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## PANEL 2: Secrecy and the Civil Justice System

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## PANEL II: SECRECY AND THE CIVIL JUSTICE SYSTEM

Aaron Twerski\*

Unlike criminal litigation, where the government is the plaintiff and there often exists a clear, unmistakable public interest need for secrecy, civil litigation involves a dispute between a private plaintiff and defendant – or a set of private plaintiffs, when dealing in cases of mass tort – that engages the judicial process. There has been huge debate in the literature about the appropriateness of secrecy in civil litigation,<sup>1</sup> because it raises questions as to whom the courts belong. Can, or should, private parties be able to enter into agreements, either voluntarily or with the blessing of the court through protective orders, concerning discovery or sealing orders with regard to judicial proceedings and secrecy orders concerning settlements?

There is both a philosophical and a jurisprudential debate about the subject. The debate almost entirely surrounds the issue of the importance of settlements, and whether or not secrecy is, in many cases, an absolute necessity in order to move a settlement negotiation along or complete a negotiation. Behind settlement issues resides an even more profound debate, almost ancillary to this discussion, as to whether settlement should play such a significant role in private litigation. Certainly, the work of Professor Owen Fiss suggests that we have placed too much emphasis on settlement.<sup>2</sup>

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\* Professor of Law, Brooklyn Law School.

<sup>1</sup> See generally Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999); Andrew D. Miller, *Federal Antisecrecy Legislation: A Model Act to Safeguard the Public from Court Sanctioned Hidden Hazards*, 20 B.C. ENVTL. L. REV. 371 (1993); Arthur R. Miller, *Confidentiality, Protective Orders, and Access to the Courts*, 105 HARV. L. REV. 427 (1991).

<sup>2</sup> Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-90 (1984)

To discuss the subject, the practical effects, and both the judicial and legislative responses, we have brought together an outstanding panel. I will not mention the backgrounds of each of the distinguished members of the panel. Their vitae appear in the program handed out to the audience upon arrival.

We are privileged to have Judge Jack B. Weinstein, who truly needs no introduction to this audience; Professor Jack H. Friedenthal from the George Washington School of Law, who is a preeminent legal scholar and expert in the field of civil procedure; Sheila L. Birnbaum, who is one of the leading authorities in the field of torts and products liability and a chief litigator in the products liability practice group at Skadden, Arps, Slate, Meagher & Flom; and our own alumnus, Harvey Weitz, an outstanding personal injury lawyer who brings a wealth of experience to this discussion.

I feel I must bow to the seniority and the prestige of the judiciary, by asking Judge Weinstein to lead off the discussion.

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(arguing that settlement is a capitulation where consent is often coerced, that the absence of a trial and judgment makes subsequent judicial involvement troublesome and that although settlement may streamline dockets, justice may not be done since disparity in the financial resources of the parties infects the bargaining process).

## SECRECY IN CIVIL TRIALS: SOME TENTATIVE VIEWS

*Hon. Jack B. Weinstein\**

I start from the principle that everything in court should be public and nothing secret except the internal chambers discussions by judges with their clerks and various drafts of opinions. The assumption that all aspects of court-centered litigation are out in the open, on the record, and fully explained by the court is an important foundation for the confidence our public has in its courts. Our work differs from the closed door deals of the executive and legislative branches. Any sacrifice of confidence by shuttering off part of the sunshine through secrecy orders needs careful consideration and justification. No one or a few such orders will debilitate the satisfaction of our citizenry with the courts; but it is easy to slip into addiction, thus sapping a main source of our Republic's health.

That said, the problems become more difficult when we move from high principle to the nuts and bolts of litigation. As a nuts and bolts *nisi prius* judge, I have signed a fair number of secrecy orders. After signing such orders, I have sometimes modified the order to reveal sealed materials.

The issues of secrecy and confidentiality in civil (as well as criminal) litigation have become more complex since I first addressed them in the *Agent Orange* cases,<sup>1</sup> a number of banking suits,<sup>2</sup> and in my book on mass tort litigation.<sup>3</sup> This change is

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<sup>1</sup> See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985). See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

<sup>2</sup> See, e.g., *In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710 (E.D.N.Y. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992).

<sup>3</sup> JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE*

sparked by the enormous increase in data collected and available through computers, the ease of widespread transmission via the internet and e-mail, and because individual, national and international enterprises and governments are collecting, analyzing, and using this data in more sophisticated ways. By contrast, the increasing use of alternative dispute resolution keeps the disputes and facts underlying them out of court and thus out of the public eye.<sup>4</sup>

Typically, data on consumer desires, buying habits, credit history, and the like are being obtained and analyzed by purveyors of mass products. Even the state licensing authorities are selling their names and numbers.<sup>5</sup> We face the likelihood that DNA analysis will be used in criminal investigations and prosecutions through state and federal data banks that could be accumulated from infancy on and utilized in such matters as employment and insurance opportunities.<sup>6</sup> Should those whose data is collected have a right to control it before it is released in civil cases of no interest to them? How should adoptions and juvenile court information be treated?<sup>7</sup> These are related matters not being discussed today.

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EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995).

<sup>4</sup> See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 246 (1996) (noting that the growth of private dispute resolution possesses the ability to “stunt the common law’s development as entire areas of law are removed from the courts” and “to deprive the public of important information”); Jack B. Weinstein, *International Aspects of Alternative Dispute Resolution*, Address Before the International Conference on Mediation and Arbitration in Nicosia, Cyprus (Apr. 8, 2000).

<sup>5</sup> See *Reno v. Condon*, 120 S. Ct. 666, 668 (2000) (upholding the constitutionality of the Driver’s Privacy Protection Act, which restricts the ability of states to disclose personal information of drivers without their consent).

<sup>6</sup> See, e.g., *Genetic Information in the Workplace: Hearings Before the Senate Comm. on Health, Educ., Labor and Pensions*, 106th Cong., available at 2000 WL 23831630 (July 20, 2000) (statement of Steven Paul Miller, Comm’r, U.S. Equal Employment Opportunity Comm’n); *Speeding DNA Evidence Processing: Hearings Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong., available at 2000 WL 11070102 (Mar. 23, 2000) (statement of Barry Steinhard, Assoc. Dir., Am. Civil Liberties Union).

<sup>7</sup> See, e.g., Sam Howe Verhovek, *Debate on Adoptees’ Rights Stirs Oregon*, N.Y. TIMES, Apr. 5, 2000, at A1 (highlighting the controversy over a state law

In the tobacco cases, I recently utilized, in a jurisdiction opinion, huge masses of data collected in the Minnesota tobacco litigations and released by Congress on the Internet.<sup>8</sup> A magistrate judge is deciding what may be thousands of individual privilege claims to this tobacco data that is available to the world, but perhaps should not be seen by our juries.

The United States and the European Union have just finalized a data privacy agreement.<sup>9</sup> It includes “a set of standards that U.S. companies can apply to comply with the EU directive, which prohibits EU-based companies from transferring personally identifiable data to third countries, including the United States, that do not provide ‘adequate’ privacy protection.”<sup>10</sup> Moreover,

[t]he safe harbor principles would require U.S. companies to provide notice to EU consumers of what data is collected about them via Web sites or otherwise. In addition, participating companies would have to ask for consent to the data collection, give consumers choice on whether the data can be sold or licensed to third parties, and ensure that EU consumers have ‘reasonable access to personal information about them that an organization holds’ and can amend that information when it is inaccurate.<sup>11</sup>

This compact may give rise to civil suits with the release of vast amounts of information.

One problem that has been of particular concern to me is the lawyer’s obligation to maintain client confidences. Even judges sometimes feel an obligation of privacy in their actions, as illustrated by Chief Judge Posner’s statement of confidentiality in the negotiations on giving up an attempt to mediate the Microsoft-

that disregards any request for anonymity by opening adoption records for those seeking to determine the identity of their birth parents).

<sup>8</sup> *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 100 (E.D.N.Y. 2000). To view the documents released by the United States government, see Chairman Bliley Releases Subpoenaed Tobacco Documents to the American People, available at <http://www.house.gov/commerce/TobaccoDocs/documents.html>.

<sup>9</sup> See Joseph Kirwin & Gary G. Yerkey, *U.S., EU Finalize Data Privacy Accord Establishing Voluntary Safe Harbor*, 68 U.S.L.W. 2568 (Mar. 28, 2000).

<sup>10</sup> *Id.* at 2568.

<sup>11</sup> *Id.*

Department of Justice antitrust dispute.<sup>12</sup> In the area of secrecy it becomes impossible to discuss the lawyer's secrecy obligations without also considering the role of the judge.<sup>13</sup> I shall emphasize the case of mass torts.

Mass tort cases usually involve serious public concerns in terms of safety and the prevention of future injuries from harm. Yet, many of these cases terminate in some form of secrecy agreement that reduces protection against future harm to the parties.

The private litigant is not required to take into account public safety in vindicating his or her rights. Significantly, the plaintiff's attorney's duty of loyalty requires him or her to put the client's interests ahead of all others.<sup>14</sup> In traditional theory, the lawyer has no ethical obligation to consider the interests of third parties. Likewise, the defendant's attorney, according to the ethical rules, is to maintain the client's confidences. There is, therefore, an affirmative duty placed upon both parties not to reveal information.

Some plaintiffs' and defendants' attorneys contend that it is almost impossible to settle some cases without a secrecy agreement. This has been my own experience.

Secrecy often has been, in fact, the price of settlement. It is not unheard of for a defendant to "sweeten" the settlement offer to plaintiffs on condition of secrecy. The defendant may threaten the plaintiff with a lengthy and expensive trial to coerce confidentiality. Some court cases can be brought and settled without the filing of

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<sup>12</sup> See John R. Wilke & Rebecca Buckman, *Microsoft Settlement Efforts Collapse*, WALL ST. J., Apr. 3, 2000, at A3.

<sup>13</sup> See WEINSTEIN, *supra* note 3, at 66-74. Much of the rest of this material is covered in Jack B. Weinstein's *Individual Justice*, and, therefore, further references are omitted.

<sup>14</sup> Should there not be a duty of private attorneys to reveal dangers to responsible government officials? It was reported that attorneys for plaintiffs injured as a result of tire failures kept this information from the government because they feared a government investigation might adversely affect their cases; lives were placed at risk by the government's failure to act. See Keith Bradsher, *Documents Portray Tire Debacle as a Story of Best Opportunities*, N.Y. TIMES, Sept. 11, 2000, at A1; cf. John C. P. Goldberg & Benjamin C. Fipursky, *The Third Restatement and the Place of Duty in Negligence*, 54 VAND. L. REV. (forthcoming 2000) (discussing duty to protect plaintiff at the hands of another).

a single revelatory document. Others are settled on just the threat of legal action with no public record. Since the ethical rules require that attorneys obtain a swift and optimal recovery for their clients, the plaintiff's attorney seems to have little choice but to accept a favorable settlement offer on secrecy terms.

Three categories of secrecy should be considered separately: (1) secrecy as to documents that appear to reveal a defendant's negligent or otherwise wrongful conduct, such as an engineer's report during the early development of a product indicating incipient dangers; (2) secrecy as to the amount of a settlement or terms of payment; and (3) secrecy as to conversations among attorneys on either plaintiff's or defendant's side, or between plaintiff and defense counsel.

The most common form of secrecy utilized by the defendant in a mass tort case is embodied in a protective order. Federal Rule of Civil Procedure 26(c) permits a party to seek a protective order prohibiting dissemination of information produced in discovery upon a showing of "good cause."<sup>15</sup> This provision does not specifically refer to the public interest. Rather, it applies primarily to commercially sensitive information that might cause the defendant some competitive harm. Defendants want to avoid disclosure of damaging information. Plaintiffs desire to use this damaging information as a negotiation tool for larger settlements for clients in the future.

"Smoking gun" documents are the most damaging form of this information. They indicate that defendants knew of the danger but suppressed the information. Oral testimony obtained in depositions is also often highly useful to plaintiffs and devastating to defendants. Documents showing cover-ups or early knowledge of defects by defendants can lead to punitive damages as well as to extensive liability for ordinary damages, so there is strong reason for defendants to try to keep them secret. Threats by plaintiffs'

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<sup>15</sup> FED. R. CIV. P. 26(c). In pertinent part, Rule 26(c) provides: "Upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*



attorneys to reveal them can be a powerful lever for higher settlements.

The societal interest in knowing what went wrong and why is great. Yet, there is some basis for the points made by defendants' counsel. First, the cost and time to explain a single document taken out of context by a plaintiff's lawyer creates an incentive not to prepare memoranda. Second, what appears damning may, in context after difficult proof, be shown to be neutral or even favorable to the defendant.

Courts have broad discretion in entering protective orders and sealing records. Most agreements are uncontested, and crowded calendars put great pressure on judges to move cases. As a result, judges routinely approve sealing and secrecy orders. Settlement agreements are often filed under seal as a matter of course.

It has been my practice to append a note to my approvals of a sealing order that "this order is subject to modification by the court in the public interest." In the *Agent Orange* case, I set aside one of these orders after settlement because the public and veterans were entitled to know the facts.<sup>16</sup> If the court is faced with the question of whether to seal documents, it should engage in a balancing test, weighing the interests of the parties in keeping the information confidential against the interests of the public in publishing it. Judges should also consider the interests of litigants in other suits, the needs of regulatory agencies to have access to information, concerns of public interest groups, and the interests of future plaintiffs.

In cases dealing with sociopolitical problems, the court must look to the effect on the community. The individual litigant's needs cannot be the court's sole concern. The mass tort case and many other cases are similar to an institutional reform case in their impact. The public, which created and funds our judicial institutions, depends upon those institutions to protect it. Sometimes the needs of individual members of the community in a litigation must yield to those of the community as a whole.

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<sup>16</sup> *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987).

Governmental regulatory systems designed to protect the public are often inadequate to their task. Mechanisms such as the Occupational Safety and Health Administration (“OSHA”), the Consumer Product Safety Commission (“CPSC”), the Food and Drug Administration (“FDA”), and the Environmental Protection Agency (“EPA”) have not yet fulfilled their promise, leaving society insufficiently protected.

Although the Consumer Product Safety Act (“CPSA”)<sup>17</sup> requires manufacturers to report defects that have or may cause serious injury or death, substantial underreporting appears to be the rule.<sup>18</sup> Just a few hundred product hazard reports from nearly two million businesses engaged in manufacturing, distributing, or selling consumer products are said to be received annually. There is a great disincentive to report. A firm’s own report may serve as damaging documentary evidence in a product liability lawsuit.

In 1990, reporting requirements were strengthened to require companies to report any product that was the subject of three product liability lawsuits in a three-year period.<sup>19</sup> Portions of these lawsuit reports, however, remain confidential and are not subject to private discovery.

The recent revelations about the possibly serious side effects associated with silicone gel breast implants demonstrate the FDA’s problems.<sup>20</sup> Even though the agency had years to investigate, it has been charged that it left an estimated one million women with implants “in emotional and medical limbo.” Benign neglect by agencies set up to protect the public is one of the reasons for our reliance on the tort system for protection.

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<sup>17</sup> 15 U.S.C. §§ 2051-2073 (1994 & Supp. IV 1998).

<sup>18</sup> See generally Michael R. Lemov & Malcom D. Woolf, *Underreporting Defects Is Risky*, NAT’L L.J., Dec. 14, 1992, at S6. Section 15(b) of the CPSA mandates that manufacturers report all incidents where information is obtained that “reasonably supports the conclusion” that a particular product may “create a substantial product hazard” or alternatively manifest “an unreasonable risk of serious injury or death.” 15 U.S.C. § 2064(b) (1994).

<sup>19</sup> 15 U.S.C. § 2084(a), (b) (1994).

<sup>20</sup> See generally *In re Breast Implant Cases*, 942 F. Supp. 958 (E.D.N.Y. & S.D.N.Y. 1996).

Should we be satisfied with a system that required officers of the court to remain silent for years while more and more women suffered from what they think was harm caused by breast implants? If this silence is “a price we must pay,” what do we receive in return?

Currently a national campaign is under way, in the name of public safety, to create a presumption of public access to all information produced in litigation. Advocates claim that protective orders are being used to hide product defects and public hazards and have been pressing for legislation to restrict the court’s discretion to issue protective and sealing orders. These plaintiffs’ attorneys have a selfish interest in opening the files for other litigations. Yet, much can be said in favor of the public’s right to know.

Arguably, even out-of-court procedures such as arbitration affect the public interest. A federal statute supports our national arbitration scheme.<sup>21</sup> Should attorneys have any ethical obligation to inform the public, or at least the appropriate government body, of dangers revealed in private arbitrations? I think so, under adequate judicial control.

A number of states have enacted sweeping reforms to restrict the courts’ ability to seal documents.<sup>22</sup> This sunshine approach is not without its critics. One defense attorney who testified before a California legislative committee investigating protective orders and the public safety asserted that troops in the Persian Gulf War were fighting to prevent the type of privacy invasion that such rules would effect. Another likened forcing defense attorneys to consider the public interest in disclosure of potential dangers to asking a criminal defense attorney who knows his client is guilty to turn the client over to the authorities.

The knowledge that secrecy cannot be depended on may discourage engineers and others from expressing doubts about a policy in written reports. There is thus a possibility that less secrecy may increase dangers to society. Even some plaintiffs’

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<sup>21</sup> Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994 & Supp. IV 1998).

<sup>22</sup> *E.g.*, Florida Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West 2000).

attorneys admit that rules limiting protective orders make them nervous because they “inject a wild card into the settlement game.”

Protective orders do have a legitimate role when there is no public impact or when true trade secrets are involved. We can strike a fair balance between the privacy interests of a corporation and the health and safety of the public so long as we recognize that a publicly maintained legal system ought not protect those who engage in misconduct, conceal the cause of injury from the victims, or render potential victims vulnerable. Secrecy in such instances defeats a function of the justice system – to reveal important legal factual issues to the public. The balance must involve the exercise of some judicial discretion. Yet, even judges have a conflict. Judges will tend to approve a secrecy agreement that encourages settlement and clearing of dockets. One law professor suggested that a remedy might be for the court to employ an ombudsman to weigh the secrecy issue independently of the trial judge. In the federal courts a magistrate judge might do the job, although this official too would want to see the court’s calendar reduced.

Whatever the method chosen, it should be a national approach whenever cases are consolidated on a national basis. It is not possible to control the litigation effectively if each state’s privileges and secrecy laws are applied. Such laws should, for purpose of mass torts, be deemed procedural so that, under *Erie R.R. Co. v. Tompkins*, a federal court does not have to apply the laws of fifty states.<sup>23</sup>

The amount of settlement in any particular case is normally a matter of much less public interest than is evidence of the merits. Sometimes a defendant will give a premium to a particularly effective advocate or appealing case because going to trial might result in an unusually high verdict, ratcheting up settlements across the board. At other times the defendant will agree to a settlement in a completely meritless case because the jurisdiction is notoriously pro-plaintiff and resistance is hopeless. But the defendant may not wish to provide a basis for national settlements before more neutral judges and juries. One leading defense attorney complained to me, “plaintiffs’ attorneys have misled the public into believing

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<sup>23</sup> 304 U.S. 64 (1938).

that the settlement amount is linked to the worth of the case.” But what a willing buyer and seller agree upon is value, and a statistical analysis of jury verdicts and settlements is used in all mature litigations to set values. Here, again, some discretion by the court is called for.

These considerations appear to me to be reasonable. I see no strong reason to oppose some form of secrecy as to settlement amount. Neither plaintiff nor defense counsel seem to object, and no great public interest is implicated. In publicly held corporations, Securities and Exchange Commission filings may, in any event, reveal such litigation details.

There may, however, be occasion when only one plaintiff’s attorney is aware of a problem that, if known, could result in a huge influx of cases. A secret settlement conceivably could result in great injustice to many people. This situation is highly unlikely in view of the vigilance of the press and the bar. But should it exist, the court would, I believe, be justified in refusing to suppress the fact, if not the amount, of the settlement.

Of course, the parties could forestall judicial intervention by settling before the suit is started. To start the suit, settle secretly, and then withdraw without informing the court of the fact that a settlement occurred seems to me to be an unethical act by attorneys for both sides. Having taken advantage of the court system paid for by the public, the attorneys should have an obligation of candor to the court and, if the court so orders, to the public.

When a comprehensive opinion is destroyed, suppressed, or withdrawn as part of a settlement, so, too, are the answers to complex questions such as “the interpretation and validity of a statute, the interpretation of contract clauses regarding insurance coverage of pollution clean-up costs, and the effects of hazardous substances upon individuals and the environment.”<sup>24</sup> According to Professor Jill Fisch, “[t]he time and effort invested in resolving these issues is a public resource,” which inures to the benefit of future claimants as well.<sup>25</sup>

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<sup>24</sup> Jill E. Fisch, *Captive Courts: The Destruction of Judicial Decision by Agreement of the Parties*, 2 N.Y.U. ENVTL. L.J. 191, 203 (1993).

<sup>25</sup> *Id.* at 204.

Professor Fisch has a point. Unless an error has been demonstrated, once an opinion is issued there is strong reason not to withdraw it because it can assist other courts and parties in their analysis. Nevertheless, there may be rare situations where withdrawal will sufficiently defuse a situation so that a settlement beneficial to the public or the parties will result. Hard-and-fast rules in this area may be dangerous. In one case, I withdrew an opinion in a minor franchising case to save the parties much expense; one of the parties was a poor small store owner. If the opinion had been published, the defendant would have been litigated to the death.

Ethical dilemmas regarding secrecy go well beyond the scope of protective orders and secret settlements. Suppose a defendant conditions a more generous settlement on the plaintiffs' attorney, experienced in a particular litigation, not taking any more cases against that defendant. The attorney may be asked to give up copies of documents and depositions. He or she may be hired as a consultant to the defendant.

There is an ethical obligation to maximize the client's benefit. There is also an ethical rule that one may not restrict an attorney's right to practice. What is the lawyer's obligation to a client who does not yet exist and whom he or she may never represent? Does a lawyer have a duty to future clients by virtue of having once offered his or her services? Or what happens if a defendant offers a larger settlement on the condition that the attorney say nothing publicly about the case? Is it unethical to give up the right to discuss the case or to inform the public? Does the attorney's duty to the individual client always prevail? The American Bar Association issued Ethics Formal Opinion 93-371 on this subject. The opinion states:

A restriction on the right of plaintiffs' counsel to represent present clients and future claimants against a defendant as part of a global settlement of some of counsel's existing clients' claims against that same defendant represents an impermissible restriction on the right to practice which

may not be demanded or accepted without violating Model Rule 5.6(b).<sup>26</sup>

Recognizing that the problem "raises important issues regarding the intersection between a lawyer's duty to his or her present clients under Model Rule 1.2 and impermissible restrictions in the right of a lawyer to practice under Model 5.6," the opinion found most persuasive the arguments under Rule 5.6.<sup>27</sup> "While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel."<sup>28</sup> If an offer of this type of conditional settlement is unethical, does the plaintiffs' lawyer who receives such an offer have a duty to report the defense lawyer who made the offer?

Corporate "buyouts" of classes of claimants are not new. One of the earliest reported buyouts resulted from the deaths of more than seven hundred workers from silicosis caused by the construction of the Hawk's Nest Tunnel in West Virginia in the early 1930s.<sup>29</sup> Union Carbide Corporation hired black migrant laborers to work on the project without taking the most minimal safety precautions. Despite substantial resistance by defendants, eventually hundreds of suits were filed. In what was then the longest trial in the country (five weeks), a team of plaintiffs' lawyers presented one hundred seventy five witnesses. Since the plaintiffs had limited resources, their attorneys made a considerable investment in the case, hoping that a favorable verdict would lead to a large number of settlements. The jury deadlocked.

Shortly before a second case was to come to trial, seventeen plaintiffs' lawyers entered into an out-of-court settlement on behalf of one hundred fifty seven claimants. The claimants had asked for \$4 million but were given \$130,000, half of which went to the attorneys. It was later revealed that the plaintiffs' attorneys had secretly signed a contract with the tunnel contractor that provided

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<sup>26</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 371 (1993).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See generally MARTIN CHERNIACK, THE HAWK'S NEST INCIDENT: AMERICA'S WORST INDUSTRIAL DISASTER (1986).

the attorneys, not the clients, with an additional \$20,000 if they agreed not to engage in any further legal action. Upon learning of the agreement, the judge ordered that half that sum go to the plaintiffs. Nevertheless, the judge upheld a provision that the plaintiffs' lawyers surrender all case records to the defendants. The second trial also resulted in a hung jury. Ultimately, a block settlement was agreed upon, and again, the plaintiffs' lawyers were required to turn over all legal papers to the defense. They were obliged to suppress all information relating to the case. These same tactics were used in an early asbestos case against Johns-Manville and in the settlement of the Buffalo Creek Disaster.<sup>30</sup>

These "buyouts" need to be supervised by the court in the same way as a settlement of a class action would be. The court has an obligation to the clients and to the community to see that the clients understand the arrangement and that it is fair. The court should also be able to veto any arrangement for secrecy under which files are returned to defendants, and plaintiffs' lawyers agree to take no future cases. The Hawk's Nest case was a shameful episode in American jurisprudence; without the judge's intervention it would have been even worse.

I conclude where I began. Each case is different, but, in general, where there is a doubt, secrecy should be rejected. Any secrecy agreement should have a judicial imprimatur, with the discretion in the court to modify the agreement on application of a party to the litigation or of a third party.

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<sup>30</sup> See generally GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).





# SECRECY IN CIVIL LITIGATION: DISCOVERY AND PARTY AGREEMENTS

*Jack H. Friedenthal\**

Controversies regarding the extent to which the courts should prohibit free public access to information developed in civil cases are not new. In addition to a number of cases,<sup>1</sup> a series of significant articles have discussed various aspects of the matter<sup>2</sup> and

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<sup>1</sup> See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610-11 (1978) (finding that the court was not required to allow a television network to make copies of tape recordings that had been played in criminal trial); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (ruling that the court could not grant temporary restraining order against magazine's planned publication of litigation documents it had obtained but had been placed under seal); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-91 (3d Cir. 1994) (stating that a settlement agreement is not a "judicial record" and is therefore not subject to the right-of-access doctrine); *Wolhar v. General Motors Corp.*, 712 A.2d 464, 469-70 (Del. Super. Ct. 1997) (ruling that a court may modify an existing protective order of confidentiality to allow parties seeking intervention access to potentially discoverable material).

<sup>2</sup> See, e.g., Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 283-88 (discussing both sides of the current debate about consensual confidentiality in light of civil litigation's shifted focus from public trial to private pre-trial adjudication and canvassing various proposals limiting the discretion of judges and parties to enter into secrecy agreements); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2648-59 (1995) (examining the tension between the purpose of the judicial process to serve the "public good" and need for judicial economy provided by encouraging settlement and for recognition of parties' privacy rights); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 459-68 (1991) (chronicling the evolution of the confidentiality debate and examining various proposals granting public access to discovery materials); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2682-87 (1995) (examining the

provided reasons both for and against the powers and duties of judges to maintain confidentiality, particularly in situations where the parties themselves agree that information should not be disclosed. One recent article<sup>3</sup> provides an excellent summary of the various views that have been advanced. Several states have adopted legislation limiting the enforcement of confidentiality agreements,<sup>4</sup> and the matter has arisen in other states<sup>5</sup> as well as before Congress.<sup>6</sup>

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perils and necessity of private settlements and giving examples of cases when publicity may be appropriate); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L.REV. 427, 429-32 (1991) (comparing value of confidentiality with harmful consequences of a presumption of public access and evaluating benefits of restricting protective orders); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 115-17 (1999) (setting forth a proposal to amend American Bar Association Model Rule of Professional Conduct 3.2 to preclude attorneys from entering into agreements restricting public's access to information lawyers reasonably believe directly concerns substantial danger to public health or safety); Richard A. Rosen, *Confidentiality Agreements Become Increasingly Elusive: Several States Have Limited the Availability of Protective Orders, and Judges Are Now More Skeptical About Issuing Such Orders*, NAT'L L.J., July 20, 1998, at B7 (examining reasons for the erosion of broadly framed protective orders). The author of this article relies heavily on these authorities.

<sup>3</sup> Dore, *supra* note 2.

<sup>4</sup> E.g., Florida Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West 2000); TEX. R. CIV. P. 76a.

<sup>5</sup> Rosen, *supra* note 2, at B7 n.5 (listing states that have adopted such legislation).

<sup>6</sup> See Sunshine in Litigation Act of 1999, S.957, 106th Cong., 1st Sess. (1999). This piece of legislation has been proposed by Senator Kohl of Wisconsin. Members of Congress have proposed similar bills in the past. See *Hearing before the Subcommittee on Court and Administrative Practice of the Senate Judiciary Committee on S. 1404*, 104th Cong., 2d Sess. (Apr. 20, 1994) [hereinafter *Hearings*]. It is interesting to note that many years ago, in 1913, Congress enacted the Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30 (1994), which permits public access to depositions taken in civil antitrust actions brought by the government seeking injunctive relief. Recently the Act was applied to permit the *New York Times* and other news organizations to sit in on depositions in *United States v. Microsoft Corp.*, 165 F.3d 952, 953 (D.C. Cir. 1999), subject to protective orders issued for good cause to prevent public disclosure of trade secrets and other material that the court finds should remain confidential. The case is discussed in the forthcoming edition of the *George*

The arguments on both sides are on two quite different levels, one involving philosophical concepts of the role of the courts in society and the other concerning the practical effects of disclosure or non-disclosure on parties to disputes and to the public at large. Usually, these considerations are intertwined. Yet it seems useful at the outset of an analysis to treat them separately because one's ultimate view as to whether broad protection against disclosure is or is not appropriate is rooted in one's belief as to the fundamental nature and purposes of a court system regarding civil disputes.

## I. THE ROLE OF THE COURTS

### A. *The Basic Conflict*

Our civil judicial system, in its fundamental concept, exists as an avenue by which one citizen can seek redress from another in an orderly fashion, under a set of logical rules. It is, of course, but one avenue. No one has to file a lawsuit. Parties to contracts can, and often do, agree in advance to other techniques of dispute resolution. And even in the absence of such a provision, or in non-contract cases, litigation in court is hardly the only method of solving problems. There has been an explosion of alternate dispute resolution opportunities and techniques in the recent past,<sup>7</sup> in part reflecting negatively on the efficacy of litigation in the courts.

Courts do not reach out for disputes. They must be brought to the court by one of the parties. Moreover, the mere filing of a case by itself is of little consequence. Indeed, that may be true of much of the pre-trial process. The court plays no role in the process unless and until a matter is brought before it for its attention. Furthermore, even when a case is before the court, alternative dispute resolution techniques are available. Indeed, they are extolled and supported, and sometimes required, by the courts themselves.<sup>8</sup>

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<sup>7</sup> See Menkel-Meadow, *supra* note 2, at 2664-65 (noting that "settlement has become the 'norm' for our system").

<sup>8</sup> See FED. R. CIV. P. 16(a)(5), 16(c)(9), 26(f).

Analytically then, it could be said that the courts exist solely to provide a service to the citizens who need a forum. Courts react to the requests of those who come before them. They have no role other than to provide the service for which they are created, the resolution of disputes of those individuals who are involved in a particular case. If those parties determine that information concerning their dispute should be kept private and confidential, then the court has no business in interfering.

On the other hand, it can be argued that courts are much more than a service establishment for settling problems of individuals who come before them. Courts are paid for by the citizens of the jurisdiction in which they sit. They exist by virtue of the constitution and laws of those jurisdictions. They are part of the governmental structure and operations, as much as the executive or the legislature. The citizens who pay for the courts are entitled to know what they do and why they do it. Those who enter the court system, voluntarily or by process, are simply not entitled to any rights of privacy and confidentiality. When it comes to judicial decisions, both the procedural and substantive legal rules by which the courts decide cases, in effect, belong to the citizens at large.<sup>9</sup> Citizens need to know those rules to determine if they are improper. If they are, then the citizens can seek legislation to alter them. If a judge ignores or misconstrues existing rules, or otherwise exhibits poor judgment, he or she can be exposed and, in those jurisdictions in which judges must stand for election, can be voted out of office. Under the latter concept, then, it would be fair to say that the courts are government instrumentalities that must operate in the interest of the populous, and every aspect of that operation must be open to public scrutiny.

The above positions are, of course, extremes, and most commentators agree that a balance must be struck to decide when matters are to be kept confidential and when they are to be

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<sup>9</sup> See Luban, *supra* note 2, at 2633-40. "[F]or the public-life conception [of the judicial process] all adjudications are public in significance – they are political, inevitably embroiling the meaning and legitimacy of government." Luban, *supra* note 2, at 2635.

available to the public.<sup>10</sup> That does not mean, however, that it has been easy to decide where the line is to be drawn and how it is to be administered.<sup>11</sup> A number of cases tend to leave matters open to public scrutiny, based on a presumption that unless a court, for good cause, issues a protective order, the fruits of discovery belong to the public.<sup>12</sup> As noted at the outset, those who debate the matter interweave arguments based on practical considerations with their underlying theoretical positions. The view that courts and their operations belong to the public is bolstered by those who challenge or downplay the value of alternate dispute resolution and settlement,<sup>13</sup> situations in which confidentiality is more easily maintained and justified than in the case of a trial where arguments favoring public access to evidence are much more difficult to refute.<sup>14</sup>

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<sup>10</sup> See Marcus, *supra* note 2, at 467 (observing that “proper resolution of these competing positions is a middle course based on established protective order principles properly applied to the concerns voiced by those who cite the supposed dangers to public health resulting from discovery confidentiality”); Menkel-Meadow, *supra* note 2, at 2684-85 (arguing that altogether eliminating private dispute resolution is undesirable); Miller, *supra* note 2, at 478-79 (eviscerating such orders’ availability altogether is not the best method to solve the problem that protective orders concealing information important to public health).

<sup>11</sup> Rules and statutes that attempt to set the line vary. See *infra* Part II.B.

<sup>12</sup> See, e.g., *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999); *In re Agent Orange Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y. 1983), *aff’d*, 821 F.2d 139, 145-46 (2d Cir. 1987), *cert. denied sub nom. Dow Chemical Co. v. Ryan*, 484 U.S. 953 (1987) [hereinafter *Agent Orange*].

<sup>13</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that substituting alternative dispute resolution for a lawsuit “trivializ[es] the remedial dimensions of a lawsuit” and “reduc[es] the social function of the lawsuit to one of resolving private disputes”); Luban, *supra* note 2, at 2640 (opining that benefits of settlement render “a world without settlement . . . unthinkable”). See generally Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (encouraging courts and policymakers to approach settlement with a critical eye due to the disparate nature of adjudication and settlement).

<sup>14</sup> See *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (determining that a protective order of confidentiality does not apply to document subsequently entered into evidence); *Agent Orange*, 98 F.R.D. 539, 544-45

Putting aside practical considerations regarding the competing needs for confidentiality and public awareness, there are strong reasons for viewing the formal judicial system as a method for public awareness. There are also strong reasons for viewing the formal judicial system as a method for private adjudication and those who are involved in private civil litigation should not, by that alone, lose any rights to privacy and confidentiality. Except in special circumstances involving "public cases,"<sup>15</sup> the basic assumption should support litigants who agree among themselves that discovery and other information should be protected. Courts in civil cases are not an arm of the executive branch. They are neither investigators nor attorneys general. They do not control disputes that are never filed in court. They cannot reach out to bring matters into their ambit, no matter how much they might believe that the public should know about them. Even when suits are filed, judges do not become involved unless and until they are asked to do so. They are not empowered to restyle complaints or answers to fit their notions of "public justice" or what could become an interesting dispute or "cannon fodder" for eager news reporters. More activist judges may make suggestions, but they do not command that lawyers conduct discovery according to what matters the judges believe should or should not be pursued. They do not go behind admissions of fact or application of law to fact, such as those made pursuant to Federal Rule of Civil Procedure 36, even though an admission may operate as a partial settlement and cover up underlying facts. Indeed Rule 36 specifically encourages its use, and the privacy it entails, by prohibiting use of admissions in subsequent cases.<sup>16</sup>

We could, at least theoretically, establish an inquisitorial-type system in which the judges with ample staffs take a major role in

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(E.D.N.Y. 1983) (reasoning that the public release of documents submitted to the court in connection with a summary judgment motion, unlike documents obtained via discovery and not submitted to the court, would not prejudice defendants).

<sup>15</sup> See *infra* Part I.B.

<sup>16</sup> FED R. CIV. P. 36(b) (providing that "[a]ny admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding").

the initiation and investigation of potential private civil actions as well as in their determination. Suffice it to say this approach places more power in the hands of judges, and hence the government, than many of us are ready to accept. Indeed, they would no longer be “judges” as we now know them. Our reluctance to cede so much control to the judicial branch of government is underscored by the fact that we tend to maintain the right to jury trial in many of our civil cases.<sup>17</sup>

### *B. The Special Nature of Public Civil Cases*

It is important to distinguish between private and public cases. Private cases are brought to determine issues among parties who are not governmental entities. Cases by or against the government or an agency of government stand in a different light. People are entitled to know the actions of their public servants in order to assess both competency and fairness. Courts have recognized the need for disclosure in such cases.<sup>18</sup> On occasion, legislation has dealt specifically with the issue.<sup>19</sup> Even then, we must be aware

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<sup>17</sup> It seems fair to say that the United States Supreme Court beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), going through *Ross v. Bernhard*, 396 U.S. 531 (1970), and continuing with *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), tended to expand the right to jury trial through its interpretations of the Seventh Amendment. The effect of this tendency may be countered to some extent by the Court’s decisions that encourage the use of summary judgment. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>18</sup> See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) (holding that “where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining” a confidentiality order); *Mullins v. City of Griffin*, 886 F. Supp. 21, 22-23 (N.D. Ga. 1995) (holding that a municipality is not entitled to a protective order of confidentiality of settlement in a civil rights lawsuit filed against it).

<sup>19</sup> See FLA. STAT. ANN. § 69.081(8)(a) (West 2000) (providing for disclosure in cases brought against a governmental entity). It is not clear why the Florida statute does not include cases brought by the government. See also The Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30 (1994) (opening depositions to the public in civil antitrust suits brought by the United States).



that a need for confidentiality may exist for involved citizens.<sup>20</sup> It is with respect to the activities of the government itself, or its agents acting within the scope of their duties, that the balance tips sharply in favor of full and complete disclosure.

That, in turn, leads to the interesting question of whether, by making a decision in a case, or conducting a trial, the trial judge converts a case from private to public. If we have a right, and an obligation, to scrutinize the actions of our public officials, shouldn't a judge's decisions and the conduct of a public trial outweigh the parties' rights to privacy and confidentiality? The situation is different from one in which the parties act on their own with respect to the gathering of information, agreeing on various issues, and determining how to proceed. There seems little theoretical justification in the latter case for failing to honor the parties' confidentiality agreements merely on the basis that an action was filed.

When, however, the court is called upon to decide matters in dispute, the decisions themselves, with few exceptions, should be open to the public, although they may be written carefully so as not to reveal private information considered by the court when making its determinations. And barring extenuating circumstances, evidence presented on the record at a trial should be made available to anyone who wishes to review it.<sup>21</sup> With regard to preliminary matters, however, the situation is not so clear. Obviously if a court, on motion, issues an order supporting a confidentiality agreement among the parties, then the documents provided to the judge, revealing the confidential information for which protection is

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<sup>20</sup> Classic examples are lurid cases that involve children as victims or witnesses.

<sup>21</sup> See *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (holding that despite the strong presumption that public access should be given to judicial record, a court may deny access to certain information, such as sources of business information, that might harm a litigant's competitive standing); see also *Dore*, *supra* note 2, at 378-83 (asserting that testimony or documents introduced at trial or forming the basis of summary judgment or other merits determination carry an exceptionally strong presumption of public access overcome only by the most compelling of competing considerations, while procedural matters unrelated or only tangentially related to a decision on the merits should carry a much lower and more readily rebuttable presumption of public access).

sought, cannot be open to the public. But what if the requested protective order is coupled with a motion for summary judgment and seeks to keep under seal the very documents upon which the grant or denial of summary judgment depends? In such a case the nature of the matter at issue and the ruling itself may be determinative. If summary judgment is granted so that the case is thereby curtailed or ended, the justification for open files is strong and only a significant showing of a justification for privacy should limit disclosure.<sup>22</sup> If relief is denied, however, and no specific issue is finally determined<sup>23</sup> so that the case continues unabated, the matter is more difficult. The issues involved in the summary judgment decision will remain open at trial. In the meantime, however, the case may settle or further development of the case may render the earlier issues moot. Although the summary judgment decision itself will be available, if the parties agree that the supporting documents should not be disclosed, they should be protected absent a sound reason for their disclosure.<sup>24</sup>

### C. Class Actions and Other Representative Actions

Class actions, and others in which persons outside the court may be bound by in-court representatives, also require special consideration whenever the actions in the case might reasonably justify interference by those who are represented. Federal Rule 23(d)(2) specifically provides that a court may require, in order to protect the members of a class, that the class receive notice of any step in the action so that they might appear to intervene.<sup>25</sup> Under Federal Rule 23(e), class members must be notified of any proposed dismissal or compromise.<sup>26</sup> Obviously an unnamed class member cannot make a seasoned decision as to what steps he or

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<sup>22</sup> See *Agent Orange*, 98 F.R.D. at 544-45.

<sup>23</sup> Even a denial may involve a specific determination by the court of an issue. This would occur, for example, if a motion for summary judgment is based on an alleged defense, and the court holds that the defense does not apply.

<sup>24</sup> *But see Dore, supra* note 2, at 380 (arguing that there should be a strong presumption of access in such cases).

<sup>25</sup> FED. R. CIV. P. 23(d)(2).

<sup>26</sup> FED. R. CIV. P. 23(e).

she might take in a situation if key information is held in secret. In such situations, a heavy burden must be placed on those who would limit access; and even if that burden is met, ways must be found to prevent injustice. If the persons represented are identified and their addresses are known, then disclosure can be limited to them alone; but in many class actions that is not the case, and the only possibility of reaching many of the unnamed members is by widely disseminated media advertisements.<sup>27</sup>

## II. PRACTICAL ARGUMENTS FOR AND AGAINST CONFIDENTIALITY

Decisions as to confidentiality ought not to be made on abstract theories as to the proper role of the courts in society. On a day-to-day basis courts make decisions that affect citizens, parties and nonparties, in ways that directly involve their lives. Litigants want, and deserve, a system that works, one that operates fairly and efficiently to resolve their disputes whether on their own or by court action.

Protection from disclosure can be sought at different times and in different ways. First, at any stage in the proceeding, parties can enter into a private agreement to ensure confidentiality. If a breach occurs, an aggrieved party can bring a separate action for damages.<sup>28</sup> Second, at the time discovery is sought, a party, acting unilaterally, may seek a protective order to limit the inquiry or to keep the results confidential. Federal Rule of Civil Procedure 26(c),<sup>29</sup> which has been adopted in many states,<sup>30</sup> is the basis for such an order. The rule requires the moving party to show good cause why an order should be granted. Third, a party may unilaterally move for a protective order regarding materials already obtained through discovery or presented to the court in support of

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<sup>27</sup> JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.6 (3d ed. 1999). For large classes, notice by publication may be employed for those members who cannot be identified by reasonable effort. *Id.*

<sup>28</sup> See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788-89 (3d Cir. 1994).

<sup>29</sup> FED. R. CIV. P. 26(c).

<sup>30</sup> Many state-court provisions are copied largely from Federal Rule 26(c). See, e.g., COLO. R. CIV. P. 26(c); ILL. SUP. CT. R. 201(c); IOWA R. CIV. P. 123.

a motion or at trial. Fourth, the parties may, at any stage, agree on a protective provision for which they seek court approval. Often, such a confidentiality provision is part of a settlement of the case. If the protective order is sought after the material has been presented to the court, it may take the form of a request to seal the records. The advantage of a protective order lies in the fact that its enforcement does not require a separate lawsuit. The court that issued the order may enforce it directly.

#### A. *The Effect of Existing Rules of Procedure*

What is interesting is the fact that courts have relied upon the good-cause requirement of Federal Rule 26(c) and its state counterparts in deciding the validity of protective orders generally. Rather than confine the rule to unilateral requests to limit discovery, to which it is directed, a number of courts have treated the rule as controlling in all situations when a protective order is sought.<sup>31</sup> A careful reading of Rule 26(c) shows that such a position is incorrect. The rule provides as follows:

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate that movant in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown,

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<sup>31</sup> See, e.g., *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096 (9th Cir. 1999) (finding that the district court erred in not using good-cause criterion in denying motion to intervene); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994) (deciding that an agreement by parties to seek protective order of confidentiality does not eliminate the Federal Rules of Civil Procedure's good-cause requirement); *Glickstein v. Neshaminy Sch. Dist.*, No. 96-6236, 1998 U.S. Dist. LEXIS 2021 \*5 (E.D. Pa. Feb. 25, 1998) ("In this circuit, the good cause requirement is no mere formality."). The distinction has not gone unnoticed, however. In *Agent Orange*, 821 F.2d 139, 145 (2d Cir. 1987), cert. denied sub nom. *Dow Chemical Co. v. Ryan*, 484 U.S. 953 (1987), the court, in upholding a lower court decision to alter a previously imposed protective order under Rule 26(c) to permit public access, relied in part on the fact that the parties had not entered into a confidentiality agreement as claimed. The only agreement was to return the documents to the respective parties who had produced them once the case was over. *Id.*

the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.<sup>32</sup>

It is quite obvious that the rule has the limited purpose of providing for protection at the time discovery "is sought." Moreover, it certainly does not contemplate control of protective orders agreed upon by the parties, alone or as part of a settlement of the case, since it applies only if those persons involved have not been able to "resolve . . . [a] dispute without court action."<sup>33</sup>

This does not mean, of course, that courts should not develop standards<sup>34</sup> for determining when the court should issue a protective order based on a private agreement of confidentiality or when such an agreement should be enforced in a separate action. It does mean that courts should not consider themselves bound by Federal Rule 26(c) in such situations, and, to that extent, should be free to accept party agreements as prima facie valid and to challenge them only if and when contrary considerations are presented.

A few courts have also discussed Federal Rule of Civil Procedure 5(d)<sup>35</sup> as a basis for the required disclosure of the fruits of discovery.<sup>36</sup> That provision currently<sup>37</sup> reads as follows:

All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed

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<sup>32</sup> FED. R. CIV. P. 26(c).

<sup>33</sup> *Id.*

<sup>34</sup> See *Pansy*, 23 F.3d at 786 (requiring district court to balance competing public and privacy interests and show "good cause" under Rule 26 existed before entering order of confidentiality).

<sup>35</sup> FED. R. CIV. P. 5(d).

<sup>36</sup> See, e.g., *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 779-81 (1st Cir. 1988) (holding that Rule 5(d) "creates a presumption that all discovery materials will be available to the public because they will be filed in court"); *Agent Orange*, 821 F.2d 139, 146-47 (2d Cir. 1987), *cert. denied sub nom.* *Dow Chemical Co. v. Ryan*, 484 U.S. 953 (1987) (finding that Rule 5(d) embodies the legislative intent that class action litigants and the public should be afforded access to discovery materials whenever possible).

<sup>37</sup> An alteration of Rule 5(d) that would normally prohibit the filing of discovery material until used in court has been approved by the Supreme Court and, unless altered by Congress, will become effective on December 1, 2000. FED. R. CIV. P. 5(d) advisory committee's note.

with the court within a reasonable time after service but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.<sup>38</sup>

The limitation with respect to discovery was not included in the provision as originally promulgated, but was added by amendment in 1980 to benefit courts that were inundated with materials in ongoing cases. An initial proposal to eliminate the need to file discovery unless ordered by the court or until the material was used was rejected on the ground that “such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally.”<sup>39</sup> Thus, it is argued with some force that Rule 5(d) was designed in part to provide open access to the fruits of discovery.<sup>40</sup>

There are several reasons, however, why Rule 5(d) has, at best, limited value as a basis for upsetting an agreement among parties that their discovery be kept confidential. First, by its terms Rule 5(d) does not apply to documents or other real items<sup>41</sup> obtained in accordance with Federal Rule 34, the rule that governs discovery of such items. Rule 5(d) applies only to papers “required to be served on a party.” Federal Rule 34 only requires that the request for documents and an answer to the request be “served.” The latter answer is simply an agreement to the request or an objection to it.

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<sup>38</sup> FED. R. CIV. P. 5(d).

<sup>39</sup> FED. R. CIV. P. 5(d) advisory committee’s note.

<sup>40</sup> See *Agent Orange*, 821 F.2d 139, 146 (2d Cir. 1987).

<sup>41</sup> *In re Halkin*, 598 F.2d 176, 191 n.29 (D.C. Cir. 1979) (ruling that “responses to requests for documents under Rule 34 do not become part of the public record unless one of the parties seeks to introduce them into evidence or to rely on them in a pleading”); *Mirak v. McGhan Med. Corp.*, 141 F.R.D. 34, 39 (D. Mass. 1992) (holding that Rule 5(d) applies “only to pleadings required to be served upon a party”). The court in *Agent Orange* recognized the limitation but held that documents could be obtained under a district court order in light of its “broad supervisory authority in class actions.” *Agent Orange*, 821 F.2d at 147.

The items produced are not “served.”<sup>42</sup> Since documents are at the heart of many claims for access by outsiders,<sup>43</sup> the efficacy of Rule 5(d) is limited.<sup>44</sup>

Second, pursuant to the 1980 amendment to Rule 5(d), a number of courts have promulgated local rules barring or excusing parties from filing discovery materials unless ordered to do so.<sup>45</sup> As a result, discovery materials in many courts are not covered by the rule. More significant is the fact that a proposed amendment to Rule 5(d), approved by the Supreme Court and sent to Congress,<sup>46</sup> would provide a uniform rule for all federal courts that discovery materials must not be filed until utilized in the proceeding or ordered to be filed by the court. Unless Congress acts, the amendment will go into effect on December 1, 2000.<sup>47</sup>

Third, unlike Rule 26(c), Rule 5(d), as it stands, does not include a “good cause” standard for determining when a court can order that the fruits of discovery not be filed. There is nothing in the rule to prohibit a court from honoring agreements among the parties that the results of discovery not be disclosed. The bottom line is that neither Rule 26(c) nor Rule 5(d), themselves, necessarily obviate a presumption favoring confidentiality with regard to materials not introduced in proceedings before the court.

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<sup>42</sup> FED. R. CIV. P. 34(b).

<sup>43</sup> See, e.g., *Agent Orange*, 821 F.2d at 144; *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 777 (1st Cir. 1988); cf. *Seattle Times v. Rhinehart*, 467 U.S. 20, 25-26 (1984).

<sup>44</sup> One court has referred to the matter as a technicality, arguing that it would make no sense to permit the request and answer to be available but not the documents themselves. *Agent Orange*, 821 F.2d at 147. That is not so clear, however. Unlike other discovery rules, excepting Rule 35 regarding physical examinations, prior to its amendment in 1970, Rule 34 required a party to obtain a court order based upon a showing of good cause before it could obtain production of another’s party documents or other items. Thus at the time that Rule 5(d) was promulgated, there was an important distinction made between testimonial discovery and discovery of one’s property. If a party’s access to documents of an adversary was permitted only on a showing of good cause, it tends to explain why the rule was written so as not to require the routine filing of such documents allowing public access.

<sup>45</sup> FED. R. CIV. P. 5(d) advisory committee’s note.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

### B. Legislative Solutions, Proposed and Enacted

As noted above, at present the basic rule in most courts regarding protective orders is quite similar to Federal Rule of Civil Procedure 26(c).<sup>48</sup> Perhaps it is because usually<sup>49</sup> there are no other rules than Rule 26(c), in accordance with a “long established legal tradition,”<sup>50</sup> that have often been expanded to apply the requirement of “good cause” to virtually all requested protective orders whether or not as limitations on proposed discovery and even when based on a stipulation of all parties.<sup>51</sup>

Even so, it is not surprising that many federal courts have routinely approved and granted enforcement to confidentiality clauses in settlement agreements without a serious review.<sup>52</sup> As we have seen, Rule 26(c), at least on its face, requires parties to attempt to enter into confidentiality agreements and does not apply if they do so successfully. Thus, it appears to embrace the fundamental notion that a lawsuit is a private matter subject to

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<sup>48</sup> FED. R. CIV. P. 26(c).

<sup>49</sup> An exception is DEL. SUPER. CT. CIV. R. 5(g)(2). “Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, *for good cause shown*, an order of the Court specifying those Court Records, categories of Court Records, or portions thereof which shall be placed under seal.” *Id.* (emphasis added).

<sup>50</sup> Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996) (quoting Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177 (6th Cir. 1983)).

<sup>51</sup> San Jose Mercury News, Inc. v. United States Dist. Ct., 187 F.3d 1096, 1103 (9th Cir. 1999) (vacating district court blanket protective order pursuant to Rule 26(c) because, *inter alia*, good cause was not considered); Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858-59 (7th Cir. 1994) (reversing on grounds that the record below revealed “no indication that the Magistrate Judge made an independent determination that ‘good cause’ existed before issuing the [protective order]” stipulated by both parties); Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1998 U.S. Dist. LEXIS 2021, at \*7 (E.D. Pa. Feb. 25, 1998) (holding that, in accordance with Rule 26(c), the district court must independently determine if good cause is established even when all parties support the protective order).

<sup>52</sup> Luban, *supra* note 2, at 2650 & n.122.



control by the parties. Moreover, the scope of protection allowed by the rule is very broad, including “annoyance,” “embarrassment” and “oppression” of a party or other person from whom discovery is sought. The very fact that a confidentiality agreement has been entered into can be considered good cause, at least in the absence of a formal objection.<sup>53</sup> If the parties reach an understanding among themselves that matters should not be disclosed, it would at the very least be “annoying” to undercut that understanding.

To alter this approach and take into account more of the public interest when that is thought to be necessary, a few states, notably Florida,<sup>54</sup> Texas,<sup>55</sup> and Washington<sup>56</sup> have enacted “sunshine” laws that curtail the powers of their courts to issue protective orders in certain situations. The chief focus of each of these provisions are cases involving public health and safety hazards. The Florida statute also deals with matters involving suits against the state or other government entities.<sup>57</sup> The Texas statute includes cases involving the administration of public office or governmental operations.<sup>58</sup>

One of the major arguments against confidentiality agreements involves claims that the public is harmed when health or safety hazards are not revealed. Interestingly, the cited state statutes differ significantly as to when discovery cannot receive protection. The Florida provision simply bars the concealing of a hazard that “has caused and is likely to cause injury.”<sup>59</sup> This appears to require a finding that such a hazard indeed exists. The Texas rule, on the other hand, bars protective orders that have “any probably adverse effect upon the general public health or safety,” which would seem

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<sup>53</sup> Except for the parties, rarely will anyone even know about a confidentiality agreement or a motion for a protective order based upon it.

<sup>54</sup> FLA. STAT. ANN. § 69.081 (West 2000) (prohibiting the concealment of public hazards).

<sup>55</sup> TEX. R. CIV. P. 76a (prohibiting the concealment of court orders or opinions).

<sup>56</sup> WASH. REV. CODE ANN. §§ 4.24.601, 611 (West Supp. 2000) (prohibiting the concealment of public hazards).

<sup>57</sup> FLA. STAT. ANN. § 69.081(8) (West 2000).

<sup>58</sup> TEX. R. CIV. P. 76a(2)(b).

<sup>59</sup> FLA. STAT. ANN. § 69.081(2) (West 2000).

to require a finding that an adverse effect is likely.<sup>60</sup> The Washington statute goes the furthest, refusing protection for “alleged” hazards.<sup>61</sup> These formulations could not only lead to different results in similar cases, but also to different consequences for the courts regarding the burden placed upon them when deciding whether or not to approve or enforce confidentiality agreements.

A proposed federal statute currently before Congress takes a somewhat different approach. It reads as follows:

(a)(1) a court shall enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case only after making particularized findings of fact that—

(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

(B)(i) the public interest in disclosure of potential health and safety hazards is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

(2) No order entered in accordance with paragraph (1) (other than an order approving a settlement agreement) shall continue in effect after the entry of a final judgment, unless at or after such entry the court makes a separate particularized finding of fact that the requirements of paragraph (1)(A) or (B) have been met.

(b) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden in obtaining such an order.

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<sup>60</sup> TEX. R. CIV. P. 76a(1)(a)(2).

<sup>61</sup> WASH. REV. CODE ANN. § 4.24.611(1)(b) (West Supp. 2000).

(c)(1) No court of the United States may approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to subsection (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.<sup>62</sup>

This proposal has a number of interesting features. First, it uses as its vehicle for reform a modification of Rule 26(c), even though it goes well beyond the scope of that provision and, indeed, beyond pretrial discovery generally. Second, by referring to information “relevant” to the protection of the public, it uses a different formulation than any used by the three state statutes discussed above: more liberal than those of Florida and Texas, and, depending upon the interpretation of “relevant,” nearly as broad as that of Washington. Third, it provides the trial judges with considerable discretion in finding that the reasons for disclosure are outweighed by the need for confidentiality. Fourth, it gives special status to orders approving settlement agreements by allowing them to continue after final judgment without further requirements. Finally, it gives any party an absolute right to provide federal and state agencies with information regarding public hazards.

On the whole, the statute, if enacted, would require federal trial judges to study carefully every situation before issuing a protective order or approval of a settlement containing a confidentiality provision. Judges would have to struggle with the question of whether the information involved would be “relevant” with regard to a matter of public health or safety. This is especially true if “relevant” is to be interpreted in the same way as it is interpreted under Rule 401 of the Federal Rules of Evidence.<sup>63</sup> Rule 401 defines “relevant evidence” as that evidence “having any tendency

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<sup>62</sup> S. 957, 106th Cong. (1999).

<sup>63</sup> FED. R. EVID. 401.

to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.”<sup>64</sup>

Note that under the Federal Rules of Evidence, relevant evidence may be excluded at trial for a number of reasons, including waste of time.<sup>65</sup> Under the proposed statute, would “relevant evidence” normally be excluded from approval of a confidentiality provision, no matter how trivial the information, absent a strong showing why confidentiality is required?

In the subsequent sections of this article, as we explore the practical arguments for and against confidentiality provisions, we will consider the proposed statute and the wisdom of its enactment.

### C. Arguments Favoring Disclosure of Discovery Materials

There are three basic arguments in favor of a strong policy of disclosure of discovery materials developed during the course of an action. First is the notion, already explored to some extent, that the public is entitled to know what is occurring in cases filed in its courts. There is nothing inherently wrong with such a proposition so long as the information sought bears any relationship to the public’s need to know. But even then it must give way when there are important factors that justify privacy and confidentiality. Otherwise, it is nothing but an article of faith that can damage the innocent and disrupt the sensible process of litigation. Nevertheless, a number of courts in recent years, in denying protective orders, have invoked a strong presumption favoring disclosure. Although members of the news media and other interested parties do not have a First Amendment right to information developed during the course of a case,<sup>66</sup> they have often been entitled to intervene in an

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<sup>64</sup> *Id.*

<sup>65</sup> FED. R. EVID. 403. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, *waste of time*, or needless presentation of cumulative evidence.” *Id.* (emphasis added).

<sup>66</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (rejecting a First Amendment challenge to a protective order and emphasizing that the “unique

action to obtain such information despite the party's desire to maintain confidentiality,<sup>67</sup> and such a right has been specifically mandated by those statutes that have dealt with the matter.<sup>68</sup> Both cases and statutes have been careful to distinguish information as to someone's trade secrets or other matters involving a competitive advantage, holding that such material should not be available without an overwhelming showing of cause.<sup>69</sup>

The current trend seems unfortunate. There is no reason whatsoever for allowing public access to information that is damaging or embarrassing to a party or a witness merely because it makes good press copy or will engage the public's interest.<sup>70</sup> The intimidation resulting from the dangers of disclosure can seriously affect the rights of all parties, not just those of "guilty" defendants. For example, some potential plaintiffs may even forego filing an action for fear that private information detrimental to them or their families might be revealed.<sup>71</sup> In the past few years, as technological advancements have changed our lives, we have become more aware of the value of personal privacy and have been increasingly alert to its erosion. We may have to be involved in internet activities on our computers, just as we may have to be

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character of the discovery process requires that the trial court have substantial latitude to fashion protective orders").

<sup>67</sup> See, e.g., *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999) (citing other cases and issuing a mandamus under federal common law and the Federal Rules of Civil Procedure requiring a blanket protective order amended so as to unseal a report).

<sup>68</sup> See, e.g., FLA. STAT. ANN. § 69.081(6) (West 2000) ("Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement, or contract that violates this section."); WASH. REV. CODE ANN. § 4.24.611(2) (West 2000) ("[M]embers of the public have a right to information necessary for a lay member of the public to understand the nature, source, and extent of the risk from alleged hazards to the public.").

<sup>69</sup> Miller, *supra* note 2, at 473-74. State statutes typically specify the need to protect such information to the extent possible consistent with the right to public access. See, e.g., WASH. REV. CODE ANN. § 4.24.601 (West Supp. 2000).

<sup>70</sup> Marcus, *supra* note 2, at 478-80; Miller, *supra* note 2, at 464-66.

<sup>71</sup> *Rhinehart*, 467 U.S. at 36 n.22 (noting that, out of concern of undesirable publicity, prospective litigants may eschew legitimate claims "resulting in frustration of a right as valuable as speech itself") (citations omitted).

involved in a lawsuit, but that should not mean that everything about our lives should be available for public consumption.

Second, it has been argued that keeping some information confidential, particularly when a case is settled, may result in a continuing hazard to public health and safety. This would occur, for example, if a particular product on the market is dangerous but information as to that fact is kept from the public. On the surface that is a powerful argument for disclosure whenever there is an indication that such a hidden problem exists. It explains why statutes that have been proposed or enacted focus on this issue.<sup>72</sup> A number of situations have been advanced as examples of cases where such product defects have been kept from the public.<sup>73</sup> And, of course, because of secrecy agreements in settlement of products liability cases, we cannot be certain of whether there are more examples to be found.<sup>74</sup>

There are a number of reasons why this argument is of far less consequence than would first appear. To begin with, plaintiffs file complaints that are open and available to the public as are motions and other proceedings. Parties are free to talk about the hazards and to inform the proper authorities before the filing and during the course of a case before any confidentiality agreement has been reached. Witnesses are not muzzled by an agreement among parties. And the Supreme Court has held that even a state court injunction barring a witness from testifying in future cases is not entitled to full faith and credit in the courts of other states.<sup>75</sup>

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<sup>72</sup> See *supra* Part I.B.

<sup>73</sup> Luban, *supra* note 2, at 2650 (“Among the products whose defects are alleged to have been hidden by protective orders or sealed settlements are Dow Corning’s silicone gel breast implants; pickup trucks made by Ford and General Motors; Upjohn’s sleeping pill Halcion; Pfizer’s Bjork-Shiley heart valves; and McNeil Pharmaceutical’s painkiller, Zomax.”).

<sup>74</sup> Luban, *supra* note 2, at 2649 (noting that manufacturers, in order to keep discovery materials sealed and out of the public eye, often prefer to exchange generous settlements for claimants’ pledges of secrecy).

<sup>75</sup> *Baker v. General Motors Corp.*, 522 U.S. 222, 240-241 (1998) (holding the Full Faith and Credit Clause did not impede a witness from testifying in a different state against auto manufacturer despite an injunction issued against his testimony by a Michigan county court pursuant to agreement between the parties).

Perhaps more important, a careful look at the instances cited as examples of improper protection of secret hazards do not support the notion that they are being hidden by court action. At the 1994 hearings<sup>76</sup> on a bill to limit the discretion of the federal courts with regard to protection of information relating to dangers to the public health and safety, a number of "witnesses" testified regarding how court protection had endangered the public or had resulted in injuries or death to family members. It was clear, however, that these were individuals who were angry over the fate of their loved ones and were frustrated by their inability to somehow further castigate the wrongdoers. One case involved medical malpractice regarding the birth of the "witnesses" child. There was no evidence that there were future dangers to the health of the public because in their particular case the delivery of their child might have been badly botched.<sup>77</sup> The implication of this "testimony" is that a confidentiality clause in a settlement agreement of a professional malpractice case should never be approved because one unfortunate mistake would reveal *per se* a danger to the public. Indeed, it would follow that the court could not approve a confidentiality agreement in many cases: for example, if a defendant has been charged with negligent operation of his or her vehicle, a court would not approve the confidentiality agreement as one negligent act might be the precursor of others.

In a second situation,<sup>78</sup> the death of a driver was related to a defective vehicle design. The argument was to the effect that had there not been protective orders in prior cases involving the same type of vehicle, the death would have been avoided. There had been substantial publicity,<sup>79</sup> however, about the dangers long

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<sup>76</sup> See *Hearings, supra* note 6.

<sup>77</sup> See *Hearings, supra* note 6, at 6-7 (prepared statement of Mr. and Mrs. Doe).

<sup>78</sup> See *Hearings, supra* note 6, at 13-14 (statement of Leonard and Arleen Schmidt).

<sup>79</sup> See *Hearings, supra* note 6, at 45 (statement of Elizabeth du Fresne noting that in 1977 and again in 1978, the National Highway and Transportation Safety Commission had issued consumer advisories concerning the problem and in 1978 a major news network had carried a prime time story about the dangers; moreover, the manufacturer had established a public reading room with ample information about the situation).

before the driver had obtained the vehicle in 1984, some nine years after its original sale. In 1980, the United States Department of Transportation, rather than requiring a recall of the vehicles, permitted the manufacturer to issue warning sticker notices to owners who had originally purchased the vehicles.<sup>80</sup> Of course the information did not directly reach individuals who bought a used vehicle, but such a person would not be any more likely to obtain notice of the dangers because of unrestricted access to evidence developed in a lawsuit. If there was fault, it was the failure of the governmental agencies who knew of the dangers and the members of the media who did not adequately publicize the information available to them. There was nothing to support the notion that the existence of protective orders made the slightest difference as to public awareness of the dangers.

One of the more publicized and cited<sup>81</sup> examples of harm to the public due to confidentiality orders is that of the breast implant case brought by Maria Stern against the Dow Corning Company. It is alleged that had there not been a confidentiality order in that case, thousands of women would have been warned about the alleged dangers of breast implants and could have avoided personal tragedy.<sup>82</sup> However, that case was publicly tried before a jury that awarded plaintiff \$211,000 in actual damages and a \$1.5 million punitive award. On November 5, 1984, the day of the decision, a United Press International news release provided details as to the name and home city of the plaintiff, the identity of the defendant corporation, the amounts of the jury award, the basis of plaintiff's claim, and the nature of her injuries. Apparently the decision sparked little interest. If a public trial and a news release regarding the dangers of breast implants and a huge punitive damage award were ignored, it is difficult to believe that the mere absence of a limitation on disclosure of specific items of evidence would have made a difference.

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<sup>80</sup> See *Hearings, supra* note 6, at 13-14.

<sup>81</sup> See Luban, *supra* note 2, at 2652 (discussing use of confidentiality orders in tobacco litigation as potentially harmful to the public interest); Zitrin, *supra* note 2, at 121; see also *Hearings, supra* note 6, at 9-10 (prepared statement of Sybil Niden Goldrich).

<sup>82</sup> See *Hearings, supra* note 6, at 9-10.



Professor Arthur Miller has analyzed a number of other similar situations in which protective orders were blamed for harm due to dangerous situations.<sup>83</sup> In each case, the protective order proved to be a scapegoat rather than a cause. To be sure, advocates of statutes limiting protective orders have cited a few other situations<sup>84</sup> although the facts as to the existence of publicity are not provided. In any event, it can legitimately be argued that the settlements tend to protect defendants from the presentation of evidence in subsequent lawsuits, not to eliminate disclosure in the media and elsewhere of the existence of a hazard. Despite the fact that the allegations of a secrecy crisis have been heard and debated for many years, there are no empirical studies that support the notion that confidentiality agreements have been a serious cause of danger to the public.<sup>85</sup>

There are legitimate advantages to confidentiality agreements. Therefore, without a firm showing that a serious problem exists, the adoption of a statute that restricts such agreements and their enforcement and also forces courts routinely to conduct contested hearings regarding evidence that could possibly be relevant to risks to public health or safety, seems extremely unwise. The difficulties are exacerbated by uncertainties as to what is and what is not a danger to public health or safety. Suppose that in discovery during a routine automobile accident case the plaintiff's state of health prior to his injuries is raised and information is developed showing that plaintiff was HIV positive or suffered from AIDS. Does this reveal a potential danger to public health? Scholars may disagree.<sup>86</sup> However, under a liberal "relevancy" standard, the court would have to make a determination in the case that the need for protection clearly outweighs the danger. Even with the recognition that sexual contact is not the only way of contracting HIV, a plaintiff might have to establish his or her safe sexual habits that

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<sup>83</sup> See Miller, *supra* note 2, at 480-82.

<sup>84</sup> See Zitrin, *supra* note 2, at 119-121.

<sup>85</sup> Dore, *supra* note 2, at 301-02.

<sup>86</sup> Cf. Luban, *supra* note 2, at 2654 (arguing that a plaintiff with AIDS is not a public health and safety concern); Menkel-Meadow, *supra* note 2, at 2684 (proposing a balancing approach to assess the plaintiff's privacy interests weighed against the "public and system needs").

would have prevented exposure. Or consider a case by an employee against an employer, alleging a dangerous work environment, in which fellow employees are deposed. The latter can suffer serious harm from disclosure of personal information, even though that information would not have been admissible had the case not settled and gone to trial.<sup>87</sup> And what about a products liability case in which a settlement is reached but the defendant stoutly contests the fact that its product is in any way unsafe, claiming that settlement was cheaper than a prolonged fight on the merits with a great amount of negative publicity? Does the court, in deciding whether to honor a confidentiality clause in the settlement agreement, have to decide the liability issue? To do its job properly, the court would have to hear from experts and other witnesses. Much of the value of the settlement would be lost, and the cost in time and energy of the court as well as the parties could be substantial. There would be an enormous burden on the judicial system if extensive inquiry were required of courts any time a confidentiality agreement was presented for approval.<sup>88</sup> Of course such problems would be eliminated if the legislation adopted a proposal similar to the Washington statute, where a mere "allegation" that health or safety is involved appears to be enough to preclude enforcement of a confidentiality order in most cases.<sup>89</sup> However, such a provision cannot be justified because it places a "club" in the hands of the media or anyone else who wished to obtain private information regardless of the circumstances.

None of this means, of course, that a court should enforce and support a confidentiality provision agreed to by the parties in a case regardless of a real danger to the public health or safety. But the presumption should be on the side of privacy. Moreover, the court should not merely reject completely a confidentiality provision. It should remove restrictions that could affect proper notice to the public of danger, but not necessarily allow public access to the fruits of discovery themselves.

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<sup>87</sup> See *Hearings, supra* note 6, at 45 (statement of Elizabeth du Fresne).

<sup>88</sup> See *Hearings, supra* note 6, at 34 (prepared statement of Judge Joseph S. Weis).

<sup>89</sup> WASH. REV. CODE ANN. §§ 4.24.601, 611 (West Supp. 2000).

A third argument favoring disclosure is based on the fact that discovery in a case that uncovers important information may be of great significance in subsequent cases based upon closely identical situations. It is the desire for such information that appears to be behind the claims regarding hazards to public health and safety. To attorneys, primarily those who represent plaintiffs in products liability actions, the easier it is to obtain useful information developed in other cases, the better it is. It is much easier, however, to “sell” a proposed statute limiting privacy if public protection appears to be at stake rather than benefits to plaintiffs and their attorneys. Thus, with one notable exception,<sup>90</sup> state provisions that have been enacted,<sup>91</sup> as well as the proposed federal statute,<sup>92</sup> do not deal with the evidence sharing issue.

Nevertheless, the argument for sharing evidence has substantial merit. It is wasteful and inefficient to force parties in subsequent cases to retrace the steps taken in an earlier case, particularly when those steps are costly and time consuming. It is not surprising, therefore, that courts<sup>93</sup> as well as commentators,<sup>94</sup> including some who have generally favored upholding confidentiality agreements,<sup>95</sup> have supported modification of protective orders to permit information sharing in appropriate circumstances.<sup>96</sup> A line must be drawn between mere “fishing expeditions”<sup>97</sup> and serious

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<sup>90</sup> VA. CODE ANN. § 8.01-420.01 (Michie 2000). “A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery . . . shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter.” *Id.*

<sup>91</sup> FLA. STAT. ANN. § 69.081 (West 2000); WASH. REV. CODE ANN. § 4.24.601, 611 (West Supp. 2000); TEX. R. CIV. P. 76a.

<sup>92</sup> S. 957, 106th Cong., 1st Sess., May 4, 1999.

<sup>93</sup> See e.g., *EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998); *Wolhar v. General Motors Corp.*, 712 A.2d 464, 467 & n.8 (Del. Super. Ct. 1997) (citing numerous cases).

<sup>94</sup> For an excellent and comprehensive discussion, see Dore, *supra* note 2, at 363-68 (citing cases as well as commentators).

<sup>95</sup> See Marcus, *supra* note 2; Miller, *supra* note 2.

<sup>96</sup> See Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 41-46 (1983); Miller, *supra* note 2, at 497-99.

<sup>97</sup> Dore, *supra* note 2, at 367.

attempts to obtain information that otherwise might not be available<sup>98</sup> or would be costly and time consuming to duplicate. Once again, however, any provision that mandates evidence sharing should be carefully drawn to achieve its purpose without unduly upsetting the interests of the parties arrived at through a settlement arrangement. The one state statute that specifically addresses the matter is quite conservative:

A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.<sup>99</sup>

It would seem proper to go beyond the terms of such a statute and leave to the court, regardless of the willingness of the party or attorney who is in possession of the desired information, the power to allow disclosure in cases of substantial need, provided that measures are taken to maximize protection of privacy. This means, of course, that the court could, in proper circumstances, permit a party in a subsequent case to inquire into the existence in the prior case of any highly relevant secret information. Thus a defendant would not be able, through a settlement and protective order, to hide a “smoking gun” found, essentially by chance, by one plaintiff, and unlikely to be uncovered by others with identical claims.

An interesting aspect of the prohibition on the use of discovery in subsequent cases involves clauses in settlement agreements that would prohibit the attorney for one side, invariably the plaintiff’s lawyer, from bringing identical suits on behalf of other plaintiffs

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<sup>98</sup> This might be the situation if a deponent in an earlier, settled case has since died.

<sup>99</sup> VA. CODE ANN. § 8.01-420.01 (Michie 2000).

against the same defendant. Such provisions are generally considered unethical. Thus, Rule 5.6 of the American Bar Association's Model Rules of Professional Conduct provides: "A lawyer shall not participate in offering or making: . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."<sup>100</sup>

It is felt that it is improper for such defendants to "buy off" attorneys whose experience and talent make them the best available to represent subsequent plaintiffs.<sup>101</sup> Nevertheless, some courts distinguish between restrictions on a lawyer's right to practice and his or her commitment not to reveal information about the initial case or to use the information in other cases. The latter is not considered an ethical violation.<sup>102</sup> Moreover, a number of courts have disqualified attorneys from participating in subsequent cases, despite ethical restrictions, based upon the contractual agreements, leaving the question of ethics to be determined by the disciplinary authorities.<sup>103</sup> These decisions enforce the notion that in the absence of a court determination to the contrary, the protection of the privacy of litigants outweighs disclosure of material deemed confidential in settlement agreements.

#### *D. Arguments Favoring Limitations*

There are a number of fundamental arguments made in favor of permitting confidentiality agreements. First, many believe that individual privacy is valuable in and of itself. It should be remembered that defendants are not in court voluntarily; they are coerced by governmental regulation. Hence, care should be taken

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<sup>100</sup> MODEL RULES OF PROF'L CONDUCT R. 5.6.

<sup>101</sup> 92 ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993) (discussing the rationale behind Model Rule 5.6).

<sup>102</sup> *Id.*

<sup>103</sup> *Id. Contra* Blue Cross and Blue Shield v. Philip Morris, Inc., 53 F. Supp. 2d 338, 344-47 (E.D.N.Y. 1999) (disqualifying a law firm that violated an agreement with an insurance company to exclude itself from the case); Jarvis v. Jarvis, 758 P.2d 244, 246 (Kan. Ct. App. 1988) (deeming such an agreement void as against public policy); Feldman v. Minars, 658 N.Y.S.2d 614, 617 (App. Div. 1997) (disqualifying law firm that solicited plaintiff in breach of Illinois settlement agreement).

not to overextend that power. An argument can be made that plaintiffs are also coerced; but for the improper actions of the defendants, they would not have had to go to court. And, of course, witnesses who may have no stake whatsoever in the outcome of a case, are certainly entitled to as much privacy as the system can afford.

Second, it is claimed that settlement of cases would be inhibited if parties could not include confidentiality clauses in their settlement agreements. Settlements are an important aspect of our dispute resolution system. Our courts are choked with cases as it is,<sup>104</sup> and if it were not for the fact that the vast number of cases settle, parties on both sides often prefer resolution without trial. In the typical case in which a plaintiff is seeking compensation for some alleged loss due to fault on the part of the defendant, the plaintiff, more often than not, wants the money at once,<sup>105</sup> even if the chances for an ultimate victory are high. And, of course, the risk of a loss can be too much to bear. A defendant is often anxious to keep the case as quiet as possible.<sup>106</sup> It does not want any unfavorable information to be made public, even if it believes that it would prevail if a trial were to take place. It certainly does not want other potential plaintiffs to be encouraged to file similar suits. But if the unfavorable information is to be made public, then defendant might believe it is better off fighting the case to the bitter end.

From a practical view, however, it seems unlikely that even a total ban on confidentiality provisions would be a major deterrent to settlement. Plaintiffs would still want their money as soon as they could get it and without risk of a loss at trial. Defendants would still want to avoid trial in order to limit dissemination of bad

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<sup>104</sup> Miller, *supra* note 2, at 487 (“[S]tate courts are experiencing difficulty in keeping up with the inflow of new cases . . . Our judges cannot assume additional tasks of the size that an expansion of the public's right of access would generate”).

<sup>105</sup> See *Hearings*, *supra* note 6, at 43 (statement of Gerry Spence).

<sup>106</sup> See *Hearings*, *supra* note 6, at 43. Here, Mr. Spence stated that in forty years of practice he had encountered no situation in which a settlement did not include a term prohibiting disclosure of the terms of the settlement and the surrounding facts. See *Hearings*, *supra* note 6, at 43.

publicity as much as possible. Moreover, in situations in which subsequent suits on identical facts would be likely, defendants would want to avoid potential liability in easy-to-win actions based on offensive issue estoppel.<sup>107</sup> In most situations, they would be better off settling cases one by one, since even a victory in a first trial would not afford them an estoppel defense in subsequent actions.

If confidentiality provisions were not honored, the dynamics of settlement would be somewhat changed, generally in favor of plaintiffs.<sup>108</sup> Defendants would often be eager to arrive at an agreement early in the case before extensive discovery or even before a case is filed. They would be more likely to push for alternate dispute resolution of suits. Except in those cases in which plaintiff would have its own interests in privacy, plaintiffs would gain some leverage. On the other hand, an agreement to a protective order is a significant "bargaining chip" for plaintiffs. It is something that they can give in exchange for a more favorable monetary amount. Without it, plaintiffs might have to settle for somewhat less.

To some extent, uncertainty as to whether courts will or will not refuse to support protective provisions would be worse than a total ban. Parties need to know at the outset of their negotiations where they stand. If anything would be likely to inhibit settlement, it would be doubt about enforcement of a potential agreement. It would cause parties initially to avoid disclosure of sensitive information whenever possible. Although we cannot eliminate uncertainty as to when disclosure will be permitted, we could certainly cut it back by taking the position that there is a presumption favoring enforcement of privacy settlement clauses.

Third, without the ability to arrange a confidentiality agreement that the parties could reasonably expect to be enforced, the scope of discovery itself would likely be affected in a number of cases. Since 1938 when the Federal Rules of Civil Procedure went into

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<sup>107</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

<sup>108</sup> Typically plaintiffs' attorneys strongly approve of provisions limiting confidentiality agreements. See *Hearings*, *supra* note 6, at 42-43 (statement of Gerry Spence).

effect, broad ranging discovery<sup>109</sup> has become the norm as state after state has patterned its provisions after the liberal federal rules.<sup>110</sup> Broad discovery is all to the good in ensuring that parties have available the information they need to build their cases. As already noted, however, defendants and witnesses, if not plaintiffs as well, have a strong argument for privacy. The scope of discovery requires disclosure of matters not admissible at trial. There is, therefore, ample opportunity for serious abuse. Revelation of information learned during the course of discovery, but not admissible in evidence, can, if not subject to protection, seriously disrupt one's life. Courts do have the power, in their discretion, to restrict the scope of discovery to avoid such abuses. If they cannot avoid problems through the use of protective orders, they are more likely to do so by curtailing discovery at the outset.<sup>111</sup> Moreover, even without court interference, discovery might well be limited because parties will be reluctant to come forward voluntarily with anything that might be damaging if it were to become public.<sup>112</sup> The value of cooperation with regard to discovery should not be underestimated. The cost to the parties and the legal system of continuous fights over what discovery is or is not appropriate can be high and disheartening.

### III. CONCLUSIONS

The following set of principles should operate with respect to disclosure of information discovered during the course of litigation:

1. Federal Rule of Civil Procedure 26(c), with its "good cause" requirement, should apply only in situations in which a party unilaterally seeks protections prior to or during discovery. It should

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<sup>109</sup> See FED. R. CIV. P. 26(b)(1). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

<sup>110</sup> See FRIEDENTHAL, *supra* note 27, at 386.

<sup>111</sup> See Miller, *supra* note 2, at 476-77.

<sup>112</sup> Miller, *supra* note 2, at 483-84.



not apply to subsequent agreements among parties to maintain privacy.

2. As to materials subject to protection in an agreement among parties when those materials have not been used at trial or on motion to obtain a substantive decision, there should be a presumption of nondisclosure. The current situation, whereby some courts routinely approve such provisions, is sensible. Only if an issue is raised as to the justification of such a provision in a particular situation, or if the court itself believes that an inquiry should be made, should the court be required to take the time and energy to make an evaluation and then the burden should be on those who seek disclosure.

3. As to materials subject to a protective agreement among the parties when such materials have been presented at trial or to the court in support of a substantive determination, the presumption should shift, and the court should be required to make a finding that the needs of privacy outweigh the needs for public access. The situation should be treated in the same way as the courts would treat a unilateral motion to seal court records.

4. A special exception to the general rule in conclusion two, above, should obtain upon a showing by or on behalf of a party in a different lawsuit that materials in the present suit contain information significant to the fair resolution of the other lawsuit and that such information is not likely to be discovered without undue cost and effort. Although the presumption should shift in favor of disclosure upon such a showing, the court should nevertheless evaluate the entire situation to make certain that disclosure is not outweighed by reasons for confidentiality, and steps should be taken to restrict the use of the information beyond its need for the other lawsuit.

5. In a case involving the propriety of the actions of a government entity or its employees operating in the scope of their employment, information as to such actions should be open to public scrutiny, except when disclosure is objected to as seriously unfair to non-governmental parties or witnesses.

Hopefully, both federal and state courts can be united in support of such principles. Differences in treatment among courts are not sound. Neither the possibility of protection nor a threat of disclosure should become a motivation for forum shopping.

If every judge was of the same caliber as the federal judges we have in this room, I would have less of a problem allowing them more discretion to decide privacy issues related to civil litigation. A real question exists as to whether, in fact, there were sealing orders occurring that deprived the public of safety information. I am aware of little empirical evidence to support this proposition.

I represented one of the national defendants, Dow Corning,<sup>1</sup> in breast implant litigation. After paying billions of dollars to resolve the dispute, Dow had to file Chapter 11.<sup>2</sup> If one has continued to follow this issue, one knows that health effects relating to breast implants are, in most instances, no longer a problem.<sup>3</sup> There is an overwhelming scientific consensus that no relationship exists, as alleged, between silicone breast implants, the gel in silicone breast implants, and auto-immune disease.<sup>4</sup>

The question, however, remains: was there a health effect? How does a judge determine a health risk from the use of a product? Discovery, settlement and trial are the three areas where privacy issues arise.

With respect to trials, privacy issues are easy to resolve. Trials are open to the public. If the litigation includes discussions of trade secrets or confidential information, the judge can address those

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<sup>1</sup> See, e.g., *D'Augustino v. Bristol-Meyers Squibb*, 980 F. Supp. 1452 (M.D. Fla. 1997).

<sup>2</sup> 11 U.S.C. §§ 1101-1174 (1994).

<sup>3</sup> For a general discussion and survey of recent medical studies relating to breast implants, see *Breast Implants - An Information Update - 2000*, available at <http://www.fda.gov/cdrh/breastimplants/indexbip.PDF> [hereinafter *Breast Implant Update*].

<sup>4</sup> See Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L. J. 2049, 2066 (2000) (noting “that there was no established correlation between breast implants and connective tissue disease”) (footnote omitted); see also *Breast Implant Update*, *supra* note 3, at 30 (“Individual cases alone cannot scientifically prove or disprove a connection between [connective tissue disease] and related disorders and breast implants.”).

issues separately. Once a case is tried in a civil forum, however, it is in the public domain. I am unaware of any civil case in the product liability or mass tort area that was not publicly tried.

What, then, are the real issues relating to privacy in civil litigation? One generally refers to broad-ranging discovery, where plaintiffs can sort through a company's documents at will. For example, in many federal district courts, there are local rules requiring litigants to automatically produce all documents that substantially bear on a claim or defense.<sup>5</sup>

Such rules raise a number of ancillary issues. For instance, how many corporate documents bearing on a claim or defense must litigants automatically disclose? There may be a substantial number of documents containing trade secrets and confidential information that should be protected and kept out of the public domain. Why should these documents be in the public domain? What is the purpose of all this openness?

Many high profile cases are now tried in the media. The plaintiff's motivation in seeking publicity is to coax the defendant to settle before allowing an opportunity to try the merits of the case. This creates enormous adverse stress on the company. One effective method of achieving these results is through use of the media. During the discovery phase of litigation, there is a great deal of pressure to prevent document protection through confidentiality agreements so that certain documents can be leaked to the media.

Litigants have, in some instances, been very successful in using the media. Anyone who has been involved in an issue receiving media attention may have experienced a disconnect between what was reported and what actually occurred. I have heard one thing said at trial but read a completely different version in the newspaper. Additionally, it is often difficult to present a balanced media presentation in a newspaper article. On occasion, it takes much longer for the defendant to tell its side of the story than for the

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<sup>5</sup> See, e.g., LOCAL CIV. R. 26 (E.D. Tex.). The Texas local rule provides that, without awaiting a discovery request, each party shall disclose "all documents, data compilations, and tangible things in the possession, custody or control of the party that are likely to *bear significantly on any claim or defense.*" *Id.* (emphasis added).

plaintiff to do the same. The plaintiff often presents one document, which on its face looks very bad. When the defendant, however, explains it or produces other documents to put it into context, the document is actually not detrimental to the defense. From the point of view of the media, however, it is often too complicated to tell the whole story.

We should not be trying cases in the media. On the other hand, courts are not going to hold civil trials in secrecy. One way to prevent a case from being tried in the media is to issue protective orders during the discovery phase of litigation.<sup>6</sup> There is no good reason why such orders should not be granted. It is not in the best interests of the parties or the court to have documents given to the media or other parties in piecemeal fashion prior to trial, especially if they contain confidential information and trade secrets.

The issue of whether safety concerns arise from civil litigation begs the question as to who makes this determination. How does the court make this determination? Does the judge have to preside over an entire trial, bringing in all the parties' experts to determine whether there truly is a health hazard? This question is one that juries decide, perhaps after a full determination of all the evidence. I realize that problems often exist when juries make these decisions, and appellate courts must resolve these issues. Yet how is the judge to make this determination and on what kind of record?

There are federal agencies that regulate many industries. The idea that governmental agencies are not investigating safety issues and are hiding problems with products, drugs, or medical devices because they settled a few cases in secrecy is not realistic.

Trial lawyers are very communicative people. They have organized groups, they belong to organizations, and they trade information.<sup>7</sup> Cases are not litigated in secrecy. Instead, they are

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<sup>6</sup> See, e.g., FED. R. CIV. P. 26(c). Rule 26(c) provides: "Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*

<sup>7</sup> The Association of Trial Lawyers of America, for example, is an association dedicated to promoting the right to trial by jury. See *Your Guide to ATLA*, available at <http://www.atla.org/info/guide.ht>. The Trial Lawyers for

litigated in open courtrooms, and confidential or sensitive documents and records are protected.

Settlements occur on a regular basis in this country under confidentiality orders. There are many reasons to settle cases. Defendants are not necessarily settling cases because their products destroy peoples' lives and limbs. The reality is, if that were occurring, a company could not keep dangerous products in the marketplace. These things just cannot be kept secret in our media conscious world.

There are very good reasons why defendants try to keep their settlements confidential. I am not sure how effective they have been. In many instances defendants are unsuccessful because of the considerable communications that exist among plaintiffs' lawyers. Settlements are very important to our judicial system. Without them the system would collapse. We should do everything we can to encourage settlement. If we do not permit defendants to settle without revealing the amounts of the settlement, there will be a chilling effect on settlements to the detriment of the civil justice system.

*Harvey Weitz\**

My position on secrecy agreements is straightforward: secrecy agreements should be considered null, void, and unenforceable. They are anathema to the public good. I can cite a number of personal experiences where the sole purpose of a secrecy agreement was to suppress information that would be of value to other litigants as well as to the general public. Without enforcement, our state and federal regulations amount to nothing more than self-policing and self-reporting measures.

Some time ago, I represented a woman who was seriously injured when her General Motors (“GM”) automobile “ran away from her.” Through the use of an on-line exchange provided by the Association of Trial Lawyers of America (“ATLA”),<sup>1</sup> I learned that a friend in Arizona had handled a similar matter where the accident was caused by defective engine mounts.<sup>2</sup> I called him soon after and asked for some details about his case, but he replied, “I can’t discuss it.” I told him that his name appeared on the ATLA Exchange in connection with an engine mount accident. He reiterated that he could not discuss the matter, and when I asked,

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<sup>1</sup> The Association of Trial Lawyers of America Exchange is an on-line members-only litigation service that provides plaintiffs access to trial litigation information including experts, deposition testimony, various pleadings and other court documents, and speaker papers and articles. *See* ATLA Exchange, at <http://exchange.atla.org/> (last visited Nov. 4, 2000). Legal information is provided via a series of searchable databases, including: directories of ATLA lawyers who requested searches from the Exchange; case abstracts that track verdicts; settlements and rulings in areas of law that are of interest to ATLA members; lists of legal and technical journals, books, government publications, and other resources; lists of ATLA members’ experience with plaintiff and defense experts; lists describing instances of discovery abuse encountered by ATLA members; and depositions retained on experts and corporate representatives. *Id.*

<sup>2</sup> *Embry v. General Motors Corp.*, 565 P.2d 1294, 1297 (Ariz. 1977) (holding that defendant did not have an obligation to warn of an alleged design defect in a wrongful death action where there was no allegation that the automobile was constructed and designed with defects).

“Why not?”, he replied that he had signed a secrecy agreement and agreed not to talk to anyone about the case. I suggested that since I already knew he had commenced the action, I did not really need to speak with him; all I needed was the discovery file. “Sorry,” he said, “I had to return everything to the defendant when the case was disposed of.”

Contrast these events with a recent case I handled where the defense claimed that their product design department had not even undertaken a failure analysis of its forklift design. Fortunately, I had obtained a product failure analysis by that same defendant from the case file of an attorney in another jurisdiction where a settlement was reached without a secrecy agreement.

Generally, when defense counsel ask for secrecy agreements, it indicates to me that his client wishes to cover up or impede an investigation of the defective product. If my client desires a settlement, I try to negotiate a “will not seek publicity” agreement. This is an agreement that allows me to answer inquiries about the lawsuit, but requires that I do not report the settlement.

Sometimes these agreements are termed “confidential” so as to imply that the company desires to avoid adverse publicity. This is not the case. I have a broad range of litigation experience, and I have never seen a case settled by a defendant because it was afraid of publicity. I have tried scores of medical malpractice cases, dozens of product liability lawsuits, and a multitude of cases involving physical assaults ranging from molestation to rape. From these, I have found it is always the defendant who asks for secrecy as a part of the settlement. Moreover, I have never seen a defendant ask for an anonymous caption in order to protect its name while it mounts a defense to plaintiff’s claims.

Recently I had the privilege of representing the State of New York in its tobacco litigation.<sup>3</sup> The big tobacco companies had engaged in a scandalous conspiracy through two front organizations known as the Tobacco Institute and the Council on Tobacco

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<sup>3</sup> New York v. Philip Morris, Inc., 686 N.Y.S.2d 564, 573 (Sup. Ct. 1998) (approving settlement in suit against tobacco company arising out of tobacco related illnesses suffered by Medicaid recipients and New York State employees).

Research.<sup>4</sup> If it were not for the open pre-trial discovery of industry documents by plaintiff's counsel, which disgorged a plethora of documents, this conspiracy might still be on-going. If secrecy orders had been in place in this instance, they would have only served to conceal the truth. Fortunately, through the open pre-trial discovery, our courts exposed the true nature of tobacco's health menace. If this conspiracy had not been exposed by the courts, many more people would have been at risk of death by cigarettes. This is just one example that revealing the truth is the greatest service courts can offer the public.

There should be no question that the courts belong to the public, but who is the public? Myself and everyone in this room? I am an individual who wants to decide for myself whether there is harm in a product. Defense counsel typically make credible and persuasive arguments concerning an "overwhelming scientific body" of work that concludes, for example, that silicone implants are safe. Nonetheless, there exists a huge body of anecdotal evidence concerning the lack of safety of those products. With slight alterations, these remarks would make a great opening for a defendant in a product liability lawsuit. I myself have handled a number of silicone breast implant cases.<sup>5</sup> Just this week I visited a plastic surgeon in connection with a cosmetic injury case, and we just happened to talk about breast implants. Despite everything that has been written in defense of breast implants, the surgeon commented, "Yes, I know all about those studies, but it is interesting because every time I remove the implants, the patient gets better." Consumers want to know specifically about the product claims. They are aware that much of the "scientific" information

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<sup>4</sup> The Council for Tobacco Research - U.S.A. (formerly the Tobacco Industry Research Committee) is an organization formed jointly by several tobacco companies in 1954. See STANTON A. GLANTZ ET AL., *SMOKING AND DISEASE: THE TOBACCO INDUSTRY'S EARLIEST RESPONSES* (1996), available at <http://www.library.ucsf.edu/tobacco/cigpapers/book/chapter2/5.html>. The tobacco industry's stated purpose in creating the council was to fund independent scientific research to determine whether scientific reports linking smoking and lung cancer were true. *Id.* However, there are documents that show that the council was formed for public relations purposes, in order to convince the public that the hazards of smoking had not been definitively proven. *Id.*

<sup>5</sup> See, e.g., *In re Breast Implant Litig.*, 656 N.Y.S.2d 97 (Sup. Ct. 1997).



that has been produced has been financed by the industry and revealed selectively. The public wants to hear from both sides of the controversy and then decide for itself.

I have handled cases in which federal agencies were involved, where their efforts fell short in getting information out. For example, in dealing with the engine mounts in the GM case, the Consumer Products Safety Commission ("CPSC")<sup>6</sup> made an inquiry of GM as to an engine mounts part with a certain serial number. The CPSC wanted to know all about the number of cases involving that specific part. GM responded in writing that there were only a few claims, and all were without merit. This response was accepted by the CPSC. As it turns out, the same part bore a different serial number in various GM product lines and those automobiles suffered many such failures. Consequently, what GM did in answering the CPSC was to hide all of the other failures of that very same product. Litigation eventually uncovered the truth.

The CPSC is underfunded, understaffed, and in need of assistance. Open courtrooms will assist the agency in discovering information corporate defendants wish to hide and reveal it to the public. Open courts, therefore, play a vital role in ensuring safety. Only a very small number of cases actually come to the CPSC's attention. Moreover, the rule-making process favors industry. Before a regulation is adopted, industry representatives develop the proposal and ultimately shape the final regulation through their input. In some well-known instances, such as gas tank protection,

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<sup>6</sup> The CPSC is an independent federal regulatory agency that was created by Congress in 1972 arising from the Consumer Product Safety Act. See CPCS - Who we are - What we do for you, available at, <http://www.cpsc.gov/cpsc/pub/pubs/103.html>. The commission has jurisdiction over 15,000 types of consumer products. *Id.* The mission of the CPSC is to inform the public about product hazards and to reduce the risk of injuries and deaths from consumer products by developing voluntary industry standards including: issuing and enforcing mandatory standards; banning consumer products if no feasible standard would adequately protect the public; obtaining the recall of products or arranging for their repair; conducting research on potential product hazards; informing and educating consumers through the media, state and local governments and private organizations; and by responding to consumer inquiries. *Id.*

the automobile industry prevented the adoption of effective regulations.

We cannot rely on the federal government or federal and state agencies to protect us. We have to rely on ourselves. My basic belief, very much like Judge Weinstein's, is that the courts belong to the public. We pay for the system, and we serve in it. Every one of us may now be summoned to serve as a juror. As citizens, we have a right to know what goes on in our courts. When courts are open, and people know they are open, there is a greater respect for the judicial system. Decisions openly arrived at elevate the court's esteem and serve a great public good.<sup>7</sup>

It is understandable that a company would wish to keep a proprietary formula secret. I also can understand why a company would want to keep costs and sales figures secret as well. I can also understand privacy in matters relating to adoption, divorce, and other intra-family disputes. With those limited exceptions in mind, I fail to see the benefit to the public of secrecy in other matters. I wish to reiterate my earlier point that I have never seen a case settled because a party wanted to avoid the publicity a trial may bring. I have, in fact, tried cases where manufacturers have spent more money defending the case than it would have taken to settle the case.

Finally, today, there is a tremendous amount of distrust of government. The best and most accessible place where one may see the government at work is in open court. There is no reason to seal the courtrooms.

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<sup>7</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980).

People assemble in public places not only to speak or to take action, but also to listen, observe, and learn . . . a trial courtroom also is a public place where the people generally – and representatives of the media – have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

*Id.* (internal citations and footnote omitted).

