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

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

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

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

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

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

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

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

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

although in many instances it might be regarded as proper.<sup>142</sup>

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

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

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

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

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

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

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

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

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

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

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

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

147. FLA. STAT. § 69.081(2) (1990).

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

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

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

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

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

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

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

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

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

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

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

#### D. Countervailing Considerations

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

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

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

[A]ll of this kind of material ought to be available in the event a similar case is undertaken here or elsewhere. To put this in context, if I were a trial judge undertaking my first Wyeth vaccine case, at the time of my first status conference with the lawyers, and wherein I will hear of the mass of discovery that is to be undertaken, I would say, "go to Wichita, study the Graham case, familiarize yourselves with what both sides know is necessary in your case, and return here with an understanding that the discovery process can and will be refined and shortened."

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Henceforth, and as pertains to similar litigation filed here or elsewhere, on application by any attorney engaged and with the authorization of any trial judge — federal or state — wherein a similar case is filed or under way, the attorney's admission to the library is welcomed here.

Additionally, because the trial record of this case probably will be of interest to researchers, academics, institutions, consumer groups, members of the medical profession or associations, private or governmental, legal associations such as the ATLA and/or Defense Research Institute, and even law students, all in the interest of stimulating scientific and/or public discourse or learning regarding whooping cough vaccinations and their ramifications, they are all welcomed here.

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

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

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

157. *Id.* at 324.

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

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

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

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

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

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

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

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

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

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

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

164. "[R]ather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it . . ." *Seattle Times v. Rhinehart*, 461 U.S. 20, 36 n.22 (1984) (quoting *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 254, 654 P.2d 673, 689 (1982)).

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

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

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

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

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

### III. ACCOMMODATING ACCESS CONCERNS WITHIN THE EXISTING CONFIDENTIALITY FRAMEWORK

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

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

*Id.* at 87-88.

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

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

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

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

169. See *Judicial Conference Approves Plan to Improve Case Management*, THE THIRD BRANCH, May 1990, at 1.

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

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

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

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

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

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

### A. *The Standard for Issuance*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

187. UNIF. TRADE SECRETS ACT § 5 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

204. See *supra* text accompanying note 29.

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

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

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

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

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

### B. Access for Other Litigants

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

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

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

210. See *supra* text accompanying notes 93-99.

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

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

213. See *supra* text accompanying note 51.

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

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

gle accident.<sup>216</sup>

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

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

Against this background, the controversy about allowing dissemina-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

234. See *supra* text accompanying note 183.

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

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

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

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

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

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

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

239. See *supra* text accompanying note 175.

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

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

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

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

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

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

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

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

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

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

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

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

244. See *supra* note 236.

245. Consider the following provision identifying those who could receive covered information: "Attorneys associating plaintiffs' counsel in the future in any cause of action against Ford or its subsidiaries; however, the association must be genuine in the sense that plaintiffs' counsel's expertise and knowledge of the relevant documents is being sought, rather than simply obtaining a copy of the documents." F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 49 (quoting an order entered in *Munson v. Percy*, No. B-840,370 (Orange Co. Dist. Ct. Texas, May 13, 1986)).

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

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

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

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

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

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

249. See Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 243, 289 (1982) (suggesting that first plaintiff might be entitled to such windfall).

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

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

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

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

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

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

### C. Umbrella Orders

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

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

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

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tiffs shall not under any circumstances sell, offer for sale or advertise either the contents of protected documents or the fact that plaintiffs have obtained FORD confidential documents." F. HARE, J. GILBERT & W. REMINE, *supra* note 4, at 30 (quoting a protective order in *Munson v. Pearcy*, No. B-840,570 (Orange Co. Dist. Ct., Texas, May 15, 1986)).

255. See, e.g., the form proposed by the MANUAL FOR COMPLEX LITIGATION (SECOND) § 41.36 (1983).

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

257. MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.431 (1983).

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

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

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

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

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

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259. See Post, *supra* note 26.

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

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

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

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

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

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

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

#### D. Settlement

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

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

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

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

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

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

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

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uct liability cases,<sup>271</sup> and this article will assume that settlements are in general desirable events.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### IV. CONCLUSION

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

Nevertheless, this article highlights some important pressure points

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

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

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

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

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

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

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

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

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

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

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

# Texas Supreme Court Curbs Secrecy of Lawsuit Records

*Far-Reaching Action Focuses on Public Health, Safety*

By Sandra Torry  
Washington Post Staff Writer

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

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

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

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

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

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

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

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

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

For example, General Motors Corp. is defending against scores of lawsuits filed by victims of fiery car crashes, avoided public

debate about the safety of its gasoline tanks by obtaining protective orders preventing disclosure of key documents.

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

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

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

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

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

## Facts About Secrecy in Litigation

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

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

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

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

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

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

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

## Examples of Secrecy:

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

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

## **PRODUCT SAFETY:**

- **PFIZER HEART VALVE:** A 1985 report on a defective heart valve withdrawn from further use in 1986, but still implanted in some 50,000 people, has been withheld from the medical community and the public because of protective orders obtained by Pfizer, Inc. Nearly 250 deaths have been caused by the defective valves, according to Pfizer's own statements. Pfizer has paid millions of dollars to settle many lawsuits in return for secrecy orders.
- **BREAST IMPLANTS:** In 1989, requests to the FDA by a public interest group seeking copies of safety studies of breast-implant material were denied on trade secret grounds. Expert witnesses who testified in lawsuits are under protective orders and cannot reveal what the manufacturer's records show about the hazards of materials in breast implants used by thousands of women. This is an example of how a protective order can be detrimental to public health and safety.
- **AUTOMOBILE FUEL SYSTEMS:** A series of suits against General Motors alleged that the fuel system used in GM cars built before the early 1980's presented avoidable risks of fuel-fed fires. GM systematically obtained protective orders that successfully kept from public scrutiny internal documents showing that financial considerations outweighed safety concerns in the design and manufacture of its automobiles.

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

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

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

STATEMENT OF FREDERICK BARBEE  
Minong, Wisconsin

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

James Miller  
44 years old  
Printer  
Carlsbad, California

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

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

STATEMENT OF JAMES MILLER  
Carlsbad, California

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

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

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

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

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

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

1. The public should know that rear seat lap belts do not provide necessary protection in certain circumstances. Our family's present condition shows how devastating the injuries can be.
2. The public should know that, although Ford never admitted that its seat belt design was defective, it eventually treated our case as if a defect had been proved in court. Ford paid an amount of money that will support our handicapped son for the rest of his life.

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

Ed Keller  
43 years old  
Disabled former electrician  
Hughesville, Maryland

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

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

STATEMENT OF ED KELLER  
Hughesville, Maryland

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

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

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

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

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

# Legislation targets concealment in public hazard settlements

## Unjust bill blackmails business

By Mary A. Nordale

A fundamental principle on which American courts operate is that each case is unique. Whether the parties in a case are at trial or in appeal, the courts must deal with their claims and circumstances alone.

The system is designed to be fair to both parties. House Bill 171, introduced by the House Judiciary Committee, would change that.

This bill provides that a court may not enter an order or judgment that has the effect of concealing a public hazard or information concerning a public hazard. It also allows someone who is not a party, a stranger to the case, to contest the order or judgment.

A public hazard is an instrumentality "that has caused injury to a person or property, and includes a device, instrument, person, procedure or product, and a condition of a device, instrument, person, procedure or product."

The courts have adopted discovery rules to assist litigants, before trial, in acquiring as much information about the case they are trying as they need in order to be successful.

These rules work for the advantage of both parties, so no surprises occur in the courtroom. And at trial, the judge has the advantage of knowing as much as possible about the facts and the issues so that he or she can apply the law fairly and correctly. Thus the decision can reflect the general rules of civil behavior our society endorses.

In the course of the discovery process a judge may be required to enter a number of orders either compelling a party to disclose information, or protecting a party from having to disclose information that is clearly not relevant to the

issues. Often a court will order disclosure of information that is clearly not admissible in the case, but that may "lead to" admissible evidence.

By asserting that a public hazard is involved, any stranger to the case can contest the order and require either or both parties to turn over to the stranger all of the information covered by the order. A judge would be required to make a determination on what are called "ultimate facts" and means that the judge will have determined as the outcome of the trial before the parties ever get to a courtroom.

All of this means that an environmental litigation organization, an attorney interested in commencing a case, or even newspapers can intervene in a case in which a defendant — targeted by the environmental litigation organizations or the American Trial Lawyers, for example — may be involved to acquire information about the defendant and compel a judge to dictate the outcome of a case before it can be tried.

This bill would destroy the courtroom as a place in which to settle disputes. It would lead to a system of blackmail against target defendants, especially natural resource-based industries.

All a plaintiff would have to do is write a letter to his target defendant alleging injury because of a public hazard. The defendant would know that the choice is to settle out of court or defend against the plaintiff and any other person who wanted information about the defendant's business.

Because the costs of trying a case can be enormous, the target defendant may very well determine that peace with the plaintiff — even if the plaintiff does not have a good case and would not win — may be less expensive than a defense.

What business in its right mind would want to establish itself in Alaska knowing that it faces this kind of blackmail? What business in Alaska already established can survive? Chevron has shut down its refinery on the Kenai Peninsula, stating that one cause is the regulatory climate.

We have lost jobs and a significant part of Alaska's economy. Consider what would happen if HB171 passes. Even the local hardware store would have to reconsider the advantages of staying in business.

Mary A. Nordale is a Sitka Alaskan, former Assistant U.S. Attorney and assistant district attorney in Fairbanks, and former Commissioner of Revenue, now in private practice in Juneau. Comments expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.

## Legislation exposes secrets

By Michael J. Schneider

It has been observed that American industry is motivated by little more than money. The "bottom line" is not the only line, but it's the only line that seems to get much attention. While this approach has provided us with industrial superiority, a high standard of living, and considerable hope for the future, it carries with it some tragic and avoidable consequences.

If the cost of correcting a product defect or a dangerous design is greater than the benefit to that industry or business, then the problem goes unremedied. Corporate wrongdoers continue to reap the monetary benefits of their dangerous products, while people, their families and the public bear the burden. Few perceive this reality as keenly as those of us whose privilege it is to represent the maimed and the injured against the giants of American industry.

One of our greatest frustrations as plaintiffs' attorneys is that we are frequent and unwilling participants in the conspiracy of silence that surrounds litigation over public hazards.

The consuming public and government regulators are kept unaware of dangerous products, safety violations and predatory business practices because of the widespread practice of making settlements and facts, obtained in the course of litigation, secret from all but the parties to the case.

The conflict arises very simply. Our first duty is to our individual client's interests. When a corporate wrongdoer finally buys peace at the courthouse steps (or on appeal after a favorable verdict), silence is customarily demanded by the wrongdoer.

Plaintiff and plaintiff's counsel are compelled to promise that they will not disclose the nature or terms of the settlement reached, nor the facts obtained or disclosed during the course of

the lawsuit. A maimed and injured plaintiff rarely declines a fair settlement offer to hold out for the "public's right to know."

Most of us in the same circumstances would make the same decision. Unfortunately, the consequence is that the most hideous and widespread misconduct and public danger remains secret, while the judicial system pays an outrageous price processing claims. This is because each new plaintiff must replot the same ground in order to obtain the facts and circumstances necessary to develop their case.

Many meritorious cases are not prosecuted because of the expense and difficulty involved. Corporate misconduct goes unpunished and consumers are left without the information they need to promote the safety of their families.

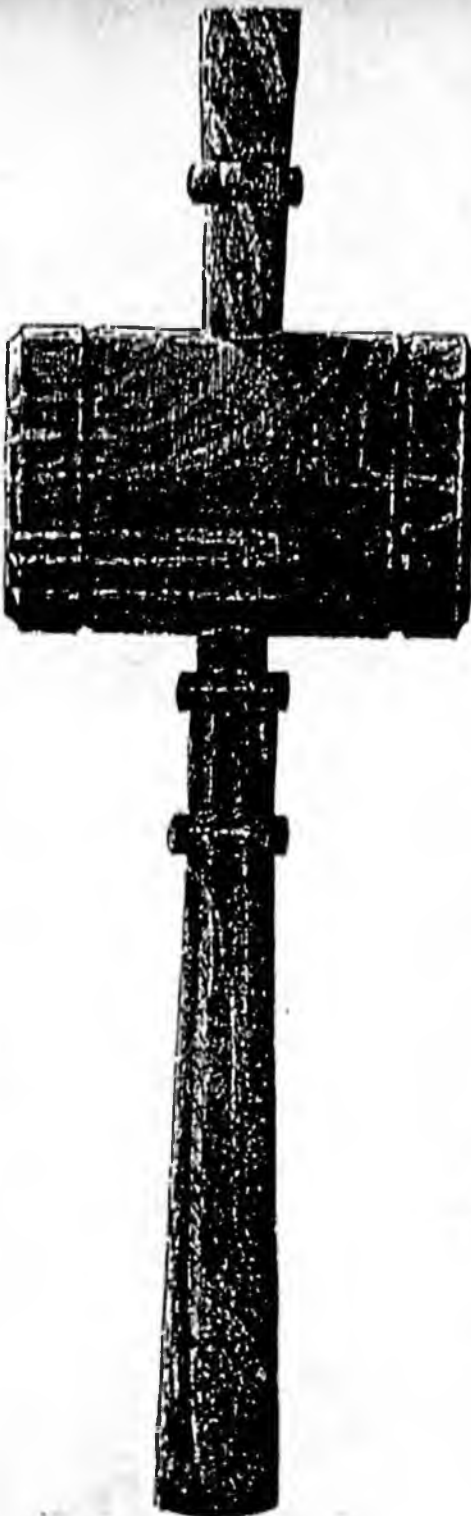
Fortunately for all of us, a move is afoot to end this conspiracy of silence. The House Judiciary Committee, under the leadership of Rep. Dave Donley, has introduced House Bill 171. That legislation is in the process of making its way through the House of Representatives and is currently before the House State Affairs Committee.

While this bill may be subject to criticism because it doesn't go far enough, it will alter Alaska's public policy in favor of the consumer and in favor of openness.

This bill needs our support to ensure that corporate wrongdoers will be unable to hide their misconduct behind a check at the courthouse steps.

Support for this legislation can be easily expressed. Your local legislative information office will be happy to send a short public opinion message to your legislators or to the entire legislature for free. Do it today. Opposition from the insurance industry, the automotive industry and the pharmaceutical industry is already being heard in Juneau. Now let them hear from us, the public consumer.

Michael J. Schneider is former chairman of Alaska Action Trust, a committee of trial lawyers opposing reductions in plaintiffs' rights and other changes in the civil justice system. Comments expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.



ANCHORAGE TIMES, MAY 5, 1991

## End secret hazards

**T**O ITS credit, the Florida Senate has voted 38-0 to approve the Public Hazard Disclosure Act. The House ought to echo that zeal, because the bill would do much to ensure Floridians' safety.

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

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

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

Consider the Pfizer heart valve, withdrawn from use in 1986, though 50,000 are still implanted. A 1985 report on the valve's defects was withheld from doctors and the public because of secrecy orders attached

### **THE PUBLIC VS. THE COURTS**

to settlements. Pfizer admits that its device caused nearly 250 deaths.

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

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

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

June 4, 1990

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

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

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

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

*—Ann Hagedorn contributed to this article.*

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

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

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

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

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

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

Keller said that, as part of the settlement, he had to agree to keep the financial award secret. "That keeps me from saying anything bad about the company,

which isn't fair. That means no one will know just how serious my case was, but I have a family to support and that's why I agreed."

James Miller of Carlsbad, Calif., also was asked to keep his out-of-court settlement secret. In 1988, his 11-year-old twin sons were severely injured in a head-on collision while wearing rear-seat lap belts in a Ford Escort. One son died and the other is paraplegic as a result of the accident.

Miller agreed to keep the settlement amount secret if Ford would alert its customers to the belt problem and provide shoulder harnesses at a reasonable cost. Miller said he refused to keep the \$8 million settlement secret after Ford refused to alert the public.

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



Ed Keller

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

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

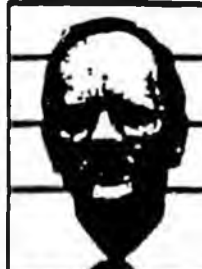
Fred Barbee of Minong, Wis., blames the corporate ability to build a wall of secrecy around defective products for the death of his wife, Carol, in April 1988.

Barbee, in recent testimony before a House investigative committee, said that his wife had a Bjork/Shiley artificial heart valve implanted in May 1982 and had no knowledge that the valve could fracture until the day his wife died. If he had known of the potential problem, Barbee said, instead of taking

his wife to a local hospital, he would have taken her to a hospital where open-heart surgery could have been performed, which may have saved her life.

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

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



Fred Barbee

Lawyers of America:

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

► Requests to the Food and Drug Administration by public interest groups for safety studies of breast-implant material were denied on trade-secret grounds. Expert witnesses who testified in lawsuits are under protective orders and cannot reveal what they know about the hazards of materials in breast implants used by thousands of women.

► Physicians have avoided disciplinary charges by their peers because sealed court files remove all records of civil suits. In the District of Columbia, for example, records of a suit alleging that a doctor had sexually assaulted a patient during a gynecological examination were sealed after the doctor settled the case and admitted having a sexual relationship with his patient.

— Barbara Reynolds



James Miller

# The Washington Post

FRIDAY, SEPTEMBER 15, 1989 A31

*Russ Herman*

## No More Dirty Little Secrets in The Courts

At long last, two court orders granting public access to vital public documents signal some headway in uncovering secrecy in our nation's courts. ["Secrecy Rules Eased in Maryland Cancer Lawsuits," Aug. 14; "Release of Sealed Records Ordered in Xerox Toxic-Chemical Case," Aug. 17.]

When a group of rubber workers sued their former employer because they had developed cancer by toiling, unwarned and unprotected, with toxic chemicals, U.S. Magistrate Deborah K. Chasanow in Baltimore refused to keep court records secret. In earlier cases, the employer had obtained a secrecy order for documents that dealt with ventilation and whether the company was obliged to disclose the hazards to its workers.

The secrecy orders had barred OSHA and union officials from using the facts—already documented and sitting in company files. These facts could not be used to prevent further injury, even after the original cases were settled out of court.

But now Chasanow has ruled that only documents that disclose actual chemical formulae and manufacturing processes may remain secret—not the essential facts, which the public deserves to know.

In another case, New York State Supreme Court Justice Joseph Fritch ordered release of sealed court records involving settlements last year between Xerox Corporation and two New York families. The families alleged that their children had contracted cancer and other serious illnesses from a toxic-chemical release by the firm. Fritch ruled that health authorities may have access to "anything under seal that may be helpful and beneficial for the protection of the public health."

So, at last, attorneys and public authorities committed to righting wrongs can obtain relief from secrecy orders. Wrongdoers who want to cover their tracks will have to think twice before labeling their negligence a "trade secret" or otherwise hiding vital facts from public view.

As The Post documented so well in a series of articles last fall ["Public Courts, Private Justice," Oct. 23-26, 1988], secrecy is rampant in court proceedings. Litigation documents—entire court files—are often hidden from public view, even though they may involve critical public health, safety and environmental concerns.

Litigators who have painstakingly uncovered crucial safety information about playground equipment, grain elevators,

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

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

Such secrecy undermines the right to know of every American citizen. And it keeps secrets that can kill hidden from the public.

America's courts are public institutions. Court records and materials obtained during litigation are not generally kept secret.

But confidentiality restrictions and secrecy orders arbitrarily imposed on victims and their attorneys as a condition of settling a case can shut off public access to health, safety and environmental concerns. Injured persons are pressured into promising, in exchange for a satisfactory settlement, to keep mum about the matter in litigation.

Without Chasanow's reexamination, OSHA, union officials and other workers at the plant who have also developed cancer would need to try to uncover the same information again and again, at appreciable expense, as if the earlier cases never existed. Without Fritch's ruling, the health consequences of toxic releases might have remained hidden from public view for all time.

The courts, and what goes on within them, are the province of the people. Private litigants must not be allowed to determine what the public will see. Judges must start with a presumption of public access. That presumption should not be waived except in very extraordinary circumstances and for very limited purposes.

Where secrecy in litigation is concerned, the path toward justice begins with a single step. The Association of Trial Lawyers of America recently took such a step. We passed a resolution urging attorneys to resist secrecy demands that are contrary to the public interest. We urge judges to refuse to enforce new secrecy orders that do not meet stringent standards to protect the public interest, and to reconsider past secrecy orders that are clearly no longer needed.

The actions of Chasanow and Fritch help to safeguard public safety. All judges and lawyers should follow their lead.

*The writer, a New Orleans attorney, is president of the Association of Trial Lawyers of America.*

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# Secrecy Rules Eased In Md. Cancer Lawsuits

By Benjamin Weiser  
Washington Post Staff Writer

Lifting a veil of secrecy that has lasted nearly a decade, a federal magistrate in Baltimore has removed most confidentiality restrictions imposed by an earlier judge in lawsuits alleging that workers at a Western Maryland tire plant contracted cancer after improper exposure to toxic chemicals.

The previous confidentiality orders, which had covered thousands of Goodyear Tire & Rubber Co. documents and were agreed to by all parties in the case, were similar to the broad secrecy procedures that have become a routine practice in civil lawsuits around the country during the past 15 years.

Under court rules, secrecy orders are designed to protect a company's trade secrets. In practice, however, many overburdened judges have tended to impose blanket secrecy at the beginning of lawsuits and to allow that secrecy to continue after settlement of cases. As a result, documents that deal with significant questions of safety and health have been kept out of public files.

U.S. Magistrate Deborah K. Chasanow ruled April 20 that only those documents dealing with specific manufacturing processes and chemical formulas at Goodyear's Kelly-Springfield plant in Cumberland, Md., could be kept secret. Attorneys for the workers publicly filed many of the documents June 29 in U.S. District Court in Baltimore.

Secrecy has been an issue in the Goodyear litigation since it began in 1980. Goodyear originally sought a protective order covering every document it provided to the workers, and Martin H. Freeman, attorney for the workers, says he consented because he felt it would expedite settlements. In 1986, Goodyear confidentially settled 34 cancer suits for between \$10 million and \$15 million, according to two sources. In settling, the company admitted no wrongdoing.

Freeman alleged in court papers that the documents show negligent behavior by company officials. He cited a document in which a company

doctor overruled a plant supervisor who said the company had a legal responsibility to provide workers with more detailed information about certain toxic chemicals.

Freeman wrote, "A company operating within the bounds of moral, ethical and legal propriety would never trade off the health of its workers for dollars of profit. Goodyear has always done so."

Goodyear officials reject any link between the illnesses and exposure at the plant. They said epidemiological studies by the National Institute for Occupational Safety and Health and by Goodyear have found no excess cancers at the plant.

Goodyear officials attributed the illnesses to other factors, such as smoking and diet. They accused Freeman of drawing a distorted and misleading picture through selective use of the documents. They said the company frequently took corrective action in response to some of the memos cited by Freeman.

Company lawyers also said that the firm used court secrecy measures to protect trade secrets, not to avoid public scrutiny. "It just wouldn't make any sense to do that and I'm confident we have not done that," said Goodyear lawyer Jonathan Dean.

Peter Infante, director of the office of standards review for the Occupational Safety and Health Administration (OSHA) in the Department of Labor, said he is troubled generally by private settlements and court orders that restrict access to information that might aid government regulators in determining links between illness and chemical exposure in the workplace. "Shielding that information is not in the public interest, nor in the interest of safety or health," Infante said.

Louis Beliczky, director of industrial hygiene for the United Rubber Workers union in Akron, said he had been aware of the Goodyear litigation but had no access to the documents because of the confidentiality orders.

"It would have been helpful for us to have so it could be used in a preventive manner," Beliczky said.

By the early 1970s, Freeman

says. Goodyear knew that many chemicals used in the tire-making process were toxic and in some cases carcinogenic, but did not reveal what it knew to workers.

In a Nov. 19, 1971, memo, a Kelly-Springfield official reported receiving a package of "special handling precautions" sheets from Goodyear's chief chemist, detailing the safe and proper handling of hundreds of toxic chemicals at the Cumberland plant.

"In the past the information contained in these reports has been treated as confidential," wrote W. L. Smelser, then manager for plant security and safety. "It is now my belief that under OSHA [regulations] we are committed to release such information to our employees . . . ."

"I am well aware of the effect the release of this information may have and my remarks are my interpretations of the law as I read it," Smelser said. "By copy of this letter I am asking for a top management judgment and decision as to my proposals."

Goodyear officials later responded that the precaution sheets were for the "exclusive use of management personnel" and did not have to be "posted, distributed, or made available to employees."

Goodyear lawyers say plant officials always permitted employees to inspect individual precaution sheets but did not allow wholesale copying of the material because it could disclose trade secrets.

Other memos from 1972 deal with ventilation systems, which are critical to removing potentially dangerous fumes and particles from the air. One memo states that surveys of plant-wide air handling equipment "reveal a corporate wide inadequate performance record."

"No longer can we afford to treat this equipment on the basis of an 'out of sight, out of mind' philosophy," wrote E.R. Moats, then manager for mechanical engineering, on May 11, 1972.

Goodyear officials said chemical exposure levels at the plant have always been within mandated limits and that Moats's memo led to corrective steps.

# Release of Sealed Records Ordered in Xerox Toxic-Chemical Case

By Benjamin Weiser  
Washington Post Staff Writer

Citing the need to allay public fears, a New York State Supreme Court justice yesterday ordered the limited release of sealed court records in a \$4.75 million settlement reached last year between Xerox Corp. and two New York families who alleged their children had contracted cancer and other serious illnesses from a toxic-chemical release.

Justice Joseph G. Fritsch, who had sealed the case at the request of all parties, ruled that county and state health authorities can have access to "anything under seal that may be helpful and beneficial for the protection of the public health."

The New York attorney general's office and local authorities had sought, along with Xerox, the opening of records after publicity about the confidential settlement sparked concern that important health and environmental data were unavailable to the public. Scientists say that court secrecy is making it more difficult to track the health effects of exposure to toxic chemicals.

Sen. Daniel Patrick Moynihan (D-N.Y.), who had called for the unsealing of the records at a hearing in Rochester, N.Y., last March, said yesterday that he welcomed the court's decision.

"Locking away vital health and environmental data serves no one, and throws up roadblocks to legitimate scientific inquiry into chemical contamination," Moynihan said.

In his decision, Fritsch criticized Xerox for its about-face in seeking release of the records. He said the request by Xerox, which had sought the secrecy in the first place, "lacked good faith and sincerity" and was "motivated by a self-serving purpose, and is a face-saving attempt to show good faith only after the print media disclosed [the secret settlement]."

However, Fritsch said he would

act on his own inherent judicial power and in "the interest of justice" and "the interest of public welfare and good" to release the records.

Xerox officials declined to comment late yesterday, saying they had not had time to review the case. "We are aware of the opinion and received a copy of the ruling late this afternoon. We have yet to review it and aren't in a position to comment at this point," said Peter S. Hawes, a Xerox spokesman.

Attorneys for the families and the state could not be reached last night for comment. Monroe County, N.Y., Deputy County Attorney Mark C. Davison said, "We're happy with the decision."

William P. Polito, a Monroe County legislator who had criticized the

settlement and filed a friend-of-the-court brief urging full disclosure of the records, said, "I think the judge made it very clear as to where the fault lay as to the facts not having gotten to the public or to governmental authorities. The New York State Department of Health has made it very clear that it needs the facts to protect the interests of the public."

In April 1988, Fritsch sealed records of the lawsuit and prohibited the parties from discussing the matter as part of a comprehensive settlement between Xerox and the two families. The families alleged that discharges into the groundwater and air from Xerox's Webster, N.Y., plant had damaged the health of their children.

The sealed lawsuit linked the illnesses to the industrial solvent trichlorethylene (TCE), a suspected carcinogen that Xerox in 1985 said had leaked into the groundwater over a period of years. The lawsuit also alleged that airborne emissions may have been a factor.

Medical specialists hired by lawyers for the families said they would testify that the chemical releases were a factor in several cases of neurological impairment and, in the case of one teenager, cancer of the lymph glands.

One specialist, John P. Morgan, who wrote a key report analyzing the health impact of the chemical exposures and drawing the connection between the discharges and the illnesses, last night expressed relief

that his report might now be seen by appropriate health and environmental officials.

Morgan, chief of pharmacology at City University of New York medical school and an expert in clinical toxicology, said he had been troubled, as a scientist and a researcher, by the secrecy surrounding his findings.

"I have been frustrated in my inability to share my report, and provoke the needed discussion and feedback from others in the scientific community," Morgan said.

Xerox strongly disputed any causal link between the TCE spill and the illnesses and said that its air emissions are filtered and meet New York state standards. In settling the case, Xerox neither admitted nor denied fault.

Fritsch, in his ruling, appears to have tried to seek an accommodation between the privacy interests of the families and the public concerns.

At a recent hearing, after E. Gail Suchman, an assistant New York attorney general, argued that the confidentiality in the case was "contrary to public interest and perhaps contrary to state law," Fritsch told one of the family members that there would have to be a "balancing" of the issue.

Fritsch yesterday limited his order to epidemiological and environmental data, reports and tests, and did not authorize the release of the children's medical records. The New York State Health Department had sought the release of the children's records, telling Fritsch in court papers that "children may react differently than adults to environmental pollutants." It promised to review the material on a confidential basis.

The Washington Post  
August 17, 1989

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# Secrecy in Toxic-Spill Case Assailed

*Review of Xerox Settlement May Spur Legislation for Disclosure*

By Benjamin Weiser  
Washington Post Staff Writer

ROCHESTER, N.Y., March 21— Sen. Daniel Patrick Moynihan (D-N.Y.) and New York state health officials today sharply criticized a court-approved secret settlement involving a toxic spill at a Xerox manufacturing plant near here, citing the case as an example of how such legal secrecy can inhibit scientific and medical inquiry into questions of health and safety.

Moynihan, who chairs an Environment and Public Works subcommittee, suggested at a hearing here that legislation may be necessary to ensure that legal settlements in environmental lawsuits do not cut off the flow of information to communities and government agencies.

"There is something unseemly about public health information, environmental health information, not being available in any circumstances," Moynihan said.

As a result of the secret settlement, Xerox agreed to pay \$4.75 million to two families who had alleged that discharges from Xerox's plant in Webster, N.Y., had damaged their health. Xerox also relocated the families and bought their houses, which are now vacant. The judge sealed all records in the case and prohibited the parties from discussing the matter.

At today's hearing, Xerox general counsel Richard S. Paul said the company will now support a motion to unseal the records if it is made by a health or government agency. Moynihan praised the com-

pany for its willingness to open the records.

The settlement came after medical specialists, hired by lawyers for the two families, said they would testify that discharges from the plant were a factor in several serious illnesses in the families, including neurological impairment. A teen-ager was found to have cancer of the lymph glands.

The sealed lawsuit linked the illnesses to the industrial solvent trichloroethylene (TCE), a suspected carcinogen that Xerox in 1985 said

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*"There is something unseemly about public health information ... not being available in any circumstances."*

—Sen. Daniel Patrick Moynihan

had leaked into the ground water over a period of years. The lawsuit also alleged that airborne emissions may have been a factor. Xerox strongly disputed any causal link between the TCE spill and the illnesses and said that its air emissions are filtered and meet New York state standards. In settling the case, the company neither admitted nor denied fault.

Moynihan held the hearing to review the Xerox settlement, disclosed last week in The Washington Post, as well as a toxic contamina-

tion at a Kodak plant here. Both Xerox and Kodak officials assured Moynihan that they were cleaning up the contamination and stressed that they believe there have been no health problems.

In reporting the details of the secret Xerox settlement, The Post quoted environmental and public health officials as saying that the increased use of court secrecy is making it more difficult to collect information about the effects of human exposure to toxic chemicals.

Health officials for Monroe County, which includes Rochester and the town of Webster, told Moynihan that they had known nothing about the illnesses alleged in the Xerox lawsuit until The Post's article appeared.

Thomas F. Jorling, commissioner of the New York State Department of Environmental Conservation, said that secret settlements are "antithetical to the public right-to-know concept, which holds that the public is entitled to know the identity and the dangers associated with chemicals used by industry in their community."

"Shielding information from the public domain creates obstacles to scientists seeking to discover the true effect of exposures to toxics and to regulators like myself seeking to develop comprehensive regulatory and enforcement strategies," Jorling said.

Xerox officials suggested to Moynihan that The Post's article had mischaracterized the secrecy order. They said it applied only to the terms of the settlement and did not restrict family members from disclosing information.

THE WASHINGTON POST  
MARCH 22, 1989

LAW

# Newport Trial Nears Close; Could Affect the Use of RICO

**COLIEN**  
THE WALL STREET JOURNAL  
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other Princeton/Newport officials never created the government out of taxes and that none of the defendants had derived any financial benefits from the trades.  
"Would it be arrogant to commit a crime where you got no money?" Mr. Wells asked jurors. "That wouldn't be arrogant; that would be insane," he said.  
Mr. Wells said Mr. Regan believed the trades "were legal then and he still thinks they're legal now." Citing the tape recordings of phone calls that the government has relied on to present the bulk of its case, Mr. Wells said that most of Princeton/Newport's phone calls were recorded by the firm itself. "Why would you do criminal acts on a taped phone?" Mr. Wells asked jurors.

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

## Administration Backs Legislation to Stiffen Antitrust Penalties

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**BY A WALL STREET JOURNAL STAFF REPORTER**  
WASHINGTON—The Bush administration backed pending legislation that would increase the maximum fine for corporate antitrust offenders in criminal cases to \$10 million from the current \$1 million.  
"This increase in penalties will send a strong signal to those who intend to defraud American consumers or the federal government through criminal antitrust conspiracies," Attorney General Dick Thornburgh said in a statement. Criminal fines for corporate antitrust violations haven't been raised for 15 years.

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

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

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

## Plaintiffs Lawyers Move to Preserve Exchange of Data

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

**BY MILO GETELIN**  
STAFF REPORTER OF THE WALL STREET JOURNAL  
BOSTON—Personal-injury lawyers who gathered here last week had one thing uppermost on their minds: preserving public access to company files in product-liability cases.

More than 2,750 plaintiffs lawyers came to the annual convention of the Association of Trial Lawyers of America, which has 61,000 members nationwide.

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

Increasingly though, defendants in such suits have responded by seeking—and often obtaining—protective orders from judges to restrict which documents can be turned over and who can see them. Protective orders, obtained usually on grounds that the requested material contains company trade secrets, have been issued in a number of product liability suits, including litigation over General Motors Corp.'s design of fuel tanks in the early 1980s, BIC Corp.'s disposable butane lighter and Hoffmann-La Roche Inc.'s anti-acne medication Accutane.

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

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

The Association of Trial Lawyers of America members spent much of the week attacking the insurance industry, which hires defense lawyers in many instances and is responsible for many of the civil-liability reform initiatives taking place nationwide. So it came as some surprise late

last week to find an ally of the enemy unwittingly camped one floor below the association's convention site in the Marriott Colony Place.

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

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

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

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

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

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

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

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

## WHO'S NEWS

### AG's New Chairman, Vita, Expansion in U.S. and Japan

**KC FLETCHER**  
THE WALL STREET JOURNAL  
Germany—When  
Schering AG's

related to the U.S. concerns R.P. Schering Corp. and Schering-Plough Corp. Its "more international in their approach than any other company here," says Kiran Dholjani,

### D'Agostino Named Chief And Chairman of Pantera's

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

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

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

By Matthew Winick

# Protective Orders Come Under Attack

## Plaintiffs Get Judges to Open Court Files

By PAUL M. BARRETT

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

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

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

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

### Plaintiff's View

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

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

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

During the pre-trial investigation known as discovery, Mr. Picadio obtained accident reports from the forklift maker, Tow Motor Corp., which he says demonstrate the link between the forklift's design and numerous other mishaps similar to his client's. Determined to publicize information about what he considers to be a dangerous product, he persuaded the judge to force Tow Motor to turn over its safety documents without any restrictions.

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

"I don't see how the public interest is served by defendants keeping these kinds of documents close to the vest," Mr. Picadio says.

Courts are beginning to share that view. "The whole idea of secrecy in a public court system is an abomination," says U.S.

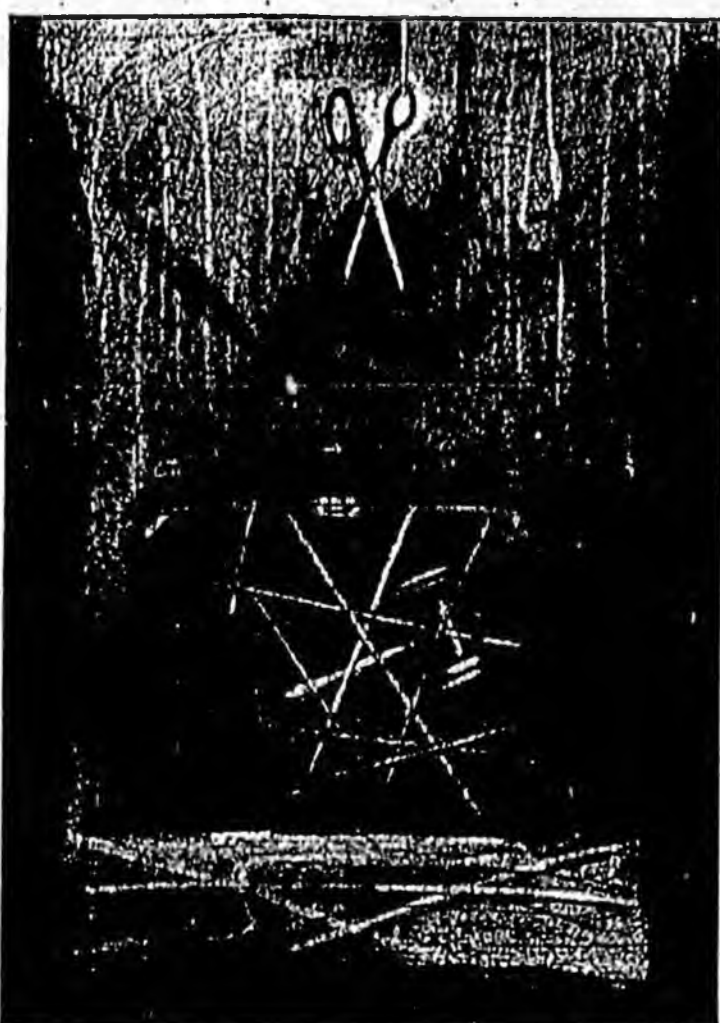


Illustration by Greg Szymanski

observes "more and more" plaintiffs' lawyers refusing to acquiesce in protective orders and trying to overturn established ones. "Where there are disputes," he adds, "I now tend to refuse protective orders."

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

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

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

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

This kind of teamwork links defense lawyers, who say it encourages irresponsible suits. The danger, says Edward Madeira, a corporate defense attorney with the Philadelphia law firm Pepper, Hamilton & Schertz, is that a single, highly publicized

particular product" before all of the facts have been examined in court.

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

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

A U.S. district judge in Wichita, Kan., recently watered down an earlier order

protecting internal research records of Wyeth Laboratories, a division of American Home Products Corp. In that case, which is pending on appeal, Wyeth lost a \$15 million jury verdict to the parents of a girl who suffered brain damage allegedly caused by her taking a whooping cough vaccine the company formerly produced.

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

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

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

### Bic's Battles

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

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

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

## Brokers Offer Higher Rates On Bank CDs

**YOUR MONEY MATTERS**

By ALEXANDRA FLEMM  
*Staff Reporter of THE WALL STREET JOURNAL*  
Wall Street securities firms are putting their marketing muscle behind certificate of deposit.  
Brokers are doing big business by acting as shopping services, searching out the

houses offer 7.9% to 8.35%. That compares with an average of 6.9% at banks and thrifts, according to Bancquote, a New York information services firm.

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

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

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observes "more and more" plaintiffs' lawyers refusing to acquiesce in protective orders and trying to overturn established ones. "Where there are disputes," he adds, "I now tend to refuse protective orders."

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

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

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

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

This kind of teamwork links defense lawyers, who say it encourages irresponsible suits. The danger, says Edward Madelira, a corporate defense attorney with the Philadelphia law firm Pepper, Hamilton & Scheetz, is that a single, highly publicized case can ignite "a national crusade against

a particular product" before all of the facts have been examined in court.

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

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

A U.S. district judge in Wichita, Kan., recently watered down an earlier order

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

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

## Brokers Offer Higher Rates On Bank CDs

YOUR MONEY MATTERS

By ALEXANDRA HICKS  
Staff Reporter of THE WALL STREET JOURNAL

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

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

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

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

### Loss Leader

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

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

Similarly, Columbia Savings & Loan of Beverly Hills, Calif., offers investors depositing \$1,000 to \$9,999 a three-year CD with a rate of 8%, while some brokerage houses offer rates of 8.5% to 9% on three-year Columbia CDs.

On three-month CDs, the top-selling maturity at brokerage houses, the securities

houses offer 7.9% to 8.35%. That compares with an average of 6.9% at banks and thrifts, according to Bankquote, a New York information services firm.

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

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

### Double Penalties

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

With brokerage-house CDs, the banks and thrifts ultimately backing them might

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

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

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

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

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

## Firms Use Copyright Law To Keep Documents Secret

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

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

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

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

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

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

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

Under the law, any "original work of authorship" expressed in a tangible me-

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

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

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

—PAUL M. ROBERTS

10/31/89

# Lawyers Launch Fight Against Court Secrecy

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

By Benjamin Welser  
Washington Post Staff Writer

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

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

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

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

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

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

Defendants usually seek broad confidentiality orders to prevent the dissemination of trade secrets. Plain-

tiffs' attorneys often agree in order to expedite settlements.

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

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

A defense lawyers group criticized the campaign against court secrecy and said it has its own pitfalls, such

as creating additional litigation costs and delays. Moreover, courts already have a method of regulating secrecy, the defense lawyers said, since judges are supposed to weigh the issues involved.

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

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



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**Train Car Owner,  
Lessee Not Liable  
In Ohio Wreck**

By JAMES P. MILLER  
And WAYNE E. GREEN

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

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

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

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

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

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

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

**SUIT AGAINST GM** to test new Texas rules limiting protective order

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

General Motors Corp. is being sued by William and Erma Dunshie, who were injured in an automobile accident in May 1969. The plaintiffs contend the seat belt system in their 1967 Buick Le Sabre was defective, and they accuse GM of negligence and breach of warranty. General Motors is asking the court to withhold from public scrutiny certain safety test results and other information plaintiffs are seeking through pretrial discovery procedures.

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

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

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

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

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

Brought by Anne Morrow Donley and the Virginia Group to Alleviate Smoking in Public Inc., the suit alleged that Philip Morris is not in compliance with Virginia's new indoor smoking law, which requires "No Smoking" signs in public areas such

as cashier lines. The law provides for a \$25 penalty for convictions.

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

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

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

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

—Allo Geytin contributed to this article.



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

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

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

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

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

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

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

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

In 1981 and 1985 Judge Gray issued a series of summary judgments, effectively throwing the case out. But last year the Ninth U.S. Circuit Court of Appeals reversed his findings, reviving the case.

After a 10-month investigation, the plaintiffs' attorneys disclosed in their recent motion to disqualify the judge that

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

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

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

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

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

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

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

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

Richard P. Myers, Alan I. Reich and

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

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

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

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

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

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

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

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

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

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

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

—Ann Hagedorn contributed to this article.

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

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

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

In corporate trading Friday on the New York Stock Exchange, PacifiCorp closed at \$21.50, unchanged.

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

## Manville Corp. Told to Consider Changes in Trust

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

By WADE LAMBERT  
AND MARJ CHARLIER

Staff Reporters of THE WALL STREET JOURNAL

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

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

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

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

#### Temporary Cover

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

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

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

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

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

#### Manville Statement

"We are pleased that the judges agreed that the most important element of the plan is the provision which prevents suits against the company and directs all settlements to the [trust]," Manville said in a statement. Manville said the injunction, which was part of the bankruptcy reorganization plan, allows the company to provide maximum value to shareholders, including the trust, which holds 90% of the company's common stock and eventually could hold 99%.

"Suits against Manville would substantially reduce the value of the trust's assets," the company said. Officials said they wouldn't be able to comment further until the middle of this week.

In their order, the judges also said,

# Majority Right, Majority Be Rich.



# Keeping Court Records in the Open

## *Texas Supreme Court Adopts New Rule*

Lloyd Doggett

**W**hen a private dispute is taken before a city council or a regulatory agency or enters the halls of Congress or a state legislature, it is no longer purely private. The public finances these institutions and thus has an interest in what is occurring in them.

The same can be said with regard to the public's interest in decisions made in the third branch of government—the judiciary. Although a particular dispute may be essentially private, judicial decisions often have far-reaching public-policy consequences.

In November 1987, the *Dallas Morning News* published a series of articles<sup>1</sup> about sealing civil court records in Dallas County. Its investigation disclosed that since 1980, sealing orders had been entered in over 200 non-child-related cases. In each instance, trial judges had

sealed court records without any prior notice to the public to allow its interest to be considered.

Judges had sealed the records without hearings and without any showing that secrecy was proper. Many overly broad orders closed entire files rather than only those parts that could justifiably have been sealed. Orders explaining the reasons for sealing had often also been sealed. Many records had apparently been closed in perpetuity because the orders specified no expiration time. Since the *Dallas Morning News* survey did not analyze protective orders restricting access to unfiled discovery in otherwise unsealed files, it represents only a small segment of secrecy directives.

During 1988, the nationwide implications of such secrecy for the public were explored in incisive series of articles in the *Washington Post*<sup>2</sup> and *Newsday*.<sup>3</sup>

### Need for Action

There is no reason to believe that the Dallas County experience was unique or even substantially different from that in other parts of the state. This situation clearly indicated the need for a comprehensive, uniform rule governing the sealing of civil court records.

Last year, legislation sponsored by Representative Orlando Garcia of San Antonio was enacted to mandate the Texas Supreme Court to adopt guidelines for judicial use in determining whether civil records should be sealed.

The court submitted the issue to a subcommittee of its standing rules advisory committee. Public hearings were held before the subcommittee, the advisory committee, and the supreme court itself. Participants included diverse representatives from the bar as well as public interest and citizen groups. After considerable debate, the advisory committee made a recommendation that was then revised substantially by the supreme court.

As finally approved, Texas Rule of Civil Procedure 76a is, therefore, a product of debate and compromise. It was adopted by the narrowest possible margin—a 5-4 vote—after the court was bombarded with communications suggesting that greater openness would produce the most dire economic consequences. The Product Liability Advisory Council, the Texas Association of Defense Counsel, and the American Tort Reform Association appear to have taken a lead in this opposition.

*Lloyd Doggett is a justice of the Supreme Court of Texas. This article is adapted from his presentation at Keeping Secrets: Justice on Trial, a conference sponsored by ATLA and the Society of Professional Journalists in late April.*

Rule 76a begins by affirming the clear presumption that all civil court records are open to the public. It is up to the person who wants to seal records to shoulder the burden of proof in every case, whether in the original request for sealing or in any later attempt to modify or vacate a sealing order. This burden is not that of showing only "good cause." Rather, it is to show a specific, serious, and substantial interest. The judge must find that this interest outweighs any probable adverse effect on the public health and safety.

In the rare cases where records should be sealed, the court must first satisfy certain substantive and procedural due process requirements. Nor can the court seal any order or motion regarding sealing itself. Paragraph (1) of the rule defines the standard by which trial courts must be guided in considering sealing requests.

The movant always has the burden of proof to establish all of the following by a preponderance of the evidence:

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

(1) this presumption of openness;  
(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means that sealing records will adequately and effectively protect the specific interest asserted.<sup>4</sup>

The trial judge is thus called on to balance the needs of the public with the asserted interest of the party seeking secrecy. In this regard, Texas has taken a different approach from some federal courts that do not view the public interest as an appropriate factor to consider for entering a secrecy order.

The rule does not ensure that the public health and safety will always surmount the private interest. There may be circumstances where the public interest is minimal and the private interest is great. The rule further calls on judges to be sure that no sealing order is a blanket order but to specify precisely what is covered and to use the least restrictive means of sealing.

The new rule is not an absolute guarantee of openness, but it is a guarantee that for the first time a true balancing of interests will occur according to specified standards.

#### Defining Court Records

The definition of "court records" in paragraph (2) includes "all documents

of any nature" filed in any civil court. Exceptions are made for (1) "documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents"; (2) documents in adoption, mental health, and other cases "to which access is otherwise restricted by law"; and (3) documents filed in cases arising under the Texas family code. Also, the term "court records" is expanded to include settlement agreements not filed of



Thomas F. Murray, Austin, Texas

record, which seek to circumvent the rule by including provisions restricting "disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety or the administration of government or the operation of government."

The most controversial provision was the inclusion within the term "court records" of documents obtained during pre-trial discovery. A court record is more than just what has a file stamp on it from the local district clerk. All such discovery that is filed of record is, of course, accorded the same status as any other filed document.

Since interrogatory answers must now be filed under the newly amended Rule 168, they are always considered court records for the purposes of the rule. Unfiled discovery "concerning matters that have a probable adverse effect upon the general public health or safety or the administration of public office or the operation of government" are also included. There is an exception for discovery in cases originally initiated for trade-secret infringement or other similar action to protect "intangible property rights."

Texas Rule of Civil Procedure 160b(5)(c) continues to authorize the entry of protective orders to seal or otherwise limit disclosure of the results of discovery.<sup>5</sup> Any such order applicable to "court records" as defined in Rule 76a must, however, now be made in accordance

with the procedures of that rule.<sup>6</sup> Even when the need for protection for public disclosure is established, the information will still be available to lawyers involved in similar litigation pursuant to *Garcia v. Peeples*.<sup>7</sup>

#### Notice and Hearing

The notice and hearing provisions in paragraphs (3) and (4) provide procedural safeguards to ensure that the public does not lose its right of access to court records. Most importantly, the rule guarantees to persons not otherwise a party to a lawsuit an absolute right to intervene to oppose secrecy.<sup>8</sup>

A party seeking sealing of records must file a written motion, obtain a hearing on the motion, and post notice of the requested sealing where notices for county meetings must be placed. The rule mandates a notice including a specific description of both the nature of the case and the records sought to be sealed.

The notice must be posted at least 14 days before the hearing on the motion to seal. A verified copy of the posted notice must also be forwarded to the clerk of the Texas Supreme Court so that both the capitol press and public interest groups based in Austin will be aware of the proposed sealing. This procedure will also provide a data base on the extent of secrecy requests throughout the state.

A hearing on the motion must be held in open court, at which time non-parties may intervene for the limited purpose of participating on the sealing issue. The court may conduct an *in camera* inspection of records as necessary. Pursuant to procedures utilized for jurisdictional special appearances under Texas Rule of Civil Procedure 120a, at the hearing the court may consider evidence including affidavits served at least seven days in advance to enable an opponent to issue subpoenas or conduct discovery. Affidavits may be used by both those supporting and opposing records closure.

#### Temporary Sealing Orders

Paragraph (5) provides for temporary sealing orders when a specific interest of the party seeking sealing will suffer immediate and irreparable injury before compliance with the notice and hearing provisions can be accomplished. Any temporary sealing order obtained must set the time for the public hearing and require the movant to post notice and

comply with the hearing provisions. A party, including an intervenor, may seek a prompt dissolution or modification of any temporary sealing order.

To be valid, a sealing order must conform to the requirements of paragraph (6). The order must include the specific findings of fact and conclusions of law regarding the standard for sealing set forth in paragraph (1). To avoid unjustified "blanket" orders, each trial court decision must reference the parts of the court records to be sealed and the length of time for which sealing is to occur. Such decisions should be incorporated in separate orders rather than as part of a judgment.

#### Continuing Jurisdiction

Paragraph (7) affirms the trial court's power to enforce, alter, or vacate its sealing orders. It further recognizes the public's right to intervene before or after a judgment in connection with such orders.<sup>9</sup>

This procedure assures that sealing orders will not exist in perpetuity without the possibility of intervention at some future date when the justification for sealing may no longer be valid. Only those who had actual notice of the orig-

inal hearing regarding records closure are required to demonstrate a material change of circumstances in order to reopen the sealing issue.

#### Appeal Rights

Given the importance of appellate review of trial court sealing orders, paragraph (8) provides that such rulings shall be considered final, appealable judgments. In addition to the usual authority to reverse the trial court, appellate courts are specifically empowered to abate an appeal where necessary to guarantee strict compliance with the notice and hearing provisions or to require the trial court to make the specific findings mandated by the rule.

Opponents of the rule urged that trial judges be accorded maximum discretion. The rule recognizes that it is considerably more difficult for an appellate court to exercise genuine review when the only issue presented concerns whether the trial court abused its discretion on good cause. With clearer standards, it is hoped that the trial court will be provided guidance to exercise its discretion in a proper manner, while, at the same time, appellate courts will for the first time have a meaningful standard by

which to review secrecy orders.

Paragraph (9) makes Rule 76a prospective except for cases that will be pending on September 1, 1990. Court records exchanged in those cases after that date are subject to the rule's provisions even if they are covered by a prior sealing or protective order. Moreover, any motions in a pending case to alter a sealing order that has been issued before September 1 are governed by the new rule.

#### Implementation

Texas is the first state to adopt such a comprehensive rule designed to ensure greater openness in judicial processes. Undoubtedly the implementation of the rule will involve some difficulties and will ultimately require further refinement of its provisions.

Rule 76a represents an initial attempt by the Texas Supreme Court to balance the limited interests of litigants in secrecy with the broad public policy favoring openness as well as the important objective that the general public health and safety not be adversely affected by closure in "private" litigation. Texas has adopted the philosophy expressed in *Atlanta Journal v. Long*,<sup>10</sup> during that



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## Court Secrecy Often Puts Public at Risk

*Editor's Note: This interview with Judge Jim Carrigan of the U.S. District Court in Colorado is reprinted with permission from USA TODAY (April 23, 1990). ©1990 USA TODAY.*

**Is increasing secrecy in the courts harming people?**

Carrigan: I think it has. I don't think public courts ought to be causing harm.

**How are people being harmed?**

Carrigan: In product liability cases, for instance. The law provides that if a product is dangerously defective, the user who is injured by it has a right to damages for whatever they've lost. An example is the Dalkon Shield, a contraceptive that transmitted bacteria into the woman's pelvic area and caused infections that caused septic abortions, and all kinds of other complications.

**What happens in cases like that?**

Carrigan: Let's say someone is burned in an automobile gas tank explosion case, and goes ahead and sues and finds out all the defects that caused that. Then the manufacturer will ask the judge to enter an order that this information isn't going to be disseminated to any other victim or attorney who might have a case.

So other people who may have been injured can't find out and won't sue. Why would a judge go along with that?

Carrigan: The defendant often says to the plaintiff's attorney, "Look, if you'll agree not to disseminate this information to anybody else, I'll give you without any hassle what you're probably going to be entitled to anyway but without the expense and delay of going to the court." Plaintiffs often find that very appealing because they don't have any money. Why should the judge have a dispute with it?

Is this may all be good for the people and companies involved in the suit. But what about the public? Who protects the rest of us so we know about dangerous products?

Carrigan: The judge has a rule that he has to follow. We call it 26C. And that requires that there be some legal ground for keeping it secret. But judges are very swarmed over with work, overwhelmed in many instances.

**Can government agencies that pro-**



**tect consumers get the information?**

Carrigan: Not usually. The agreements usually stipulate that the plaintiff's attorney not give this information to any federal or state regulatory agency that might have to do with safety. The Federal Aviation Administration, if they found a defect in an airplane, or the Consumer Product Safety Commission, or the Food and Drug Administration if it's a dangerous drug. Or, for example, these heart valves that have been found to be defective now. That involves the lives of people as well as just their safety.

**Doesn't the public's right to be protected outweigh the rights of companies and plaintiffs to keep such things secret?**

Carrigan: That's the question: Should this information be made generally available so that other people become aware that certain products are dangerous, such as the Dalkon Shield? Maybe people would have used a different kind of birth control method if that information had been made public a lot sooner. But because of protective orders and because the company didn't publish what it found out about its product in a very timely manner, it didn't become public sooner. So a lot of women got very badly injured and lost babies and so forth.

**There's an economic factor, isn't there? If you don't accept this settlement, you've got to go to trial.**

Carrigan: Right. It used to be even worse. Until about a year or so ago, there was also a condition frequently attached—the plaintiff's attorney would agree not only to turn all the materials back, but also not to accept any more cases of this type against this defendant. The powers that be have now ruled that it is unethical to even ask for that.

**Does that mean the tide is turning against this secrecy?**

Carrigan: Maybe. I think plaintiffs are going to be agreeing to them less and less now because they're becoming more aware. After all, the whole idea of litigation is to try to find out what the truth is. And then you say, "Well, let's hide the truth from everybody else who might have an interest in knowing the truth, and make them start all over again."

**Is secrecy ever justified?**

Carrigan: Obviously, if there is a legitimate trade secret, it ought to be protected so that a competitor can't just bring a lawsuit and get the other party's trade secret and make it public. That's not fair. Attorney-client privilege has some legitimate value to it, so that people can feel more free to disclose to their attorneys all the facts.

**Won't companies stop selling products once they know they're dangerous, even if suits are not made public?**

Carrigan: In the Dalkon Shield case, the company knew for many, many years from letters from their own doctors warning them that this product had very dangerous side effects, but kept on manufacturing them because it was very profitable.

**What's the best way to break this cycle?**

Carrigan: Perhaps the best way is just what you're doing right now. And there ought to be a presumption that information in court is open to anybody who wants to see it. The person who wants to keep it private has the burden of proof to show that there's some real, substantial reason why it ought to be kept private. There's been more or less a gentleman's agreement between the attorneys handling these matters that has overlooked their long-range impact in an effort to get a faster, cheaper resolution of their own lawsuit.

**Is there any evidence that dangerous products have come off the market as a result of disclosure?**

Carrigan: Why don't we have Dalkon Shields on the market anymore? Why did we get rid of those gas tanks that were burning up people? You can enumerate as many examples as you want to. There are thousands of them out there. □

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court's review of a somewhat more narrow open records procedural rule.<sup>11</sup>

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## Notes

- <sup>1</sup> McGonigle, *Secret Lawsuits Shelter Wealthy, Influential; Jurist Believes Sealing Records Is Under-estimating; Judge Says Privacy Can Help Settle Suits*; Dallas Morning News, Nov. 22, 1987, at A1, col. 1, and A25, col. 1; McGonigle, *Sealed Lawsuits Deal with Poisoning, Sex, Surgery*, Dallas Morning News, Nov. 23, 1987, at A1, col. 1.
- <sup>2</sup> Walsh and Weiser, *Public Courts, Private Justice*, Washington Post, Oct. 23-26, 1988; Mar. 13, 1989.
- <sup>3</sup> Meier, *System Thwarts Sharing Data on Unsafe Products*, Newday, Apr. 24, 1988, at 24; *Legal Merry-Go-Round*, June 5, 1988, at 21.
- <sup>4</sup> See, e.g., Cipollone v. Liggett Group, Inc., 822 F.2d 335, 340-41 (3d Cir. 1987); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 358-59 (11th Cir. 1987).
- <sup>5</sup> For a comprehensive review of protective orders, see F. Harc, J. Gilbert & W. ReMine, *CONFIDENTIALITY ORDERS* (1988).
- <sup>6</sup> This is a change from the general attitude expressed in *Houston Chronicle Pub. Co. v. Hardy*, 678 S.W.2d 495, 499 (Tex. Ct. App. 1984, mandamus overruled), *cert. denied*, 470 U.S. 1052 (1984), that the trial court has exceedingly broad discretion in denying third parties "their claimed right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings."
- <sup>7</sup> 734 S.W.2d 343 (Tex. 1987).
- <sup>8</sup> It is not necessary for an intervening third party to satisfy a standing requirement by showing an actual or threatened injury as was required in *Oklahoma Hosp. Assn. v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985).
- <sup>9</sup> See *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex. 1987); *Express-News Corp. v. Spears*, 766 S.W.2d 885 (Tex. Ct. App. 1989, mandamus overruled).
- <sup>10</sup> 369 S.E.2d 755, 757 (Ga. 1988).
- <sup>11</sup> Since becoming effective in July 1985, Georgia's Uniform Superior Court Rule 21 has provided a strong statement of a public policy supporting openness. However, it does not appear to encompass any pre-trial discovery not filed of record; nor does it enumerate the more complete procedural safeguards in Texas Rule 76a. Concern for unreasonable judicial restrictions on access to discovery materials obtained during personal injury litigation resulted in remedial legislation last year in Virginia (VA. CODE ANN. §§18.01-420.01 (1989)). Regarding legislative consideration of this and similar proposals in other states, see Walsh, *Rising Secrecy in Civil Cases Prompts Legislative Backlash*, Washington Post, Feb. 20, 1989. In May, the Florida legislature passed a "Sunshine in Litigation" Act to prevent judicial concealment of any "public hazard," S.B. 278, H.B. 839, 22d Fla. Leg., Gen. Sess. (1990), creating §69.081, Fla. Stat. The law was signed June 1, effective July 1.

### Conclusion

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

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

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

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

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

## Article

# Protecting the Confidentiality of Settlement Negotiations

by  
WAYNE D. BRAZIL\*

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

Second, this Article discusses other possible sources of protection against admissibility, especially Federal Rule of Evidence 403<sup>2</sup> and stat-

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

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

1. Federal Rule of Evidence 408 provides:

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

2. Federal Rule of Evidence 403 provides:

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

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

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

Finally, this Article examines the effectiveness of alternative methods for enhancing protection of settlement communications, including protective or sealing orders and side agreements. Although placing a settlement under seal pursuant to a court order may be useful in some cir-

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

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

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

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

6. 5 U.S.C. § 552 (1982).

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

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

cumstances, counsel cannot be confident that this procedure assures protection of the settlement's confidentiality. In an important recent case from the United States Court of Appeals for the Third Circuit, an entity that was not a party to the settlement agreement successfully invoked its common law right of access to court records to force disclosure of a settlement agreement between purely private parties, even though that agreement had been sealed by order of the District Court.<sup>9</sup> Likewise, counsel must appreciate the limitations of side agreements to protect the confidentiality of a settlement. A recent opinion from the United States Court of Appeals for the Second Circuit distinguishes between "private" judgments entered pursuant to settlement and "public" judgments so entered,<sup>10</sup> holding that in the latter the parties must disclose any side agreements that would permit satisfaction of the judgment on lesser terms than those reflected in the public record.<sup>11</sup>

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

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

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

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

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

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

11. *Id.*

12. See *infra* text following note 394.

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

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

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

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

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

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

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

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

18. *Id.*

19. *Id.*

20. FED. R. EVID. 408.

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

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

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

Counsel can argue persuasively that this is a rule that the courts could easily eviscerate. By resolving close cases in favor of admitting the evidence, courts would strike fear into the hearts of negotiating lawyers and clients and could compel them to play their settlement cards closer to their chest. Negotiations would thus become more of an irrational poker game and deprive parties of access to the reasoning that supports one another's positions. To avoid this result, counsel should argue that judges should construe the rule broadly. Broad construction of the rule would enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept. Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality. Every blow the courts strike against openness is a blow against the health of the

21. See *supra* note 15 and accompanying text.

22. *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976)

system and against the fundamental values on which it is based. These kinds of arguments should be effective because rationality is at the center of the judiciary's self-image.

Because the drafters of rule 408 departed so substantially from the principal thrust of the common-law tradition, lawyers cannot safely assume that cases decided before 1975 offer reliable guidance about the scope of the protection the rule affords.<sup>23</sup> An attorney will be on firmer ground if he looks to ways in which state courts have interpreted provisions from state law that served as models for the current federal rule. California provided one such model when it adopted a rule extending protection to statements made during compromise negotiations.<sup>24</sup> The notes of the United States Senate's Committee on the Judiciary suggest that provisions adopted in Nevada, New Mexico, and Wisconsin also served as models for the federal rule.<sup>25</sup>

#### B. Two Key Prerequisites to Invoking the Rule

Two important prerequisites to successful invocation of rule 408 emerge clearly from its terms: the rule only offers protection if there is a disputed claim, and it only applies to communications made or conduct that occurs "in compromise negotiations." In other words, unless there are both a real dispute and negotiations to resolve it, the rule provides no help. Thus, if a client first acknowledges both the existence and size of a debt, then the attorney tries to negotiate compromise terms of payment, the conduct and statements receive no protection.<sup>26</sup> The Advisory Committee's notes articulate this limitation: "The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. . . . Hence, the rule requires that the claim be disputed as to either validity or amount."<sup>27</sup>

Of course, rule 408 could afford protection if a client acknowledged the existence of an obligation but did not concede its size.<sup>28</sup> It also is important to emphasize that the rule's reference to claims for an "amount" does not imply that its protections are available only in cases in which a party seeks monetary relief. The rule clearly applies regardless of the character of the relief sought (legal or equitable) or the kinds

23. See C. WRIGHT & K. GRAHAM, *supra* note 14, at 175-76.

24. *Id.* at 165-66, 172; see CAL. EVID. CODE §§ 1152, 1154 (West Supp. 1988).

25. S. REP. NO. 1277, 93d Cong., 2d Sess., reprinted in FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 283-84 (West 1987).

26. C. WRIGHT & K. GRAHAM, *supra* note 14, at 213-14.

27. FED. R. EVID. 408 advisory committee's note (citation omitted).

28. C. WRIGHT & K. GRAHAM, *supra* note 14, at 215, 249-50.

of terms negotiated. As discussed below, however, a proposal to settle that consisted of inviting the opposition to join in an illegal act or conspiracy would not be protected.<sup>29</sup>

Counsel must beware of the possibility of narrow judicial views of when a claim is "disputed" for purposes of the rule. For example, in *Hiram Ricker & Sons v. Students International Meditation Society*,<sup>30</sup> which was decided before rule 408 became effective but which acknowledged that one purpose of the common-law rule was to encourage settlement negotiations, the First Circuit upheld a decision to admit evidence of an offer that was intended to conclude a frayed relationship and preclude a follow-up lawsuit. The plaintiff had become "increasingly dissatisfied with the size of the periodic payments" that the defendant had been making, payments whose size was supposed to be a function of the number of the defendant's guests who used the plaintiff's facility. At trial, the plaintiff testified that, on the day the last payment was due, the defendant handed the plaintiff a sheet of paper that contained calculations and a bottom line figure and said "This is what we owe you. If you agree and sign a release absolving us from any and all damage and all future bills we will pay you."<sup>31</sup>

Both the trial court and the appellate court held that this statement was not entitled to protection as an offer of compromise. Recognizing that the "rule excluding offers of settlement is designed to encourage settlement negotiations *after a controversy has actually arisen*,"<sup>32</sup> the appellate court reasoned that the defendant's statement did not qualify for protection because the plaintiff could not be sure there was "an actual controversy" until the defendant tendered its final payment.<sup>33</sup> The appellate court found that the making of the subject statement marked the beginning of the "actual controversy" for purposes of rule 408.<sup>34</sup> Readers should appreciate what this reasoning means: courts may deny protection even though (1) before the subject statement was made both sides knew that plaintiff was dissatisfied with defendant's performance and that litigation was a clear possibility, and (2) the obvious purpose of the statement was to make an offer, which, if accepted, would settle accounts and preclude any subsequent lawsuit.

Counsel also must beware of courts making a distinction between

29. *Id.*

30. 501 F.2d 550, 553 (1st Cir. 1974).

31. *Id.*

32. *Id.* (emphasis added).

33. *Id.*

34. *Id.*

mere business communications, which are not entitled to protection, and "offers of compromise," which are.<sup>35</sup> The key to drawing this line lies in how the courts define "dispute" or "controversy" for purposes of rule 408. If the dynamic between the parties does not qualify as a "dispute" within the meaning of the rule, then by definition communications cannot constitute offers of compromise.

*Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*<sup>36</sup> first suggested the distinction between business communications and offers of compromise. Prior to the filing of the action, plaintiff and defendant had exchanged correspondence to determine which company had the right to use the phrase "Big Foot" to identify its tires. In this correspondence, the plaintiff claimed that it had exclusive trademark rights in this phrase. In response the defendant indicated, among other things, that if the plaintiff sued "the case would be in litigation long enough that Goodyear might obtain all the benefits it desired from the term 'Bigfoot.'"<sup>37</sup> Thus, at the time the subject communications took place, clearly (1) the parties had a real and economically significant disagreement about who had the right to use the phrase "Big Foot," (2) the purpose of the subject communications was to attempt to resolve this disagreement, and (3) litigation was a real possibility.

Despite these facts, the Tenth Circuit upheld the trial court's conclusion that the communications from the defendant in this context did not qualify for protection under rule 408 and should be admitted into evidence.<sup>38</sup> Although the judges may have been motivated by a desire to punish the defendant for its "strong-arm" negotiating tactics,<sup>39</sup> the "law" that emerges from this appellate court opinion remains with us and can be troublesome for lawyers who make good faith efforts to negotiate settlements before lawsuits are filed. The Tenth Circuit seemed to suggest that the correspondence remained mere "business communications" because at the time the letters were sent the "discussions had not crystallized to the point of threatened litigation, a clear cutoff point."<sup>40</sup> The court apparently felt that it was not until the parties had exchanged positions through their letters that they could know that the plaintiff's claim was in fact "disputed" within the meaning of rule 408.

The difficulty with this reasoning lies in the implication that rule

35. See, e.g., *Olin Corp. v. Insurance Co. of N. Am.*, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985).

36. 561 F.2d 1365 (10th Cir. 1977).

37. *Id.* at 1368.

38. *Id.* at 1373.

39. C. WRIGHT & K. GRAHAM, *supra* note 14, at 214.

40. *Big O Tire Dealers*, 561 F.2d at 1373.

408's protections are available only after negotiations have degenerated to the point at which one party threatens litigation. In a slightly more recent Seventh Circuit case, *United States v. Hooper*, the court obliquely suggests (but does not unequivocally announce) the even more troubling idea that the protections of rule 408 might be available only when a lawsuit is already on file.<sup>41</sup> If adopted by other courts, the overly technical and demanding views suggested by the *Big O* and *Hooper* courts would defeat one of the principal purposes of the rule: to encourage parties to settle their disagreements outside the court system.

Some courts have adopted more generous interpretations that are less threatening to rule 408's purposes. For example, in *Olin Corp. v. Insurance Co. of North America*,<sup>42</sup> the District Court concluded that there was a disputed claim within the meaning of rule 408 because the plaintiff reasonably "contemplated that litigation might be necessary," and another party "conceded that litigation was possible." The court reached this conclusion even though no suit had been filed and the parties might not have known they were fully at loggerheads.<sup>43</sup>

There is another context in which courts may find rule 408 inapplicable because no "dispute" existed prior to the time the subject communication occurred. *Cassino v. Reichhold Chemicals, Inc.*,<sup>44</sup> concerned the admissibility of a document entitled "Settlement Agreement and General Release" that defendant had asked plaintiff to sign during a meeting in which defendant informed plaintiff that he was being terminated. "The document, which Cassino refused to sign, offered \$18,000 in exchange for Cassino's release of all claims against [defendant] 'including, but not limited to, rights under federal, state or local laws prohibiting age or other forms of discrimination. . . .'"<sup>45</sup> It is important to note that the *Cassino* result may reflect, sub silentio, the court's belief that the interests protected by federal statutes that prohibit age discrimination simply outweigh the interests that might have been advanced by permitting the defendant in this case to use rule 408 to bar admission of a document the court believed was probative of defendant's motive in terminating an older employee.

In concluding that this document was admissible, however, the Ninth Circuit Court of Appeals distinguished between an offer that is

41. See *United States v. Hooper*, 596 F.2d 219, 225 (7th Cir. 1979).

42. 603 F. Supp. 445, 450 (S.D.N.Y. 1985).

43. See *Gangl v. Gangl*, 281 N.W.2d 574 (N.D. 1979) (construing the parallel state court rule, N.D.R. Ev. 408).

44. 817 F.2d 1338 (9th Cir. 1987).

45. *Id.* at 1342.

extended to try to settle a dispute that arises "after the termination," and an offer that is presented at the time the decision to terminate is communicated to the employee.<sup>46</sup> Characterizing offers made at the time of termination as proposed "termination agreements," the court observed that such proposals "are generally made a part of the record in the case and are considered relevant to the circumstances surrounding the alleged discriminatory discharge itself. The termination agreements, therefore, are probative on the issue of discrimination."<sup>47</sup> The "record" alluded to by the court presumably is the record developed during administrative proceedings on the underlying claim. Administrative bodies' routine consideration of these kinds of documents supports the court's conclusion that the documents are probative on the core liability issue; but that fact has no bearing on the scope of a rule of evidence that is inapplicable in the administrative context.

To support its holding that rule 408 barred admission of the proposed settlement and release agreement, the *Cassino* court relied on only one proposition: "the protections of Rule 408 were designed to encourage the compromise and settlement of existing disputes."<sup>48</sup> The Court emphasized not the language or policies of the rule, but the probative weight (on the liability issue) of the content and timing of the settlement offer:

Where, as here, the employer tries to condition severance pay upon the release of potential claims, the policy behind Rule 408 does not come into play. Rule 408 should not be used to bar relevant evidence concerning the circumstances of the termination itself simply because one party calls its communication with the other party a "settlement offer."<sup>49</sup>

Perhaps significantly, the court promptly added that "[s]uch communications may also tend to be coercive rather than conciliatory."<sup>50</sup> The court proceeded to admonish that "courts should not allow employers to compromise the underlying policies of the ADEA<sup>51</sup> [Age Discrimination in Employment Act] by taking advantage of a superior bargaining position or by overreaching."<sup>52</sup> This language suggests that *Cassino* may be another case in which the judiciary's hostility to "strong-arm" bargaining helps to explain the court's analysis of rule 408. In the end, however, one senses that the principal reason that the *Cassino* court

46. *Id.*

47. *Id.*

48. *Id.* at 1343 (emphasis added) (citations omitted).

49. *Id.*

50. *Id.*

51. 29 U.S.C. § 621 (1982).

52. 817 F.2d at 1343 (citations omitted).

insisted on construing rule 408 narrowly was the court's understandable belief that the policies that inspire rule 408 simply are not as important as those that inspire the ADEA.

What lessons should counsel learn from these cases? First, the policies that inform rule 408 often will be in competition with other social policies, and that competition may cause some courts to interpret the rule narrowly. A second lesson, implicit in *Big O* and *Cassino*, is that many courts do not like "strong-arm" negotiation strategies.<sup>53</sup> Judges are especially likely to resent litigants or lawyers who try to use the cost and delay of litigation to gain an advantage to which they know they are not entitled. The most significant lesson from *Big O* is that some courts might punish your client if they believe that its bargaining position is not based on its perception of the merits of the case, but reflects a self-conscious attempt to use the fact that it will cost your opponent a great deal of money or take him a great deal of time to get relief through the court system or both.

The technical lesson from *Big O*, *Hiram Ricker & Sons*,<sup>54</sup> and *Cassino* is this: To maximize the odds that communications will be protected by rule 408, an attorney should either (1) file suit before beginning negotiations (a move may not be conducive to constructive discussions) or (2) announce, as a preface to communications, that he is invoking the protections of rule 408, that communications already completed between the parties establish that they have a dispute, that his client fears the dispute could lead to litigation, and that the purpose of his communication is to present an offer of compromise and to contribute to negotiations looking toward a settlement agreement. The problem with this advice is that by following either route an attorney risks damaging the prospects for creating the kind of feelings between the parties that are most conducive to reaching agreement. It is unfortunate that tough cases (and overreaching litigants) have forced courts to construe rule 408 in ways that tend to defeat its purposes.

There is authority, however, for the view that statements need not rise to the level of formal "offers" in order to qualify for protection. Communications whose primary purpose is to explore whether an opponent is interested in discussing settlement should be protected, as should communications that solicit an offer or a demand from an opponent.<sup>55</sup> Moreover, as long as it is viewed either as part of an effort to negotiate settlement or as an offer of compromise, a proposal to refer a dispute to

53. See C. WRIGHT & K. GRAHAM, *supra* note 14, at 214.

54. See cases cited *infra* notes 155-217.

55. See C. WRIGHT & K. GRAHAM, *supra* note 14, at 178.

arbitration or to some other alternative dispute resolution procedure also should come within the ambit of the rule.<sup>56</sup>

## II. The Principal Limitations on the Scope of Rule 408

Unfortunately for lawyers and clients who want "free and frank discussion"<sup>57</sup> to maximize the odds of achieving settlement, limits on the scope of rule 408 result in many circumstances in which courts may admit into evidence even communications that clearly were part of good faith negotiations, the sole purpose of which was to settle claims that already have been filed in court.

The primary reason counsel cannot safely assume that their communication will be protected by rule 408, however, is not the possibility that courts might construe narrowly the threshold requirements that there be a "claim" and that it be "disputed." The more consequential limit on the rule's scope is the proviso that it applies only when the purpose of admitting evidence from the negotiations is "to prove liability for or invalidity of the claim or its amount."<sup>58</sup> Thus, by its own terms, rule 408 does not preclude admission of offers of compromise, or statements made in negotiations, when admitting the evidence would serve any purpose other than directly proving or disproving liability for or the amount of the claim. Because there are so many other purposes for which such evidence might be admitted, because it is impossible to forecast the likelihood that any such purpose will surface at trial, and because the outcome of any given judge's balancing analysis under rule 403 is not predictable, the wise lawyer has no choice but to be circumspect when negotiating directly with the opposition.

This sobering position means that counsel either must accept only half-rational negotiations (the "blind man's bluff" approach, in which neither side has meaningful access to the reasoning that supports the other side's view of the case) or must look to some device other than rule 408 to protect the confidentiality of what they say during negotiations. I describe some of the alternative sources of protection after briefly discussing some of the purposes for which evidence from settlements might be offered other than to "prove liability for or invalidity of the claim or its amount."<sup>59</sup>

There are many purposes for which settlement negotiation evidence might be offered that would not be within the scope of rule 408. The

56. *Id.* at 202-03.

57. *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976).

58. FED. R. EVID. 408.

59. *Id.*

most significant of these are (1) to impeach a witness; (2) to negative a contention of undue delay; (3) to prove wrongful acts during negotiations; (4) to prove the existence of or to block enforcement of an alleged settlement contract; and (5) to show the state of mind of a party. The principal impression created by most of the cases discussed in this section is that the scope of rule 408 is indeed limited and that many courts appear to be quite comfortable permitting parties to brush past the thin veil of confidentiality that surrounds settlement negotiations. Before turning to these cases, however, I point out that there is authority for the view that the policies that inspire rule 408 are so important that courts should interpret the scope of its protection liberally and should resolve doubts about its scope by refusing to admit evidence from settlement negotiations.

One recent case exemplifies this liberal spirit. In *Stacey v. Bangor Punta Corp.*,<sup>60</sup> Judge Carter refused to rule in advance of trial that evidence of a settlement between the plaintiff and a third-party defendant should be admitted, even though the defendant's proffer showed that the purpose of the evidence would be to establish the bias of the third party defendant and not to prove the "invalidity of the claim or its amount." In announcing that he would not rule on this motion until the unfolding of the trial itself better exposed "exactly the context in which Defendants will seek to offer [the] evidence," Judge Carter quoted with approval the following passage from a treatise by Professors Louisell and Mueller:

There are, to be sure, purposes for which the proof [of settlement] is competent, but these are relatively narrow. It is well recognized, and rightly so, that the risks of prejudice and confusion entailed in receiving settlement evidence are such that often Rule 403 and the underlying policy of Rule 408 [to encourage settlement] require exclusion even when a permissible purpose can be discerned.<sup>61</sup>

Judge Carter went on to point out that it is often difficult to keep separate the purposes for which evidence is offered, and that if issues of impeachment "are inextricably bound up with issues of causation and liability," as they sometimes are, offers of evidence made ostensibly to impeach might still run "afoul of Rule 408."<sup>62</sup>

These passages from *Stacey v. Bangor Punta Corp.* suggest a point that we must keep clearly in mind while journeying through the forest of cases that conclude that rule 408 offers no protection because the purpose for which the settlement material is proffered is not to "prove liability for

60. 620 F. Supp. 636, 637 (D. Me. 1985).

61. *Id.* (citing 2 D. LOUSSELL & C. MUELLER, FEDERAL EVIDENCE § 170, at 272 (1978)).

62. *Id.* (citing *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 250-51 (1st Cir. 1985)).

or invalidity of the claim or its amount." Courts cannot assume that evidence from settlement negotiations is admissible simply because it is offered for a real purpose other than one of the purposes prohibited by rule 408.<sup>63</sup> In this situation courts also must conduct a balancing analysis under rule 403. Before deciding to admit settlement evidence, judges must be satisfied that its probative value is not clearly outweighed by any prejudice, confusion, or delay that introducing it might cause.

Counsel also should understand that trial judges have discretion in fixing the scope and content of cross-examination and that rule 408 does not destroy that discretion even when evidence of settlement is offered for some purpose other than that to prove liability. The Fifth Circuit's opinion in *Reichenbach v. Smith*<sup>64</sup> illustrates this point well. Without advertent to rule 403 at all, the *Reichenbach* court upheld the district judge's decision to exclude evidence of plaintiff's settlement with a co-defendant even though the proffered purpose was to challenge the credibility of plaintiff's testimony. In upholding the trial judge's ruling the appellate court emphasized the importance of encouraging settlements and the role confidentiality can play in the settlement dynamic. The Fifth Circuit panel proceeded to declare that when ruling on an objection to the admission of evidence of settlement rule 408 permits the trial judge to:

balance the policy of encouraging settlements with the need for evaluating the credibility of the witnesses. . . . The importance of informing the jurors fully so that they can carefully judge the credibility of each witness in making their fact determination may in some situations outweigh the desire to encourage settlements. But this choice must be made in the first instance by the trial judge.<sup>65</sup>

The appellate court went on to affirm the trial judge's conclusion that because there were other, obvious reasons for scrutinizing closely the plaintiff's testimony, admitting the evidence of the settlement would not add significantly to the jury's ability to assess her credibility. Because it was reasonable to conclude that admitting the evidence of the settlement would not contribute materially to the jury's ability to assess credibility, the trial judge committed no harmful error by deciding that the balance tipped in favor of encouraging settlement.<sup>66</sup>

Inexplicably, however, the *Reichenbach* panel added a concluding paragraph that seems inconsistent with the body of its opinion and that appears to take away much of the discretion the court had just acknowl-

63. See *infra* notes 150-54 and accompanying text.

64. 528 F.2d 1072 (5th Cir. 1976).

65. *Id.* at 1075 (emphasis added).

66. *Id.*

edged. The court emphasized that its "affirmance is not to be considered an approval for the future of the trial court's approach. The existence of a settlement agreement goes directly to the issue of credibility and usually the better approach is that codified in rule 408."<sup>67</sup> While this last paragraph obviously compromises the utility of this opinion for lawyers resisting the admission of settlements, the reasoning in the body of the opinion is sound and consistent with the body of doctrine developed separately under rule 403.

#### A. Impeachment

The first purpose outside rule 408's scope for which settlement material might be offered is impeachment. The word "impeachment" is used to embrace a great many purposes for which evidence might be introduced at trial. These purposes include showing witness bias or prejudice; demonstrating that a prior claim of the opponent is inconsistent with his present claim or that the present claim was omitted from a prior action in which it logically should have appeared; or providing evidence that a party made a prior statement that is inconsistent with a statement made at trial. When thinking about the scope of rule 408, lawyers must appreciate that whether it will serve as an obstacle to admissibility may depend in part on which kind of impeachment is being attempted.

##### (1) Bias or Prejudice of a Witness

Despite the fact that the *ultimate* purpose for introducing impeaching evidence is to help the proffering party win the case on the merits (or at least to affect the size of the damage award), and thus, in the language of the rule, "to prove liability for or invalidity of the claim or its amount," many courts would hold that rule 408 does not bar admission of statements made during negotiations if the *immediate* purpose is to impeach by proving "bias or prejudice of a witness."<sup>68</sup> By its express terms, the rule "does not require exclusion when the evidence is offered for . . . proving bias or prejudice of a witness."<sup>69</sup>

A classic example of the application of this express limitation on the scope of the rule arises when one of several defendants settles with the plaintiff, then appears at trial to testify on the plaintiff's behalf. In this setting, some courts interpret rule 408 as permitting the non-settling de-

67. *Id.* at 1076.

68. *But cf.* *Stacey v. Bangor Punta Corp.*, 620 F.Supp. 636, 637 (D. Me. 1985) (prema-ture to determine admissibility of evidence of plaintiff's settlement with third party defendant prior to offer of evidence of settlement).

69. FED. R. EVID. 408.

defendants to introduce the terms of the settlement agreement in an effort to show that the testifying former defendant is biased in favor of the plaintiff.

The opinion by the Court of Appeals for the Third Circuit in *John McShain, Inc. v. Cessna Aircraft Co.*<sup>70</sup> illustrates this point. In this case, the plaintiff had settled a purported \$25,000 property damage claim with one of the named defendants for consideration that had two elements: (1) the defendant agreed to pay the plaintiff ten dollars and (2) the defendant permitted the plaintiff to use one of the defendant's employees as an expert witness at trial. When the employee testified at trial, the district judge permitted the remaining defendant to introduce evidence about the terms of the earlier settlement agreement, on the theory that these terms could support an inference that the employee-expert witness was biased in favor of the plaintiff.<sup>71</sup> On appeal, the court concluded that this ruling neither offended rule 408 nor constituted an abuse of the trial court's discretion under rule 403.<sup>72</sup>

In reaching this conclusion, the Third Circuit panel characterized quite narrowly the "core of the public policy that the rule against admission of compromises was designed to vindicate."<sup>73</sup> That policy, according to the court, "encourages negotiation by preventing the parties to the compromise from being tied elsewhere to the concession they made *inter sese*."<sup>74</sup> Unfortunately, this narrow view ignores the Advisory Committee's and Congress' use of rule 408 to expand the common-law protection so that not just offers and demands would be covered, but also (as the language of the rule itself states) "conduct or statements made in compromise negotiations." Moreover, since the purpose of the extended coverage was to encourage "freedom of communication with respect to compromise,"<sup>75</sup> it is clear that the drafters of the rule intended to do much more than reduce fear of the *one* danger that the *McShain* opinion acknowledged, namely the fear of "being tied elsewhere to the concession . . . made *inter sese*."<sup>76</sup>

70. 563 F.2d 632 (3d Cir. 1977).

71. *Id.* at 635.

72. *Id.*

73. *Id.* at 635 n.5.

74. *Id.*

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

76. *John McShain, Inc.*, 563 F.2d at 635 n.5; see *Quad Graphics, Inc. v. Faw*, 724 F.2d 1230, 1235 (7th Cir. 1983). For further discussion of *McShain*, see C. WRIGHT & K. GRAHAM, *supra* note 14, at 201, 262-67. See also *Sharp v. Hall*, 482 F. Supp 1 (D. Okla. 1978) (whether jury should be fully advised of fact of settlement and amount thereof is a matter resting in the sound discretion of the trial court); *L. J. Ventrone Constr. Co. v. Alliance Indus., Inc.*, 215 Neb. 248, 272-73, 338 N.W.2d 60, 63 (1983) (evidence relating to a "Mary Carter"

Professors Wright and Graham have pointed out another problem that the *McShain* court ignored: when judges permit introduction of evidence that the plaintiff settled a closely related claim against a former co-defendant on terms that are generous to the former defendant, the jury might infer that the plaintiff really does not believe in his claim against the remaining defendant.<sup>77</sup> It is precisely this risk that rule 408 was designed to avoid. The principal fear that inspires exclusion of evidence of offers of compromise is that juries will interpret these offers as acknowledgements that a claim or defense is weak or meritless. Given this risk, lawyers should argue that even if a literal reading of rule 408 would not block admission of evidence about offers or demands, the balancing analysis (weighing probative value against the likelihood of unfair prejudice) required under rule 403 would compel exclusion.

Counsel looking for support for this line of argument can cite *Kennon v. Slipstreamer, Inc.*,<sup>78</sup> a recent opinion from the Fifth Circuit. In this case a divided appellate court held that a trial judge violated rule 408 and committed reversible error when, in explaining to the jury the sudden absence of three defendants, he disclosed not just the fact that plaintiff had settled with them, but also that the amount of the settlement was a nominal ten dollars each.<sup>79</sup> The *Kennon* majority acknowledged that the purpose of disclosing the fact of the settlement was to avoid jury confusion, but insisted that in the circumstances presented there was "no proper purpose" for disclosing the amount.<sup>80</sup> Thus by disclosing the amount of the settlement the trial court had violated rule 408.

Having reached that conclusion, the appellate court was required to proceed to the next question: Did the violation of the rule require reversal? To answer this question, the Fifth Circuit panel had to assess the likelihood and probable magnitude of unfair prejudice to the remaining defendant. The centerpiece of the court's justification for reversing and remanding was its conclusion that when the trial judge disclosed the terms of the settlement, he created a great risk of extreme prejudice to the remaining defendant.<sup>81</sup> The court's words have significant implications for many issues concerning the scope of rule 408:

First, the fact that the settlement was for a nominal amount suggests that the plaintiffs thought that the settling defendants were not liable

agreement—covenant not to execute—should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to an agreement).

77. C. WRIGHT & K. GRAHAM, *supra* note 14, at 264.

78. 794 F.2d 1067 (5th Cir. 1986).

79. *Id.* at 1071.

80. *Id.* at 1070.

81. *Id.*

for the plaintiff's injuries and therefore points the finger at Slipstreamer as the one responsible. Just as we held in *McHann v. Firestone Tire and Rubber Co.*, that informing the jury of a large settlement by a co-defendant might lead the jury to believe that only the co-defendant, and not the nonsettling defendant, was negligent, the disclosure of the "nominal" ten dollar settlement in this case suggests to the jury that Slipstreamer alone was liable. Furthermore, the willingness of the plaintiff to settle for a pittance with the other defendants could be taken by the jury as a reflection of the strength of the plaintiffs' case against Slipstreamer.<sup>82</sup>

Based on these and other considerations, the majority held that "no party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure . . ."<sup>83</sup> The fact that the court's logic about the scope of rule 408 is not air-tight<sup>84</sup> should not obscure this opinion's importance: it delineates the kind of substantial prejudice that can result from admitting terms of settlement into evidence and makes it clear that courts have a responsibility to weigh this prejudice when deciding whether to admit such evidence, regardless of the technical purpose for which it is proffered. In the end, the *Kennon* opinion may prove more useful to courts conducting analyses under rule 403 than under rule 408. In either event, it casts a long shadow of doubt over the continuing vitality of opinions like *John McShain, Inc. v. Cessna Aircraft Co.*<sup>85</sup>

## (2) Prior Inconsistent or Omitted "Claims"

Another form of impeachment that might not be prevented by rule 408 involves evidence that before trial the opposing party made a claim that is inconsistent with a claim he is pressing at trial. As Professors Wright and Graham point out, rule 408, by its own terms, applies to offers of compromise and to statements made "in compromise negotiations," but not to claims.<sup>86</sup> Thus there is some risk that a court would view a party's initial demand not as an offer of compromise of a disputed claim but as a description by that party of what his claim embraces. For example, in *Reich v. Reich*,<sup>87</sup> the court decided that the evidence of how much a party was willing to pay for her interest in property was not an offer of compromise but a reflection of what she believed to be the value of the property. Courts also might permit an opponent to introduce evidence of

82. *Id.* at 1070 (citation and footnote omitted).

83. *Id.* at 1071.

84. *Id.* at 1075-76 (Thornberry, J., dissenting).

85. 563 F.2d 632 (3d Cir. 1977).

86. C. WRIGHT & K. GRAHAM, *supra* note 14, § 911 at 266.

87. 235 Kan. 339, 344, 680 P.2d 545, 547 (1984).

an initial demand to show that it did not include some claim that the plaintiff later pressed at trial. In *Fieldson Associates v. Whitecliff Laboratories, Inc.*,<sup>88</sup> a California appellate court construed a state law counterpart to rule 408 to permit a defendant to prove the scope of a contract by introducing evidence that the plaintiff had not made a claim for lost profits.<sup>89</sup>

The view that rule 408 simply does not apply to statements of claims can be interpreted as a variation on the theme described above, which provides that the parties may seek the protection of this provision only after they know that there is a "dispute." If taken too literally, this requirement would mean that rule 408 could apply only after an initial offer or demand has been rejected. This obviously makes no sense, in part because such an interpretation would not encourage settlements and would frustrate the purposes of the rule, and in part because it is not consistent with the "real world." Opening offers or demands are often in fact "compromise" proposals, made in an environment in which everyone knows the parties do not see eye-to-eye about how a particular matter should be resolved.

The situation is different, of course, when a debtor expressly admits that he owes a specified sum, but offers to pay a smaller figure in the hope that the creditor will accept it rather than go through the hassle and expense of litigation to collect. The Advisory Committee's notes to rule 408 make it clear that the "policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum."<sup>90</sup> Good lawyers will argue, however, that except when a party expressly concedes the amount of its obligation, courts should not construe rule 408 either to discourage parties from being the first to put an offer or demand on the table or to force the careful lawyer to inflate his client's opening demand to cover every conceivable claim, thus eliminating the possibility of a later argument that because something was omitted his client does not really believe in the validity of it.<sup>91</sup>

The moral of these stories is relatively straightforward. The careful lawyer should preface an opening demand or offer by expressly stating that there is a dispute between the parties and that the proposal being advanced reflects neither a complete statement of the client's claims nor a full valuation of them. Rather, the lawyer should make clear that the

88. 276 Cal. App. 2d 770, 773, 81 Cal. Rptr. 332, 334 (1969).

89. *Id.* at 772-73, 81 Cal. Rptr. at 333-34 (interpreting CAL. EVID. CODE §§ 1152, 1154).

90. FED. R. EVID. 408 advisory committee's note (emphasis added).

91. See C. WRIGHT & K. GRAHAM, *supra* note 14, at 197-98.

proposal is an offer of compromise made in the hope that it will produce a settlement and thus enable both sides to avoid the cost and delay associated with litigating to judgment.

### (3) *Prior Inconsistent Statements*

One of the most common forms of impeachment consists of evidence that a party or witness on some earlier occasion made a statement that is arguably inconsistent with a statement he or she has made on the stand during trial. Rule 408 bars admission of offers or demands, or statements made in settlement negotiations, if the direct and immediate purpose is "to prove liability for or invalidity of the claim or its amount." Thus a party clearly cannot introduce evidence of pretrial offers or statements made during negotiations as part of that party's case-in-chief on the liability or damages issues before the party who allegedly made the statement testifies. Surprisingly, however, courts have not formulated a consistent, reliable body of doctrine to determine the extent to which rule 408 bars evidence of pretrial offers or statements made during negotiations (1) when the party who allegedly made them has given testimony at trial with which the pretrial offer or statement is arguably inconsistent and (2) when the purpose of introducing the evidence is to attack that party's credibility by calling into question his veracity, memory, or accuracy of perception.

There is support from commentators and in cases for both sides of this issue. Among commentators, Professors Redden and Saltzburg take the position that it would effectively defeat the principal purposes of rule 408 to hold that it permits admission of statements made in negotiations solely because they are arguably inconsistent with testimony offered by a party at trial.<sup>92</sup> Professors Louisell and Mueller seem to line up on the other side.<sup>93</sup> Professors Wright and Graham also advocate admission of such statements, even though they do so without overwhelming conviction, and after acknowledging that the competing arguments are not without substance.<sup>94</sup> The few judicial opinions in this area are not elaborately reasoned, but most seem to favor admission of settlement communications for impeachment purposes when the communications qualify as

92. K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 172 (2d ed. 1977). Additional support for this view from commentators can be found in M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 255-56 (1981); Waltz & Huston, *The Rules of Evidence in Settlement*, 5 LITIGATION 11, 16 (1981); Kirkpatrick, *Reforming Evidence Law in Oregon*, 59 OR. L. REV. 41, 67 (1980).

93. 2 D. LOUISSELL & C. MUELLER, FEDERAL EVIDENCE 277 (1978).

94. C. WRIGHT & K. GRAHAM, *supra* note 14, at 227-28; see Blakely, *Article II: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 242 (1983).

prior inconsistent statements.<sup>95</sup> Judicial support for the opposite view can be found in *C & K Engineering Contractors v. American Steel Co., Inc.*<sup>96</sup>

The next few paragraphs suggest arguments that could be used by lawyers whose objective is to persuade a court that rule 408 does not permit admission of statements made by a party opponent during negotiations merely because the statements are arguably inconsistent with testimony by that party at trial. Counsel should keep in mind, however, that even if they fail to persuade the court that rule 408 should be so construed, they may still be able to mount powerful arguments against admission under rule 403, since the evidence's marginal contribution to the jury's capacity to assess the credibility of the witness often clearly will be outweighed by the risk of unfair prejudice, confusion, and digression into collateral matters.<sup>97</sup>

The most important argument counsel can make under rule 408 is that to admit statements made during negotiations simply because they are arguably inconsistent with a party's prior trial testimony would eviscerate the rule completely. To admit such statements would make a mockery of the rule's promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are completely consistent and because it is so easy to find some tension between virtually any two statements on the same subject. Even Professors Wright and Graham concede that interpreting rule 408 to permit the admission of statements merely because they are inconsistent with trial testimony threatens to reduce "the second sentence of Rule 408 to a cipher."<sup>98</sup>

If lawyers and parties know there is a great risk that what they say in settlement negotiations may be used against them at trial, they will retreat into a shell of secrecy and non-communication in the pretrial period, thus turning settlement "negotiations" into little more than posturing and poker-playing. If parties are afraid to share the reasoning that supports and explains their offers and demands, they bear a greater risk that the substantive terms of settlement agreements will not reflect rational and fair resolutions of disputes. Since so many of our cases are

95. See, e.g., *County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984); *American Family Life Assurance Co. v. Traskale*, 733 F.2d 559, 568 (8th Cir. 1984); *Missouri Pac. Ry. v. Arkansas Sheriff's Boys Ranch*, 280 Ark. 53, 63-65, 655 S.W.2d 389, 394-95 (1983); *In re Commodore Hotel Fire and Explosion*, 324 N.W.2d 245, 248 (Minn. 1982).

96. 23 Cal. 3d 1, 12-13, 587 P.2d 1136, 1142-43, 151 Cal. Rptr. 323, 329-30 (1978) (interpreting CAL. EVID. CODE § 1155).

97. See *infra* notes 125-54 and accompanying text.

98. C. WRIGHT & K. GRAHAM, *supra* note 14, at 227.

concluded by settlement agreements, it is unseemly to interpret rules of evidence in a way that significantly reduces the likelihood that settlements will be rational and that the parties will feel the settlements are fair. The courts' interpretation of evidentiary rules should promote rationality and respect for the ways disputes are resolved in the system rather than irrationality and cynicism.

Counsel can buttress these policy arguments by noting that the only form of impeachment acknowledged by the rule itself is proof of "bias or prejudice of a witness." In addition, all of the cases cited in the Advisory Committee's note supporting admissibility for purposes of impeachment involved evidence of generous settlements with former defendants who were subsequently called to testify at trial on behalf of plaintiff.<sup>99</sup> It seems unlikely that the drafters of the rule would have failed to mention as common a form of impeachment as prior inconsistent statements, if they felt that it should constitute an exception to rule 408. Moreover, it is difficult to imagine that the drafters did not see that the apparent promise of meaningful protection offered by rule 408 would be a charade and a huge trap for the unwary if impeachment by a prior inconsistent statement were considered a sufficient basis for admission.

Counsel also can argue that there are other well-established "exceptions" to rule 408 that give courts ample power to admit evidence necessary to correct wrongs committed during settlement negotiations. As discussed below, there is clear authority to admit evidence of statements made during negotiations if the purpose is to show illegality in the terms of an agreement or that an agreement was acquired through fraudulent representations or omissions.<sup>100</sup> Similarly, courts have held that because rule 408 applies only to genuine compromises of real disputes, it offers no protection when statements made during negotiations or the terms of an agreement tend to show that a purported settlement was in fact a sham. For example, rule 408 would not protect a statement that a settlement was entered solely to buy the testimony of a former defendant, or to induce him to pretend to remain active in the case by pursuing claims against co-defendants in order to give plaintiff more leverage with those other defendants.<sup>101</sup>

The only wrong that a party could hide behind rule 408 if courts refuse to admit statements made during negotiations simply because they

99. *Id.* at 262; see F.R.D. R. EVID. 408 advisory committee's note.

100. See *infra* notes 108-16 and accompanying text.

101. C. WRIGHT & K. GRAHAM, *supra* note 14, at 263; see *L. J. Vontz Constr. Co. v. Alliance Indus., Inc.*, 215 Neb. 268, 272-73, 338 N.W.2d 60, 63 (1983); see also *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1235 (7th Cir. 1983).

are arguably inconsistent with testimony at trial is lying on the stand or during a settlement discussion. Lying from the witness stand or during settlement negotiations is a serious evil. But acknowledging that fact is not where thinking about this matter should stop.

First, courts must ask how much the narrower interpretation of the rule would affect real world behavior: how much less lying would there be, and how much more often would lying be detected, if rule 408 were construed to permit admission of statements that were made in settlement negotiations solely on the ground that they arguably are inconsistent with testimony offered at trial? Since there is no empirical study that answers this question, we are forced to speculate. My speculation is that adopting the narrower interpretation of the rule would have little effect on lying. The psychological and other forces that lead people to lie are probably sufficiently powerful in most instances to overwhelm whatever fear might be engendered by the rather remote possibility of exposure through admission of words uttered in settlement negotiations. Most lawyers and litigants understand that only a small percentage of cases reach the trial stage, so most counsel and clients probably would believe that the odds are small that a lie committed during settlement negotiations would be exposed at trial. Moreover, if a party lies during settlement negotiations about a matter of any real consequence, it seems unlikely that he would not repeat the lie at trial. If he repeats the lie, his stories will not be inconsistent and the narrower interpretation of the rule would not help expose his dishonesty.

There is some possibility that parties might be truthful during settlement negotiations but untruthful at trial. The odds of that scenario occurring often with respect to important issues seem small, however, because the pressure to be truthful at trial is much greater than it is in the informal, off-the-record settlement negotiations. Moreover, most settlement negotiations are conducted almost exclusively by counsel and not by the clients. Thus, in the vast majority of cases, the stories that would be compared for impeachment purposes would be (1) the story told by the client at trial and (2) the story told by his lawyer in settlement discussions. It is not clear that courts would permit impeachment of a party's trial testimony by words uttered earlier by his lawyer in private efforts to compromise the claim. In sum, it is questionable whether the narrower interpretation of the rule would contribute to the goal of deterring or detecting perjury at trial or lying during settlement negotiations.

On the other hand, the broader interpretation of the rule, which would bar evidence of settlement communications if the only ground for admission was arguable inconsistency between statements in settlement

negotiations and testimony at trial, might promote positive ends by encouraging parties to share, during settlement discussions, more of the reasoning and evidence that supports the offers or demands they make. I hasten to concede that just as it is not clear how much a narrow interpretation of rule 408 discourages or exposes lying, it also is not clear how much a broad interpretation of the rule would improve the openness and rationality of settlement discussions. The absence of empirical data forces courts to make educated guesses on both sides of the debate. I fear, however, that fair consideration has not been given to the arguments that support a broader interpretation of the rule. Such consideration might begin by acknowledging that it is not true that only liars need fear an interpretation of rule 408 that would permit admission of statements made in negotiations solely on the ground that they are arguably inconsistent with trial or deposition testimony. Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent. In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous. The choice clearly is *not* between protecting liars and exposing liars. Rather, the choice is between (1) an interpretation of the rule that might, to some unmeasured extent, deter some lying by permitting party opponents to expose it when negotiations do not lead to settlements, and (2) an interpretation of the rule that would give some reality to its promise of confidentiality and that might, to some unmeasured extent, make settlement negotiations more rational by encouraging parties to share the reasoning that supports their positions. Given the lack of evidence that the narrow view of the rule has any effect on lying, courts should reject that interpretation on the ground that it makes rule 408 hollow and misleading and creates pressures on counsel and litigants that tend to defeat the rule's purposes.

#### B. Negating a Contention of Undue Delay

By its own terms, rule 408 does not compel exclusion of settlement communications if they are proffered for the purpose of "negating a contention of undue delay." Parties are most likely to want to use settlement communications for this purpose when the opposition is asserting that the doctrine of laches should bar their claim. As both Wigmore and

Professors Wright and Graham point out,<sup>102</sup> however, often it will only be the existence of negotiations that is relevant, not the content of the parties' statements during the discussions. Lawyers who are trying to limit disclosures from the negotiations should press this point on the judge. On the other hand, the content of statements made during the negotiations would be relevant and admissible, barring protection from some other rule such as rule 403, if plaintiff contended that he had failed to press forward because of specific promises defendant made during their settlement talks. For example, this may occur where there is evidence that the defendant told the plaintiff not to file suit because the defendant would make the plaintiff whole without the necessity of resorting to the court system.

In contrast, parties will rarely be able to use an opponent's assertion of a defense based on the statute of limitations to justify introducing evidence from settlement negotiations. The obstacle, however, would not be rule 408, but rule 402's requirement of relevance.<sup>103</sup> Under most statutes of limitations, "the fact that one was attempting to compromise the dispute is usually no excuse for failure to file the complaint or to take whatever steps are required to comply with the statute."<sup>104</sup> An exception to this generalization might arise when the evidence from the negotiations suggests that the defendant had affirmatively induced the plaintiff not to file his claim by making false promises to pay or otherwise correct the situation. When a defendant's request or promise reasonably induces the plaintiff not to file within the statutory period, the plaintiff might well be able to invoke the doctrine of equitable estoppel to make the evidence relevant.<sup>105</sup>

Courts have permitted parties to use evidence of settlement negotiations to excuse failures to begin efforts to mitigate damages promptly, or to rebut a defendant's contention that the plaintiff's delay in stopping work under a contract showed that the plaintiff did not believe that the defendant had breached.<sup>106</sup> Similarly, a defendant is likely to be permitted to introduce evidence that during settlement negotiations it offered to

102. See C. WRIGHT & K. GRAHAM, *supra* note 14, at 272 (citing WIGMORE, EVIDENCE § 1061 n.43 (1972)).

103. FED. R. EVID. 402.

104. C. WRIGHT & K. GRAHAM, *supra* note 14, at 271.

105. *Id.* at 283.

106. See, e.g., *California & Haw. Sugar Co. v. Kansas City Terminal Warehouse Co.*, 602 F. Supp. 183, 188 (W.D. Mo. 1985) (company sold sugar to alternate buyer while negotiations progressed, resulting in greater damages due to drop in market price); *Urico v. Parnell Oil Co.*, 708 F.2d 852, 855-56 (1st Cir. 1983) (plaintiff incurred additional loss of use damages while negotiating with insurer over who would pay for truck repair); C. WRIGHT & K. GRAHAM, *supra* note 14, at 272, 283.

reinstate the plaintiff when the purpose of the evidence is to show that the plaintiff did not mitigate his damages.<sup>107</sup>

### C. Wrongful Acts During Negotiations

Rule 408 will not block admission of evidence from settlement negotiations if the purpose of the evidence is to show that a party committed a civil or criminal wrong or proposed illegal activity. For example, rule 408 would be no obstacle to introducing evidence that an offer to compromise made by a defendant in an antitrust action consisted of an invitation to join an illegal conspiracy.<sup>108</sup> Similarly, there is no reason to read rule 408 as barring evidence that a party attempted to extort another during settlement negotiations. As suggested by Judge Weinstein, a former member of the Advisory Committee on the evidence rules, courts also should admit evidence from settlement negotiations that shows a libel, an assault, or an unfair labor practice during the negotiations themselves.<sup>109</sup>

Evidence from settlement negotiations may be used in other contexts. Parties may use such evidence to help prove the failure of an insurance carrier to make a good faith settlement within policy limits.<sup>110</sup> Evidence from settlement negotiations also might be used to help prove a claim of attorney malpractice, or as part of a lawyer's effort to prove that he is entitled to a fee that a former client is wrongfully refusing to pay.<sup>111</sup> There is also authority for the view that a grand jury investigating criminal charges may subpoena evidence about settlement negotiations in an earlier civil lawsuit.<sup>112</sup> This exception finds support in rule 408's express permission to use evidence from settlement negotiations to prove "an effort to obstruct a criminal investigation or prosecution."<sup>113</sup>

A significant variation on this theme can arise when some members of a putative class object to a proposed settlement of a class action. An important Seventh Circuit opinion held that "the conduct of the negotia-

107. See *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630, 637-38 (E.D.N.Y. 1982) (discrimination in employment not cause of damages after reinstatement offer).

108. Cf. *Crouse-Hinds Co. v. Internorth, Inc.*, 518 F.Supp. 413, 414-16 (N.D.N.Y. 1980) (Clayton Act provides an exception to rule 408 as regards consent decrees or *nolo contendere* pleas in antitrust actions; exception is necessary to allow use of past antitrust conduct in enforcing law).

109. 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* 408-428 (1975).

110. See, e.g., *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 396, 89 Cal. Rptr. 78, 90 (1970) (construing an earlier version of analogous state law, CAL. EVID. CODE § 1152).

111. C. WRIGHT & K. GRAHAM, *supra* note 14, at 282.

112. See *In re Special Nov. 1975 Grand Jury*, 433 F.Supp. 1094, 1097 (N.D.Ill. 1977) (subpoena *duces tecum* issued to Peat, Marwick, Mitchell & Co.).

113. FED. R. EVID. 408.

tions [is] relevant to the fairness" of a proposed class settlement.<sup>114</sup> Therefore, members of a class that seek to block approval of such a settlement are entitled to conduct discovery or examinations into how the negotiations were handled, including inquiry into alternative offers that may have been considered and potential conflicts of interest of counsel who led the settlement negotiations on behalf of the class.<sup>115</sup> The court noted that the "seemingly irregular conduct of the negotiations" raised real questions about whether those who had purported to represent the members had done so adequately and whether the terms of the proposed agreement were unfair to some of the people who would be included.<sup>116</sup>

#### D. To Prove or Block Enforcement of an Alleged Settlement Contract

Rule 408 does not bar the use of evidence from settlement negotiations if the purpose is either (1) to prove that an agreement was reached and should be enforced, or (2) to defeat enforcement of an apparent agreement. For example, the rule will not prevent a party from introducing evidence from the negotiations to show that a settlement contract was procured by fraud<sup>117</sup> or was the product of duress or mutual mistake.

There are some circumstances, however, in which counsel may be able to forestall such suits. Counsel may incorporate a release into the settlement contract that specifically announces that in deciding to enter the agreement neither party is relying on "any inducements, promises or representations" that are not set forth with particularity in the settlement contract itself. The Ninth Circuit recently relied, in part, on such language to deny a sophisticated commercial entity an opportunity to prove that a settlement and release were obtained through the intentional fraud of an opponent.<sup>118</sup> Courts presumably would be more reluctant to permit such language to foreclose an effort to set aside a settlement between parties of substantially unequal bargaining power and sophistication. Moreover, state statutes may prevent general release language (as opposed to language that specifically identifies certain events or documents out of which no future claims could be made) from extinguishing "claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."<sup>119</sup>

114. *Oswald v. General Motors Corp.*, 594 F.2d 1106, 1124 (7th Cir. 1979).

115. *Id.* at 1123-25.

116. *Id.* at 1124.

117. See *Gezman v. Soble*, 120 Mich. App. 831, 842, 328 N.W.2d 119, 124-25 (1982) (construing the parallel state rule).

118. *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1445 (9th Cir. 1986).

119. CAL. CIV. CODE § 1542 (West 1982).

### E. State of Mind

Although there are innumerable other purposes for which counsel might seek to introduce evidence from settlement negotiations, one has been upheld over objections based on rule 408 so often that it warrants specific mention. Courts often have admitted evidence of settlements or from settlement negotiations to help prove the state of mind or the knowledge of a party to those negotiations. In *Breuer Electric Manufacturing v. Toronado Systems of America, Inc.*,<sup>120</sup> for example, the court held that evidence from settlement negotiations that occurred before filing a complaint was admissible to rebut an assertion by defendant that it had not been aware of an issue until the suit was filed. In *United States v. Gilbert*,<sup>121</sup> the Second Circuit upheld a trial court's decision to admit a consent decree entered by defendant with the Securities Exchange Commission when the purpose of the evidence was to show the defendant's knowledge of securities reporting requirements. Similarly, the Third Circuit has admitted evidence from settlement negotiations to show that a police department knew that a particular officer had violent propensities.<sup>122</sup>

Most reported opinions seem quite liberal in admitting evidence from settlement negotiations to prove or rebut contentions about a party's state of mind or knowledge. At least one court, however, has viewed this kind of reasoning as perilously close to permitting the use of such evidence to prove the validity of a claim itself. In *Fidelity & Deposit Co. of Maryland v. Hudson United Bank*,<sup>123</sup> the court refused to admit evidence of an earlier settlement with a non-party that was proffered to show that the defendant knew about alleged employee dishonesty earlier than it contended at time of trial. The court reasoned that admitting the evidence for such a purpose was tantamount to admitting "to establish the validity of the plaintiff's underlying claim."<sup>124</sup>

### III. Rule 403: An Additional Source of Protection

Rule 408 does not purport to compel courts to admit evidence of settlement whenever that evidence is offered for some purpose other than to prove liability or damages. Rather, in such situations the rule simply does not compel exclusion of the evidence. Rule 408 also does not purport to prevent counsel from invoking other rules of evidence to attempt

120. 687 F.2d 182, 185 (7th Cir. 1982).

121. 668 F.2d 94, 97 (2d Cir. 1981).

122. *Gagliardi v. Flint*, 564 F.2d 112, 116 (3d Cir. 1977).

123. 493 F. Supp. 434, 444-45 (D.N.J. 1980).

124. *Id.*

to block admission of settlement material. When rule 408 does not compel exclusion, counsel should look to Federal Rule of Evidence 403 as an independent potential source of protection.<sup>125</sup>

Rule 403 provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.<sup>126</sup>

It is important to emphasize at the outset that the Advisory Committee's note to this rule states that the other rules in article IV, which include rule 408, "reflect the policies underlying" rule 403 and consist of "concrete applications evolved for particular situations."<sup>127</sup> Thus, rule 408 is a sub-species of rule 403, and the kind of analysis required by rule 403 is appropriate to decide whether evidence from settlement negotiations should be excluded under rule 403 even though it is not barred by rule 408.

Before turning to the case law that supports this view, it is important to describe a strong argument by analogy from rule 404(b). Rule 404(b), also in article IV, is one of the "concrete applications [of the kind of balancing generally called for in rule 403] evolved for particular situations."<sup>128</sup> The structure of rule 404(b) parallels the structure of rule 408. Both begin by prohibiting admission of specified kinds of evidence for a specified purpose, then go on to announce that courts are not required to exclude the kind of evidence the rule covers if it is offered for a purpose other than the one proscribed. Rule 404(b) prohibits admission of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith."<sup>129</sup> In its second sentence rule 404(b) states that such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>130</sup> Explaining how courts should proceed when "the rule does not require that the evidence be excluded" because it is offered for a purpose that is not prohibited, the Advisory Committee's note declares:

No mechanical solution is offered. The determination must be

125. See, e.g., *Weir v. Federal Ins. Co.*, 811 F.2d 1387 (10th Cir. 1987); *infra* notes 134-54 and accompanying text.

126. FED. R. EVID. 403.

127. FED. R. EVID. 403 advisory committee's note.

128. *Id.*

129. FED. R. EVID. 404(b).

130. *Id.*

made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.<sup>131</sup>

Thus, for a rule that also is in article IV, and that is structured just like rule 408, the Advisory Committee makes it clear that courts should conduct an independent analysis under rule 403 *after* they conclude that the concrete application provided for in a particular rule does not require exclusion.<sup>132</sup>

The Fifth Circuit proceeded exactly in this manner in *United States v. Cook*.<sup>133</sup> Significantly, the evidence that generated the dispute consisted of a consent decree and supporting documents that resulted from a settlement of a prior civil lawsuit.<sup>134</sup> Thus the court arguably could have adverted to the policies supporting rule 408 in addition to relying on rule 404(b). Neither party sought to draw support from rule 408, though, and the court did not raise the issue. The court did state clearly, however, that even if the evidence was not barred by rule 404(b) because it was proffered for a purpose other than the purpose proscribed, its admissibility "remains subject to the balancing test of rule 403. The probative value of the evidence under consideration must be determined and compared with the danger of unfair prejudice occasioned by its admission, error being found when it is clear that the latter substantially outweighs the former."<sup>135</sup> Applying this test, the *Cook* court concluded that the trial court had committed reversible error by admitting the consent decree documents.<sup>136</sup> Since the reasoning in support of this conclusion was colored substantially by the special concern for protecting a defendant's rights in a criminal trial, however,<sup>137</sup> the implications of this holding for civil litigation are not clear.

As the *Cook* court suggested, and as the Advisory Committee's note makes clear, the kind of analysis that is appropriate under rule 403 consists of "balancing the probative value of and need for the evidence against the harm likely to result from its admission."<sup>138</sup> In conducting this kind of analysis, courts may consider, among other things, the "availability of other means of proof" and whether the evidence would

131. FED. R. EVID. 404(b) advisory committee's note.

132. *Id.*

133. 557 F.2d 1149, 1153-55 (5th Cir. 1977).

134. *Id.* at 1151.

135. *Id.* at 1153 (citing FED. R. EVID. 404 advisory committee's note; *United States v. Catano*, 553 F.2d 497, 499-500 (5th Cir. 1977)).

136. *Id.* at 1155.

137. *Id.* at 1153-54.

138. FED. R. EVID. 403 advisory committee's note.

have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>139</sup> *Olin Corp. v. Insurance Co. of North America*<sup>140</sup> is instructive in this context. In that case, the court refused to order pretrial disclosure of settlement documents, reasoning in part that representatives of the party seeking discovery had participated in the settlement discussions and thus would be in a position to impeach erroneous testimony about those discussions without discovery of the documents.<sup>141</sup> Interestingly, the *Olin* court did not cite rule 403; instead, the court based its holding on the implications of rule 408.<sup>142</sup>

Given the strength of the common-law view that an offer of compromise sheds light only on a party's desire to terminate litigation, not on its assessment of the merits of an opponent's underlying position, counsel should be able to argue persuasively in many environments that evidence of an offer of compromise is of little or no probative value.<sup>143</sup> Simultaneously, counsel can argue that admission of an offer of compromise would create a huge risk of unfairly prejudicing the party who made the offer and of confusing and misleading the jury—risks that could not be eliminated by limiting jury instructions. Moreover, if a court admitted evidence from settlement negotiations, fairness would require giving opposing counsel a full opportunity to explicate for the jury the context in which the settlement statements or offers were made. This would effectively expand the litigation into collateral matters that would exacerbate the jury's confusion and fruitlessly lengthen the trial.

Counsel should add arguments based on the policy that informs rule 408: courts that admit evidence from settlement negotiations discourage communication about settlement and impair the rationality of settlement discussions, and thus help to defeat the policy of encouraging consensual resolution of disputes. Admitting the proffered evidence would seriously threaten these important interests. Since that evidence generally would be of marginal probative value, it should be excluded.

While not numerous, there are several cases that clearly endorse the propriety of using a rule 403 balancing analysis before deciding to admit evidence from settlement that is not clearly barred by rule 408. In *Weir*

139. *Id.*

140. 603 F. Supp. 445, 450 (S.D.N.Y. 1985).

141. *Id.*

142. *See id.*

143. *See, e.g., Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F. Supp. 499, 535-37 (E.D. Mich. 1974) (efforts to settle or compromise a claim, along with direct suggestions or overtures of settlement, will not be received in evidence as an admission of liability on part of the party making the offer).

*v. Federal Insurance Co.*,<sup>144</sup> the district court had conducted a rule 403 analysis of proffered settlement evidence and had decided to exclude the evidence because "its relevance was outweighed by its prejudicial value."<sup>145</sup> On appeal, the panel of Tenth Circuit judges explicitly upheld the propriety of conducting such an analysis under rule 403.<sup>146</sup> The reviewing court declared:

The prejudicial effect of allowing a jury to hear of the circumstances surrounding the settlement of a claim was one of the concerns that motivated the drafters of the Federal Rules of Evidence to absolutely prohibit the use of evidence of a settlement to prove liability or the amount of a claim. Fed. R. Evid. 408. Although Rule 408 does not prohibit the admission of evidence of the circumstances surrounding a settlement to prove something other than liability—such as voluntariness—many of the same concerns about prejudice and deterrence to settlements exist regardless of the purpose for which the evidence is offered.

The district judge must weigh the prejudicial effect of such evidence against the relevance of the evidence.<sup>147</sup>

Remanding the case for other reasons, the *Weir* court explicitly instructed the district judge to conduct a full balancing analysis of the proffered settlement evidence under rule 403.<sup>148</sup> While the Tenth Circuit panel did acknowledge that the "exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly," it also emphasized that the "decision to exclude (or admit) evidence under [rule 403] is within the sound discretion of the trial court, and will not be reversed by this court absent a clear abuse of discretion."<sup>149</sup>

Several years earlier a different panel of Tenth Circuit judges had more summarily endorsed this use of rule 403 in *United Fidelity v. Law Firm of Best, Sharp, Thomas & Glass*.<sup>150</sup> The appellate court upheld a trial judge's decision under rule 403 to exclude testimony that "would have revealed settlement efforts" in a related earlier case. The appellate court noted that rule 403 confers considerable discretion on a trial judge with respect to such matters and found no abuse of that discretion.<sup>151</sup>

Several cases provide additional, but less direct, support for the notion that courts may use a rule 403 balancing analysis to decide whether

144. 811 F.2d 1387, 1395 (10th Cir. 1987).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1396.

149. *Id.*

150. 624 F.2d 145, 149 (10th Cir. 1980). Only Judge McWilliams participated in both *Weir* and *United Fidelity*.

151. *Id.*

to admit settlement evidence whose exclusion would not be compelled by rule 408.<sup>152</sup> In *Kennon v. Slipstreamer, Inc.*,<sup>153</sup> the majority found a violation of rule 408, then focused on the extent of the prejudice to defendant in deciding that reversal was necessary because of the trial court's disclosure of the amount of a settlement with former codefendants. The *Kennon* dissent argued that the appropriate analytical model in this situation consists of the balancing called for by rule 403.<sup>154</sup>

In sum, it is entirely appropriate to invoke rule 403 to oppose the admission of settlement evidence that rule 408 would not automatically bar. As the arguments and authorities described above make clear, there are many circumstances in which the interests that would be advanced by exclusion clearly outweigh the benefits that might result from admission.

#### IV. Discoverability vs. Admissibility: Is There a "Privilege" for Settlement Communications?

Attorneys must be careful to distinguish pretrial discoverability from admissibility at trial. Litigators cannot safely assume that statements made during settlement negotiations that would not be admitted at trial (by virtue of rule 408, or rule 403, or simply because they would be irrelevant) are also immune from discovery. Courts attempting to resolve the discoverability question must face issues and conduct analyses that are quite different from the issues and analyses relevant when ruling on the question of admissibility. Unfortunately for counsel, who would like to be able to predict the likelihood that settlement communications will remain confidential, the published opinions on discoverability of settlement negotiations do not reflect a consensus about basic issues in this area. As the paragraphs that follow make clear, some courts are sympathetic with the need to preserve confidentiality even as against discovery,<sup>155</sup> while many others have ruled that settlement communications are discoverable despite the policies that inform rule 408.<sup>156</sup>

Whether or not communications made during settlement negotia-

152. See, e.g., *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977); *United States v. Cook*, 557 F.2d 1149, 1152-55 (5th Cir. 1977); *Stacey v. Bangor Punta Corp.*, 620 F.Supp. 636, 637 (D. Me. 1985). The *McShain* court concluded that a trial judge's decision to admit evidence of settlement with a former defendant to show bias of an expert witness employed by that former party "was not an abuse of discretion 'so inconsistent with substantial justice' as to require a new trial." *John McShain, Inc.*, 563 F.2d at 635.

153. 794 F.2d 1067, 1070-71, 1075-78 (5th Cir. 1986).

154. *Id.* at 1076 (Thornberry, J., dissenting).

155. See *infra* notes 160-71 and accompanying text.

156. See *infra* notes 172-217 and accompanying text.

tions are discoverable may depend, in part, on whether courts will recognize a "privilege" for settlement communications under rule 408 or federal common law. This question is important because the scope of discovery is defined as "any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>157</sup> It follows that if communications made in connection with settlement are privileged, they will fall outside the scope of discovery, even if they are relevant. While no appellate court in the federal system has addressed this question directly, several district court opinions express or imply views on this matter. The majority view seems to be that settlement communications are not "privileged" within the meaning of the rules that define the scope of discovery.<sup>158</sup> The same question arises under analogous state statutes. As discussed below, the only appellate court in California that has addressed this question also has concluded that there is no generalizable "privilege" that shields settlement communications from discovery.<sup>159</sup>

#### A. Support for the Existence of a Settlement Privilege

The case law support for the view that rule 408, or its common-law antecedent, creates a privilege is relatively thin and appears to represent the minority view. At least one important opinion from a federal court of appeal prior to 1975, when the Rules of Evidence became effective, uses the word "privileged" when referring to settlement communications.<sup>160</sup> This reference, however, appears almost casual, not the product of self-conscious analysis about the significance of the word privilege.

More recently, Judge MacMahon of the United States District Court for the Southern District of New York appeared to endorse the notion that Federal Rule of Evidence 408 creates a "settlement privilege." This privilege would block discovery of communications related to settlement unless the party seeking the discovery can show clearly that rule 408 would not bar admission of the communications at a subsequent trial.<sup>161</sup> Unfortunately, the only reasoning the court offers in support of this conclusion is a cryptic suggestion that denying discovery of the product of earlier settlement negotiations is necessary "in order to safeguard the policy favoring settlements."<sup>162</sup>

157. FED. R. CIV. P. 26(b).

158. See *infra* notes 172-217 and accompanying text.

159. See *Covell v. Superior Court*, 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371, 373 (1984).

160. See *Edward Valves, Inc. v. Cameron Iron Works, Inc.*, 286 F.2d 933, 938 (5th Cir. 1961).

161. *Olin Corp. v. Insurance Co. of N. Am.*, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985).

162. *Id.* at 450; see *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158 (E.D.N.Y. 1982), discussed *infra* notes 211-19 and accompanying text.

Two of the other opinions that support the argument that rule 408 creates or reflects a privilege offer a little more by way of explanation but focus on the trial stage rather than on the discovery stage. *Kennon v. Slipstreamer, Inc.*,<sup>163</sup> presented the issue of whether or not a trial judge had committed reversible error when, in explaining to the jury why certain defendants were no longer present, he disclosed not only the fact that they had settled with the plaintiff but also the nominal amount for which they were released. In support of his dissenting view that the trial court had not committed reversible error, Circuit Judge Thornberry emphasized that rule 408 "is rooted in the policy of promoting settlement by privileging settlements and settlement negotiations."<sup>164</sup> When Judge Thornberry insisted that the rule "is based on the privilege rationale," however, his purpose was not to argue against the discoverability of such material, but to support his minority view that a party could effectively waive the operation of rule 408 at time of trial by agreeing to the introduction of its own settlement offer or demand.<sup>165</sup> Thus his dissenting opinion lends only oblique support to arguments that rule 408 has created a generalized privilege for settlement negotiations that protects them from pretrial discovery.

Counsel will find a little more support for such an argument in the rationale that supports Senior District Judge Marovitz's conclusion in *Dunlop v. Board of Governors*.<sup>166</sup> This case presented the issue of whether the court should strike an affidavit submitted in support of a motion for summary judgment because the affidavit contained accounts of positions the parties had taken in settlement negotiations.<sup>167</sup> In explaining its decision to strike the affidavit, the court pointed out that the purpose of rule 408 is "to encourage settlement and compromise negotiations."<sup>168</sup> The court then proceeded to argue that "[i]t is only through such orderly and 'privileged' discourse regarding claims that this policy is most effectively served, and only when the privileges thereby received are strictly enforced will opposing counsel feel free to candidly and fully set forth their proposed compromises."<sup>169</sup>

While these opinions in *Kennon* and *Dunlop* addressed issues raised at the trial stage, the rationale that supports them surely is not irrelevant to the question we face here, which is whether federal law, through rule

163. 794 F.2d 1057, 1068-69 (5th Cir. 1986).

164. *Id.* at 1075-76.

165. *Id.*

166. 16 F.E.P. Cases 1116 (N.D. Ill. 1975).

167. *Id.* at 1117.

168. *Id.*

169. *Id.*

408 or otherwise, creates a "privilege" that can offer settlement communications some protection from discovery. The root of the rationale in each opinion is identical: if the law wants to encourage settlement by encouraging frank negotiations, it is important to create an environment in which counsel and parties can be fairly confident that what they say as they negotiate, and the terms of any agreements they might reach, will not be used against them later. Arguably, the law will fail to create such an environment if settlement communications are discoverable simply on a showing that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>170</sup>

A strong argument in favor of viewing rule 408 as creating a privilege can be built from the principal purpose of this rule. Because its principal purpose is to encourage settlement by encouraging "freedom of communication with respect to compromise, even among lawyers,"<sup>171</sup> rule 408 has something very important in common with traditionally recognized privileges. The principal reason the law cloaks communications between attorney and client with confidentiality, for example, is to encourage clients to "tell all" to their lawyers. The traditional privileges, in short, have been designed to open up lines of communication in certain settings in which full communication will serve important societal interests. The fact that rule 408 is designed to serve a closely analogous function is a major argument in favor of viewing it as creating a privilege.

#### B. Support for the View that No Settlement Privilege Exists

The traditional privileges attach to communications between persons who have ongoing, *supportive*, interdependent, nonadversarial relationships (e.g., between priest and penitent, husband and wife, doctor and patient, lawyer and client). One purpose of the traditionally recognized privileges is to strengthen these relationships, relationships that society has an interest in fostering. Parties to settlement negotiations, in sharp contrast, are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants, at least none that parallels the kind of societal interest that inspires the traditional privileges. Because no special relationship that society is committed to fostering is involved in most settlement negotiations, it can be argued that a key rationale supporting traditional privileges is inapplicable to the kinds of communications covered by rule 408.

170. FED. R. CIV. P. 26(b).

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

Additional arguments can be marshaled against the view that rule 408 creates a privilege. One such argument is that the rule purports to apply only at the trial stage and offers no express protection against pre-trial discovery of settlement communications. Another argument is that by its own terms rule 408 erects no barrier to admission at trial of settlement communications when the evidence is offered for any purpose other than "to prove liability for or invalidity of the claim or its amount." Thus the protection rule 408 offers is much more limited than the protection offered by a privilege like the attorney-client privilege. The attorney-client privilege attaches automatically to certain kinds of communications and can be penetrated only on an extraordinary showing. Rule 408, however, does not come into play at all unless a party wants to introduce the settlement communication at trial for the only purpose that is forbidden by the rule. The rule alone is not a bar if the party who wants to introduce the evidence can proffer any one of the scores of other purposes that might make the evidence relevant. Since rule 408 promises so much less, it cannot serve as the source of an expectation of privacy that is nearly as strong as the expectation created by the attorney-client privilege.

Another reason that might be cited by courts in declining to hold that rule 408 creates a privilege lies in the fact that the legislative history of rule 501<sup>172</sup> strongly suggests that Congress did not want the Federal Rules of Evidence to serve as a source of "privilege" law. As originally submitted by the Supreme Court to Congress, article V of the proposed Federal Rules of Evidence contained thirteen rules, nine of which defined specific nonconstitutional privileges that the federal courts would have been required to recognize.<sup>173</sup> Another of these proposed thirteen rules announced that federal courts could recognize only those privileges identified in the proposed rules or in some other act of Congress.<sup>174</sup> Significantly, the prohibition against admission of settlement negotiations to prove liability was not in this package of privileges. It was set forth not in the article dealing with privileges, but in the article entitled "Relevancy and Its Limits," in which it is presently located. Thus, it would appear that the Advisory Committee and the Supreme Court did not consider the protection offered by rule 408 a privilege. Moreover, Con-

172. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 8, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7082; S. REP. NO. 1277, 93d Cong., 2d Sess. 11, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7058. Compare Proposed Rules of Evid., 51 F.R.D. 315, 356-83 (1971) with FED. R. EVID. 501.

173. See Proposed Rules of Evidence, 51 F.R.D. 315, 356-83 (1971).

174. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 8, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7082.

gress rejected the privilege rules as proposed by the Advisory Committee and the Court and substituted in their place what is now rule 501, which essentially provides that privileges in federal question cases "shall be governed by the [evolving] principles of the common law." Thus, Congress in effect decided that the Federal Rules of Evidence should not be used to establish or to change the scope of privileges. Since Congress rejected the use of the Federal Rules for this purpose, it would seem difficult to argue that rule 408 creates a privilege.

While they have not directly endorsed all the arguments described above, several federal courts have concluded that there is no generalized privilege that protects settlement communications from discovery. Before discussing opinions whose reasoning would appear to apply to cases of all kinds, it is important to discuss a Seventh Circuit opinion that deals with the special problems associated with settlement of class actions.<sup>175</sup> In *In re General Motors Corp.*,<sup>176</sup> the trial court had approved settlement as to a subclass of plaintiffs after refusing to permit lawyers for disgruntled class members to conduct discovery into how the negotiations were handled by other lawyers who purported to represent the interests of all members. The appellate court concluded that this refusal constituted an abuse of discretion and reversible error.<sup>177</sup> The court pointed out that, before approving proposed class action settlements, district courts have a special responsibility to make meaningful inquiry into their fairness.<sup>178</sup> If lawyers for class members who did not have an opportunity to participate in the negotiations challenge this fairness, meaningful review requires affording them an opportunity to discover "the options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement."<sup>179</sup>

The court of appeals noted that there was "no convincing basis" for an argument that the conduct of these class action settlement negotiations "is protected from examination by some form of privilege."<sup>180</sup> The court insisted that its ruling was consistent with the letter and spirit of

175. Presumably similar problems could arise in connection with any settlement that required court approval, e.g., "shareholder derivative suits, bankruptcy claims, antitrust suits brought by the United States . . . , and any suits 'affecting the public interest.'" *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986).

176. 594 F.2d 1106, 1124-25, 1131 (7th Cir. 1979).

177. *Id.* at 1131.

178. *Id.* at 1123.

179. *Id.* at 1125 (quoting Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1562 (1976)).

180. *Id.* at 1124 n.20.

rule 408.<sup>181</sup> It was consistent with the letter of that rule because, on its face, rule 408 "only governs admissibility."<sup>182</sup> It was consistent with the spirit of the rule, which seeks to promote settlement, because:

Participants in negotiations to settle class actions are aware that Rule 23(c) requires the trial court's approval of any settlement reached. Moreover, they are or should be aware that the court will inquire into the conduct of the negotiations. . . . To the extent that such inquiry discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial doubt on their fairness.<sup>183</sup>

In other words, the Seventh Circuit panel concluded that participants in class action settlement negotiations had no reasonable expectation of privacy, at least as against other members of the class. Where there is no reasonable expectation of privacy, no privilege should attach.

Because no published opinion takes exception to the holding or reasoning of *In re General Motors Corp.*, counsel who participate in class action settlement negotiations should appreciate the substantial likelihood that their words and deeds in that context are both discoverable and admissible in a proceeding to assess the fairness of the proposed agreement or the adequacy of the representation of the class. Similar risks may attend any negotiations in which the court must approve the terms of a purported settlement.

In *Federal Trade Commission v. Standard Financial Management Corp.*,<sup>184</sup> a First Circuit panel held that the common-law right of access reaches financial statements submitted in confidence as part of a negotiated consent decree and that the parties resisting disclosure of these documents had failed to make the compelling showing that would be required to overcome this common-law right. The *Standard Financial* court accepted the premise that a common-law right of access attaches to all documents considered by a court "in the course of adjudicatory proceedings."<sup>185</sup> The court then held that a judge's consideration of a proposed consent decree constitutes an "adjudicatory proceeding."<sup>186</sup> According to the court, even when the proposed decree already has been hammered out through private settlement negotiations between a governmental agency and private parties, the trial court retains a responsibility to "make its own inquiry into the issue of reasonableness" before it can

181. *Id.*

182. *Id.*

183. *Id.* (citation omitted).

184. 830 F.2d 404, 409 (1st Cir. 1987).

185. *Id.*

186. *Id.* at 408-10.

put its imprimatur on the decree as proposed.<sup>187</sup> In the case at hand, the district court had relied on the confidential financial statements "in assessing the reasonableness of the order, i.e., in determining the litigants' substantive rights, and in performing its adjudicatory function. The common-law presumption of public access therefore attached to them."<sup>188</sup> The court went on to hold that a party who attempts to overcome the common-law right of access must make a compelling showing and that the courts should prohibit public disclosure (in this case to a newspaper) only when the interests that would be served by sealing the documents clearly outweigh the policy and tradition that support the public right of access.<sup>189</sup> In the case at hand, the First Circuit upheld the trial court's decision to unseal the financial documents even though they had been submitted to the governmental agency as part of settlement negotiations on the assumption that they would remain confidential. *En route* to its holding the court noted that the "appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."<sup>190</sup>

Two of the most important cases outside the class action environment that hold that settlement communications are not privileged from discovery involved the Freedom of Information Act (FOIA).<sup>191</sup> Because the opinions in these cases obviously were influenced by the policies favoring disclosure that inform the FOIA, it may not be safe to assume that these courts would adopt the same posture in cases in which the target of the discovery is not the federal government and the FOIA is irrelevant.<sup>192</sup> Neither court, however, limited its holding that rule 408 does not create a generalized discovery privilege.<sup>193</sup> Thus, on their face, these opinions apply across the board.

District Judge Hogan wrote the first of these two opinions in *Center*

187. *Id.* at 408.

188. *Id.* at 410.

189. *Id.*

190. *Id.*

191. 5 U.S.C. § 552 (1982); see *NAACP Legal Defense & Educ. Fund, Inc. v. Department of Justice*, 612 F. Supp. 1143 (D.D.C. 1985); *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739 (D.D.C. 1983).

192. See *NAACP Legal Defense & Educ. Fund*, 612 F. Supp. at 1146-47; *Center for Auto Safety*, 576 F. Supp. at 742 n.5, 748-49; see also *infra* notes 234-325 and accompanying text (discussing FOIA's role in efforts to discover settlement communications from the federal government).

193. See *NAACP Legal Defense & Educ. Fund*, 612 F. Supp. at 1146; *Center for Auto Safety*, 576 F. Supp. at 748.

for *Auto Safety v. Department of Justice*.<sup>194</sup> Because it has been cited with approval in subsequent opinions from other courts, the pertinent passage from this opinion warrants full reproduction here:

Moreover, the argument that a 'settlement negotiation' privilege is authorized under F.R.E. 408 is also misplaced. The cited rule limits a document's relevance at trial, not its disclosure for other purposes [citing 2 Weinstein's Evidence Par. 408 (1)]. The protection afforded by Rule 408 is far less broad than the DOJ asserts. While its intent is to foster settlement negotiations, the sole means chosen to effectuate that end is a limitation on their [sic] admission of evidence produced during settlement negotiations for the purpose of proving liability at trial, not the application of a broad discovery privilege. Otherwise parties would be unable to discover compromise offers which could be offered for a relevant purpose, i.e., proving bias or prejudice of a witness, opposing a claim of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or enforcing a settlement agreement.<sup>195</sup>

This interpretation of rule 408 is arguably inconsistent with the Advisory Committee's note, which indicates that excluding evidence of settlement negotiations as irrelevant is not as "consistently impressive" as the rationale that focuses on the importance of promoting settlement by encouraging "freedom of communication with respect to compromise."<sup>196</sup> The *Center for Auto Safety* passage in effect reverses the position taken by the Advisory Committee by slighting, or discrediting altogether, the privilege rationale for rule 408 and restoring the pre-rule 408 predominance of considerations of relevance. Moreover, the paragraph cited from Judge Weinstein's treatise lends no real support to this reversal because that paragraph only makes the obvious point—a point made in the text of rule 408 as well—that a party cannot hide relevant facts simply by presenting them in a settlement discussion before they are requested in discovery, a principal that applies to all privileges.

While *Center for Auto Safety* is not faithful to the reordering of rationales for rule 408 that is suggested by the Advisory Committee, the opinion is consistent with the structure of the rule itself. In fact, the reasoning in *Center for Auto Safety* exposes the central difficulty that arises from the kind of compromise between competing concerns that rule 408 embodies. The compromise in the rule consists of the decision to make settlement communications inadmissible only for limited purposes—to prove liability for, the invalidity of, or the amount of damages from a claim—clearly leaving open the possibility that courts could ad-

194. 576 F. Supp. 739 (D.D.C. 1983).

195. *Id.* at 749.

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

mit this same kind of evidence for any of a large number of other purposes.

By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege rationale that they purported to find so "consistently impressive" and that they intended to make the principal underpinning of the newly formulated rule. The protection of rule 408 virtually evaporates; there are so many conceivable purposes for which settlement communications might be admissible, and counsel easily can argue that they cannot determine whether there is some permissible purpose for which the communications might be admissible at trial unless they can discover their contents.<sup>197</sup> The *Center for Auto Safety* opinion shows that the drafters constructed a rule that is unfaithful to its own rationale. To truly serve the privilege rationale, a rule would have to offer at least presumptive protection from both discovery and admissibility in most circumstances (perhaps analogous to the protection offered by the work product doctrine as it applies to material that does not reflect a lawyer's mental impressions or legal theories). By adopting the much more limited approach reflected in rule 408, the drafters made results such as those reached in *Center for Auto Safety* virtually inevitable.

Several other reported opinions support the notion that there is no generalized "privilege" for settlement communications. In *NAACP Legal Defense and Educational Fund, Inc. v. Department of Justice*,<sup>198</sup> for example, the court paraphrases part of the key passage from *Center for Auto Safety* to justify the conclusion that rule 408 "was never intended to be a broad discovery privilege."<sup>199</sup> Examples of opinions that reach the same conclusion on the privilege issue but do not rely on *Center for Auto Safety* include *Triax Co. v. United States*<sup>200</sup> and *Manufacturing Systems, Inc. v. Computer Technology, Inc.*<sup>201</sup> In an opinion issued just before rule 408 became effective, Judge Charles Richey concluded that while settlement communications "are clearly not admissible at trial for a number of public policy reasons, such negotiations do not fall within the confines of

197. See, e.g., *Bennett v. La Pere*, 112 F.R.D. 136, 139-40 (D.R.I. 1986), discussed *infra* notes 203-13 and accompanying text.

198. 612 F. Supp. 1143, 1146 (D.D.C. 1985) (FOIA case).

199. For a similar use of *Center for Auto Safety*, see *Weissman v. Fruchtman*, No. 83-2958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database).

200. 11 Ct. Cl. 130, 134-35 (1986).

201. 99 F.R.D. 335, 336 (E.D. Wis. 1983).

the privileges recognized at common law."<sup>202</sup>

Judge Selya's recent opinion in *Bennett v. La Pere*<sup>203</sup> reflects the most aggressive assault on the notion that settlement communications should be at least presumptively privileged from discovery. The court addressed "whether a nonsettling defendant in a civil action may compel disclosure of an accord reached between the plaintiffs and (former) codefendants."<sup>204</sup> The court first faced the question whether or not the remaining defendant could show that the settlement documents met the "liberal view of the standards of relevance applicable in discovery proceedings."<sup>205</sup> The judge answered this question in the affirmative. Significantly, he pointed out that rule 408 bars admission of such material only for limited, specified purposes, leaving open the possibility of admissibility for other purposes,<sup>206</sup> and that there is "no satisfactory way for the [remaining defendant] to determine whether it can slip within the integument of the Rule 408 exception unless it gains discovery access to the settlement documents."<sup>207</sup> The court confirmed the implication of this observation, noting that "in our adversary system" the only fair way to reach a conclusion about whether there might be a permissible use of the settlement documents at trial is to compel their disclosure in discovery.<sup>208</sup>

Having thus concluded that it would be virtually impossible to block discovery of such material on grounds of irrelevance, the *Bennett* court asked whether there were any other considerations that "might militate against disclosure."<sup>209</sup> In particular, it discussed whether some policy consideration reflected in rule 408 should either bar discovery of the settlement materials or, short of creating an absolute bar, lead courts to require parties who seek discovery of such material to make some showing of justification or need beyond satisfying the liberal relevance standard of rule 26(b).<sup>210</sup> Rejecting the reasoning and conclusion in *Bottaro v. Hatton Associates*,<sup>211</sup> the court held that nothing in rule 408's language or purposes justifies a conclusion that it creates any special obstacles to discovery. In finding that the settlement documents in question were

202. *Oliver v. Committee for the Re-Election of the President*, 66 F.R.D. 553, 556 (D.D.C. 1975).

203. 112 F.R.D. 136 (D.R.I. 1986).

204. *Id.* at 137.

205. *Id.* at 139.

206. *Id.* at 139 n.1.

207. *Id.* at 139.

208. *Id.*

209. *Id.*

210. *Id.* at 140.

211. 96 F.R.D. 158 (E.D.N.Y. 1982); see *infra* notes 218-19 and accompanying text.