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"not privileged" and were discoverable, the court relied not only on the fact that rule 408 applies only to admissibility at trial, but also on his argument that compelling disclosure of the terms of a completed settlement could not adversely affect the policy goal of encouraging settlements.[212] In making the latter argument the court asserted that the *only* fear that might inhibit settlement, and that rule 408 attempts to assuage, is the fear that a pretrial settlement proposal would be used against the party who made it during a subsequent trial in the same case.[213]

The one fear that the court in *Bennett* was willing to acknowledge is not the only fear that rule 408 is designed to assuage, as the courts in *Bottaro v. Hatton Associates*,[214] and *Weissman v. Fruchtman*[215] recognize. The *Bennett* opinion misconstrues rule 408 in part because it accepts an unrealistically narrow view of the several different ways that fear of disclosure could impair the settlement dynamic. If the only fear the drafters of rule 408 wanted to combat was fear that the terms of a settlement proposal would be used against the party who made the proposal, they would have written the rule much more narrowly than they did. If combating this fear had been their only objective, the drafters certainly would not have extended the protections of the rule to evidence "of conduct or statements made in compromise negotiations." The Advisory Committee's note leaves no room to question the reason the drafters expanded the common-law doctrine through the rule to cover "admissions of fact" and other statements made during settlement discussions: the drafters believed that the "inevitable effect" of the narrower common-law approach had been "to inhibit freedom of communication with respect to compromise, even among lawyers."[216] The rule was designed to encourage communication about a broad range of settlement-related matters, not just about offers or demands.

Common sense supports the drafters' broader vision. The *Bennett* court's approach would enable counsel to exchange only offers and demands and would reduce "negotiations" to irrational volleys of numbers. It is hard to understand how a law that encourages only the exchange of numbers, with no regard for the reasoning or the evidence that supports those numbers, could contribute much to fostering settlement. It takes no genius to see that a rule that offers some protection to lawyers who share the reasoning underlying their positions will contribute much more

212. *Bennett*, 112 F.R.D. at 139-40.
213. *Id.* at 141.
214. 96 F.R.D. 158, 160 (E.D.N.Y. 1982).
215. No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database).
216. Fed. R. Evid. 408 advisory committee's note.

to the prospects for settlement than a rule that permits only mechanical and sterile exchanges of bottom lines. Moreover, adopting rules whose effect is to reduce the negotiation process to mere number swapping degrades our system in fact and in the eyes of litigants who are forced to use it.

The *Bennett* court also mistakenly assumed that the purposes of rule 408 are fully satisfied once a settlement agreement has been reached by some or all of the parties to a particular action.[217] What people say in negotiations to settle one lawsuit may well be relevant to other litigation in which they are involved or in which they fear they might become involved. I have hosted many settlement conferences during which parties have expressed concerns about related cases or parallel situations involving nonparties, or in which one party has been unwilling to settle unless it is assured that the terms will not be disclosed to others who might be encouraged to file new claims or hold out for more money in cases already docketed. It is naive not to recognize that lawyers and litigants are constantly concerned about how their statements or actions in one setting might come back to haunt them in other settings. If courts construe rules so as to increase the circumstances in which communications made during negotiations can be discovered or admitted into evidence, they create inhibiting forces that reinforce the instinct parties and lawyers already have to play their cards as close to their chests as possible.

C. A Test for Discoverability that Appropriately Reflects the Policy Objectives

For the reasons just described, I disagree strongly with the *Bennett* court's suggestion that it is appropriate to decide whether negotiation material is discoverable simply by using the same kind of analysis that courts would use for any other nonprivileged matter. Although it may be fair to say that rule 408 does not create a privilege, the rule clearly reflects a significant federal policy in favor of promoting settlements *by encouraging freedom of communication* that is not implicated by most discovery requests. This policy would be seriously jeopardized if courts routinely permitted discovery of communications made in settlement discussions. Counsel seeking to protect settlement materials from discovery should argue vigorously that courts should order disclosure only after conducting a balancing analysis in which the federal policy of promoting settlement is given the full weight it deserves.

Case law supports this balancing approach. For example, in *Bottaro*

217. *Bennett*, 112 F.R.D. at 140.

v. *Hatton Associates,*[218] the opinion Judge Selya attacked in *Bennett*, the court declared:

> Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we . . . require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.[219]

In *Weissman v. Fruchtman,*[220] the court quoted this passage from *Bottaro* with approval. The court relied on it to justify blocking a party's access to settlement materials when he could not make a clear showing that these materials would be admissible at trial or lead to discovery of admissible evidence. In effect, the *Bottaro* and *Weissman* courts reversed the presumption that the *Bennett* court indulged in favor of discovery. The *Bennett* court held that a party must have discovery access to settlement materials in order to determine whether they might be admissible on some theory that would not be barred by rule 408.[221] The *Bottaro* and *Weissman* courts, in contrast, insisted that because free discovery access to such materials would threaten the policy objectives of rule 408, courts should protect these materials unless a party can make a persuasive showing that such materials are likely to be admissible or to lead to significant other evidence.[222]

Groton v. Connecticut Light & Power[223] further supports the approach endorsed by *Bottaro* and *Weissman*. In *Groton*, the court used a balancing test to determine whether to permit discovery that might interfere with ongoing settlement negotiations.[224] The court made clear that it would prohibit discovery of this kind where the potential prejudice to the settling parties outweighed the need for disclosure.[225]

Even without *Bottaro*, *Weissman*, and *Groton*, lawyers would be on solid ground in asking a court to conduct a balancing analysis before permitting discovery of confidential settlement communications. Federal courts conduct exactly this type of balancing analysis when a party seeks a protective order under Federal Rule of Civil Procedure 26(c). Rule

218. 96 F.R.D. 158, 160 (E.D.N.Y. 1982).
219. *Id.*
220. No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database).
221. Bennett v. La Pere, 112 F.R.D. 136, 139 (D.R.I. 1986).
222. 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Assoc., 96 F.R.D. 158, 160 (E.D.N.Y. 1982); Weissman v. Fruchtman, No. 83-8958 (S.D.N.Y. Oct. 31, 1986) (WESTLAW, Allfeds database); *cf.* Olin Corp. v. Insurance Co. of N. Am., 603 F. Supp. 445, 449-50 (discovery of terms of insurance agreement denied in order to safeguard the policy favoring settlements).
223. 84 F.R.D. 420, 423 (D. Conn. 1979).
224. *Id.* at 422-23.
225. *Id.* at 423.

26(c) clearly contemplates the courts' making particularized judgments comparing the potential utility of requested information with the harm that might be done if the information were disclosed.[226] Rule 26(c) also expressly empowers courts to enter orders that certain discovery not be conducted at all, or that "certain matters not be inquired into, or that the scope of the discovery be limited to certain matters," or that "trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."[227] Rule 26(c) obviously acknowledges that there will be circumstances in which the interests that support preserving the confidentiality of certain material will outweigh the interests that might be served by permitting discovery of this material.

Thus, even if federal courts refuse to hold that rule 408 creates a "privilege," they should afford settlement material an extra level of protection from routine discovery by conducting a balancing analysis in which the federal policy reflected in rule 408 is given the full weight it deserves. Courts should acknowledge that the public policies reflected in rule 408 create a substantial presumption against discovery of settlement material. Moreover, courts should permit rebuttal of this presumption only after a strong showing that the competing interests clearly outweigh the interests and the policies favoring confidentiality and that the competing interests cannot be satisfied in some other, less intrusive manner.

The only authority in this subject area is from a California court and points, albeit somewhat unclearly, in the direction of *Bottaro* and its progeny. In *Covell v. Superior Court,*[228] the appellate court considered section 1152 of the California Evidence Code,[229] which served as a model for Federal Rule of Evidence 408[230] and affords the same kind of protection to settlement negotiations as the federal rule. The court concluded that the section does not create a privilege, relying entirely on one fact: section 1152 is not located in the division of the California Evidence Code that defines "privileges."[231] While this reasoning is not profound, it may be sufficient.

226. FED. R. CIV. P. 26(c) (giving court discretion to grant a motion for protective order where "good cause shown," and "which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense"). *See, e.g.*, Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (D. Mo. 1950); *cf.* FED. R. CIV. P. 26(b)(1) (1983 amendments) (describing general scope and limits of discovery).
227. FED. R. CIV. P. 26(c)(4), (7).
228. 159 Cal. App. 3d 39, 205 Cal. Rptr. 371 (1984).
229. CAL. EVID. CODE § 1152 (West Supp. 1988).
230. FED. R. EVID. 408 advisory committee's note.
231. *Covell*, 159 Cal. App. 3d at 42, 205 Cal. Rptr. at 373. Section 1152 appears in the division that sets out evidence affected by or excluded for policy reasons.

The *Covell* court went on to hold, however, that the settlement material was not discoverable, even though it was not privileged, because the party seeking it had failed to show that it was "reasonably calculated to lead to the discovery of admissible evidence."[232] Most significantly, the spirit in which the court reviewed the relevance arguments seems more demanding than one would normally expect at the discovery stage. The appellate court took the unusual step of finding that the trial court had abused its discretion when it ordered disclosure of the material.[233] The appellate court's willingness to take this unusual step supports an inference that, under California law, judges will impose a more demanding standard for discovery of settlement material than they would for discovery of material that is unprotected by the kinds of public policies reflected in section 1152 of the California Evidence Code.

D. Settlements with Public Entities: Public Right of Access

Lawyers who represent public entities in settlement negotiations, or private parties who decide to enter a settlement agreement with a public entity, must be aware of the possibility that interested persons could use the Freedom of Information Act (FOIA),[234] or a state law equivalent like the California Public Records Act,[235] to force disclosure of both the terms of a settlement agreement and other documents related to settlement negotiations. This section focuses primarily on the applicability of the FOIA to materials generated in connection with settlement negotiations conducted by agencies of the federal government. It also includes a discussion of the only major opinion from a California appellate court that addresses the applicability of California's Public Records Act to an effort by a third party to compel disclosure of the terms of a settlement entered by a local government with a tort claimant.[236]

FOIA contains no exemption that explicitly mentions materials generated in connection with settlement negotiations. Because of this, and the general admonition that courts are to construe FOIA's exemptions narrowly and to resolve doubts in favor of disclosure,[237] there are circumstances in which citizens can use FOIA to force governmental agencies to disclose documents generated in connection with settlements.[238] The reported decisions suggest that documents related to settlement negotiations will be deemed exempt from FOIA if they have not been disclosed to or received from an adversary.[239] These decisions also suggest, however, that documents disclosed to or received from an adversary during confidential settlement negotiations are vulnerable to a FOIA request, regardless of the nature of the interest that inspires the request.[240]

232. 159 Cal. App. 3d at 43, 205 Cal. Rptr. at 374.

233. *Id.*

234. 5 U.S.C. § 552 (1982 & Supp. IV 1986).

235. Cal. Gov't Code §§ 6250-6265 (West Supp. 1987).

236. Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 205 Cal. Rptr. 92 (1984).

237. Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 741 n.2 (D.D.C. 1983); County of Madison, New York v. Department of Justice, 641 F.2d 1036, 1040 (1st Cir. 1981).

Among the nine exemptions from FOIA, the one that seemed most promising to lawyers trying to preserve the confidentiality of settlement documents was number five, which covers "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[241] This exemption protects government-generated documents whose confidentiality the government has maintained and which satisfy the criteria for any clearly established privilege. For example, this exemption would prevent use of FOIA to compel disclosure of a document the government generated in connection with settlement negotiations if the document satisfied the criteria for the attorney-client privilege or the work product doctrine.[242] Similarly, the fifth exemption applies to documents that would be protected from disclosure in civil litigation by the "deliberative process" privilege.[243]

On several occasions government lawyers have tried unsuccessfully to persuade courts that there is a separate "settlement privilege" in civil litigation and that materials that would qualify for it also should fall within the protections of the fifth exemption.[244] The seminal case is

238. FOIA applies only to documents. 5 U.S.C. § 552 (1982).

239. This is true provided that documents also fit into some existing privilege or constitute work product. *See, e.g., Center for Auto Safety*, 576 F. Supp. at 748; *see infra* notes 241-43 and accompanying text.

240. For authority for the proposition that analysis of access rights under FOIA is not contingent on the nature or intensity of the requesting citizen's interest, see *County of Madison*, 641 F.2d at 1040-41. *See also* National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).

241. 5 U.S.C. § 552(b)(5) (1982).

242. *See* Pennsylvania Dep't of Pub. Welfare v. Department of Health and Human Serv., 623 F. Supp. 301, 305-07 (M.D. Pa. 1985); Murphy v. Tennessee Valley Auth., 571 F. Supp. 502, 506-07 (D.D.C. 1983).

243. *See Pennsylvania Dep't of Pub. Welfare*, 623 F. Supp. at 305-07; *Murphy*, 571 F. Supp. at 504-06.

244. *See* County of Madison, N.Y. v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981); NAACP Legal Defense & Educ. Fund, Inc. v. Department of Justice, 612 F. Supp. 1143 (D.D.C. 1985); Norwood v. Federal Aviation Admin., 580 F. Supp. 944 (W.D. Tenn. 1984); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739 (D.D.C. 1983).

County of Madison, New York v. United States Department of Justice.[245] In that opinion, Chief Judge Coffin, writing for a unanimous panel, ordered the government to disclose documents generated in connection with settlement negotiations in an earlier, related matter.[246] The documents in question had either been sent by the party opponent to the government or by lawyers for the government to opposing counsel during the course of the negotiations.[247] The appellate court refused to categorize these documents as "intra-agency" memoranda or letters.[248]

The court also rejected an argument that FOIA empowers federal courts, under the guise of exercising equitable discretion, to decide whether considerations of "public policy" justify adding exemptions to FOIA for categories of documents not specifically exempted by Congress on the face of the statute.[249] The court acknowledged the importance of the government's ability to resolve disputes by settlement and conceded that the government's ability to reach consensual agreements with adversaries in litigation would be impaired if parties knew that under FOIA "written settlement communications will be available to anyone, irrespective of the merit of his or her need to know."[250] The *County of Madison* panel felt constrained, nonetheless, to honor the letter and spirit of FOIA, which they emphasized "is not a withholding statute but a disclosure statute."[251] The court ruled that the public policy favoring settlement simply cannot justify distorting FOIA's language and giving courts discretionary power to limit the statute's disclosure mandate by carving out an exemption that is not even intimated in that language.[252] The effect of *County of Madison* is clear: exemption five will not protect documents related to settlement that were generated by or shared with a party opponent, even if both the government and its opponent intended all such documents to remain confidential.

Center for Auto Safety v. Department of Justice[253] followed and in some measure extended the reasoning of *County of Madison*. The former case arose when the Center for Auto Safety attempted to use FOIA to force the Justice Department (DOJ) to disclose documents it had shared with or received from the "big four" American auto manufacturers dur-

245. 641 F.2d 1036 (1st Cir. 1981).
246. *Id.* at 1039, 1041.
247. *Id.* at 1040-41.
248. *Id.* at 1040-42.
249. *Id.* at 1041.
250. *Id.* at 1040.
251. *Id.*
252. *Id.* at 1041.
253. 576 F. Supp. 739 (D.D.C. 1983).

ing the course of negotiations to modify a consent decree entered in an antitrust action.[254] In the end, the court rejected the Justice Department's arguments that these documents were exempt from disclosure under either exemption five or exemption seven of FOIA.[255]

First, the court ruled that memoranda or letters exchanged by the government and the consent decree defendants could not be considered "intra-agency" documents within the meaning of exemption five.[256] The court rejected the argument that entry of the original consent decree somehow converted the auto makers into the equivalent of independent contractors working with the government to ensure that the public interest was satisfied.[257] Instead, the court insisted that the auto makers remained adverse parties and thus that communications between them and the DOJ could not be considered "intra-agency."[258] This ruling applied even to drafts of consent decrees prepared by DOJ lawyers and accompanying memoranda, both of which included comments and notations that reflected, among other things, "the mental impressions and views of various agency personnel."[259] Drawing on *Coastal States Gas Corp. v. Department of Energy*,[260] Judge Hogan held that documents that might otherwise be protected can be swept within the scope of FOIA once they are shown to adversaries because in so doing the governmental agency can be deemed either to adopt the documents as its position on an issue or to use them "in its dealings with the public."[261] The court articulated its holding clearly: "[w]hile these documents may at one time have been used for internal advisory purposes and would therefore be protected, when the DOJ elected to use them as tools in their negotiations with the public [the defendants] they lost their internal status, and their qualification for Exemption 5."[262]

In a significant part of the opinion, the court held that even if the documents in question somehow could be deemed "intra-agency" they would not satisfy the second requirement of exemption five—that they would be protected by some privilege that would have protected them

254. *Id.* at 741.
255. *Id.* at 747, 754-55. Exemption seven protects documents "compiled for law enforcement purposes" from disclosure. 5 U.S.C. § 552(b)(7)(A) (1982) (current version at 5 U.S.C.A. § 552(b)(7)(A) (West Supp. 1988)).
256. *Center for Auto Safety*, 576 F. Supp. at 748.
257. *Id.* at 745-46.
258. *Id.* at 745-47.
259. *Id.* at 747.
260. 617 F.2d 854, 866 (D.C.Cir. 1980).
261. Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 747 (D.D.C. 1983).
262. *Id.*

against an adverse party if the agency had been involved in litigation.[263] Noting that there is a "presumption against recognizing new discovery privileges under Exemption 5,"[264] Judge Hogan concluded that "there is no clear congressional intent to include a settlement negotiation privilege within Exemption 5" and that Federal Rule of Evidence 408 neither acknowledged nor created any such privilege.[265] According to the court, since there is no clearly established "settlement negotiation privilege," the mere use of documents in settlement negotiations does not mean that they "would not be available by law to a party . . . in litigation with the agency," as required by the second clause of exemption five.[266]

In combination, *County of Madison* and *Center for Auto Safety* stand for this proposition: Exemption five will not protect documents related to settlement unless they have *not* been shared with or received from an adverse party *and* they meet all the requirements of a clearly established discovery privilege. The *County of Madison* court did make a suggestion, however, to which government counsel should attend. Relying on *Federal Open Market Committee v. Merrill*,[267] the court implied that FOIA could not be used to acquire these kinds of materials, even when shared with an adverse party, if counsel had persuaded a court to enter a protective order making the settlement negotiations and the documents related thereto confidential.[268] Counsel practicing in the Second Circuit should be able to rely on this method of protecting confidentiality,[269] but those practicing in the Third Circuit cannot assume that sealing orders will protect such material.[270]

The *Center for Auto Safety* court disposed of the government's arguments under exemption 7A with comparable dispatch.[271] Congress recently expanded this exemption,[272] but apparently not in ways that would eviscerate *County of Madison's* reasoning or dislodge its conclusion. To qualify under exemption seven, even as amended, the documents must have been "compiled for law enforcement purposes" and

263. *Id.* at 748.
264. *Id.*
265. *Id.* at 749.
266. 5 U.S.C. § 552(b)(5) (1982).
267. 443 U.S. 340, 362 (1979).
268. Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 749 (D.D.C. 1983).
269. *See infra* notes 300-33 and accompanying text.
270. *See infra* notes 334-55 and accompanying text.
271. 576 F. Supp. at 749-55; *see* 5 U.S.C. § 552(b)(7)(A) (1982) (current version at 5 U.S.C.A. § 552(b)(7)(A) (West Supp. 1988)).
272. *See* 5 U.S.C. § 552(b)(7) (Supp. IV 1986).

satisfy at least one of six other criteria.[273] The case law suggests that a document will not be deemed to have been generated "for law enforcement purposes" unless it was created in connection with an investigation that focused on " 'specifically alleged illegal acts, illegal acts of particular identified officials, acts which if proved result in civil or criminal sanctions.' "[274] Most documents generated in connection with efforts to settle civil litigation will not satisfy this requirement.

In 1984 and 1985 two federal district courts followed the lead of the *County of Madison* and *Center for Auto Safety* opinions in refusing to acknowledge a "settlement negotiation privilege" under exemption five and ordered governmental agencies to disclose terms of settlements or settlement-related documents that had been shared with an adversary.[275] These two cases are *Norwood v. Federal Aviation Administration*[276] and *NAACP Legal Defense and Educational Fund, Inc. v. United States Department of Justice*.[277]

Norwood adds an important factor to the exemption five analysis. Pointing out that "the Supreme Court has held that 'final dispositions' of matters by an agency can never be exempt under exemption 5,"[278] *Norwood* announced that "the FAA [Federal Aviation Administration] cannot use exemption 5 to withhold production of the settlement agreements themselves, since the settlement agreements represent the final disposition of an agency case."[279] Whether or not other courts will find this reasoning persuasive is difficult to predict, but counsel should be aware that exemption five might offer no protection at all to the final terms of settlement agreements.

The *Norwood* opinion discusses an additional exemption that might apply to some settlement documents. Exemption six covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[280] In *Norwood*, a lawyer who represented 170 terminated air traffic controllers was using the FOIA in an effort to gain access to settlement agreements and related documents between the FAA and controllers reinstated after the nation-

273. *Id.*
274. *Center for Auto Safety*, 576 F.Supp. at 750 (quoting Rural Housing Alliance v. Department of Agric., 498 F.2d 73, 81 (D.C. Cir. 1974)).
275. Apparently there are no opinions that contradict this line of authority.
276. 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984).
277. 612 F. Supp. 1143, 1146 (D.D.C. 1985).
278. 580 F. Supp. at 1000 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153-54 (1975)).
279. *Id.*
280. 5 U.S.C. § 552(b)(6) (1982).

wide strike in 1981.[281] District Judge Horton declared that in order to qualify for exemption six the government would have to show three things: "(1) that the requested information is properly classified as a 'personnel,' 'medical,' or 'similar' file [and not simply put in a personnel file to shield it from the scope of FOIA]; (2) that the release of the information would violate substantial privacy interests of those involved; and (3) that the privacy interest is not outweighed by the public interest in disclosure."[282] The court concluded that the removal letters and the settlement agreements had been properly classified as "personnel" matters, but that the government had failed to carry its burdens with respect to the remaining two requirements.[283] In concluding that the documents had to be disclosed, the court made it clear that it would hold government counsel to demanding standards with respect to the second and third requirements, thus implying that it would be difficult to use exemption six to avoid disclosure of settlement documents.[284]

Other exemptions to the FOIA might, in rare cases, protect documents related to settlement,[285] but as far as I am aware only one of these other exemptions is the subject of a reported opinion in which a court ruled on an effort to discover materials related to settlement negotiations. In *Parker v. Equal Employment Opportunity Commission*,[286] Judge Robinson, relying on exemption three, rejected an effort to use the FOIA to compel the Equal Employment Opportunity Commission (EEOC) to disclose "all predetermination settlement agreements and conciliation agreements made in the Commission's Philadelphia Regional Office during March, 1974."[287] Exemption three covers agency records that are "specifically exempted from disclosure by statute," as long as the statute in question meets specified criteria.[288] The court held that these documents qualified for exemption three even though the statute that governs EEOC procedures does not mention these kinds of documents, and the statute would impose a duty of confidentiality only on negotiations that occur after the Commission has found reasonable cause to believe that a charge of an unlawful employment practice is true. The significance of

281. *Norwood*, 580 F. Supp. at 996-97.
282. *Id.* at 998.
283. *Id.* at 998-99.
284. *Id.*
285. For example, exemption four covers "trade secrets and commercial or financial information obtained from a person and priviledged or confidential." 5 U.S.C. 552(b)(4) (1982).
286. 534 F.2d 977 (D.C. Cir. 1976).
287. *Id.* at 979.
288. 5 U.S.C. 552(b)(3) (1982) (the exempting statutes must be framed so as to leave no discretion on the question of disclosure, or must either refer to the particular types of matters to be withheld or establish particular criteria for withholding).

the latter point is that "predetermination settlement [agreements] are entered into after a charge is filed but before any determination of reasonable cause by the Commission."[289] Despite these technical difficulties, both the District Court and the appellate court were satisfied that Congress intended to place a cloak of confidentiality around all types of informal negotiations conducted by the Commission and all of the agreements that such negotiations produced.[290] Both courts concluded that Congress had elevated the public interest in fostering settlement of EEOC claims, by extending a promise of confidentiality, above the public interests generally reflected in the FOIA.[291] Thus, both the predetermination settlements and the conciliation agreements are "specifically exempted from disclosure by statute" within the meaning of exemption three. No other reported opinion has interpreted this exemption with respect to settlement agreements.

The extent to which state law analogues to the FOIA might be used to force disclosure of settlement materials is not at all clear. In fact, only one reported opinion by a California appellate court even addresses this question. That opinion suggests that attorneys who negotiate settlements with or on behalf of public agencies in California cannot safely assume that the terms of the deals they strike will remain confidential. In *Register Division of Freedom Newspapers, Inc. v. County of Orange*,[292] the appellate court affirmed a trial court's ruling that California's Public Records Act[293] entitled a newspaper to access to virtually all of the documents related to a confidential settlement of a tort claim brought by a prison inmate against a county government. The court explicitly concluded that the public agency's promise to the plaintiff to maintain the confidentiality of the negotiations and of the terms of the agreement was insufficient to overcome the statutory mandate of public access to the records involved.[294]

Holding that the terms of the settlement itself, as well as most related documents, had to be disclosed, the court of appeal made some sweeping pronouncements that seem to reflect little sympathy for the notion that confidentiality can be a key to the success of the settlement process. Among other things, the county defendant had argued that disclosure of settlement documents would encourage people to file frivolous

289. 534 F.2d at 979.
290. *Id.* at 980-81.
291. *Id.* at 978, 980.
292. 158 Cal. App. 3d 893, 205 Cal. Rptr. 92 (1984).
293. CAL. GOV'T CODE §§ 6250-6265 (West Supp. 1987).
294. 158 Cal. App. 3d at 909-10, 205 Cal. Rptr. at 102.

claims and would compromise the public body's freedom to decide that it was in the taxpayer's best interests to offer a nuisance value settlement rather than incur the much greater expense of defending a case through trial and appeal.[295] "Against this interest," responded the court:

> must be measured the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny. We find these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs fostered by both the CPRA and Brown Act. While County's concern with the potential for escalating tort claims against it is genuine, opening up the County's settlement process to public scrutiny will, nevertheless, put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds. This in turn will strengthen public confidence in the ability of governmental entities to efficiently administer the public purse.[296]

In a footnote that apparently was intended to offer some reassurance to public bodies, the court added a potentially significant, but unclear, limitation on the implications of this paragraph: "Plaintiff does not claim, nor do we hold, every discussion regarding settlement of an actual or potential case against the county should be made public. We limit the scope of our holding to the actual discussion and actions of the claims settlement committee."[297]

Because the *Register* court's analysis turned almost entirely on California statutes, the law that emerges from this lengthy opinion is binding only in California courts.[298] Counsel working in other states must determine whether their states have statutes comparable to California's Public Records Act.

V. Alternative Methods of Enhanced Protection of Settlement Negotiations

In light of the numerous threats to the confidentiality of settlement communications previously discussed, the following section presents a number of alternative approaches counsel can consider in order to protect settlement negotiations from disclosure. Part A will discuss the use

295. *Id.* at 909, 205 Cal. Rptr. at 102.
296. *Id.*
297. *Id.* at 909 n.13, 205 Cal. Rptr. at 102 n.13.
298. It would also be binding on a federal court whose jurisdiction was premised solely on diversity of citizenship if the court were to decide, under principles announced in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny, that it was bound to follow California law on this kind of question.

of protective orders or sealing orders. Part B discusses side agreements under seal. Federal Rule of Civil Procedure 68 and recently enacted state mediation statutes are the subject of part C. Finally, part D discusses the enforceability of private contracts between settling parties to ensure confidentiality.

A. Protective or Sealing Orders

A protective or sealing order entered by a federal court apparently will prevent interested persons from being able to use FOIA to force disclosure of settlement agreements and related documents. The court in *Center for Auto Safety* stated, "[I]n the antitrust decree modification context, the DOJ is in the position of petitioning the supervisory court for a protective order under [Federal Rule of Civil Procedure] 26(c) which would qualify as a *per se* discovery privilege and bar to disclosure under FOIA."[299] Other authorities suggest that the protections from FOIA that are available through protective or sealing orders are not limited to antitrust or consent decree settings.[300]

One technical, but apparently sufficient, reason that court orders can protect documents otherwise discoverable under FOIA is that this statute reaches only "agency" records,[301] and courts generally do not consider themselves to be "agencies" within the meaning of the statute.[302] Thus, settlement documents that become court documents are simply outside the purview of the FOIA.[303]

The most explicit consideration of this issue occurred in the trial court and affirming appellate court opinions in *In re Franklin National Bank Securities Litigation*,[304] and *Federal Deposit Insurance Corp. v. Ernst & Ernst*.[305] These opinions resulted from an effort by the Public Interest Research Group (PIRG) to use FOIA to force disclosure of the terms of a settlement agreement between the Federal Deposit Insurance Corporation (FDIC), the trustee for the bankrupt Franklin National Bank, and its accountant, Ernst & Ernst.[306] PIRG launched this effort some two years after District Judge Jack B. Weinstein had entered an

299. 576 F. Supp. 739, 749 (D.D.C. 1983) (citing Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, at 362 n.24 (1979)).
300. *See, e.g.*, Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).
301. 5 U.S.C. § 551(1)(B) (1982).
302. *See* Tigar & Buffone v. Department of Justice, 590 F. Supp. 1012, 1014 (D.D.C. 1984).
303. *See* United States v. Charmer Indus., Inc., 711 F.2d 1164, 1170 n.6 (2d Cir. 1983).
304. 92 F.R.D. 468 (E.D.N.Y. 1981).
305. 677 F.2d 230 (2d Cir. 1982).
306. *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 471.

order, at the parties' request, sealing the settlement documents and commanding the parties to maintain the confidentiality of the terms of the agreement.[307] PIRG first presented its request for information about the settlement to the FDIC, invoking the FOIA.[308] Relying on the court's order, the FDIC rejected the request.[309] Thereafter, PIRG petitioned Judge Weinstein to vacate the order sealing the documents and compelling confidentiality.[310]

The court rejected PIRG's argument that "a court's order to a federal agency to withhold agency records from the public is limited to the reasons for withholding permitted in the FOIA."[311] Judge Weinstein reasoned that the goals of the FOIA are:

> not necessarily defeated when an agency obtains protection from a court which is broader than the FOIA exemptions. The Act was intended to circumscribe the discretion of agencies rather than that of courts. In the context of this case it cannot be said that the FDIC manipulated this court in order to avoid the agency's obligations under the FOIA. Rather, the court properly issued a not unusual protective order in aid of its own jurisdiction.[312]

In a subsequent section of the opinion Judge Weinstein emphasized that it was not the FDIC, but private litigant Ernst & Ernst, that insisted on the confidentiality provision in the settlement agreement and the court order sanctioning it.[313] The court might have been less confident about the implications of the FOIA for such a sealing order if the party who took the initiative and had the principal interest in seeking the order had been the federal agency that otherwise would have been constrained to disclose the terms of the agreement.

After rejecting the FOIA argument, the trial court considered the merits of PIRG's petition to modify the sealing order.[314] It balanced the interests that would be served by disclosure against those that had been advanced by sealing the settlement documents initially and those that would be harmed by withdrawing the protection of confidentiality after the parties had relied on it for two years.[315] This balancing analysis acknowledges that there might be some circumstances in which a court

307. *Id.*
308. *Id.* at 470.
309. *Id.*
310. *Id.*
311. *Id.* at 471.
312. *Id.*
313. *Id.* at 472.
314. *Id.* at 471-72.
315. *Id.*

could be persuaded to "unseal" a settlement agreement.[316] PIRG, however, failed to persuade the judge to exercise his discretion in favor of disclosure.[317] In conducting its balancing analysis, the court emphasized how much time and resources were saved by the settlement of this massive case and the fact that one of the private parties absolutely refused to enter a settlement unless its terms were sealed.[318] Thus, "[w]ithout secrecy of the terms, a settlement would not have been consummated."[319]

When Judge Weinstein turned to the interests that would be harmed by disclosure after the fact, he found substantial additional grounds for denying PIRG's request. He noted:

> The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.[320]

In sum, the trial court found that "the strong public policy favoring settlement of disputes, particularly in complicated cases, and the importance of the stability of judgments and settlements" outweighed the interests that would be advanced by disclosure.[321]

On appeal, the Second Circuit upheld Judge Weinstein's refusal to modify the original sealing order "essentially for the reasons stated" in his opinion.[322] The appellate panel agreed that courts could order agencies to withhold documents even when no FOIA exemption covered the material in question.[323] More specifically, the Second Circuit held that "the FOIA does not apply to a court's order directing an agency not to reveal the terms of an agreement crucial to the settlement of an action."[324] The higher court also emphasized that after "a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification."[325]

A different panel of Second Circuit judges revisited this general sub-

316. Judge Weinstein explicitly confirmed this possibility in *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 770 (E.D.N.Y. 1984).
317. *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. at 472.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 231 (2d Cir. 1982).
323. *Id.* at 232.
324. *Id.*
325. *Id.*

ject three years later in *Palmieri v. State of New York.*[326] The FOIA was not involved in *Palmieri*. Instead, the issue was simply what kind of showing was required to compel modification of existing protective orders that had covered both settlement negotiations between private parties and the terms of the settlement itself.[327] What is particularly interesting about the *Palmieri* opinion is that it reflects considerable resistance to vacating such sealing orders even when the effort to penetrate the seal is being made by the Attorney General of the State of New York and a state grand jury for the purpose of developing evidence of possible criminal conduct arising out of the same circumstances that were the subject of the earlier settled civil antitrust action.[328] Even in this situation, the Second Circuit held that the persons seeking to vacate the sealing order must satisfy a demanding standard by showing either that the original order was "improvidently granted" or that "extraordinary circumstances" or a "compelling need" justified the modification.[329]

The appellate court went on to suggest that none of the required showings would be easy to make. For example, to establish that the sealing order had been improvidently granted, the state attorney general would be required to show that the issuing judge "reasonably should have recognized a substantial likelihood that the settlement would facilitate or further criminal activity."[330] If the attorney general failed to carry this burden, the parties' reliance on the sealing orders, "as evidenced by their unwillingness to engage in settlement negotiations without the protections afforded, raises a presumption in favor of upholding those orders."[331] Finally, the appellate panel pointed out that the attorney general's ability to make the required showing of a "compelling need" would be compromised, although not necessarily fatally, by the fact that the government and the grand jury had at their disposal "special investigatory powers not available to private litigants."[332]

In sum, the tone of the *Palmieri* opinion is not hospitable to efforts to vacate orders that created the environment of secrecy that was essential to conducting settlement negotiations and concluding an agreement. Not surprisingly, the Second Circuit is not so inhospitable to such requests when targets of criminal investigations attempt to use sealing orders to prevent disclosure of corporate records that existed before litigation commenced, before any protective order was sought, and before settlement negotiations commenced.[333]

326. 779 F.2d 861 (2d Cir. 1985).
327. *Id.* at 862.
328. *Id.* at 863.
329. *Id.* at 866.
330. *Id.* at 865-66.
331. *Id.* at 865 (citing Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982)).
332. *Id.* at 866.

A recent opinion by a divided panel of judges from the Third Circuit contrasts sharply with the Second Circuit opinions in *Palmieri* and *FDIC v. Ernst & Ernst.* As no governmental agency was involved in *Bank of America v. Hotel Rittenhouse Associates,*[334] the party seeking disclosure of settlement documents could not rely on the FOIA. The two judges who formed the majority in *Hotel Rittenhouse,* however, focused on a doctrine that the Second Circuit opinions had ignored: The "common law right of access to judicial records and proceedings."[335] In fact, the majority relied on this doctrine to overrule the District Court's refusal to unseal settlement documents and other papers filed in a civil proceeding.[336] In so doing, the court not only reversed the presumptions favoring sealing orders that are reflected in the Second Circuit opinions, but went much further by holding that the interests advanced by promising litigants that their settlement will remain confidential cannot outweigh, at least absent some extraordinary showing, the common-law right of public access to court documents.[337] As the majority phrased it, "the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."[338] Thus the majority made it clear that "the presumption of access" that attaches to sealed court documents is very strong and that a party seeking to overcome this presumption, and thus to maintain the confidentiality of such sealed documents, bears a heavy burden indeed.

Because Judge Sloviter's opinion for the two-judge majority in *Hotel Rittenhouse* is so explosive in implications and so inconsistent with recent opinions from the Second Circuit, it is necessary to understand the context in which it arose. This context may expose a basis for distinguishing the case from situations more commonly arising in civil litigation. By looking carefully at the context, one also can develop practical suggestions for lawyers that should enable them to avoid the outcome reflected in the *Hotel Rittenhouse* case.

Two aspects of the background against which *Hotel Rittenhouse* was

333. *See* United States v. Davis, 702 F.2d 418 (2d Cir. 1983).
334. 800 F.2d 339 (3d Cir. 1986), *cert. denied,* 107 S. Ct. 921 (1987) (case captioned Bank of Am. Nat'l Trust and Sav. Assoc. v. FAB III Concrete Corp.).
335. *Id.* at 343.
336. *Id.* at 344.
337. *See id.*
338. *Id.* at 346.

decided seem to have been most important to the court's decision: (1) the parties who entered the settlement decided to file the agreement, under seal, and thus to make it formally a record in the case;[339] and (2) after filing the settlement agreement under seal, the parties began disputing its meaning and, most importantly, each filed motions petitioning the court to interpret and enforce the contract.[340] The District Court permitted the parties to conduct their enforcement litigation entirely under seal: their motions, cross-motions, responses and replies remained under wraps, even when the court entered a judgment compelling one of the parties to pay the other more than thirty-eight million dollars pursuant to the contract and ordered the marshall to sell the subject commercial property.[341] In the meantime, the concrete subcontractor for the project was pressing an 800,000-dollar claim for work done on the property.[342] This contractor filed an action in state court charging that the two parties to the federal action had conspired to defraud him and that the sealing of the settlement action was one of the acts they committed in furtherance of their fraudulent scheme.[343] The contractor's petition to unseal the settlement agreement and the subsequent motion papers led to the *Hotel Rittenhouse* opinion.[344]

The Court of Appeals emphasized the fact that the parties had voluntarily elected to file their settlement in the District Court and then had sought to use that court to achieve their private enforcement ends.[345] Judge Sloviter noted that the parties had an alternative that probably would have enabled them to protect the confidentiality of their agreement. "[I]t is likely," she wrote, "that had [the parties] chosen to settle and file a voluntary stipulation of dismissal, as provided in Rule 41(a)(1) of the Federal Rules of Civil Procedure, they would have been able to prevent public, and even [the cement subcontractor's], access to these papers."[346] But the filing of the settlement documents, even under seal, made them part of the court record and, as such, "subject to the access accorded such records."[347]

339. *Id.* at 344-45. The parties apparently took this step because they feared compliance problems, and they wanted to improve the odds that the court would help them enforce the terms of the contract in expeditious proceedings; they did not want to have to file a separate action on the settlement contract and wait in line for trial of that matter.
340. *Id.* at 341, 344.
341. *Id.* at 341.
342. *Id.* at 340-41.
343. *Id.* at 341.
344. *See id.* at 340.
345. *Id.* at 345.
346. *Id.* at 344.
347. *Id.* at 345.

In distinguishing the Second Circuit's opinion in *Federal Deposit Insurance Corp. v. Ernst & Ernst*,[348] Judge Sloviter emphasized two factors. The first, and apparently the more important, was that in the *Hotel Rittenhouse* case, unlike in *Ernst & Ernst*, "there were *motions* filed and *orders* entered that were kept secret, in direct contravention of the open access to judicial records that the common law protects."[349] Driving the point home, the court declared that "[h]aving undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements."[350] Judge Sloviter also distinguished *Ernst & Ernst* by pointing out that it implicated interests of much greater public import and of a much larger number of people than did the *Hotel Rittenhouse* matter.[351] But because the cases were dissimilar, the two judges who made up the majority in *Hotel Rittenhouse* refused to decide whether the kind of showing of particularized need to maintain confidentiality that had been made in *Ernst & Ernst* was sufficient to "override the strong presumption of access."[352]

From the structure of the court's opinion in *Hotel Rittenhouse*, it appears that there are virtually no circumstances in which Judges Sloviter and Aldisert would uphold the confidentiality of settlement documents and related papers when such materials have been the subject of litigated motions, orders, and judgments. The odds that these two judges would vote to preserve confidentiality appear to be somewhat better—but still not good—when there has been no litigation about the terms of the agreement and thus when the only court document that would remain under wraps is the settlement contract itself.

The lesson to be learned from *Hotel Rittenhouse* should be clear: lawyers practicing in the Third Circuit must decide whether preserving the confidentiality of the terms of their clients' agreement is more important than improved ability to enforce its terms. If preserving confidentiality is the more important consideration, counsel in the Third Circuit should not file their agreement. Instead, they should file a stipulated dismissal and rely on a separate action, sounding in contract, for enforcement purposes.

Two additional points about the majority opinion in *Hotel Rittenhouse* remain to be made. The first arises from Judge Sloviter's emphasis

348. 677 F.2d 230 (2d Cir. 1982).
349. *Id.* (emphasis in original).
350. *Id.*
351. *Id.* at 345-46.
352. *Id.* at 346.

that there might be two independent bases on which a party could seek disclosure of sealed settlement documents.[353] The basis on which the majority ruled in *Hotel Rittenhouse* was the "common law right of access to judicial records and proceedings."[354] This common-law right gave rise to the test used in the court's opinion: a balancing analysis in which the scales are heavily weighted in favor of disclosure. Thus, the party seeking to preserve confidentiality must overcome the "strong presumption" in favor of access.[355]

The second point to note is that the majority intimated, but refused to formally decide, that the first amendment might offer parties a separate, and independently sufficient, predicate for attacking the sealing of settlement documents.[356] Moreover, Judges Sloviter and Aldisert suggested that the "test" to which the first amendment might give rise in situations like this might be even more difficult for parties resisting disclosure to survive.[357] That test apparently would parallel the "compelling state interest" test developed by the Supreme Court for analyzing statutes that restrict core political speech on the basis of its content.[358] Vigorously applied, this test is virtually impossible to pass. The significance of all this is that the court intentionally left open the possibility that even if its reasoning under the common-law right of access were to be rejected at some point in the future by the Supreme Court, it would have another, even more powerful, doctrine to invoke to support the same conclusion.

Judge Sloviter's reasoning has at least two vulnerabilities that could be used by counsel in other jurisdictions to persuade their courts not to follow *Hotel Rittenhouse*. The first "soft spot" in Judge Sloviter's reasoning is her unpersuasive effort to distinguish the Supreme Court's opinion in *Seattle Times Co. v. Rhinehart*,[359] in which the High Court held that the first amendment did not prevent a District Court from entering a protective order sealing certain discovery documents. The *Hotel Rittenhouse* court argued that discovery "is ordinarily conducted in private" and that the public somehow has a less powerful interest in access to discovery documents than to a settlement agreement that is filed under seal.[360] In many courts, of course, discovery documents are routinely filed and accessible to the public. Moreover, a number of settlement

353. *Id.* at 342-43.
354. *Id.* at 344.
355. *Id.* at 344-46.
356. *Id.*
357. *Id.* at 344.
358. *Id.*
359. 467 U.S. 20, 36-37 (1984).
360. *Hotel Rittenhouse Assoc.*, 800 F.2d at 343.

agreements contain confidentiality clauses. As a general proposition, there may be a greater expectation of privacy with respect to the terms of settlement than there is with respect to discovery documents. For these reasons, Judge Sloviter's effort to distinguish *Seattle Times* remains unpersuasive.

The second problem with Judge Sloviter's opinion is her reliance on the "common law right of access." This is a controversial, ill-defined and unevenly supported doctrine, especially as it applies to civil litigation.[361]

Lawyers searching for help in efforts to challenge the reasoning of *Hotel Rittenhouse* may look to the essentially contemporaneous opinion by the Supreme Court of Minnesota in *Minneapolis Star & Tribune Co. v. Schumacher*.[362] Like *Hotel Rittenhouse*, *Schumacher* dealt with settlement documents that had become part of the record of a civil action and did not address unfiled settlement agreements. After considering the relevant precedents from the United States Supreme Court, the Supreme Court of Minnesota decided in *Schumacher* that "no first amendment right of access exists" in settlement documents.[363] In reaching this conclusion, the high court of Minnesota relied heavily on its perception that "[h]istorically, the majority of settlements entered into between parties have been private" and on its belief that allowing public access to settlement documents might jeopardize the important policy objective of encouraging consensual disposition of lawsuits.[364]

The *Schumacher* court went on to acknowledge, however, that even though the first amendment gives rise to no general right of access to settlement documents that are made a part of the record in civil actions, the common law creates a presumption in favor of such access that can be overcome only by showing "strong countervailing reasons why access [to the filed settlement documents] should be restricted."[365] The court promptly softened the implications of this position, however, by (1) announcing that the standard of review for decisions by trial judges over whether to grant access to sealed settlement documents is abuse of discretion, and (2) holding that the trial judge had not abused his discretion

361. For a thorough and illusion-puncturing examination of the history and underpinnings of this doctrine as it applies to discovery materials, I recommend Professor Richard L. Marcus' article, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).
362. 392 N.W.2d 197 (Minn. 1986). The *Schumacher* opinion was issued on August 8, 1986, exactly one month before the opinion in *Hotel Rittenhouse*. There is no reason to believe that the Third Circuit panel that produced *Hotel Rittenhouse* was aware of the *Schumacher* opinion.
363. *Id.* at 204.
364. *Id.* at 204-05.
365. *Id.* at 205-06.

in refusing to permit a newspaper to have access to "settlement and distribution papers" and transcripts of settlement hearings in five wrongful death actions against an airline that was being sued by other victims of the same accident.[366] In affirming the trial judge's action, the Supreme Court noted that the "historical and philosophical privacy of settlement documents, along with the relevant facts and circumstances of this case, demonstrate that the privacy interests asserted by the litigants were strong enough to justify restricting access."[367]

It is arguable that the effect of relying on the "historical and philosophical privacy of settlement documents" is to eviscerate the strong presumption in favor of access that the court purported to acknowledge. If the court permits the historical privacy of settlement to offset the presumption in favor of access, the "test" that emerges is an open balancing (that is, not weighted in favor of any outcome). And if the scales are not tipped at the outset significantly in favor of disclosure, trial courts will enjoy considerable discretion in deciding whether or not to permit access to sealed settlement documents. In *Schumacher*, the trial court was satisfied by a showing that if the settlement documents were made public the plaintiffs might be subjected to harassment, exploitation, and intrusions on their privacy.[368] Neither the trial court nor the Minnesota Supreme Court ascribed much countervailing weight in the balancing process to the great public interest in the airline crash or to the pendency of other litigation arising out of the same incident. In fact, the Supreme Court used the level of public interest in the event and its aftermath to buttress its conclusion that disclosure of the terms of the settlements might lead to further intrusions on the privacy of the settling plaintiffs.[369]

In spirit, *Schumacher* and *Hotel Rittenhouse* could not be more antithetical. The Minnesota Supreme Court seems to be more sympathetic than the Third Circuit with the goal of promoting settlement and with the argument that affording real protection to the privacy of settlement contracts is essential to that goal. By contrast, the Third Circuit ascribes more weight to the importance of public access to records that show how civil proceedings were closed. Which of the competing assumptions that underlie these two approaches is wisest is a question to which we have no empirical answer. Thus, the debate will continue at least until the Supreme Court of the United States enters the fray.

366. *Id.* at 206.
367. *Id.*
368. *Id.* at 205, 206.
369. *Id.* at 205.

B. Side Agreements Under Seal

Janus Films, Inc. v. Miller,[370] a recent Second Circuit opinion, exposes a different kind of risk that lawyers face when they file a side agreement under seal in connection with a consent judgment or a settlement judgment. *Janus Films* was a copyright infringement action that the parties purported to settle in open court on the second day of trial. The proposed settlement included a concession of liability by the defendant, an agreement that judgment would be entered "for statutory damages, attorney's fees, and costs in the total amount of $100,000," and "a separate, confidential agreement, to be placed under seal, regarding 'the terms and conditions of collection' of the judgment."[371] The confidential side agreement permitted the defendant to satisfy the monetary aspect of the judgment by "payment of a sum considerably less than the $100,000 over an extended period of time."[372] Despite the defendant's subsequent change of mind and attempt to avoid the commitment he had made in open court, the trial judge entered a judgment that described the 100,000-dollar obligation and certain injunctive relief, but did not mention either the content or the existence of the side agreement.[373]

The Second Circuit panel was not comfortable with the way the trial judge had handled the side agreement. Noting that it was dealing with an issue of first impression, the Court of Appeals distinguished between:

> a judgment that concerns only the parties to the lawsuit being settled and a judgment likely to be of concern to others. The former, which might be called a "private judgment," is illustrated by a judgment that resolves the claims of all parties to a dispute involving a tort or a breach of contract. The latter, which might be called a "public judgment," is illustrated by the pending case, where a judgment resolves a dispute concerning a copyright that may be enforced against other members of the public besides the defendant in this litigation.[374]

Because the case did not involve a "private judgment," the appellate panel declined to consider whether courts should permit parties in such actions to terminate their suit through entry of a consent judgment or a settlement judgment accompanied by a separate side agreement that is filed under seal.[375]

With respect to "public judgments," however, the *Janus Films* court announced a new rule. Noting that "there is always the distinct risk that

370. 801 F.2d 578 (2d Cir. 1986).
371. *Id.* at 580.
372. *Id.*
373. *Id.* at 581.
374. *Id.* at 584.
375. *Id.* at 585.

either party may seek to induce others to settle similar disputes on terms exactly like or at least similar to the terms of the judgment," the Second Circuit held that parties who terminate litigation by having the trial court enter a consent judgment or a settlement judgment should be required to disclose the content of any side agreements that are part of the arrangement that concludes the suit.[376] This holding does not mean that parties cannot settle cases on confidential terms. As the *Janus Films* panel pointed out, litigants who have settled their dispute retain the option of forgoing entry of judgment, terminating the case by a stipulated dismissal, and "keeping confidential all aspects of their settlement."[377] If terms of disposition are "likely to be asserted against other[s]," however, the parties may not "secure a judicial imprimatur for an obligation that [they have secretly] agreed means less than its terms state."[378]

C. Federal Rule of Civil Procedure 68 and State Mediation Statutes

Attorneys who are especially concerned about preserving the confidentiality of offers or demands, or of statements made during negotiations, should consider proceeding under Federal Rule of Civil Procedure 68, or a state law analogue, like section 998 of the California Code of Civil Procedure, or turning to a "mediation" process that enjoys special state statutory protection.

The bar to admissibility that is articulated in Federal Rule of Civil Procedure 68, and in section 998 of the California Code of Civil Procedure, is virtually unqualified, in sharp contrast to the limited protection offered by Federal Rule of Evidence 408. Rule 68 flatly declares that evidence of an *unaccepted* offer that was made under the rule is "not admissible except in a proceeding to determine costs."[379] The language of section 998 of the California Code of Civil Procedure is similarly sweeping: "If such offer is not accepted . . . it . . . cannot be given in evidence upon the trial."[380] These prohibitions seem operative regardless of the purpose for which the evidence would be proffered at trial and thus avoid the limitations on the scope of rule 408.[381] Since neither rule 68 nor section 998 purports to extend protection to evidence of "conduct or

376. *Id.*

377. *Id.*

378. *Id.* at 584-85.

379. Evidence that a rule 68 offer was made could be introduced after judgment at trial, when the offeror attempts to recover his costs from a plaintiff who rejected a rule 68 offer that turned out to be larger than the award at trial.

380. CAL. CIV. PROC. CODE § 998 (West Supp. 1988).

381. *See supra* notes 57-124 and accompanying text.

statements made in compromise negotiations,"[382] counsel cannot be sure to what extent these rules of procedure can be invoked to protect communications that accompany and explain protected offers. Moreover, by their express terms, these rules apply only to offers that are not accepted.[383] It is unlikely that these rules would offer any protection in a case in which a person who was not a party to a settlement agreement is attempting to compel disclosure of settlement communications or terms.

As an alternative to simple two-party settlement negotiations, counsel could proceed with private mediations that are covered by recently enacted state confidentiality statutes with much greater confidence in the scope of the protection they afford. As one commentator has noted, recent "legislative enactments in several states have provided near-absolute protection for communications made in mediation, [thus greatly enhancing] the protection available to mediation under the traditional rules of evidence and contract."[384] Some of the most populous states in the country, including California, New York, and Florida, have enacted such laws.[385]

The California version of these statutes appears as section 1152.5 of the Evidence Code, which was added in 1985. Except for certain family law matters that are covered by other confidentiality provisions, this statute applies to any kind of civil dispute.[386] When parties "agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute," and when, before the mediation begins, they agree in writing to invoke the protections of the statute after setting forth the provisions of the statute in their agreement, the law prohibits admitting evidence "of anything said or . . . any admission made in the course of the mediation" or any "document prepared for the purpose of, or in the course of, or pursuant to, the mediation."[387]

382. FED. R. EVID. 408.

383. *See* FED. R. CIV. P. 68 ("An offer not accepted shall be deemed withdrawn and evidence therof is not admissable except in a proceeding to determine cost."); CAL. CIV. PROC. CODE § 998(b)(2) (West Supp. 1988) ("If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.").

384. Note, *supra* note 3, at 452.

385. *Id.* at 452 n.79; *see* CAL. EVID. CODE § 1152.5 (West Supp. 1988); *see also* MINN. STAT. §§ 572.31-.40 (Supp. 1987); MINN. STAT. § 595.02 (Supp 1987) (offering a shield of confidentiality to communications and documents connected with mediations except as needed in an action "to have a mediated settlement agreement set aside or reformed"); *see also Protective Order Limits Deposition of Privately Retained Mediators*, Alternative Dispute Resolution Rep. (BNA) 212-13 (Sept. 17, 1987).

386. CAL. EVID. CODE § 1152.5 (West Supp. 1988); *see* CAL. CIV. CODE §§ 4351.5, 4607 (West Supp. 1988); CAL. CIV. PROC. CODE § 1747 (West 1982).

387. CAL. EVID. CODE § 1152.5 (West Supp. 1988).

The Law Revision Commission's comment to the 1985 addition[388] makes clear that parties can waive their confidentiality rights under this section either by failing to object to a proffer at the time of trial or by mutual consent. The same comment points out that the purpose of this section is "to encourage this alternative to a judicial determination of the action" and that the justification for the confidentiality provision is the same as the justification for the much narrower provision contained in section 1152, which renders offers of compromise "inadmissible to prove . . . liability for the loss or damage or any part of it."[389] The Law Revision Commission's comment emphasizes that instead of attempting to limit the applicability of the statute through a definition of the term "mediation," the legislature decided that it would make the statutory protections available only when "the persons who will participate in the mediation (including the mediator) execute a written agreement before the mediation begins stating that Section 1152.5 of the Evidence Code applies to the mediation" and only when their agreement sets "out the full text of subdivisions (a) and (b) of Section 1152.5."

Thus, California practitioners who want to take advantage of the broad protections available through this statute should develop forms that recite all the relevant provisions of the statute and that expressly articulate the commitments to confidentiality that all parties and the mediator make. When they follow the proper procedure, California lawyers should be able to use this statute to fill virtually any gap left by section 1152 of the California Evidence Code, which applies only to "offers to compromise."[390]

There is no reason to believe that because a dispute is already the subject of litigation the protections of section 1152.5 are rendered inaccessible. There is reason to believe, however, that this more generous section would not apply to negotiations between the parties that did not involve a neutral third party. While the new statute does not purport to define "mediation," it clearly contemplates a process that involves the participation of a neutral person who must sign the confidentiality agreement. Counsel cannot simply change the label of direct settlement negotiations to "mediation" and assume that they will enjoy the protections of the new statute, but must involve a neutral person from the outset.

Before deciding to proceed under section 1152.5, counsel should consider the disadvantages that might derive from the breadth of its protections. As a commentator has pointed out concerning comparable statutes enacted in other states, proceeding under statutes that on their face bar use of evidence from mediations regardless of the purpose for which the evidence would be used could create extra difficulties for a party who subsequently seeks either (1) to enforce an agreement that resulted from the mediation or (2) to resist enforcement of an agreement that was the product of duress, fraud, mutual mistake, or overreaching.[391] Similarly, the broad language of a statute like section 1152.5 could impair efforts to redress wrongs arising out of violation of some specific duty relating to the conduct of negotiations, such as the duty to bargain in good faith in labor disputes, or the duty of an insurance carrier to consider in good faith reasonable settlement proposals.[392]

388. CAL. EVID. CODE § 1152.5 law revision commission's comment (West Supp. 1988)
389. *Id.*
390. CAL. EVID. CODE § 1152 (West Supp. 1988).

Apparently anticipating this problem, the Minnesota legislature explicitly provided that the promise of confidentiality that extends generally to communications made in connection with mediations does not apply when a party applies to a court "to have a mediated settlement agreement set aside or reformed."[393] Even though they acted a year later than their counterparts in Minnesota, California legislators failed to add any such caveat or qualifier to the promise of confidentiality in section 1152.5. Thus, counsel cannot be sure how California courts will respond when a party attempts to use material or statements made in connection with a mediation to enforce or to defeat a mediated settlement agreement. Given this uncertainty, counsel must assess separately the needs and risks presented by each specific situation that calls for some effort to reach a settlement, then either (1) choose from the pre-existing procedures[394] the one that best fits that situation or (2) attempt to create, through private contract, a mini-trial process that is specially tailored to meet the needs of the parties.

D. Private Caucus Settlement Conferences

A private caucus settlement conference hosted by a judge or magistrate offers two sources of protection for communications. In conferences structured on this model the parties have virtually no direct interaction. The person to whom they present the reasoning that supports their offers or demands, and to whom they divulge how far they might be willing to go in an effort to compromise differences, is the

391. *See* Note, *supra* note 3, at 452-54.
392. *See id.* at 452-54.
393. MINN. STAT. § 595.02 (1984).
394. Some of the alternatives include a judicially hosted settlement conference, a mediation, offers of compromise under rule 68 or section 998 of the California Civil Procedure Code, or traditional face-to-face negotiations by the lawyers.

judge—not opposing counsel. Furthermore, the parties can ask the judge to keep secret the admissions or concessions about which they are most sensitive, or the most potentially damaging reasons for the positions they are taking. An opponent who does not learn these things cannot attempt to introduce them at trial.

The second source of protection for communications made during judicially hosted settlement conferences is the difficulty an opponent would have compelling a judge who had hosted such a conference to testify at trial about what a party said to her in confidence during the negotiations. There may be circumstances under which this kind of testimony could be compelled, but the judicial community is likely to require a compelling showing before permitting a party to penetrate this sensitive arena.

E. Using Private Contracts to Extend Protection

Another tool that counsel might consider using to increase protection for their settlement communications is a contract with the opposition designed explicitly for the purpose of guaranteeing confidentiality. In such a contract, the parties might commit themselves not to attempt to introduce at a trial on the merits, for any purpose, any statements made during settlement negotiations. Such a contract clearly would reach farther than rule 408 and erect a stone wall instead of a split rail fence between settlement negotiations and trial. Such contracts, of course, cannot bind parties who do not sign them and may have little effect on the capacity of a non-party to discover or introduce at trial the settlement communications covered by the contract.[395]

Unfortunately, the enforceability of such contracts is not always clear. There is a risk, though probably small, that a federal judge would refuse to enforce such an agreement on the ground that it embodies a doctrine Congress refused to enact when it adopted the Federal Rules of Evidence. There also is a risk that a federal judge would view such a contract as invading a judicial prerogative—restricting the judge's power to make sure that all the evidence that will help the jury ascertain the truth is accessible. Clearly there is a substantial risk that a judge will refuse to honor such a contract if doing so would make it impossible to determine whether a subsequent settlement agreement should be enforced. To write such an agreement that purported to go this far would be unwise in most circumstances. Similarly, courts can be expected to

395. *See* Grumman Aerospace Corp. v. Titanium Metals Corp. of Am., 91 F.R.D. 84 (E.D.N.Y. 1981).

penetrate any such agreement when it is necessary to determine whether the parties engaged in illegal conduct or set up a relationship that violated public policy.[396]

Confidentiality contracts that threaten none of these more compelling public policies, however, may be enforceable, at least in instances when they are entered into by parties who are competent and represented by counsel, and between whom there are not dangerous differences in bargaining power. A California appellate court has upheld such a contract as it applied to a voluntary mediation.[397]

Lawyers looking for creative ways to use contracts to increase protection for the confidentiality of settlement communications might find interesting a suggestion in *United States v. Cook*.[398] In a footnote, a panel of Fifth Circuit judges indicated that they would be receptive to an argument that a party who promised—as part of a settlement contract in one case—not to use that settlement outside the action in which it was entered, should be estopped from introducing evidence from the settlement in a subsequent suit.[399] Defendants in a criminal trial that the government launched after it had settled an earlier civil matter with them argued that "the government was estopped from using the injunction documents [a consent decree that resulted from a settlement agreement] because of the specific prohibition they contained against their use for any purpose other than 'the purpose of this action.'"[400] Characterizing this argument as "persuasive," the *Cook* court went on to opine that in "simple equity, the government should not be allowed to induce or obtain a defendant's consent to settlement under specific terms, and later violate those terms."[401] This comment suggests that counsel should consider adding clauses that explicitly limit the permissible uses of settlement material to their settlement contracts or to agreements that fix the rules for settlement negotiations.

The caveat that courts will not enforce such agreements if their purpose or effect violates public policy is reflected in the opinion of the California Court of Appeal in *Mary R. v. B. & R. Corp.*[402] In that case, the

396. *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 14, § 5039, at 207-08.

397. Simrin v. Simrin, 233 Cal. App. 2d 90, 95, 43 Cal. Rptr. 376, 379 (1965). *See generally* Note, *supra* note 3, at 450-52 (focusing on the status of stipulations whose effect is to exclude relevant evidence); 21 C. WRIGHT & K. GRAHAM, *supra* note 14, § 5039 (same); 22 C. WRIGHT & K. GRAHAM, *supra* note 14, § 5194 (same).

398. 557 F.2d 1149, 1152 n.6 (5th Cir. 1977).

399. *Id.*

400. *Id.*

401. *Id.*

402. 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).

court refused to enforce a term of a settlement agreement that purported to prohibit the plaintiff, the alleged victim of child molestation by a physician, from revealing information to regulatory authorities.[403] While the facts of that case were unusual, the principle that emerges from it could apply in a wide range of more commonly occurring situations. In the securities area, for example, courts might well refuse to honor a contract, whether or not it led to a settlement agreement, in which the parties agreed that neither would share with the Securities Exchange Commission or anyone else information about insider trading that it learned during settlement discussions. Similarly, parties should not expect courts to enforce agreements between competitors that purport to prohibit disclosure or adn. sion at trial of communications whose purpose or effect was to promote anticompetitive activities, even if these communications occurred during settlement negotiations.

Moreover, courts that follow precedents developed in cases dealing with the enforceability of "stipulations" could find many different grounds on which to relieve a party of an apparent contractual commitment limiting the admissibility of communications made or acts committed during the course of settlement discussions. Courts may relieve a party from a stipulation because it was procured by fraud, because it was entered as a result of misrepresentation, mistake of fact, or excusable neglect, or because there has been such a substantial change in circumstances that binding the party to the stipulation would be unfair.[404] The significance of these grounds for relief from a stipulation lies in the fact that they also are commonly presented bases for relief from a settlement agreement. As explained earlier, rule 408 would not bar admission of communications made during settlement negotiations if the purpose for which they would be admitted is to prove that the settlement contract is unenforceable because it was procured by fraud, or was entered as a result of misrepresentation, mistake of fact, or excusable neglect.[405] Thus a party might be able to use the same ground both to escape a contractual commitment not to disclose communications made during negotiations and to defeat the settlement agreement itself.

One additional warning is in order here. When the basis for subject matter jurisdiction in federal court is diversity of citizenship, there is a possibility that state law, rather than federal common law, will determine whether or not a contract that enlarges the protections of rule 408—for example, by making communications during negotiations inadmissible

403. *Id.* at 316, 196 Cal. Rptr. at 876.
404. *See* People v. Trujillo, 67 Cal. App. 3d 547, 555, 136 Cal. Rptr. 672, 676 (1977).
405. *See supra* notes 108-19 and accompanying text.

for any purpose—is enforceable. Professors Wright and Graham suggest that courts deciding whether to enforce such contracts should consider doctrines developed in the law of procedure and doctrines developed in the substantive law of contract, arguing that procedural analysis should be based on federal common law in diversity cases, but that the substantive contract analysis should be based on the law of the relevant state.[406] In *Blum v. Morgan Guaranty Trust Co.*,[407] the Eleventh Circuit assumed, without conducting a detailed analysis under *Erie Railroad Co. v. Tompkins*[408] and its progeny, that in a diversity case the enforceability of stipulations whose effect is to limit the admissibility of evidence is a question to be resolved under state law.

Conclusion

Despite commonly made assumptions, and the apparent promise of Federal Rule of Evidence 408, there are many circumstances in which many courts would permit both the discovery and the admission at trial of confidential settlement communications. Given the unpredictability of judicial rulings in this area, and the unforeseeability of events that could result in disclosure or admission at trial of settlement communications, good lawyers have no choice but to proceed with caution in this area. If confidentiality is their client's paramount concern, counsel should not rely on the rules of evidence for protection and should consider taking some of the extra precautions described in the latter sections of this Article.

406. *See* 21 C. WRIGHT & K. GRAHAM *supra* note 14, § 5339.
407. 709 F.2d 1463, 1465 (11th Cir. 1983).
408. 304 U.S. 64 (1938).

The Boston Sunday Globe, March 10, 1991, [A31:1]

Renewed tension between right to privacy and the public's right to know

ARTHUR R. MILLER

To the person on the street, the American legal system often seems bewildering and overused, but nonetheless distant and unrelated to daily life. Consequently, most people would be outraged to learn that for less than $50, the fee for filing a lawsuit, a neighbor has the legal right to compel them to turn over all of their bank statements, medical records, income tax returns, religious documents, school records and other private information, so long as the information is likely to lead to other information that may be related to the lawsuit.

The outrage might intensify upon learning that the neighbor could then give or sell this information to gossips, the press, cdn artists, or any other buyers, unless the court issues an order prohibiting public disclosure, commonly called a protective order.

Should the courts have the authority to issue protective orders to keep private information confidential? Of course. If the court has the power to compel broad intrusions into private matters to resolve a lawsuit, it must also have the power to protect this same private information from further public disclosure outside of the lawsuit.

Although the answer may seem obvious, it is the source of controversy within the legal community and the media. This controversy has also caused consternation among members of the business community, who frequently are involved in litigation and who rely upon the courts' power to protect confidential trade secrets and other commercial information in order to maintain their competitive livelihood.

Behind this controversy are members of the media, and lawyers who handle personal injury cases, who claim that courts are using their power to protect information about public health and safety that the public has a right to know. To prevent courts from keeping information secret, these groups are lobbying state and federal legislatures to change the law. They want to restrict or eliminate the power of courts to keep private information produced in a lawsuit confidential.

Although Florida and Texas have acted precipitately and done so, there simply is no need to change the current system. Such an effort is under way in Massachusetts.

As any poor soul slapped with a lawsuit will tell you, courts must have the power to protect privacy when necessary.

There is no reason to believe that they have used that power to the detriment of the public's right to know. Courts have fine-tuned the classic tension between the right to privacy and the public's right to know for centuries. In recent years, this fine-tuning has led to greater public access. A few anecdotal cases have been put forth in the media, and by personal injury lawyers, allegedly demonstrating that courts have hidden information affecting public health and safety. Upon investigation, none of these war stories actually establishes a link between information kept confidential in court records and subsequent harm to the public.

Instead, investigation reveals that both the media and personal injury lawyers have an insatiable thirst for information – it is an essential fuel to their professional and financial well-being.

Those advocating reduced confidentiality in the courts undervalue competing privacy and property interests.

Although the public interest may be served when court proceedings are open, at times confidentiality serves equally important public interests. Arguably, restrictions on court authority to guarantee confidentiality might discourage someone from reporting instances of government fraud or corruption out of fear that his identity will be revealed in subsequent litigation, making retaliation against him possible.

Confidential news sources might dry up for similar reasons. Fear that prior medical treatment or marital difficulties might be disclosed publicly could cause some people to forgo legitimate legal claims altogether. Society is not served when the price of seeking civil justice is the sacrifice of the right to be let alone. This is a right of increasing importance to human dignity in a computerized society that provides instant and universal access to information once it has been captured.

To businesses involved in litigation, confidentiality is often the only means to protect million-dollar investments in trade secrets, intellectual property, and other proprietary information. Preventing this type of information from falling into the hands of business rivals is central to maintaining a competitive edge. Indeed, trade secrets and the like are considered property, and the protection of private property rights is one of most fundamental obligations of our legal system.

Finally, confidentiality is an important judicial tool that facilitates the resolution of a lawsuit by encouraging litigants to exchange information among themselves freely without fear that it will be disclosed publicly. Society's interest in the prompt, inexpensive resolution of legal disputes is compromised when we take these tools away from our already overburdened judiciary.

As the proponents of restrictions on confidentiality argue, the courts are public institutions. But this concept has meant that the courts are open to the public in order to resolve legal disputes and to allow the public to observe the justice system in action. Until this recent controversy, this concept never stood for the proposition that the courts are like fishbowls through which the public can observe the most intimate affairs of the litigants suspended in the civil justice process.

Lawsuits already are highly invasive and impose inordinate costs in both time and money. Legislatures should not raise these costs by restricting the power of courts to assure privacy and confidentiality when necessary.

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SECRECY versus SAFETY

Restoring the Balance

COMMENTARY

BY BOB GIBBINS

In 1984, a San Francisco federal court case set the stage for a display of the potential of protective orders to delay government regulation and conceal threats to public health. It provides a potent look at the workings of secrecy in litigation—and clearly reflects why determined action is essential to restore balance to America's justice system. (For another view, see Arthur Miller's "Private Lives or Public Access," August 1991 *ABA Journal*, page 64.)

That case, *Stern v. Dow Corning Corp.* (U.S. Dist. Ct., N.D. Cal., No. C83-2348), involved silicone breast implants used in reconstructive surgery. The jury rendered a verdict for the plaintiff on her complaint that the manufacturer committed fraud and failed to warn of the potential for severe side effects. The case was settled while on appeal.

After *Stern* was concluded, a protective order demanded by the implant manufacturer remained in force. It prohibited the plaintiff's attorneys and expert witnesses from telling government regulators or anyone else what the discovery documents showed about safety tests of the product.

Even at a 1988 U.S. Food and Drug Administration hearing held to consider requiring implant manufacturers to demonstrate safety, a *Stern* attorney subject to that protective order was unable to disclose information about clinical or animal tests.

A medical school professor who examined more than a dozen breast implant litigation files has been similarly prohibited, by protective orders in every case, from sharing his knowledge of tests with FDA or congressional investigators. Here is an example of a publicly funded inquiry of a possibly dangerous product; yet a medical school professor is legally gagged through a process funded by taxpayers.

The protective-order strategy was used by several manufacturers, and it bought them time. Manufacturers produced and sold implants for at least six years after the *Stern* verdict, until the FDA took its first look at the companies' clinical data in 1991.

The agency concluded that no test results submitted by any manufacturer demonstrated the safety of implants, and one manufacturer has since recalled its entire line and announced its withdrawal from the breast implant market. But while the FDA vacillated and numerous product liability cases were settled with confidentiality "agreements" and protective orders, 150,000 new patients received implants each year.

Secrecy devices have been used increasingly in litigation during the past decade. A comprehensive new study of products liability litigation involving punitive damages awards revealed a marked increase in the use of confidential settlements after 1986. Conducted by professors Michael Rustad of Suffolk University Law School and Thomas Koenig of Northeastern University, the study examined a quarter-century of data.

Recent litigation involving the prescription sleeping medication Halcion further shows how secrecy, along with lax pharmaceutical regulation, multiplies consumer risks. In 1989 a blanket protective order was entered in *Grundberg v. The Upjohn Co.* (U.S. Dist. Ct., D. Utah, No. C89-274), a case that alleged severe, unpredictable mood changes caused by this drug now used by several million Americans. The *Grundberg* protective order effectively made all documents produced by the defendant confidential and required their return or destruction following the conclusion of the lawsuit. But shortly after *Grundberg* was settled, Halcion's manufacturer acknowledged that clinical data submitted to the FDA during the drug approval process were incomplete.

As it stands, the *Grundberg* protective order leaves an unknown number of patients and doctors wondering what caused side effects. Considering that the plaintiff in *Grundberg* had killed her own mother (although charges against her were dismissed because of involuntary intoxication with Halcion), access to complete information is crucial. A consumer organization is now asking the court to modify the protective order.

Other examples of the threat posed by secrecy are, unfortunately, not hard to come by:

▶ A patient with a Shiley artificial heart valve is unable to learn of the danger that the device's mechanism may fracture. She dies when the valve fails, and her husband later learns that the manufacturer secretly settled litigation brought by other victims years before.

In part through that practice, the company avoids the notoriety that could have led to earlier warning of patients and/or withdrawal of the valves from the market.

A congressional investigative report ("The Bjork-Shiley Heart Valve: Earn as You Learn," House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, 2/90) cites "numerous instances" of deaths that might have been avoided had patients and doctors been aware of the danger earlier. *Barbee v. Shiley, Inc.* (claim was settled in 1989 without filing complaint).

▶ The widow of a police officer killed in the crash of a traffic-control

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ILLUSTRATION BY SAM WARD

plane is denied discovery of evidence of the airplane's design defect because of a confidential settlement "agreement" in another case. The aircraft type is still in use. *Turnberger v. Cessna Aircraft Co.*, Broward Cty., Fla., 17th Jud. Cir. Ct., No. 83-12392.

▶ A scientist who herself suffered a potentially fatal allergic reaction to a painkiller—later withdrawn from the market—discovers that other victims were similarly affected several years earlier but were sworn to secrecy. She also discovers that some confidential settlement "agreements" even prohibited discussion of adverse reactions in scientific journals. *Davis v. McNeilab, Inc.*, U.S. Dist. Ct., D.C., No. 85-CV-3972 (case settled in 1986).

While private matters having no public impact and true trade secrets justify confidentiality, it is inconsistent with the impartial administration of justice for a publicly created and maintained legal system to help hide responsibility for misconduct.

Events that lead to litigation often have an impact well beyond the immediate parties, and that impact can be deadly. In today's age of mass manufacturing and distribution, a dispute brought before a court can involve a potentially life-threatening hazard that already may have affected thousands of citizens, and may affect even more in the future.

Confidentiality "agreements" in products liability cases can keep information about the dangers of defective products from coming to the attention of government regulators, the news media and others who could alert the public.

And in medical negligence cases, the doctors alleged to have caused an injury may well have other patients undergoing the same procedures. Secret settlements and sealed files can enable physicians to keep practicing without having to account for substandard care. The same concerns apply to injurious behavior in other professions.

In fact, in all types of tort litigation, both the deterrent and compensation functions of the civil justice system can be stifled by secrecy. Beyond leaving past victims ignorant of the cause of their injuries and future victims vulnerable, secrecy also can make it more difficult for victims to prepare and prove their cases.

Secrecy can make it more likely that critical evidence will be concealed or destroyed without ever being discovered.

A legal system that functions in this way is out of balance, which is why there is growing support for changes in court rules and procedures to eliminate unwarranted secrecy. Those who advocate such change seek a fairer balance between privacy and property rights

on one side, and public health and safety on the other. Restoring lost balance also could help to reduce injuries and resulting litigation.

The imbalance in the tort litigation system is rooted in abuses of otherwise legitimate rights. The litigation playing field was level when the Federal Rules of Civil Procedure and other similar reforms of litigation practice were inaugurated in the 1930s. The system at that time provided protection for truly personal information (the reasons why a divorce was sought, or why child custody was refused) and true trade secrets (chemical formulae, manufacturing methods, details of distribution networks).

Some segments of the legal community now attempt to protect classes of information that go well beyond the original plan. They are advised to misuse the "trade secret" and "privacy" labels, claiming special protection for information never intended to have confidential status under the rules of civil procedure, and claiming corporate privacy rights never recognized by American law.

From this attempt to expand the idea of protected information into new areas, there has developed a well-known arsenal of devices intended to protect wrongdoers:

▶ "Agreements" that prohibit disclosure of the compensation paid in a settlement, the names of the parties, and sometimes even the fact that litigation occurred;

▶ Sealed court files that can conceal the very existence of the lawsuit;

▶ Protective orders that require the return or destruction of discovery information after the termination of the litigation, and prohibit sharing discovery material with other attorneys handling similar cases or with government agencies; and

▶ Prohibitions against attorneys handling similar cases in the future.

New secrecy strategies are still emerging. In medical malpractice cases, for instance, negotiated dismissals of individual physicians have been used to keep the doctors' names out of the federal government's data bank of malpractice verdicts and settlements, thus thwarting an important public policy.

Secrecy proponents argue that confidentiality makes litigation go more smoothly and promotes early settlement, and indeed it may—when the advocates of secrecy get their way.

But secrecy also can delay the resolution of litigation, consume large amounts of lawyers' time, and strain the courts' capacity to move cases toward a conclusion—as shown by a recent federal court opinion in *Wauchop v. Domino's Pizza, Inc.* (U.S. Dist. Ct., S.D. Ind., No. S90-496). The plaintiffs in *Wauchop* sought information on the corporation's promise to deliver food by car in 30 minutes or less, arguing that the policy may have led to an auto collision.

The defendants demanded that much of the discovery material requested by the plaintiffs be protected against further disclosure. The court concluded that secrecy was not justified for most categories of the material, but the defendants' demand for a protective order forced the court to read motions, review and analyze numerous discovery requests, and render its conclusions in an opinion and order more than 30 pages long. The judge properly lamented that the federal rules on discovery "should be self-executing through the cooperation of counsel."

To stabilize this out-of-balance system and counteract the harm secrecy can cause, this country needs a strong presumption of openness for court proceedings and records.

We need adequate procedures to ensure that the trial judge will consider the public's interest in information that would be concealed under a proposed protective order. Advocates of secrecy argue that existing procedures already allow courts to consider the public interest as part of the exercise of judicial discretion, but widespread approval of protective orders and confidenti-

ality "agreements" suggests that the public interest has not been made a routine part of the courts' calculus.

The Association of Trial Lawyers of America acted in 1989 to focus attention on the multiple problems caused by secrecy. ATLA's Board of Governors passed a resolution encouraging:

- ▶ Courts to scrutinize requests for secrecy and grant them only when information sought to be protected is a true trade secret or can qualify for some other privilege;
- ▶ Courts to allow sharing of discovery material with attorneys handling similar cases, regulatory agencies and professional boards;
- ▶ Courts to liberally grant relief from pre-existing orders and "agreements" that unfairly impose secrecy; and
- ▶ Attorneys to resist secrecy demands that preclude sharing information with regulatory agencies and other lawyers, and discouraging them from agreeing to proposed secrecy orders.

By now eight states have joined the movement away from secrecy. Some of this initiative has come from judges themselves. In 1990, the Texas Supreme Court was the first court to amend its rules to recognize a presumption of openness for all court proceedings, and to establish procedures to be followed for any request to seal court files.

Court rules with a similar focus on openness have been adopted by the New York State Administrative Board of the Courts, the San Diego County Superior Court, and the Delaware Supreme Court and Chancery Court.

In 1990, a different approach was taken by Florida, which passed legislation that identified a class of dangers as "public hazards," and prohibited concealment of such hazards through judicial processes.

Narrower mechanisms have been adopted in several other states. These include specific procedures to be followed in disclosing discovery material to attorneys handling similar cases (adopted in Virginia in 1989), and standards for confidentiality regarding litigation by and against state government (adopted in North Carolina, Florida and Oregon).

Other bills and proposed court rules are under consideration in many states, most based on either the Texas or Florida models, and usually with the support of consumer, labor, environmental, senior citizen or media organizations.

The mechanics of the new measures aside, an obvious question is what the new rules and procedures change, and what they leave unchanged.

The new mechanisms give no one any new substantive rights of action. They cannot engender new cases. Nor, in any known case, do they expose strictly personal information or reveal genuine trade secrets to the public.

The changes do, obviously, give judges new duties of review in a number of situations. But once it becomes clear that requests for secrecy will be measured against the public interest, the number of secrecy demands should decrease, so that the net result is the same or better than what has been observed in the past.

The same effect should be noticeable in terms of the cost of litigation. Market forces can be expected to work against satellite litigation when clients realize that demands for unjustified secrecy will not succeed, and that they may be penalized.

Perhaps most importantly, the new measures do not infringe on judicial discretion. Indeed, they depend on judges to exercise discretion as much as the former rules ever did. They provide standards to be met by litigants, like many other written standards of proof, and prescribe what the result will be if the judge determines that the standards have not been met.

There is at least some evidence of improvement already. An ATLA member who practices in Minnesota, where no legislation has yet been passed on secrecy, recently observed a dramatic reversal of the Shiley heart valve manufacturer's previous use of secrecy demands, as well as judges' awareness of the issue of secrecy and the potential it has for harm.

These developments suggest that secrecy advocates' dire warnings about increased satellite litigation and diminished access to information are exaggerated. Their predictions imply that America's judges would allow the courts to slow to a crawl, and that members of the bar and the public would accept dramatic increases in litigation costs. Experienced judges and trial lawyers, however, will not tolerate such a result.

The goal here is to have a safer society. One way to attain that goal is to create mechanisms designed to help protect us all. ■

USA TODAY 1/15/92

Today's debate is on **PRODUCT LIABILITY**
and whether courts should allow case files to remain secret.

Open court files to protect public health and safety

OUR VIEW **Judges should make sure that vital data are not kept from consumers or government regulators.**

Two events this week should sound a call to arms for everyone who suspects some courts help some companies play fast and loose with our safety.

First, new concerns surfaced that Dow Corning Corp. rushed its silicone gel breast implants to market despite questionable test results.

The firm denies that — but the Association of Trial Lawyers says secrecy ordered as part of court settlements likely kept test data from regulators for years. The group says one doctor alone — Marc Lappe of the University of Illinois — now is subject to 18 gag orders.

Secondly, the first suit from the 1989 Iowa crash of United Flight 232 was settled out of court. A trial might have resolved who was most to blame and helped other victims seek fair treatment — but the settlement was secret, so other victims are on their own.

Such cases are all too frequent: Companies entice plaintiffs with quick settlements. In return, they ask courts to shroud what went wrong. Many judges, facing clogged dockets, happily agree.

Who does that hurt? It can hurt you:

▶ Government regulators don't see data that could help protect consumers.

▶ Manufacturers have less incentive to change harmful products.

▶ Other victims are denied helpful evidence, and potential victims remain unaware.

Some firms say they need such secrecy to protect trade secrets or prevent nuisance suits. But the public suffers.

Johnson & Johnson got court records sealed in suits filed by people who had suffered harmful reactions to its painkiller Zomax.

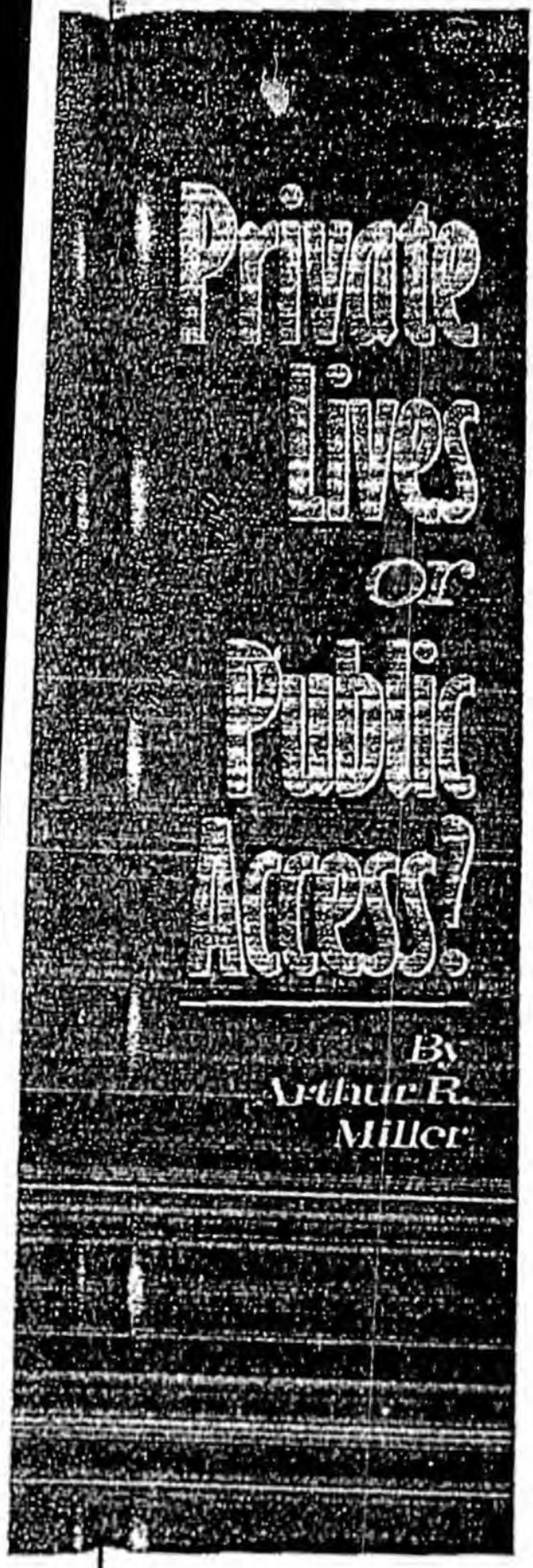
Pfizer Inc. got courts to order secrecy in suits over its heart valve — recalled only in 1986, after 160 patients had died.

Consumers clearly need federal and state laws so judges will forbid secrecy if public safety or health is at stake.

Florida now has such a law; six states have court rules favoring openness.

Far too often, though, makers of harmful products still find it too easy to buy silence. That must stop.

▶ Dow Corning halts production, 1D



COMMENTARY

The Debate Over Courthouse Confidentiality

By tradition, the American public may view the daily activities of the courts through an expansive window that reveals our civil and criminal justice systems at their best and their worst. Through this window, sometimes garishly illuminated by television lights and press reports, the public has front row seats from which it may observe an endless panoply of lawsuits, litigants, judges and juries.

Like much of our system of justice, the right of public access to court proceedings descends from the English common-law tradition. The right exists to enhance public trust in the fairness of that system, to promote public participation in the processes of government, and to protect constitutional guarantees.

This right of access, however, is not absolute; it never has extended beyond the confines of court proceedings and documents themselves. As Justice Holmes said in *Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917), the trial judge always has had great discretion "to determine whether, to whom, and under what precautions," public access should be permitted. Further, there never has been any right of public access to the activities, discussions and papers of the parties outside of the courtroom during discovery or settlement.

An intense, nationwide campaign is underway, calling for a "presumption of public access" to all information produced in litigation including discovery and settlement. This presumption is necessary, it is said, because courts have disregarded the public interest and as a result have kept important information affecting public health and safety confidential. Thus, the proponents of increased public access seek to transform the halls of justice into walls of glass, so that absolutely nothing is withheld from the public eye.

Such a transformation would be nothing short of a fundamental change in the role of the courts. From its inception, our legal system has recognized a variety of situations in which confidentiality is more than just appropriate, and, in fact, is essential to the even-handed administration of justice.

Discovery, grand jury proceedings, settlement negotiations and jury deliberations are conducted far from public view. Classified government information, intimate personal matters, confidential communications between attorney and client, the identity of confidential news sources or police informers, and proprietary information traditionally have been treated as confidential and public access to such information generally is not permitted.

In each of these instances, confidentiality is essential to accomplish fundamental goals of the justice system and of society in general, goals of greater importance to us than providing the public with insight into the details of a particular case.

The traditional model of civil adjudication in this country envisions private parties bringing a private dispute to a dispassionate arbiter—the judge—for resolution based on neutral principles of law. The judge and, sometimes, a jury consider only the evidence and arguments presented by the parties, apply the law to the facts, and do not inject their personal views.

Nor does the trier consider interests or matters outside the facts of the case. Public access to information produced in litigation always has been a secondary benefit, or side effect, of the primary undertaking of the courts. Allowing public access or public interest in litigation to assume an importance greater than the interests of the private litigants skews the traditional balance, transforming the courts into something other than dispute resolution agencies.

Some public law theorists have suggested that this traditional role of the courts is too narrow, saying that the courts also should involve themselves aggressively in promot-

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All indications are that the current system including the media, has plentiful

ing broad social goals within the context of private litigation.

But a number of states that have considered legislation to restrict the use of confidentiality in litigation have decided that, in light of the broad public access rights already extant, the outcry for a presumption of access is nothing but noise.

So far this year efforts to change the law on court confidentiality in Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Mississippi, Montana, New Mexico, South Dakota and Virginia have failed. These states rejected the kind of confidentiality limitations imposed earlier in Florida and Texas.

New York has adopted a rule to require a showing of good cause prior to sealing court records, which is essentially a codification of existing practice. The New York rule does not, however, affect discovery or the rule regarding protective orders. Legislatures and rule-making bodies in other states are raising serious questions about the need to change the rules on confidentiality, based on their understanding of the important role that confidentiality plays in the justice system.

Confidentiality is an integral part of the civil litigation process, and plays an essential role in fostering the resolution of disputes from start to finish. Keeping communications between client and attorney confidential fosters the candid exchange of information that is vital to the attorney's efforts to serve the client's interests most effectively. The protection of attorney work product prevents unfair intrusion into the mental processes of the lawyer preparing for litigation in an adversary system.

Preventing public disclosure of trade secrets through litigation preserves the valuable investment of the trade-secret owner. Information of an intensely personal nature is withheld from the public to prevent unwarranted invasion of personal privacy.

The rules giving courts discretion to issue confidentiality orders are central to the litigation process. An expectation of confidentiality can be vitally important in overcoming inhibitions in the early stages of litigation: bringing a lawsuit to enforce one's rights, engaging in complete disclosure during the pretrial process; fully airing all issues at pretrial hearings and during trial; and being willing to negotiate a settlement and doing so candidly. Consequently, compromising the court's discretion to protect confidentiality undoubtedly will affect the civil justice process as a whole.

The current movement to restrict judicial discretion in the name of public access does not present an across-the-board challenge to confidentiality. Instead, the movement focuses on protective orders during discovery and court seals or confidentiality agreements during settlement, claiming that these devices are being used to hide important information from the public.

Although these protective orders and court seals are the exception, not the rule, their availability to provide confidentiality during discovery and settlement serves objectives of the justice system as important as the attorney-client privilege, work product doctrine, or the protection of trade secrets and privacy rights.

Wide-angle discovery is central to contemporary civil litigation, and provides the litigants with equal access to all relevant data. But that does not make discovery a public process; indeed, history and practice are to the contrary. It is a private and voluntary process, with only occasional intervention by the court, intended solely to assist in the resolution of disputes. These assumptions are reinforced by the availability of the protective order, to which the parties typically stipulate, to guard privacy and prevent misuse of discovered information.

The assumption that material produced in discovery will not always be made available for use outside the litigation assures widespread voluntary compliance with the discovery regime, upon which we base our ability to resolve cases on their merits. This is true because modern discovery has the widest possible berth. It therefore tends to produce large quantities of material that are not used—or are not even directly relevant to the case—but that can be extraordinarily intrusive or extremely damaging if disclosed.

If we undermine the principle that discovery is a private process, or degrade the reliability of protective orders, the discovery process would become infinitely more contentious, protracted and expensive.

Litigants would be motivated to contest discovery requests with increasing frequency to prevent disclosure. More litigants would choose a full litigation strategy, rather than pursuing a settlement, simply to vindicate their reputations by bringing out the complete story concerning information produced in discovery and disclosed out of context. Further, the litigants' time and money would be wasted; the energies of that most precious resource—our judges—would be dissipated. The net effect might well be a constriction on the flow of information, rather than its expansion.

Broad discovery also enables litigants to appraise their cases and evaluate the risks of proceeding to trial. It often is the availability of discovery that leads parties to settle, saving themselves and the court system enormous time and money. Without the guarantee of confidentiality, some litigants would have little or no incentive to produce information during discovery, particularly if courts permit public access for reasons unrelated to the lawsuit.

Similarly, the settlement process would be impaired if the parties could not rely on the assurances of confidentiality reached voluntarily in the settlement agreement. In fact, the greater incentive to litigate, simply to postpone or avoid public access to confidential information, would work to the disadvantage of poorer litigants.

Our civil justice system simply could not bear the increased burden if the settlement rate were to decline, or if settlements were delayed to any significant degree, or if the dissemination of settlement details encouraged the bringing of suits that otherwise would not have been brought.

Nonetheless, it is alarming to think that protective orders, court seals and confidentiality agreements are being used to conceal information regarding hazardous consumer products, toxic waste dumps, or other potentially harmful activities. The allegations that courts are concealing such information apparently stems from

works rather well. The public, access to the courts and court records.

news media reports about a handful of cases. According to these reports, were it not for protective orders and court seals keeping this information confidential, the public would have learned about these potential threats to their health and welfare.

These reports, however, do not withstand scrutiny. For example, it was alleged that Xerox had hidden vital information about hazardous-waste contamination of a neighborhood near a New York plant in a sealed court settlement. However, no information of this type was found in the sealed files, which only contained medical records.

In another example, it was claimed that a drug manufacturer hid information about a potentially fatal side effect of a new drug in sealed court records. The facts, however, show that the manufacturer promptly notified the government of the potential problem, published warnings about the potential side effect in the prescription drug manual, and also sent a warning letter to over 100,000 physicians.

Neither of these examples reveals a cause and effect relationship between protective orders, sealed court records, and harm to public health or safety.

Nonetheless, it is argued that once allegations of harm are made, the public should be permitted access to all information subsequently produced in discovery. But that approach inadequately balances the tension between the public's right to know and the important purposes served by confidentiality.

Most jurisdictions have extremely liberal pleading requirements. Thus, it rarely is possible to determine in advance of trial whether allegations of harm in the pleadings of a lawsuit, or information produced in bits and pieces in discovery, rise to the level of proof that some injury actually occurred or is even likely to occur.

Today's rules of civil procedure are intended to make access to the judicial system easy, and to achieve that end, they only require notice pleading.

Discovery is designed only to reveal information that may lead to discovery of admissible evidence. This makes it virtually impossible to stop a lawsuit at the courthouse door or during the pretrial process, regardless of the merits of the case.

Once inside the courthouse, motions to dismiss are not difficult to survive. Consequently, although the allegations made in a complaint may raise issues that appear to implicate matters affecting public health and safety, and information produced in discovery may appear to confirm that, the truth of the allegations can be known only after they have been tested through the full litigation process. Release of information prior to trial is premature at best, and destructive to a litigant's reputation or business at worst.

A prime example of precisely this result is the treatment of the Audi 5000, which was claimed to have killed and injured numerous people due to a sudden acceleration defect. Even though no sudden acceleration defect was noted in identical cars sold in other countries, the national media, such as the CBS program "60 Minutes," tried and convicted the vehicle.

American consumers stopped buying it, only to find, after many trials and a National Highway Transportation Safety Administration investigation, that driver error and not a defect in the car itself caused the sudden acceleration. Yet, the car is off the market, and Audi is still struggling to re-establish its former reputation for producing high-quality cars.

Despite the financial tragedy the media and over-eager plaintiffs' bar caused in this instance and others, both the media and the plaintiffs' bar stridently proclaim their "right" to decide what information is of import to the public, to be given unfettered access to that information, and to use it in whatever manner they see fit.

I do not quarrel with an expansive reading of the First Amendment or judicial decisions that allow publication of material of public significance despite the fact that it will embarrass, or even damage, those to whom the information pertains. Neither the First Amendment, nor those decisions, however, legitimate demands to publish any private information, no matter how sensitive, how personal, how ruinous, or how irrelevant to daily events it may be.

We must remember that the proponents of increased public access, whether they are the plaintiffs' bar or the press, engage in business and have their own agendas to serve; they are just like the defendants they pursue who support confidentiality. Given the self-interest of the contending forces, the simple truth is that only the judges can be neutral gatekeepers.

When information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has—within the sound discretion of the court. Only the trial judge has no axe to grind and no prospect of pecuniary gain. Existing rules and procedures are more than adequate to accomplish this end.

Additional support for allowing the judge to determine whether information produced in a lawsuit raises issues of public health and safety that warrant public disclosure lies in the rules of evidence.

Evidence admitted at trial generally is available to the public through the traditional common-law right of access to the courtroom. If the judge finds the information inadmissible at trial, it is because the court deems the information irrelevant or unreliable. If the information has no logical connection to a fact at issue, or if the information is not trustworthy or credible, it is difficult to understand how the public is served by public disclosure. In fact, public disclosure of untrustworthy safety or health information could cause serious public anxiety and harm.

Also, in today's litigious society it is not altogether unheard of for individuals to institute completely unfounded lawsuits for a variety of purposes. A suit could be filed merely to compel the defendant to produce information that the plaintiff subsequently can sell to others, perhaps for a percentage of the damages awarded in subsequent cases—an impermissible abuse of the system. The possibility of Rule 11 sanctions is inadequate once the damage has been done.

In all of the fanfare and expressions of concern about the rights of the public, insufficient attention has been given to the rights of the actual litigants, who are in court to resolve very real legal disputes of

Information affecting compelling public interests is available to the public.

great import to themselves.

Due to the invasive nature of the litigation process, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown.

Unfettered authority to collect and disseminate private information through the judicial process raises images of an Orwellian society where Big Brother knows all. Litigants do not give up their rights to privacy just because they have walked through the courthouse door.

Those who drafted the broad discovery procedures in rules of civil procedure did so to improve the dispute resolution system. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access. Because of the importance of the right to privacy, it would be imprudent to endorse any proposal that would restrict or eliminate the discretion of the courts to protect the privacy rights of litigants on a case-by-case basis.

Another substantive right that litigants often are compelled to place at risk to resolve a legal dispute is the right to the exclusive use of private property. Information is often very valuable in today's society—so valuable that it can be bought and sold for great sums of money. Unlike tangible property, which can change hands without diminishing its value to the current owner, once information has been disclosed, its original owner never again can obtain exclusive possession of it.

To expedite resolution of a lawsuit, rules of procedure can compel both the plaintiff and defendant to reveal information, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may not be involved in the lawsuit, in which a property right exists.

Courts traditionally have issued protective orders to protect property rights in information and to prevent outsiders from gaining gratuitous access to proprietary information to the detriment of a litigant. These protective orders are the most effective means of safeguarding the commercial value of this type of information while still making it available for use in the litigation. The only alternative might be denying discovery of this type of information altogether.

The rights to privacy and property ownership are among the most fundamental rights that we have as

citizens of this country. Any type of governmental intrusion into these rights is costly to society as a whole, and should not be permitted except for the most compelling reasons. A presumptive right of public access to information, the physical embodiment of these rights, would work a wholesale invasion of them—not for some demonstrated compelling reason, but in most instances for no legitimate reason at all.

There is a final systemic concern about recognizing a wholesale right of public access to materials produced in litigation: The American judicial system already is unable to resolve civil disputes in an economical, timely fashion.

To breed "satellite litigation" concerning access to discovery or material settlement information is especially onerous because it undermines a fundamental principle behind these two components of litigation—they both were designed to operate extra-judicially.

Our judges simply cannot assume the additional burdens that satellite litigation over access would create. Adding a clearinghouse—or Freedom of Information Act—function to the existing judicial workload, which essentially is what the proponents of increased access advocate, is unjustifiable for even the most compelling reasons.

It is unrealistic to believe that our judges can examine the masses of discovery generated in today's litigation to determine questions of public access. In *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court rejected similar efforts by the press to use an executive agency as a clearinghouse for information about private individuals. There is every reason to believe that the Court would take the same view of the judiciary acting as an information agency.

The truth is that even if the courts had the resources to assume this function, they are not the appropriate institutions for doing so. Judges generally lack the scientific or medical expertise needed to evaluate properly the complex data and theories routinely implicated when health and safety are at issue.

Indeed, a multitude of expert executive and administrative agencies at the local, state and federal levels already exist for this purpose. If efforts by these agencies are inadequate, it does not follow that their responsibilities should be shifted to the courts.

The balance clearly favors retaining the present practice—relying on our courts to use their discretion to issue confidentiality orders to protect the legitimate interests of the parties, and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Rules of civil procedure, as currently written, allow judges to consider and act in the public interest when circumstances so indicate.

There is simply no reason to believe that current court rules and practices create any risks to public health or safety. Indeed, all indications are that the current system works rather well. The public, including the media, already has plentiful access to the courts and court records; information affecting compelling public interests is available to them. No change to the practice of providing confidentiality when appropriate is needed. ■

Ideas & Trends

Florida courts may not seal records on public hazards

A new Florida law that went into effect July 1 prohibits courts from sealing records that contain information about a public hazard. The first comprehensive law of its kind in the nation, the legislation was opposed by automobile manufacturers and pharmaceutical companies, frequent targets of product-liability suits. Manufacturers have often insisted that court records and information related to product-liability litigation be kept secret as part of settlement agreements.

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NCSL OCT. 1990

Oversight, Phase I: Keeping Records of Doctors With Records

By PHILIP J. HILTS

THE mutually protective relationship that has long existed between doctors and hospitals began to grow less cozy this month when the National Practitioner Data Bank — more popularly known as "docs in a box" — began collecting information on medical malpractice.

On Sept. 1 computers began recording the names of doctors, dentists, psychotherapists and other licensed health-care practitioners who have been seriously reprimanded by hospitals, state medical boards and professional societies. The system will make note of medical licenses, hospital privileges or society memberships that have been suspended for 30 days or more. It will also record malpractice settlements. This is especially important because many settlements — including some involving the biggest and most egregious cases — have been hidden by court-sealed secrecy agreements.

Doctors may see their own files and write rebuttals, but otherwise the information may be read only by official regulatory bodies like hospital peer review boards, state licensing boards and professional societies.

For consumer groups, the establishment of the data base is a step toward giving the public access to the information. For the medical profession, which has long insisted on policing itself, the data bank already goes far enough. Moves have already begun to cut back the information that will be recorded in the system.

Hospitals have commonly dealt with troublesome practitioners by letting them quietly resign. Fears of lawsuits provided a powerful incentive for keeping information about medical transgressions under wrap. As a result, many doctors forced to leave one institution easily found work in another.

Now this symbiotic relationship has been severed, with all hospitals, as well as medical boards, medical societies and insurance companies, required by Federal law to submit reports on disciplinary actions and settlements. Hospitals must also search the data bank each time they hire a new practitioner, and every two years to monitor those already on staff.

Dr. Robert Harmon, chief of the Health Resources Services Administration, which administers the data bank, said he expected 50,000 to 60,000 reports to be logged annually. Payments in medical malpractice settlements or judgments may account for 30,000 to 40,000 of the entries. In addition to 6,000 civilian hospitals, those operated by the Defense Department will also be affected. The Health Resources Services Administration is still trying to negotiate an agreement with the Department of Veterans Affairs, which has more than 100 hospitals and thousands of doctors.

The American Medical Association, which initially opposed the data base, now says it supports it — with reservations. Both the A.M.A. and the American Hospital Association would like to find ways for "nuisance suits" to be settled off the record.

An official of the A.M.A., who insisted on anonymity, said the data bank could make doctors less willing to avoid court action by settling unwarranted claims for small sums. "It is true there will be more fighting," the official said. "It was more convenient and cheaper in the end to settle nuisance suits, but now those will go into a doctor's files. Doctors really do not want that, so more cases will be taken to the mat. The defense costs will go up. Malpractice premiums may go up."

The Health Resources Services Administration has the option, after one year of operation, to set a lower limit for reporting settlements. The A.M.A. has suggested not reporting anything under $30,000, a move that consumer groups oppose.

The A.M.A. also says that it has been common for doctors to accept judgments from hospital peer review boards at least partly because they were kept private. "I would advise doctors not to resolve these cases so quickly, not to agree to a quiet settlement," the A.M.A. official said. That could lead to more conflicts with the hospitals.

> A wedge in relations between hospitals and physicians.

The official noted that the hospitals "have lost one option" in dealing with doctors they don't want. They can no longer just let them resign. The law that established the data bank requires that hospitals report resignations that take place after an investigation has begun.

One supporter of the new system is Dr. Ron D. Anderson, the chief executive officer of Parkland Hospital, a 940-bed public hospital in Dallas.

"We are taking this very seriously," he said. "We will really have to document our background checks on doctors. With 800 full-time faculty and 1,200 clinical faculty members, that is a lot of work."

In Dallas and some other places, he said, hospitals have created verification centers to keep records, check backgrounds of doctors, and to handle the flow of information between the hospitals and the national data bank.

Hospitals have also had to review their habits and procedures for punishing doctors, Dr. Anderson said, to make sure that any suspension of 30 days or more "is serious and is intended to protect the patients, not just punish a staff member for not doing his charts or not being a good citizen in some other way in the hospital."

Both doctors and hospitals are looking over their shoulders at what they fear more than "docs in a box" — a movement to open the system to the public. The Health Research Group of Public Citizen Inc., a consumer advocacy group, supports public access, as does Representative Ron Wyden, the Oregon Democrat who sponsored the data bank legislation.

With the possibility that the system might someday be open [illegible] years pursual, doctors can be expected to fight [illegible] any hard against black marks on their [illegible] keep doctors from suing hospitals for damages. [illegible] the law setting up the data bank [illegible] medical providers immunity.

USA TODAY 1/15/92

Public is protected now

OPPOSING VIEW **Attorney Alfred Cortese says increased access to court records means less justice.**

Whoever said, "There are none so blind as those that will not see," could have been referring to today's editorial opposing court "secrecy." Anyone who sees the recent disclosure of court documents concerning the Dow Corning breast implant as proof that courts are concealing product safety information must have blinders on.

If this case proves anything, it's that the current system works. Courts understand the public's interest in the cases they consider. Current law allows courts to make information public when appropriate, even when the litigants want it kept confidential, so government agencies can do their jobs. The breast-implant case proves the point.

The fuss about court "secrecy" boils down to a nationwide campaign by personal-injury lawyers, fueled by the media, to use bald accusations to destroy beneficial products and privacy rights.

Increased access to court records means more sensationalized stories but less justice for all. Unproved accusations drove the only safe treatment for morning sickness, Bendectin, off the market. They did the same to the Audi 5000. The fact is, the allegations about court secrecy are equally untrue. They are based on innuendo and manipulated facts, not hard proof.

Litigant rights are important, too. A sexual harassment victim ought to be able to sue her harasser without a newspaper printing the intimate details of her sex life. If courts have no authority to protect her privacy, she may forego her legal rights. Also, courts must be able to protect trade secrets from falling into the hands of competitors. Under current law, they can. So far, over 30 states have wisely rejected attempts to turn their courts into information clearinghouses.

Courts balance the need for confidentiality against the need for access in each case. Their ability to maintain that balance should not be restricted.

Alfred W. Cortese Jr. is a partner in the Washington law firm of Kirkland & Ellis.

ATRA American Tort Reform Association

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

April 4, 1992

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

Dear Chairman Kubina:

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

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

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

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

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

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

Sincerely,

Martin F. Connor
President

American Tort Reform Association

January 21, 1992

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

American Tort Reform Association

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

American Tort Reform Association

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

American Tort Reform Association

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

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

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

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

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

KEEPING SECRETS

Justice on Trial

Report of the
Conference
on
Courtroom
Secrecy

**Society of
Professional Journalists**

and

**Association of
Trial Lawyers of America**

KEEPING SECRETS
Justice on Trial

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EXECUTIVE SUMMARY

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

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

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

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

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

Right to Know vs. Right to Privacy

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

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

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

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

Legal Ethics

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

Cost of Secrecy

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

Trade Secrets

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

Judges' Role

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

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

Solving the Problem

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

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

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

Justice Lloyd Doggett,
Texas Supreme Court

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

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

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

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

SCOPE OF THE PROBLEM

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

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

Forms of Secrecy

There are three major forms of secrecy:

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

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

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

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

Paul McMasters, Society of Professional Journalists

Process of Secrecy

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

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

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

Dianne Jay Weaver,
Plaintiff's Attorney

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

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

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

First Amendment and Freedom of Information Concerns

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

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

Extent of Secrecy

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

Elsa Walsh, *Washington Post*

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

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

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

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

Additional Issues for Consideration

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

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

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

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

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

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

Harold Jacobson,
Defense Attorney

INTRODUCTORY REMARKS

Why Trial Lawyers Urge Openness

Russ Herman, President, Association of Trial Lawyers of America

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

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

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

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

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

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

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

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

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

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

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

Ed Keller, Accident Victim

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

Erosion of Our Right to Know

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

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

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

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

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

Michael Gartner, President, NBC News, and Keynote Speaker

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

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

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

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

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

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

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

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

JUSTICE FOR WHOM:

THE CASE FOR AND AGAINST SECRECY

Members of the Panel:

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

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

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

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

How Secrecy Appears to a Scientist and a Victim

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

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

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

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

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

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

he history of lawsuits over omax, asbestos, post-menopausal strogens and cancer, Dalkon hields, seat belts, heart valves, nd DES provides evidence that ourt-ordered secrecy helps neither cience nor the public.

. Devra Davis, National Academy of Sciences

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

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

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

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

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

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

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

What One Newspaper Did About Secrecy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Case for Privacy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

James Morris, Defense Attorney

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

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

Implement the Laws We Have

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

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

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

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

Eugene Pavalon, Plaintiff's Attorney

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PUBLIC COURTS, PRIVATE JUSTICE

Members of the Panel

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

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

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

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

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

How Secrecy Hurts Consumers

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

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

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

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

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

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

Joan Claybrook, President,
Public Citizen

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

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

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

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

Ethical Dilemma of Lawyers

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

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

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

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

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

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

Destroying Confidence in the Courts

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

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

Why is information produced in litigation valuable?

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

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

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

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

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

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

Alfred Cortese,
Defense Attorney

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

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

Public Responsibility of the Court System

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

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

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

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

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

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

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

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

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

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

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

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

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

Of course no such agreement was forthcoming.

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

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

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

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

Secrecy vs. Safety

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How Should Protective Orders Be Limited?

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

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

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

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

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

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

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

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

TESTING THE SYSTEM:

BALANCING PUBLIC INTEREST AND PRIVACY RIGHTS

Members of the Panel

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

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

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

Conflict Between Openness and Reporters' Privilege

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

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

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

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

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

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

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

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

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

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

Prevalence of Sealed Records

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

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

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

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

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

Elsa Walsh, *Washington Post*

His response was one we found all over the country.

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

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

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

The Case for Maximizing Openness

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

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

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

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

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

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

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

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

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

Arthur Bryant, Trial Lawyers for Public Justice

Changing Perceptions of the Public Interest in the Civil Justice System

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

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

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

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

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

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

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

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

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

Enforcing the Right to Openness

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

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

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

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

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

Protecting the Privacy of Litigants

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

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

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

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

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

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

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

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

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

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

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

When Secrecy Is Unethical

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

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

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

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

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

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

ARTHUR BRYANT: What ought the rules to be?

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

ALICE LUCAN: On a good showing?

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

CLOSING PLENARY:

MAKING NEW RULES

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

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

Justice Lloyd Doggett, Texas Supreme Court

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

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

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

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

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

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

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

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

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

Justice Lloyd Doggett,
Texas Supreme Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Justice Lloyd Doggett,
Texas Supreme Court

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

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

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

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

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

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

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

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

Remarks by Moderators and Closing Plenary Chair

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

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

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

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

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

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

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

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

The Fight for Openness

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

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

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

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

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

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

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Michael C. Maher, Plaintiff's Attorney

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

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

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

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

LUNCHEON ADDRESS

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

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

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

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

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

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

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

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

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

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