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SECRECY IN LITIGATION: THE HEALTHY DEBATE CONTINUES

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> Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.
>
> *Lord Acton*[1]

The question of whether—and to what extent—information and court records relating to civil litigation should be shielded from public view by court directive is one that has challenged courts and policymakers for decades. Recent episodes of court-sanctioned confidentiality have, in the view of some, brought the courts into disrepute by keeping information regarding public safety out of the public domain. Those events have caused legislators, both state and federal, to propose sunshine-in-litigation legislation, and have caused judges to take a fresh look at existing practice—a practice that occasionally involves summarily keeping from public view anything that the parties wish to have sealed.

There are, of course, occasions when courts should yield to a request for court-ordered[2] confidentiality. Trade secrets, proprietary information, and sensitive security data, among other things, have traditionally been deserving of the court's solicitude, and orders are routinely entered protecting the privacy of such information.

The difficult questions occur, as they always do, at the margins. For example, what should a judge do when a groundwater contamination case will settle, but only if the judge agrees to enter an order requiring that all documents produced during discovery be returned or destroyed and never

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1. LORD ACTON AND HIS CIRCLE 166 (Abbot Gasquet ed., Burt Frankin 1968) (1906). *See also* United States v. Salemme, 91 F. Supp. 2d 141, 148 (D. Mass. 1999), *rev'd in part sub nom.* United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000) (quoting same).

2. I prefer to use the adjectives "court-ordered" and "government-enforced" because the issue being debated is *not* the right of the litigants, *inter se*, to agree to keep information confidential—no one disputes that they possess that right. Rather, the proper focus of the issue discussed in the pages which follow is the extent to which the government, through the court system, should participate in the effort to keep information from the public through orders *requiring* that such information be withheld, on pain of contempt of court for a violation.

shared with anyone? Does the judge have an obligation to the legal system at large or to future litigants who might live in the affected area and who need the same documents in subsequent litigation? Suppose a judge presides over the settlement of an action involving a teacher accused of molesting a child, and is told that the case will settle only if the court enters a gag order restricting the parties and litigants from discussing facts developed during discovery? What if the judge knows that the teacher intends to remain in the classroom after the case is concluded? Should the judge enter the gag order? Or consider the case of an automobile dealer who is accused of rolling back odometers and wants desperately to settle the claim against him, but imposes as a precondition to settlement a requirement that all information developed during discovery—revealing many other instances of odometer tampering—be shielded from the public by an order threatening the court's contempt power for anyone caught violating the court-ordered secrecy?

Although I have generally been a proponent of open court records in cases such as those described above, I recognize that compelling countervailing arguments can be made. The debate over these issues is a healthy one, and one that should continue—hence, the need for the articles contained in this symposium issue.

If nothing else, continued debate over the proper role of judges in withholding information from the public serves to focus the issue and make judges more sensitive to the competing concerns that arise when judges exercise this quintessentially discretionary function.[3] Perhaps even more importantly, the judiciary must take steps to keep its own house in order, lest the political branches foist upon the judicial system draconian rules for open court records that even public access proponents admit go too far.

This symposium issue is a follow-up to a program presented in January 2005 at the Annual Meeting of the Association of American Law

3. Two recent examples involving cases from the District South Carolina are illustrative. In *Bibeau v. Shortt*, No. 3:04-22306 (D.S.C. filed Sept. 22, 2004), Judge Matthew J. Perry, Jr., refused a request to close the courtroom in a case involving allegations that a physician routinely dispensed steroids to National Football League players. Transcript of Motion Hearing Before the Honorable Matthew J. Perry, Jr., *Bibeau*, No. 3:04-22306 (Mar. 3, 2005). In *Bankair, Inc. v. Baroody*, No. 3:02-2840 (D.S.C. filed Aug. 23, 2002), and its companion case, *Baroody v. Bankair, Inc.*, No.3:03-00578 (D.S.C. filed Feb. 21, 2003), an airline and one of its pilots asserted competing claims (the airline contended the pilot was negligent and the pilot contended the airline discriminated against him). Judge Margaret B. Seymour declined a joint request to seal "all of the filings" in the case and to delete "reference to these cases from the Court's record keeping systems." *See* Consent Motion to Seal Case and Memorandum of Points and Authorities in Support Thereof at 2, *Bankair, Inc.*, Nos. 3:02-2840, 3:03-00578.

Both of these cases were heard after the federal and state courts in South Carolina adopted rules favoring open court records. Both cases arguably involved conduct that transcended the immediate conflict and impacted the public interest.

Schools (AALS). After the program, Professor Nancy Marder suggested that the participants put their remarks in writing so that their ideas could reach an even broader audience than those who had attended the AALS meeting. This symposium, which began with the panel and now includes contributions from the panelists and several other experts in the field, is a collection of insightful articles addressing the topic from several viewpoints.

Striking the proper balance between the right of litigants to have their legitimate requests for confidentiality respected and the right of the citizenry to reasonable access to the operation of the third branch of government is a delicate task for judicial officers on all levels. Publications such as this one assist in that endeavor.