senior ACS attorney John A. Edgerly, Sr., that a British study was "showing greater bacteria buildup with DS [Dalkon Shield]." Aetna also paid for a comparative study by New York University's primate laboratory of IUDs in baboons (primates that, after chimpanzees, have a female reproductive system most closely resembling a human's).

Attorney Edgerly feared confirmation of Tatum's experiments. And so in June 1977, he wrote a classic head-in-the-sand directive to Harris W. Wagenseil, then a San Francisco lawyer who has been described as "a principal architect" of the defense of the Dalkon Shield, and who reported to Aetna mostly through McGuire, Woods. First, Edgerly instructed Wagenseil to classify information about the baboon study as a lawyer's confidential "work product" to prevent plaintiffs' counsel from seeing it. Then he

wrote: "There is one caveat, and that is, this test could verify the finding of Tatum—if the conclusion appears to be headed in this direction, the study will be aborted."

For whatever reason, the study continued long enough to go far toward confirming Tatum's experiments. In an analysis of the data in 1981, after the study was completed, Dr. William M. O'Leary, professor and chairman of microbiology at Cornell, concluded that there was "a striking association" between the multifilamented string and bacterial contamination of the womb. After I learned of the study in 1984, NYU refused for six months to reveal who had paid for it. Finally, Forrest admitted in court testimony that Aetna had picked up the entire bill.

Only a complete recall could protect Dalkon Shield wearers, all of whom were unaware that the string deteriorating in their bodies was exposing them to ever-increasing peril. The need for a recall of these IUDs became apparent in late May 1974, when Robins disclosed that four women who had become pregnant while wearing the Dalkon Shield had suffered rare fatal septic infected miscarriages. The toll of serious cases

and fatalities increased almost daily.

FDA staff members urged Commissioner Alexander M. Schmidt to recall at least all unimplanted Dalkon Shields. But he settled for a "voluntary" suspension of sales—the weakest course of action besides doing nothing. It was also the course Robins had preferred because, a Robins lawyer advised, it minimized the company's legal liability. An Aetna memo quoted a revealing admission from an official identified as Bill Dumbauld: "Bill's caustic comment was 'those unsafe cars on the road aren't being recalled.'"

To force a recall, Aetna could have refused to renew the annual liability coverage that Robins needed to do business since, as Robins's own insurance broker warned, if ACS didn't insure the Dalkon Shield, no other carrier would. The possibility was considered. But Aetna resisted a true recall, and a reason emerged in a 1980 interoffice communication in which ACS official Douglas D. Carr discussed a meeting the previous day. Robins, he wrote, "was still contemplating a recall of the IUD which would precipitate an influx of claims."

Aetna renewed its coverage in 1976 and again in 1977. That it coveted the Robins account is suggested by an inter-

nal memo warning that "unless we do something to safeguard ourselves, profitability of account will disappear." Although Aetna's profits from 1974 to 1977 haven't been disclosed, its 1973 profit from Robins was relatively trivial—about \$30,000, according to an internal memo.

Even supposing that Aetna subsequently jacked up its premiums, it seems strange that profits on this scale could account for the annual renewals after 1974, when Aetna had to know that big trouble lay ahead. But blindly following the "basic insurance-company practice" of seeking the maximum possible premium income in order to make investments had apparently led Aetna into a colossal blunder. "I can't see anything beyond stupidity," said NICO's Hunter, "I just can't."

Aetna finally cut off coverage effective February 28, 1978. The cut-off was a consequence of a megabucks battle with Robins, similar to one in the asbestos litigation, over the question of when the insurer's liability began: upon exposure to the product or upon diagnosis of disease. Negotiations failed to settle the dispute, so Robins sued Aetna.

In March 1977, while the case was pending in circuit court in Richmond,

## Calendar of NITA Programs

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### Trial Advocacy Programs

May 9-19, 1991	Southeast Regional University of North Carolina School of Law Chapel Hill, North Carolina	June 12-22, 1991	Southern Regional Southern Methodist University School of Law Dallas, Texas
May 23- June 2, 1991	Mid-America Regional University of Nebraska College of Law Lincoln, Nebraska	June 21- July 1, 1991	Northwest Regional Univ. of Washington School of Law Seattle, Washington
June 5-15, 1991	Mid-Atlantic Regional Temple University School of Law Philadelphia, Pennsylvania	July 6-20, 1991	National Session University of Colorado School of Law Boulder, Colorado
June 11-22, 1991	Western Regional University of California School of Law Berkeley, California	July 21-31, 1991†	Pacific Regional Univ. of San Diego School of Law San Diego, California

### Master Advocates Programs

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

the companies signed a secret armistice. Aetna, waiving traditional immunities from liability, consented to some cold-blooded provisions. It would pay all compensatory awards, even for "intended bodily injuries," and for injuries arising "on account of Robins's failure to disclose relevant information and the supplying of false and misleading information [to physicians and women]." [Italics added]. The quid for this quo was that Robins would pay all punitive awards. The lawsuit was settled in 1984, on the eve of trial.

The pact could have embarrassed Aetna and rocked the industry if it leaked into a court proceeding. ACS outside counsel Rufus Coldwell warned in a 1982 memo that a judge could construe it "in an unfavorable manner and place upon ACS some heretofore non-existent duty of disclosure to the public."

In February 1984, the then-chief U.S. district court judge for Minnesota, Miles W. Lord, excoriated E. Claiborne Robins, Jr., and two other top Robins executives for having refused to recall the Dalkon Shield. A multitude of women were still carrying "the deadly depth charge in their wombs, ready to explode at any time," Lord told the utterly unrepen-

tant trio standing before him. "Face up to your misdeeds," he pleaded. "Please, gentlemen, give consideration to tracing down the victims and sparing them the agony that will surely be theirs." Finally in October, Robins asked all women who were wearing the Dalkon Shield to have it removed.

If Lord had seen the newly available

[REDACTED]

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

[REDACTED]

court documents, he surely would have extended his wrath and his plea to complicit Aetna executives. Still, he had a few harsh words for Aetna:

The policy of delay and obfuscation practiced by [Robins's] lawyers in courts throughout this country has made it possible for you and . . . Aetna Casualty and Surety Company to delay the payment of these claims for

such a long period that the interest you earn in the interim covers the cost of these cases. You, in essence, pay nothing out of your pockets to settle these cases.

But in keeping with the court rules—it's a no-no for a jury to be told whether a defendant is insured—the Aetna executives were, and remain to this day, all but invisible. Yet they have been complicit in a decade of delay of the recall, while the Dalkon Shield injured thousands more women than any serial rapist ever has.

#### Monkey Business

Aetna dodged my questions about the baboon study, the armistice with Robins, and other awkward subjects, citing "legal reasons," "advice of counsel," and the inviolability of insurer confidentiality: "We are prevented by law from publicly discussing or otherwise disclosing any information provided to us in confidence by our clients," a spokesman told me at the time.

"Confidentiality is not only paramount to an insurer's relationships with its clients; it is also our business and legal principle without which it might not be possible for insurance companies to pro-

## Spring/Summer, 1991

### Appellate Advocacy Program

March 13-15, 1991

Univ. of Richmond School of Law  
Richmond, Virginia

### Expert Testimony Programs

Sept. 12-14, 1991† California Western School of Law  
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Oct. 17-19, 1991†

Northwestern University School of Law  
Chicago, Illinois

### Teacher Training Sessions

April 5-7, 1991 Harvard Law School  
Cambridge, Massachusetts

June 20-22, 1991

Notre Dame Law School  
Notre Dame, Indiana

### Negotiation Programs

June 6-8, 1991† Northwestern University School of Law  
Chicago, Illinois

October 6-8, 1991

Univ. of North Carolina School of Law  
Chapel Hill, North Carolina

### Deposition Programs

May 16-18, 1991† Southern Methodist University  
School of Law  
Dallas, Texas

August 9-11, 1991†

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Los Angeles, California

May 22-24, 1991† Northwestern University School of Law  
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Sept. 4-6, 1991†

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vide . . . liability insurance in any form." Unlike the insurance industry, the medical and legal professions do not say "never" to disclosure because they recognize that confidentiality treated as an absolute inevitably collides with higher responsibilities to the welfare of the community at large:

- The American Medical Association's ethical code allows a physician to "reveal the confidences entrusted to him in the course of medical attendance" if "required to do so by law or [if] it becomes necessary in order to protect the welfare of the individual or of the society."
- The American Psychiatric Association's "Guidelines on Confidentiality" warn that "psychiatrists today may be held responsible for protecting parties whom their patients seriously threaten, particularly when these other persons have been specifically identified."
- The American Bar Association's Model Rules of Professional Conduct say that information confided by a client may be revealed "to the extent the lawyer reasonably believe necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

Considering that a dangerous patient or client is usually only a threat to one person or a few people, and that just one needlessly hazardous product may injure tens of thousands of people, is it rational public policy to treat the insurer-customer relationship as sacrosanct?

And even in financial matters that aren't life-threatening, the government is likely to construe professional confidentiality as waivable. Accountants had no small role in the S&L disaster, a case in point being a major accounting firm's apparent cover-up of the shenanigans of Charles Keating, Jr. So late last year, the House of Representatives passed a bill requiring accountants to alert regulators to serious irregularities. The bill died in conference with the Senate, but Rep. Ron Wyden (D. Or.), who has been sponsoring the proposal for years, sees a good chance of enactment in the new session. A Congress that can compel disclosure by accountants can also compel disclosure by insurers who learn of avoidable hazards in products and the workplace.

But the way things stand, the courts equate an insurer of wounding and lethal products with a priest who hears the sacramental confession of a serial murderer. In *Ethics in the Sanctuary*, author Margaret P. Battin recalls the much-

publicized West German case of Jurgen Bartsch, a 15-year-old butcher's apprentice who confessed to his priest that he had committed a murder:

The priest attempted to persuade Bartsch to give himself up to the police. When he was unable to do so, the priest followed Roman Catholic church law requiring absolute confidentiality of the confessional and did not reveal information about the murder or Bartsch's intentions. Bartsch committed three more murders—all of them of 11-year-old boys, all of whom he subjected to sexual torture prior to killing them—before he was caught four years later (in 1966).

At least the priest did what he felt he could to avert further bloodshed. The insurers of asbestos and the Dalkon Shield did not.

More than two years after William McGehee had asked his incisive question about the insurer's duty, he was still groping for a satisfactory answer—while women in large numbers continued to be stricken with pelvic infections. He rephrased his concern in April 1984 in handwritten notes in which he spoke of the "dilemma of insurance company which knows that insured has danger of defective product."

Aetna's headquarters are less than 20 miles from a nuclear plant. If the "defective product" giving rise to the "dilemma" were about to cause a meltdown at the plant, would Aetna bend its iron rule of confidentiality?

**The Columbus Dump**

Thirteen days after the February 1975 verdict in Wichita, Forrest and other Robins officials met in Hartford with five Aetna executives and an official from Robins's insurance broker to discuss why the case had been lost and how to build better legal defenses against Dalkon Shield lawsuits. Toward the end of two pages of handwritten notes, Joseph E. Fazio, an ACS manager and claims attorney, made a startling reference to Forrest: "Purging files to be sure that for future they will not be as vulnerable." The meeting minutes also refer to a discussion of purging of documents.

In one way or another, thousands of documents sought by plaintiffs' lawyers vanished suspiciously after McGuire, Woods took over the Dalkon Shield litigation under Aetna's direction. An especially odd fate awaited about 20 boxes of documents, some concerning secret tests of the Dalkon Shield's string.

The papers had been in the possession of Harris Wagenseil, the San Francisco attorney retained by McGuire, Woods. He shipped the boxes to Columbus, Indiana, when he moved to a new home there. In what he described in testimony as a "spring cleaning," his wife had the boxes carted off to the city dump.

At the time, the papers relating to the string tests were under a court "non-destruct" order. In a February 1984 report to Judge Lord, two special masters said that plaintiffs' attorneys had established a strong prima facie case that there was "ongoing fraud" and that it had "involved the destruction or withholding of documents."

In June 1984, when Dalkon Shield litigation was reaching floodtide proportions, four ACS officials met to discuss the carrier's options. One sentence in notes of the meeting—handwritten by someone not publicly identified—leaps off the page: "If we propose alternative #1—re: giving greater detail about how to run their [Robins's] operations and they don't accept it and we walk, aren't we conspiring even more?"

This teasing hint drew strength in 1985, when the U.S. Department of Justice began to investigate whether Robins had criminally obstructed justice. In four subpoenas, a federal grand jury in Wichita ordered Robins ("Company X" or "Company") in public court papers because of the secrecy of grand jury proceedings) and McGuire, Woods ("Law Firm Y" or "Law Firm") to produce specific records. Company and Law Firm, asserting the attorney-client and lawyer's work-product privileges, refused to produce substantial numbers of the subpoenaed documents.

In deciding whether to sustain the refusal, District Judge Patrick F. Kelly, who was supervising the grand jury, conducted an in camera examination of sealed grand jury testimony and exhibits. Kelly ruled that the privileges could not be invoked "as a result of the crime-fraud exception." The in camera submissions, he said,

contain a strong prima facie showing that [Company] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing, and sale of [the Product], and used its attorneys to perpetuate and cover up these ongoing crimes and fraud during the ensuing product liability litigation through the commission of frauds on the courts, obstruction of justice, and perjury.

Significantly, Kelly noted that these alleged acts had occurred "during the period of representation by [Law Firm]"—that is, during the period Aetna controlled the law firm's representation of Robins.

An appeal by Company X failed. Upholding Kelly 3 to 0, the U.S. Court of Appeals for the Tenth Circuit said, "From 1975 to 1985, the law firm was responsible for the nationwide coordination of Company's defense." From 1975 to 1985, Aetna had "complete control" of this litigation.

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

Company X petitioned for Supreme Court review. In a vigorous reply brief in February 1989, the Justice Department listed the possible violations it was investigating: obstruction of justice, mail and wire fraud, false declarations before the grand jury, racketeering, and conspiracy.

The Supreme Court denied the Robins petition in June 1989—an obviously significant victory for the Justice Department. So it was astounding when in January 1990 the department dropped its five-year investigation. Had Company X been found to be not provably guilty of any crimes? Found wholly innocent of criminal activities? Had the "false declarations before the grand jury" suddenly been transformed into true declarations?

#### Runaround Suit

Flat-out allegations of conspiracy were made against (and denied by) Aetna in private lawsuits. Such allegations against an insurer are not a first. In cases dating back to 1977, for example, 80 former asbestos workers at a Johns-Manville plant in New Jersey accused Metropolitan Life Insurance Company of "negligence, fraudulent concealment, and conspiracy," and a federal judge ruled that the insurer "could be held as a defendant" on those accusations. Brodeur wrote in *Outrageous Misconduct*.

One allegation was that in a 1935 report on asbestos disease, Metropolitan had altered certain passages "to suit the

insurance industry"; another was that it had withheld "vital information from asbestos workers." However, after long delays of a trial that might have determined Metropolitan's legal accountability, the parties settled.

While the Dalkon Shield episode left Robins a shattered, humiliated company, Aetna almost completely escaped punishment, thanks to a class-action lawsuit called *Breland*. Robins's bankruptcy filing in 1985 meant Aetna faced a nightmarish possibility: It could become the sole defendant in the hundreds or thousands of lawsuits latent in the approximately 195,000 claims that survived court screening. But Aetna itself could not have devised a more brilliant self-rescue than *Breland*.

It was a mockery of an adversarial lawsuit: Aetna instantly embraced it; the lead plaintiff's lawyer had never tried a civil suit; Aetna produced only the documents it cared to (summarized in a 99-page "index"); and no plaintiff's lawyer took a single deposition. The *Breland* plaintiffs' counsel crafted the class action as an unprecedented—and, for the ongoing asbestos litigation, precedent-setting—"mandatory non-opt-out class."

This extraordinary move meant that hundreds of thousands of Dalkon Shield victims who had never heard of their self-appointed putative benefactors—Glenda Breland, her co-plaintiffs, and their lawyers—would, without their knowledge or consent, forever lose their constitutional right to a jury trial against Aetna, to select their lawyers, and to have their cases heard in the jurisdictions where they live.

U.S. District Judge Robert R. Merhige, Jr., of Richmond, who supervised both the Robins bankruptcy and the *Breland* hearings, certified the class action, airily declaring in his April 1988 opinion that, "there have been no suggestions that Aetna had any relation with the alleged injuring device except as an insurer." He disregarded the allegations of conspiracy and other wrongs imputed to Aetna even in *Breland*, and he was at variance with uncontested facts. Aetna's "complete control" of the Dalkon Shield litigation had been a reality for nearly 13 years, for example. And contrary to Merhige's opinion, Aetna attorney Edgerly's order to abandon the baboon test if it was yielding undesired results was certainly more than a "suggestion."

Based on Merhige's ruling, *Breland* counsel and Aetna reached an amicable settlement, as no one had doubted they

# The Research is Done

## BIBLIOGRAPHIES FOR MOTOR VEHICLE ACCIDENT CASES

- By Leading Highway Safety Expert
- Concise List of Key Standards Handbooks, Periodicals, Research and Trial Exhibits
- Addresses/Phone Numbers for Each Listing

## BIBLIOGRAPHIES

- Accident Reconstruction
- Driver Behavior, Impairment, Visual Needs
- Highway Curves
- Highway Maintenance
- Highway Sight Distance
- Highway Shoulders
- Highway Work Zones
- Pavement Edge Drop-Offs
- Pavement Skid Resistance and Hydroplaning
- Rail-Highway Crossing Safety
- Roadside Safety Design
- Traffic Signs, Signals, Markings

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would. The claimants—most of them exceedingly weary of waiting to be compensated for injuries suffered a decade or more earlier—could not easily refuse, though some plaintiff's lawyers claimed "collusion" contaminated the settlement.

Once all the agreement's misleading provisions are weighed, they indicate that for \$43 million—little more than nuisance value—Aetna could walk away from the multibillion-dollar arena of Dalkon Shield liability immune from lawsuits for ever after. This from a company that in 1989 listed assets of \$87.12 billion and a net income of \$676 million. No wonder Aetna was so happy to pay *Breland's* attorneys—including a former partner of the judge involved—fees of \$8.2 million (an average of \$407 an hour) plus expenses.

In a brief filed as part of an unsuccessful appeal to overturn the settlement by 500 of the Dalkon Shield victims involuntarily corralled by *Breland*, two plaintiffs' lawyers cut to the heart of the matter: "If one follows Aetna's arguments to their logical conclusion," they wrote, "an insurer such as Aetna cannot be held liable for fraud, obstruction of justice, negligence, or any other tortious activities as long as it is acting as insurer at the time of its tortious activities."

### Sunshine on Policyholders

The first line of defense against defective and needlessly unsafe products resides not in those who manage the offices where they are insured, but in those who manage the factories where they are made. This deserves particular emphasis because in recent years *self-insurance* has become commonplace in a wide range of manufacturing industries, including automotive parts, chemicals, general aviation, medical devices, pharmaceuticals, sporting goods, and tobacco.

Since 1979, Reps. John Conyers, Jr., (D. Mich.) and George Miller (D. Cal.) have proposed a bill to strengthen the first line of defense. The bill says that "whoever is an appropriate manager with respect to a product or business practice," and who "discovers . . . a serious danger associated with such product (or a component of the product) or business practice," shall within 30 days "inform each appropriate federal agency in writing . . . and warn affected employees in writing." A manager convicted of a violation "shall be fined not less than \$50,000 or imprisoned not less than two years, or both"; a convicted corporation shall be fined not less than \$100,000.

The virtues of this approach are several: It would induce personal accountability where there is now too little, offset pressures on managers to cover up, and be enforced by U.S. attorneys—no new bureaucracy would be needed. In an impressive example of local initiative, California enacted a close copy of Conyers-Miller in late November.

Florida has also blazed a trail toward corporate accountability. Its "Sunshine in Litigation Act," which took effect July 1, says that

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

Why not a federal sunshine in litigation act?

In the 1972 law creating the Consumer Product Safety Commission, Congress put on distributors and retailers the same legal burden of disclosure it put on manufacturers: Each and every one who obtains information "which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard" must inform the CPSC immediately. If he doesn't, the agency is empowered to compel him to do that which he had already been morally bound to do.

In 1975, former Sen. Frank E. Moss (D. Utah) and the late Sen. Warren G. Magnuson (D. Wash.) introduced a CPSC bill that would have extended the reporting requirement to products liability insurers (and to independent testing labs). For Congress, the bill was an apparently novel perception that protecting human life, safety, and health is too important to exempt insurers (and labs) from reporting serious hazards to regulators. The measure passed the Senate but died in squabbles with the House of Representatives over unrelated issues—and was never reintroduced.

Still, the public health and safety being so much at stake, we need new federal and state legislation that revives the implicit message of Magnuson and Moss: The "thou" in Leviticus 19:16—"Neither shalt thou stand idly by the blood of thy neighbor"—exempts none of us, including the insurer watching from the window. □

applicable principles of law.<sup>10</sup>

The superior court's judgment is AFFIRMED, and the case is REMANDED with instructions to the superior court not to enforce its judgment requiring production, unless and until the federal protective order is vacated or modified.



Nancy R. CARTER, Appellant,

v.

David A. NOVOTNY, Appellee.

Nos. S-2645, S-3049.

Supreme Court of Alaska.

Sept. 8, 1989.

Rehearing Granted Oct. 9, 1989.

Minor child's maternal aunt appealed from two orders of the Superior Court, Third Judicial District, Anchorage, David C. Stewart, J. pro tem., which first awarded shared legal custody of child to both aunt and child's father, with physical custody in father, and second, ordered physical custody transferred from father to aunt with joint legal custody retained. The Supreme Court, Compton, J., held that: (1) Superior Court had jurisdiction to make such award, and (2) award was not abuse of discretion.

Second order affirmed.

1. Divorce  $\Leftrightarrow$ 312.6(1)

Father failed to file cross appeal from order modifying custody and, thus, father's insufficiency of evidence claim was not properly before Supreme Court.

10. After we issued the order affirming the decision below, Judge Holland permitted the Daily News to intervene in the federal case and vacated the June 20 protective order. Grace appealed to the United States Court of Appeal, Ninth

2. Parent and Child  $\Leftrightarrow$ 2(12)

Parent is entitled to custodial preference over nonparent, unless there is clear evidence that parent is either unfit or welfare of child requires that child be placed in custody of nonparent.

3. Parent and Child  $\Leftrightarrow$ 2(18)

Burden of proving that parent's custody of child would be clearly detrimental to child is on nonparent seeking to modify custody.

4. Parent and Child  $\Leftrightarrow$ 2(17)

Superior court had jurisdiction to award shared custody of minor to both parent and nonparent. AS 25.20.060.

5. Parent and Child  $\Leftrightarrow$ 2(17)

Superior court did not abuse its discretion in awarding parent and nonparent shared custody of minor child with physical custody in nonparent, even though court had determined that it would be detrimental to child to continue physical placement with father, insofar as such award was in best interest of child. AS 25.20.060, 25.24.150.

Charles Hagans, Hagans, Brown, Gibbs and Moran, Anchorage, for appellant.

William T. Ford, Anchorage, for appellee.

Ame Ivanov, Anchorage, Guardian Ad Litem.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

The principal issue presented in this appeal is whether the superior court erred in awarding shared custody of Heidi Novotny to David A. Novotny, her father, and Nancy R. Carter, her maternal aunt, after having determined that it would be detrimental

Circuit, but dismissed the appeal when the circuit court refused to grant a stay pending appeal. The settlement documents were released for public inspection.

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## FISCAL NOTE

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Bill No. HB 171

Revision Date: 03/27/92 Department Affected: Alaska Court System  
 Title: An Act restricting court orders and BRU: Trial Courts  
certain private agreements... public hazards Components: \_\_\_\_\_  
 Sponsor: Judiciary Committee  
 Requestor: House State Affairs COMPONENT SERIAL NO. 000 | 000 000 | 768

## EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	41.4	41.4	41.4	41.4	41.4	41.4
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	41.4	41.4	41.4	41.4	41.4	41.4
CAPITAL						
REVENUE						

## FUNDING: (Thousands of Dollars)

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

## POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel *CS* Phone: 264-8228  
 Division: Alaska Court System Date: 03/27/92  
 Approved by: Arthur H. Snowden, II, Administrative Director *AS* *CS*  
 Agency: Alaska Court System Date: 03/27/92

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

Alaska Court System  
Fiscal Analysis of House Bill 171

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

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

Fiscal Impact

Personal Services

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

AS Amended

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DGT6143

90 H-8522

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1990

A N A C T

RELATING TO CAUSES OF ACTIONS

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

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

*Vetoed by Governor  
Edward D. DiPrei  
(7-31-90 - after  
Sessions ended)*

*Legislature reconvene  
Jan. 2, 1991*

90-H 8522

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

Referred To: Committee on Judiciary

It is enacted by the General Assembly as follows:

- 1 SECTION 1. CHAPTER 9-1 OF THE GENERAL LAWS ENTITLED "CAUSES OF
- 2 ACTION" IS HEREBY AMENDED BY ADDING THERETO THE FOLLOWING SECTION:
- 3 9-1-50. Availability of information in product liability ac-
- 4 tions. — (a) No court may enter an order in a product liability ac-
- 5 tion involving a product distributed in commerce that forbids any
- 6 person from making any document or other information which is obtained
- 7 in discovery and which is reasonably related to design specifications,
- 8 performance standards, warranties, warnings and instructions or any
- 9 other matter related to the safety of any product distributed in com-
- 10 merce available to:
- 11 (1) a federal, state or local regulatory agency, law enforcement
- 12 agency or legislative or judicial body if the agency or body has
- 13 regulatory, law enforcement, legislative or adjudicative responsibil-
- 14 ity with respect to the product and if the agency or body states in
- 15 writing to such person before such document or information is made
- 16 available that it has procedures in place to prevent the unauthorized
- 17 disclosure to the public of trade secret information or

1 (2) any person who the person reasonably believes:

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

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

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

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

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

19 (2) in the case of an attorney, not to represent any other claim-  
20 ant in any action similar to the product liability action or any  
21 claimant in any other product liability action against any of the  
22 defendants in the product liability action; and

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

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

30 SECTION X, 3 This act shall take effect upon passage.

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

90 H-8522

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

AN ACT

RELATING TO CAUSES OF ACTIONS

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

5           The act would take effect upon passage.

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DGT6143  
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MISSOURI

SECOND REGULAR SESSION  
**HOUSE BILL NO. 1139**  
85TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE GRAHAM.

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

DOUGLAS W. BURNETT, Chief Clerk

2324-1

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**AN ACT**

Relating to the disclosure of discoverable materials.

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

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

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

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

# VIRGINIA

## 1989 RECONVENED SESSION VIRGINIA ACTS OF ASSEMBLY - CHAPTER

REENROLLED

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

[H 1581]

Approved

Be it enacted by the General Assembly of Virginia:

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

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

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

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President of the Senate

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Speaker of the House of Delegates

Approved:

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Governor

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A bill to be entitled

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

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

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

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

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

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

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



1 themselves from injury which may result from the public  
2 hazard.

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

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

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

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

1 or materials necessary or useful to the public regarding the  
2 public hazard.  
3           Section 2. This act shall take effect July 1, 1990,  
4 and shall apply to causes of action accruing on or after the  
5 effective date.  
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CODING: Words stricken are deletions; words underlined are additions.



1 otherwise restricted by law;

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

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

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

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

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

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

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

1 of a party requesting sealing at the hearing required by paragraph  
2 4.

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

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

26 8. Appeal. Any order (or portion of an order or judgment)

1 relating to sealing or unsealing court records shall be deemed to  
2 be severed from the case and a final judgment which may be appealed  
3 by any party or intervenor who participated in the hearing  
4 preceding issuance of such order. The appellate court may abate the  
5 appeal and order the trial court to direct that further public  
6 notice be given, or to hold further hearings, or to make additional  
7 findings.

8       9. Application. Access to documents in court files not  
9 defined as court records by this rule remains governed by existing  
10 law. This rule does not apply to any court records sealed in an  
11 action in which a final judgment has been entered before its  
12 effective date. This rule applies to cases already pending on its  
13 effective date only with regard to:

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

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

19                           \*\*\*\*\*

20                           **APPLICABLE PORTIONS OF RELATED RULES**

21   Rule 166b       **'Forms and Scope of Discovery; Protective Orders;**  
22                           **Supplementation of Responses**

23       5. Protective Orders. On motion specifying the grounds and  
24 made by any person against or from whom discovery is sought under  
25 these rules, the court may make any order in the interest of  
26 justice necessary to protect the movant from undue burden,  
27 unnecessary expense, harassment or annoyance, or invasion of  
28 personal, constitutional, or property rights. Motions or responses  
29 made under this rule may have exhibits attached including  
30 affidavits, discovery pleadings, or any other documents.

1 Specifically, the court's authority as to such orders extends to,  
2 although it is not necessarily limited by, any of the following:  
3

4 a. ordering that requested discovery not be sought in whole  
5 or in part, or that the extent or subject matter of discovery be  
6 limited, or that it not be undertaken at the time or place  
7 specified.  
8

9 b. ordering that the discovery be undertaken only by such  
10 method or upon such terms and conditions or at the time and place  
11 directed by the court.  
12

13 c. ordering that for good cause shown results of discovery be  
14 sealed or otherwise adequately protected, that its distribution be  
15 limited, or that its disclosure be restricted. Any order under  
16 this subparagraph 5(c) shall be made in accordance with the  
17 provisions of Rule 76a with respect to all court records subject to  
18 that rule.  
19

20 **Rule 120a. Special Appearance**  
21

22 3. The court shall determine the special appearance on the  
23 basis of the pleadings, any stipulations made by and between the  
24 parties, such affidavits and attachments as may be filed by the  
25 parties, the results of discovery processes, and any oral  
26 testimony. The affidavits, if any, shall be served at least seven  
27 days before the hearing, shall be made on personal knowledge, shall  
28 set forth specific facts as would be admissible in evidence, and  
29 shall show affirmatively that the affiant is competent to testify.  
30

31 Should it appear from the affidavits of a party opposing the  
32 motion that he cannot for reasons stated present by affidavit facts  
33 essential to justify his opposition, the court may order a  
34 continuance to permit affidavits to be obtained or depositions to  
35 be taken or discovery to be had or make such other order as is  
36 just.  
37

38 Should it appear to the satisfaction of the court at any time  
39 that any of such affidavits are presented in violation of Rule 13,  
40 the court shall impose sanctions in accordance with that rule.  
41

42 \*\*\*\*\*  
43

44 **For further information contact: Justice Lloyd Doggett**  
45 **Supreme Court of Texas**  
46 **P. O. Box 12248**  
47 **Austin, TX 78711**  
48 **512/463-1344**  
49 **Adm. Asst: Virginia Smith**

## Summary of Developments on Secrecy Issue

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

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

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

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

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

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

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

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

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

March 1, 1991

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

October 11, 1990

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

TO: Representative Dave Donley

FROM: John B. Gaguine ~~JK~~  
Legislative Counsel

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

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

Representative Dave Donley

Page 2

October 11, 1990

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

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

If I may be of further assistance, please advise.

JBG:gc  
G15/022

Enclosure

**DIVISION OF LEGAL SERVICES**

**LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

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

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

**MEMORANDUM**

February 4, 1991

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

**TO:** Representative Dave Donley  
Attn: H. Kaden

**FROM:** John B. Gaguine *JBG*  
Legislative Counsel

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

JBG:lmb  
91-012.lmb

Enclosure

## STATEMENT

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

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

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

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

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

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

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

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

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

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

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

FISCAL NOTE

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

Bill No. HB 171

Revision Date: 03/27/92 Department Affected: Alaska Court System  
 Title: An Act restricting court orders and BRU: Trial Courts  
certain private agreements... public hazards Components: \_\_\_\_\_  
 Sponsor: Judiciary Committee  
 Requestor: House State Affairs COMPONENT SERIAL NO. 000 | 000 | 000 | 788

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	41.4	41.4	41.4	41.4	41.4	41.4
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	41.4	41.4	41.4	41.4	41.4	41.4

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)  
  
See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel *CS* Phone: 264-8228  
 Division: Alaska Court System Date: 03/27/92  
 Approved by: Arthur H. Snowden, II, Administrative Director *AS*  
 Agency: Alaska Court System Date: 03/27/92

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

Alaska Court System  
Fiscal Analysis of House Bill 171

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

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

Fiscal Impact

Personal Services

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

## **ANTI-SECRECY AGREEMENT ACTIVITY: A National Perspective**

- CALIFORNIA:** By local rule, last July the San Diego County Superior Court adopted a policy which states that secrecy practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.
- COLORADO:** A bill based on the Florida statute was introduced in January, 1991.
- FLORIDA:** The Florida Sunshine in Litigation Act took effect on July 1, 1990 and is the model for many other states. The law forbids courts from entering orders which conceal a "public hazard" or information about a public hazard. It also makes any agreement to conceal a public hazard unenforceable, and allows the public and news media to contest orders or contracts which would conceal public hazards.
- HAWAII:** In 1990 the House passed a bill applying only to health and safety information produced in discovery in wrongful death actions. There are plans to introduce new, broader secrecy legislation in 1991 which would provide for public access to such information.
- ILLINOIS:** A bill modeled after the Florida statute is being introduced in April 1991. There are plans to request court rule amendments similar to those adopted by the Texas Supreme Court.
- NEVADA:** The Senate Judiciary Committee, as a whole, is sponsoring anti-secrecy legislation. The local Society of Professional Journalists plans to testify in favor of the bill.
- NEW HAMPSHIRE:** A measure modeled after Rhode Island's 1990 bill is expected to be introduced this session.
- NEW JERSEY:** Assembly Bill 4110, essentially identical to the Florida statute, was introduced last October. Assembly Resolution 136, pending action, urges New Jersey attorneys and judges not to enter into or approve secrecy agreements or orders in civil cases involving toy-related injury and death, and urges the New Jersey Supreme Court to adopt rules to implement the resolution.
- NEW YORK:** New York State's Administrative Board of the Courts circulated a proposed court rule on secrecy for comments by the bench and bar. In February, the Board considered the comments and implemented the rule, which prohibits sealing of court records without a finding of good cause.

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

# SECRECY HURTS CONSUMERS

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

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

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

*- Ralph Nader*

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

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

*- Jim Miller  
Victims Group Opposed to  
Unsafe Restraints*

# SECRECY HURTS PATIENTS

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

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

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

*- Dr. Devra Davis, Toxicologist  
National Academy of Sciences  
Zomax allergic reaction victim*

# SECRECY HURTS WORKERS

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

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

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

- Louis Beliczky  
Director of Industrial Hygiene  
United Rubber Workers

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

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

- Jan Chatten-Brown, Coordinator  
WORKSAFE!

# SECRECY HURTS SENIOR CITIZENS

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

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

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

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

Oraflex, an anti-arthritis 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 respiratory problems, liver disease and birth defects in newborns. Despite the potential gravity of the situation -- it happened next to a child care center -- Fiberite refused to settle the case unless all the information regarding the toxic incident was sealed in the process.

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

*- Michael Paparian, Director  
Sierra Club of California*

# DIVISION OF LEGAL SERVICES

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Mail Stop 3101

### MEMORANDUM

May 1, 1991

**SUBJECT:** Department of Law's comments on HB 171

**TO:** Representative Dave Donley  
Attn: H. Kaden

**FROM:** John B. Gaguine *JBG*  
Legislative Counsel

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

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

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

If I may be of further assistance, please advise.

JBG:lmb  
91-155.lmb  
Enclosure

7-LS0112V ✓  
Gaguine  
5/1/91

CS FOR HOUSE BILL NO. 171 ( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

21 Sec. 09.25.250. DEFINITIONS FOR AS 09.25.230 - 09.25.250. In AS 09.25.230 -  
22 09.25.250,

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

26 (2) "public hazard" means an instrumentality that has caused injury to a person  
27 or property, and includes a device, instrument, person, procedure, or product, and a condition of  
28 a device, instrument, person, procedure, or product.

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

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

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

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

MEMO

TO: HOUSE STATE AFFAIRS COMMITTEE  
CHAIRMAN - GENE KUBINA

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

DATE: April 2, 1991

RE: OPPOSITION TO HOUSE BILL 171

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

Furthermore, this bill purports to change no fewer than six of the existing Alaska Rules of Civil Procedure.<sup>3</sup>

---

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

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

<sup>3</sup> Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d) and 37(a)(2).

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

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



## LAWYERS FOR CIVIL JUSTICE

1225 Nineteenth Street, N.W. - Suite 470  
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**"A Coalition of Defense Trial Lawyers Promoting  
Excellence and Fairness in the Civil Justice System"**

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

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

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

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

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## MISSION STATEMENT FOR LCJ

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

The purpose of LCJ is to accomplish civil justice reform through

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

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# Alaska State Legislature



House of Representatives  
House Judiciary Committee  
Chairman Dave Donley

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(907) 465-4712

SPONSOR STATEMENT - HB 171

SECRECY AGREEMENTS IN LAWSUITS

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

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

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

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

SPONSOR STATEMENT

**F USE COMMITTEE REPORT**

(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

no recommendations

individual recommendations

additional referral to the FINANCE Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact Court System

fiscal note(s) \_\_\_\_\_

zero fiscal note \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	<u>OTHER</u> RECOMMENDATIONS	DNP	NR	AM
<i>T. Cook</i>	<input checked="" type="checkbox"/>	<i>Exp. and A. Kistina</i>		<input checked="" type="checkbox"/>	
		<i>David ...</i> <small>CHOCQUETTE</small>		<input checked="" type="checkbox"/>	
		<i>...</i> <small>BAKIC</small>		<input checked="" type="checkbox"/>	

*Exp. and A. Kistina*  
 CHAIRMAN'S SIGNATURE

# Privacy, Secrecy, and the Public Interest

by Arthur R. Miller

*The following article is derived from a statement of Professor Miller to the Subcommittee on Courts of the Senate Judiciary Committee, made on May 17, 1990.*

The public's right of access to information produced in litigation is a subject that raises a variety of issues that are both significant and subtle. Some of them I have studied and previously discussed at length, including the proper functioning of the rules of procedure that govern civil cases as they move through the federal courts, the role of the courts in today's society, and the tension between the right to privacy and the public's right to know.

I served as the reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States when the 1980 and 1983 amendments were proposed and promulgated. Because of my involvement in drafting these amendments, I can say with some confidence that the amended rules, and the remaining rules of civil procedure, are the product of considerable thought, analysis, and discussion at the highest levels of the legal profession. They reflect what we judged to be an appropriate balance between the often conflicting needs of all those who are involved in the litigation process as well as the legal system as a whole.

I am somewhat disturbed, therefore, to discover

that the proponents of public access to court documents have started referring to protective orders, authorized by Rule 26(c) of the Federal Rules of Civil Procedure, by the rather pejorative misnomer of "secrecy orders." This nasty epithet implies that they are designed for some fundamentally evil purpose. Further, it implies that those who request protective orders and those who authorize them are engaged in a conspiracy to bury truth. The illogical conclusion of this line of thought is that those of us involved in drafting the rules, and those in the judiciary and the Congress who shepherded them through to promulgation, have unleashed a procedural device capable of subverting truth and justice.

In fact, the opposite is true. A legal system that does not recognize the right to keep private matters private would be far more likely to lead to deleterious consequences—the evil of an Orwellian society where Big Brother knows all. See generally, Miller, *The Assault on Privacy* (Ann Arbor 1971). Although that might not be the result the proponents of public access have in mind, unfettered authority to collect and disseminate private information through the judicial process can, without doubt, lead to that end.

Recognition of a general right of public access to civil litigation documents would be at odds with the

parties' rights to privacy. Litigants do not give up their rights to privacy just because they have walked through the courthouse door. Because of my belief in the importance of the right to privacy in our computerized world, I find it very difficult to accept any proposal that would eliminate individual consideration of the privacy rights of litigants on a case-by-case basis in favor of a presumption of public access. As the District of Columbia Circuit noted in *In re Halkin*, 598 F.2d 176, 195 (D.C.Cir. 1979), "only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain."

Our legal system recognizes a limited public right of access to information used in the courts and justice system. That right most clearly exists at common law and under the First Amendment in criminal cases. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (right to attend criminal trial); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right to attend voir dire examination of jurors in criminal trial); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (right to attend preliminary hearings in criminal trial).

Nonetheless, the United States Supreme Court never has recognized a First Amendment right of access to information used in a civil trial, much less a right of access to information that is merely produced in the course of discovery. Prior to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), courts were divided over whether non-litigants had First Amendment rights in information produced in litigation. *Seattle Times*, 467 U.S. at 25, n.6. Since *Seattle Times*, a few lower federal courts and some state courts appear to have misunderstood the Supreme Court's application of a First Amendment analysis in *Seattle Times* as implicit recognition that a request for access to information produced in litigation implicates the requestor's First Amendment rights. See e.g., *Palmer v. Liggett Group, Inc.*, No. 83-2445-MA (D.Mass. 1988) (order to modify protective order); *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D.Kan. 1988) (order to modify protective orders).

According to the Supreme Court, the right of access exists to allow the public to monitor the functioning of our judicial system: access promotes participation in governmental processes and helps protect constitutional guarantees. *Nixon v. Warner Communications*, 435 U.S. at 598.

It does not follow, however, that this limited right extends to private information about the private individuals or organizations involved in civil litigation. Often information produced in discovery con-

sists only of bits and pieces of information. It is difficult to imagine how this fragmented intrusion into the private affairs of private parties promotes any societal interest; or how it could result in any balanced or fair presentation of the disputed facts. Yet, that is precisely what the proponents of public access claim. They assert that because of some possible public interest in information produced in the course of litigation, there should be a presumptive right of access to that information, whether or not the information is used at trial, (see *In re CBS, Inc.*, 838 F.2d 958, 959 (2d Cir. 1987)), or merely produced in pretrial discovery, and regardless of whether the information is shown to be truthful. Very often, information produced in discovery will tell only one side of the story, raising obvious opportunities for injustice. In light of *Seattle Times*, the position the proponents of public access take clearly is not supported by the law.

Notwithstanding the settled nature of the law on this issue, the proponents of public access strenuously argue that the public must have access to information produced by private parties at a minimum when that information affects public health and safety. Although this position initially seems to have merit, it fails to come to grips with the critical question: "Who decides that information produced in litigation affects public health and safety?"

Under current law, the presiding judge decides what information is relevant at trial and pretrial and whether any information generated in the process should be protected from public disclosure by a protective order. Before a protective order will issue, the party seeking the order must show "good cause," and also must make specific allegations of the harm that will occur if the protective order does not issue. See Wright & Miller, *Federal Practice & Procedure*, §2025. See, e.g., *General Dynamics Corp. v. Self Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973); *Kamp Implement Co. v. J.I. Case Co.*, 630 F.Supp. 218 (D.Mont. 1986); *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

Courts have developed considerable experience in balancing the needs of the adverse parties in the protection or disclosure of information. Further, federal judges are the only impartial participants in litigation, and they are in the best position to determine whether any information pertaining to public health and safety is being improperly withheld from the public under cover of a protective order. When that is shown, the judge can modify the protective order to take action to disclose the information to the appropriate government agency. Appellate review also generally is available to ensure the efficacy of the process.

Additional support for allowing the judge to determine whether information produced in a lawsuit raises issues of public health and safety that warrant public disclosure lies in the rules of evidence. If a court concludes that information concerning public health or safety is relevant to the issues in a lawsuit and the information is reliable, the court will admit it as evidence at trial. Evidence admitted at trial generally is available to the public through the traditional common law right of access to the courtroom. If the judge finds the information inadmissible at trial, it is because the court deems the information irrelevant or untrustworthy. If the information has no logical connection to a fact at issue, or if the information is not trustworthy or credible, it is difficult to understand how the public is served by public disclosure.

In fact, public disclosure of untrustworthy safety or health information could cause serious public harm. Under existing law, the trial court has the discretion to weigh all of these issues and act in the public's best interest. In the end, only the trial court is sufficiently objective to decide what is and what is not in the public interest.

Nonetheless, the proponents of public access seem to be saying that they should be the ones to decide whether information sought in litigation affects public health and safety. This is an untenable position for several reasons.

First, neither allegations of harm made in the pleadings of a lawsuit, nor information produced in bits and pieces in discovery, rises to the level of proof that some injury actually occurred or is even likely to occur. The Federal Rules of Civil Procedure provide easy access to the judicial system because they only require notice pleading. Discovery is designed only to reveal information which *may lead* to discovery of admissible evidence. See *Conley v. Gibson*, 355 U.S. 41, 46 n.6 (1957) (citing with approval *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)). See also Miller, "The Adversary System: Dinosaur or Phoenix," 69 Minn.L.Rev. 1, 8-9 (1984).

Thus it is virtually impossible to stop a lawsuit at the courthouse door or during the pre-trial process, regardless of the actual merits of the case. Once inside the courthouse, motions to dismiss are not difficult to survive. Rule 15 of the Federal Rules of Civil Procedure sets forth liberal provisions for amendment of pleadings, and motions to dismiss under Rule 12(b)(6) for "failure to state a claim

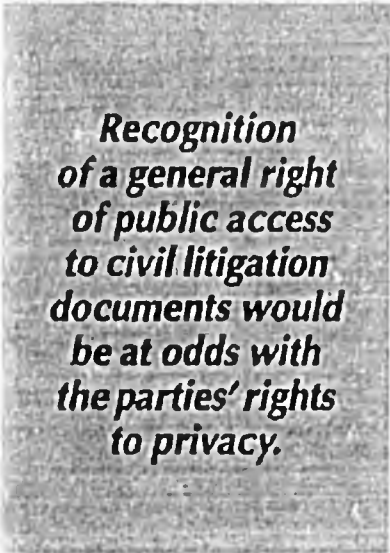
upon which relief can be granted" rarely are successful. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45. See 5 Wright & Miller, *Federal Practice and Procedure*, §1357.

Consequently, although the allegations made in a complaint may raise issues that appear to implicate matters affecting the public health and safety, and the bits and pieces of information produced in discovery may appear to confirm that, the truth of the allegations can be known only after they have been tested through the full litigation process. Release of information prior to trial is premature at best, and destructive of a litigant's reputation and his business at worst.

Second, it is not altogether unheard of for individuals to file completely unfounded lawsuits for a variety of purposes. A suit could be filed merely to compel the defendant to produce information that the plaintiff subsequently can sell to other similarly situated plaintiffs, for a percentage of the damages awarded in subsequent cases. If an individual determined on using the courts in this fashion is allowed to decide what and when information produced in litigation should be available to the public, it is not difficult to see that these individuals invariably will

favor public disclosure. A presumption in favor of disclosure allows these individuals to use the courts solely as conduits for finding new clients and other money-making enterprises—an outrageous abuse of the system. The possibility of Rule 11 sanctions is inadequate once the damage has been done. I find it difficult to understand why the plaintiffs' bar would support this "presumption of access." In reality it means that the attorney who first uncovered the "public" information would own it. That attorney would become the gatekeeper, charging others for access to it at monopoly prices and denying access whenever it suited his personal predilections. I hardly think that many members of the bar would willingly support this considerable transfer of power from the courts to individual attorneys.

Third, I must return to an issue that has troubled me for many years—the great deference our legal system gives journalists, and perhaps now the advocates of public access, to decide what is in the public



**Recognition  
of a general right  
of public access  
to civil litigation  
documents would  
be at odds with  
the parties' rights  
to privacy.**

interest. See Miller, *The Assault on Privacy*, supra, at 196; Miller, "Press versus Privacy," 16 *Gonzaga L.Rev.* 843, 848-50 (1981). I do not quarrel with an expansive reading of the First Amendment or judicial decisions that allow publication of material of public significance despite the fact that it will embarrass those to whom the information pertains. Neither the First Amendment, nor these decisions, however, legitimate demands to publish any private information, no matter how sensitive, how personal, how ruinous, or how irrelevant to daily events it may be.

The position of the proponents of public access seems to be that only they, and not our nation's judges, are capable of protecting the public from the harms perpetrated on the public by secretive courts and defendants. These proponents apparently think that only they are capable of meeting the ever-present enemy and that they must continuously sally forth to slay the enemy. This strikes me as a distorted and egocentric view of the universe.

In reality, the proponents of access, whether they are the plaintiffs' bar or the press, are engaged in business and have their own agenda to serve, just like the defendants they pursue. The simple truth is that only the judges can be neutral gate-keepers. Thus, when information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has — within the sound discretion of the court. Only the trial judge has no axe to grind and no pecuniary gain in sight. Existing rules and procedures are more than adequate to accomplish this end.

Fourth, my experience tells me that there are reasons to be very concerned about the effect universal public access would have on civil litigation in the federal courts. In the course of invoking the rhetoric of "secrecy" and "public health and safety," those who propose universal access to materials generated in the course of civil litigation ignore many important values that might well be compromised if present practice were to be dramatically altered. "A protective order pursuant to Rule 26(c) may be the least intrusive means of achieving the goals of protecting the fairness of the judicial process and preserving the discovery system.... The only plausible alternative to a protective order may be the denial of discovery altogether." *In re Halkin*, 598

F.2d 176, 195 (D.C.Cir. 1979).

The centerpiece of contemporary federal civil litigation is discovery. Indeed, one of the crowning achievements of the Federal Rules of Civil Procedure is the discovery regime, which seeks to provide the litigants with equal access to all relevant data in the hope of achieving the efficient resolution of cases on their merits rather than through artifice and surprise. The rules, in effect, have taken the position that it is justifiable to intrude on the private affairs of parties and non-parties through discovery in order to permit full preparation for trial.

But that does not make discovery a public process. Indeed, history and practice is to the contrary. It is a private process, with only occasional intervention by the court, and it is intended solely to assist in the process of dispute resolution. Parties are encouraged to reveal information, and occasionally

are compelled to do so, under the assumption that discovery materials are being used solely for purposes of the particular litigation and that other uses are inappropriate. This assumption is reinforced by the availability of the protective order, to which the parties typically stipulate, to guard privacy and prevent misuse of discovered information.

The assumption that material produced in discovery is not available for use outside the litigation is critical to assuring widespread, voluntary compliance with the discovery regime, upon which we base our ability to resolve cases on their merits. This is particularly true

in federal litigation because discovery is given the widest possible berth and tends to produce material that is not used—or even relevant to the case—and which can also be extraordinarily intrusive.

If we undermine the assumption that discovery is a private process, or degrade the reliability of protective orders, the discovery process would become infinitely more contentious, protracted, and expensive. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986). Litigants would be likely to pursue a full trial to bring out the complete story and vindicate their reputations. The time and money of litigants would be wasted; the energies of that most precious resource—our federal judges—would be dissipated. The federal courts' ability to handle major complex litigation and cases involving issues of enormous social importance would be compromised. The net effect might well be a constriction on the flow of information, rather than its expansion.

***Courts have developed considerable experience in balancing the needs of the adverse parties in the protection or disclosure of information.***

Cf., *In re Halkin*, 598 F.2d at 195 (denial of discovery to protect confidentiality benefits no one).

Discovery also enables litigants to appraise their cases and evaluate the risks of proceeding to trial. It often is the availability of discovery that leads parties to settle, thereby saving themselves and the court system enormous amounts of time and money. Without the guarantee of confidentiality, some litigants will have little or no incentive to produce as much information as possible during discovery, particularly if courts permit public access for reasons unrelated to the litigation. Because an essential precursor to settlement will have been removed, it would be much more difficult to resolve cases. Similarly, the settlement process would be impaired if the parties could not rely on the confidentiality assurances in the settlement agreement. In fact, there would be significantly greater incentive to litigate simply to postpone public access to confidential information. Our civil justice system simply could not function if the settlement rate were to drop or if settlements were delayed to any significant degree.

It always must be remembered that there are many legitimate reasons for litigants, both individual and corporate, to keep information confidential. In addition to concerns about individual and institutional privacy, today's commercial litigation often involves information that is critical to marketing, distribution, product development, and various elements of competition. Eliminating the possibility of maintaining confidentiality throughout the litigation process might well encourage the institution of lawsuits for ulterior purposes.

In short, changing the current protective order practices under Rule 26(c) could have dramatic and unfortunate consequences for civil litigation in our federal courts. Ironically, these consequences probably would be more of a hardship for plaintiffs as a group than defendants, because plaintiffs would have greater difficulty gaining access to data and there would be greater resistance to settlement. Unless litigants are able to rely on the assumption that materials produced in the context of a civil lawsuit will be used only for those purposes, absent a judicially declared supervening interest in public health or safety, many of the objectives of Rule 1 ("the just, speedy, and inexpensive determination of every action"), the discovery regime, the healthy developments in judicial management (as reflected in Rule 16 and in the *Manual on Complex Litigation*), and the ability to achieve settlements could be seriously undermined.

I have a final systemic concern about recognizing a wholesale right of public access to documents produced in litigation: the American judicial system

is already unable to resolve civil disputes in an economical, timely fashion. Adding a clearinghouse—or Freedom of Information Act—function to the existing burdens on the courts, which is essentially what the proponents of access advocate, is unjustifiable for even the most compelling reasons because the courts simply cannot withstand the additional workload. As the court said in *Anderson v. Cryovac, Inc.*, 805 F.2d at 12:

The public's interest is in seeing that the [discovery] process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this in turn could lead to lengthy and expensive interlocutory appeals....

Discovery was designed to operate extra-judicially. But, because of the complexity and extent of modern litigation, federal judges are overwhelmed with management functions. They are barely able to perform these management duties for legitimate litigation purposes. It is unrealistic to ask them to manage a freedom of information system as well. The Supreme Court recently rejected a similar effort by the press to use an executive agency as a clearinghouse for information regarding private individuals. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S.Ct. 1468, 1475 (1989). There is every reason to believe that the Court would take the same view of the judiciary disseminating information as well.

The law regarding access to documents used in litigation has been settled for decades and it has worked very well. As Justice Holmes said long ago:

It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

*E.I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917). These words were written regarding the right to protect trade secrets, just one type of information that would be endangered by a universal right of access. Holmes' position was well-founded in 1917 when the decision was rendered, and it is equally appropriate today, because once confidentiality has been destroyed, it can never again be restored.

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# THE DISCOVERY CONFIDENTIALITY CONTROVERSY

Richard L. Marcus\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## I. THE EVOLVING DEBATE

### A. *The First Amendment/Common Law Challenge*

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

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

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

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

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

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

9. *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1330-31 (D.C. Cir. 1985); *cf.* *Nixon v. Warner Communications, Inc.*, 433 U.S. 589 (1978).

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

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

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

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

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

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

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

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

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

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

16. *Id.* at 25.

17. *Id.* at 26.

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

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

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

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

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

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

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

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

22. *Id.* at 33.

23. *Id.* at 35.

24. *Id.* at 34.

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

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

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

*Id.*

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

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

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

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

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

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

30. *Id.* at 34.

31. *Id.* at 37.

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

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

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

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

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### B. *The Current Controversy*

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

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

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

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

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

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

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

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

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

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

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

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

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

This change is needed, according to its proponents, because state courts are sealing an increasing number of court documents that contain information vital to protecting public health and safety. In fact, this concern about an increasing number of sealed court records apparently stems from news media reports about a handful of cases that concerned environmental hazards, harmful consumer products, and other complex tort litigation. According to these reports, were it not for protective orders and court seals keeping this information confidential, the public would have learned about these potential threats to their health and welfare.

Despite the lack of a showing that current New York practices have affected public health and safety, and notwithstanding the fact that the public clearly did learn about the alleged threats to health and safety allegedly hidden in the sealed records discussed in the media, the allegation that courts are concealing information of this type is still of concern, although there is serious reason to doubt whether this assertion is true.

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

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

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

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

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

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

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

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

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

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

47. FLA. STAT. § 69.081 (1990).

48. *Id.* at § 69.081(3).

49. *Id.* at § 69.081(4).

50. *Id.* at § 69.081(6).

51. VA. CODE ANN. § 8.01-420.01 (Supp. 1990).

52. See Kolbert, *New York Bans Routine Sealing of Court Records*, N.Y. Times, Feb. 5, 1991, at A14 col. 1. For a general discussion of the New York provisions, see Carpinello, *Public Access to Court Records in Civil Proceedings: The New York Approach*, 34 ALB. L. REV. 93, 101-08 (1989) (describing proposed rule).

53. See *State Bar Votes to Oppose Court Rule on Sealing Files*, N.Y. L.J., Jan. 28, 1991, at 1.

54. 135 CONG. REC. H49 (daily ed. Jan. 4, 1989).

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

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

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

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

56. Legislation limiting restrictions on disclosure of discovered material has been introduced before the legislatures of a number of states: California (Senate Bill 711, March 6, 1991) Colorado (House Bill 91-1060, 58th Gen. Assembly); Mississippi (House Bill No. 87, Reg. Sess. 1991); Missouri (House Bill No. 1139, 85th Gen. Assembly); New Hampshire (SB-91, 1991 Sess.); New Jersey (Assembly Bills No. 3794 and 4110); Pennsylvania (Amendments to House Bill No. 1289, 1990 Sess.); South Dakota (House Bill No. 1252, 66th Sess., 1991); Virginia (House Bill No. 1203, Jan. 9, 1991); Washington (House Bill 1320, 1991 Reg. Sess.). In addition, reports indicate that similar legislation will soon be introduced in Illinois. See Blum, *Anti-Secrecy Drive Spreads in the States*, Nat'l L.J., Jan. 14, 1991, at 3, col. 2.

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

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

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

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

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

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

information.<sup>62</sup>

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

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

## II. THE PURPOSES OF COURTS AND PUBLIC ACCESS TO DISCOVERY

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

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We strongly believe that discovery should be used *only* for purposes of a given case—there should be a strong presumption that any materials or information disclosed in discovery would continue to remain the property of the disclosing party and should continue to be confidential.

We also believe that, consistent with the purpose of discovery and of avoiding complex ancillary disputes over discovery, protective orders should be entered upon a minimal showing of good cause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### A. Public Resources and Discovery

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

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

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

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

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

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

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

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

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

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81. 5 U.S.C. § 552 (1988).

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

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

84. Until 1970, parties seeking to inspect documents had to make a motion supported by good cause before obtaining discovery. This proved unworkable, and only about 25% of litigants seeking inspection complied, preferring instead to rely on informal agreements. See W. GLASER, *PRETRIAL DISCOVERY IN THE ADVERSARY SYSTEM* 2:0 (1968); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2205 (1970). The 1970 amendment allowed document production, like depositions and interrogatories, to be initiated without any involvement of the court. See *FED. R. CIV. P.* 34.

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

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

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

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

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

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

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

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

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

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

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

92. See, e.g., *Band's Refuse Removal, Inc. v. Borough of Fair Lawn*, 62 N.J. Super. 522, 163 A.2d 455 (1960) (court reverses because trial judge appointed "amicus curiae" to develop extra evidence and called 27 witnesses at trial while parties called only five).

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

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

### B. Public Scrutiny of the Court System

Beyond saying that discovery should be public because it occurs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.*

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

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

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

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

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

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

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

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

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

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

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

*Id.* at 1338.

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

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

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

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

126. See *supra* text accompanying note 22; see also *In re Reporters' Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985) (Scalia, J.) ("Traditionally, absent a statute or court order, even parties to the case did not have the right to inspect depositions taken at the behest of their opponents."); *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 359, 366 (E.D.N.Y. 1985)

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

### C. Public Interest in Discovered Information

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

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

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

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

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

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

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

130. *E.g.*, *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990) (newspaper could refuse to turn over unpublished photographs of accident that gave rise to products liability action); *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 263 Cal. Rptr. 733 (1990) (California newspaper's shield law protects reporter from having to disclose unpublished nonconfidential eyewitness information, but immunity can be overcome in criminal case where defendant demonstrates reasonable likelihood that information will be helpful to defense).

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

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

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

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

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

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

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

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

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