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Federal Antisecrecy Legislation: A Model Act to Safeguard the Public from Court-Sanctioned Hidden Hazards

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FEDERAL ANTISECRECY LEGISLATION: A MODEL ACT TO SAFEGUARD THE PUBLIC FROM COURT-SANCTIONED HIDDEN HAZARDS

*Andrew D. Miller**

It is perfectly appropriate for the parties to a lawsuit to insist that everything that's happened in the lawsuit will be kept confidential if that helps encourage settlement.

Peter Bleakly, Xerox Corporation lawyer[1]

Consumers suffer serious injury and death from hazards that are concealed by confidential settlements.

Dianne Jay Weaver, Board of Governors, Association of Trial Lawyers of America[2]

They paid my clients a ton of money for me to shut up.

Allan Kanner, Zomax Victims' lawyer[3]

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* Solicitations Editor, 1992–1993, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. I would like to thank my loving and supportive fiancee Wendy Kaplan for all of her help.

[1] *Open Court Records to Protect Public*, USA TODAY, Mar. 16, 1989, at 6A.

[2] Dianne Jay Weaver, *Secrets That Can Kill Have No Place In Our Courts*, 19 PRODUCTS SAFETY LIABILITY REP., 701, 701 (1991). The prepared statement of Devra Davis, Ph.D., before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate, 101st Cong., 2d Sess. 3–4 (May 17, 1990), highlighted the effect of court-sanctioned secret settlements. In 1983, Ms. Davis suffered a potentially fatal anaphylactic reaction to the drug Zomax. At some point after her adverse reaction to the drug, Ms. Davis learned that as many as three years ago others had suffered similar reactions to Zomax, and that some of these individuals had died. The drug's manufacturer successfully concealed information regarding Zomax's fatal complications through court-sanctioned settlement agreements. *Id.*

[3] *Open Court Records to Protect Public*, *supra* note 1, at 6A.

I. INTRODUCTION

The proliferation of protective orders, confidentiality or "secrecy" agreements, and sealed court files has brought charges that a system of private justice has taken over our public court system, and left in its wake the potentially deadly reality of environmental hazards, medical malpractice, and defective products.[4] Because most civil cases settle before trial, the possibility exists that defense counsel will attempt to suppress discovery information and settlement terms by offering plaintiffs large cash payments in exchange for confidential settlements.[5] This cash-for-silence exchange, ensuring the confidentiality of the terms of the agreement and the information exchanged in discovery, is called a "secrecy agreement."[6]

The use of secrecy agreements in civil cases has steadily risen since the mid-1970's, while demands for court issued protective orders are now routine practice among defense attorneys in products liability cases.[7] The threat to public health and safety that secrecy agreements and protective orders pose, is elevated by the systemic pressure placed on judges to promote settlement, expedite cases, and sanction agreements reached between parties.[8]

Since the 1988 *Washington Post* series "Public Courts, Private Justice," the media have given the issue of secret settlements widespread attention.[9] As a result of this national exposure, states have responded by developing antisecrecy laws and court rules to reduce the number of secret agreements, and court orders that limit public access to court record information pertinent to the public health and safety.[10] Recently four states have passed antisecrecy legisla-

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[4] *See* Herb Jaffe, *Public Good vs. Sealed Evidence*, NEWARK STAR LEDGER, Sept. 2, 1990, § 3, at 1; *see generally*, Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice: Court Secrecy Masks Safety Issues*, WASH. POST, Oct. 23, 1988, at A1, A22.

[5] *See* Joseph F. Sullivan, *In Lawsuits, How Much Should the Courts Keep Secret?*, N.Y.TIMES., Mar. 3, 1991, § 4, at 6. About 97% of all civil suits nationally are settled. *Id.* (statistic from Sanford N. Jaffe, Director of the Center for Negotiation and Conflict Resolution at Rutgers University).

[6] *See* Tripp Baltz, *Shhhh–Confidentiality in the Courts*, CHI. LAW., Jan. 1991, at 1; FED. R. CIV. P. 26(c); *see also infra* note 19 and accompanying text.

[7] *See* Walsh & Weiser *supra* note 4, at A22; Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, DALLAS MORNING NEWS, Nov. 22, 1987, at 1A. In Dallas County alone, between 1980 and 1987, judges issued 200 sealing orders in cases not involving child-related issues where sealing orders are commonly used to protect the minors involved. *Id.*

[8] *See* Walsh & Weiser, *supra* note 4, at A22.

[9] *See id.*

[10] *See* Amy Dockser Marcus, *Firms' Secrets Are Increasingly Bared by Courts*, WALL. ST. J., Feb. 4, 1991, at 1, § B.

tion,[11] while four other states have adopted antisecrecy court rules.[12]

The success of the antisecrecy drive is a source of current controversy. Opponents of the movement claim that antisecrecy bills failed in eighteen states in 1991 alone.[13] A national debate has developed over confidentiality in the courts: a debate that pits the public's right to know what transpires in the public court system squarely against the individual's right to privacy.[14] As attorneys battle over the policy issues involved and the fundamental questions raised about the purpose and role of the American court system, public attention has turned to the United States Congress, where the fate of antisecrecy legislation lies.[15]

From an environmental standpoint, the limiting of access to discovery evidence and settlement information poses a risk to public health and safety.[16] Court-sanctioned secret settlements and protective orders have resulted in non-disclosure of information as important to public health as the release of toxins into ground water and the air by corporations.[17] Not only is the public denied access to information pertaining to the destruction of critical environments because of court sanctioned secret settlements and protective orders, but secret agreements also hinder the ability of agencies to take legal action against the source of such hazards.[18]

This Comment proposes that the present standard of review for the issuance of protective orders[19] is ineffective, and that Congress

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[11] As of October 18, 1991, four states had enacted antisecrecy legislation. *See* FLA. STAT. ANN. § 69.081 (West Supp. 1991); N.C. GEN. STAT. §§ 132–12.2 (1989); OR. REV. STAT. § 30.42 (1991); VA. CODE ANN. §§ 8.01–420.01 (West Supp. 1990).

[12] *See* DEL. CT. CIV. P. R. 9(bb) (1990); N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1 (1990); SAN DIEGO COUNTY SUP. CT. R., DIV. II, Rule 6.9 (1990); TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991).

[13] *See* MA. LAW. WKLY., *Lawmakers Say 'Nyet' To 'Court Glasnost'*, May 27, 1991, at 3.

[14] *See* Baltz, *supra* note 6, at 1.

[15] *See generally Senate Panel Urged To Curb Closure Of Civil Case Records To Protect Public*, DAILY REP. FOR EXECUTIVES (BNA) No. 97, at A-14 (May 18, 1990). [hereinafter *Senate Panel*].

[16] *See* Sullivan, *supra* note 5, at 6.

[17] *See* Martin H. Freeman & Robert K. Jenner, *Just Say No; Resisting Protective Orders*, TRIAL, 66, 70 & n.26, 71 (citing *Del Monte v. Xerox Corp.* No. 14121/86 (N.Y. Sup. Ct., Monroe County Aug. 15, 1989)). In the *Del Monte* settlement, the Xerox Corporation exchanged a $4.75-million offer for a confidentiality stipulation that bound two families, suing on behalf of their children who had contracted cancer, not to disclose information that Xerox had released toxic chemicals into local groundwater and into the air. *Id.*

[18] *See* Senate Panel, *supra* note 15, at A-14.

[19] FED. R. CIV. P. 26(c). The provision states that

> 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,

must formulate an antisecrecy law that has as its primary purpose the protection of public health and safety. Section II of this Comment discusses the arguments for and against antisecrecy legislation in general. Section III examines two major antisecrecy state statutes: Rule 76a of the Texas Rules of Civil Procedure, regarding the sealing of court records,[20] and Section 69.081, the Florida Sunshine in Litigation Act, which prohibits concealment of a public hazard in a court order, judgment, agreement or contract.[21] Section IV of this Comment establishes the goals and purposes of federal antisecrecy legislation. Finally, Sections V and VI conclude by proposing and explaining a federal antisecrecy statute that would provide access to information pertinent to public health and safety and declare void any settlement or contract that has the effect of concealing a public hazard. The proposed statute would safeguard both the legitimate privacy rights of individuals and the interests of business.

II. ANTISECRECY LEGISLATION: HOW THEY WORK, AND DO THEY WORK?

A. How Confidentiality Orders Work

At both the federal and state level there are three ways to assure that discovery documents and settlement terms remain confidential. First, defendants may request a protective order during the discovery phase of litigation. Such an order would allow the release of internal documents on the condition that their contents remain confidential.[22] The scope of a protective order may cover the release of only one document, or, if an "umbrella" order is issued, may include many documents.[23] Umbrella orders, classifying all exchanged documentation as confidential, eliminate the burdensome court task of

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> oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specific terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. . . .

Id.

[20] TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991).

[21] FLA. STAT. ANN. § 69.081 (West Supp. 1990).

[22] *See* Elsa Walsh & Benjamin Weiser, *Early Warning Signals on Safety Often Ignored in Rush to Secrecy*, WASH. POST, Oct. 23, 1988, at A1.

[23] *See* Freeman & Jenner, *supra* note 17, at 67–68.

sifting through reams of discovery material for confidential content.[24] A judge may issue a protective order, of any scope, over the objection of opposing counsel.[25]

Second, both parties to a settlement may agree privately on the confidential nature of the settlement and ask the judge to dismiss the lawsuit.[26] Settlement agreements contingent on confidentiality stipulations are attractive to all involved. Confidentiality stipulations allow the plaintiff's attorney to obtain a larger settlement in exchange for the agreement, the defense attorney to conceal effectively the client's faults, and judges to clear dockets by avoiding lengthy trials.[27] In most cases, plaintiffs cannot afford to wait for a verdict and view the settlement offer as a risk-free alternative.[28]

Finally, the parties may request that the court seal the entire lawsuit file, removing all aspects of the suit, from original filings to settlement terms, from public access.[29] A party seeking to seal the entire court record in a case must meet procedural and substantive common law requirements.[30] Suits filed under a sealing order receive the label *Sealed v. Sealed*, completely protecting the identity of the parties and providing only the name of the approving judge.[31] Sealing orders may be so inclusive as to contain stipulations to bar access to information otherwise available under the Freedom of Information Act.[32]

B. The Arguments Against Antisecrecy Legislation

The opponents of open court records believe that the current system of judicial discretion under Federal Rule of Civil Procedure (FRCP) 26(c) works, and that antisecrecy legislation is an unnecessary interference with the judicial role of establishing the balance between the litigant's privacy rights and the public's common law

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[24] *Id.*

[25] *See* Walsh & Weiser, *supra* note 22, at A1.

[26] *Id.*

[27] *Id.* Typically settlements contain no admission of fault. *Id.*

[28] *See* Alan Abrahamson, *New Ruling Lifts Veil of Secrecy in Civil Cases*, L.A. TIMES, Sept. 9, 1990, at 1, Metro, part B.

[29] *See* Walsh & Weiser, *supra* note 22, at A1.

[30] Ernest E. Figari, Jr. et al., *Annual Survey of Texas Law: Civil Procedure*, 45 SW. L.J. 73, 84 & n. 107; *see, e.g.*, *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) (public must be given opportunity to present views against sealing); Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (as procedural requirement, movant must give "proper notice" to public). *Id.*

[31] *See* Walsh & Weiser, *supra* note 4, at 22.

[32] *See* Jaffe, *supra* note 4, § 3, at 1.

right of access to court records.[33] Under FRCP 26(c), upon a showing of good cause by a movant, a judge may issue a protective order to safeguard a party from annoyance, embarrassment, oppression, or undue burden or expense.[34] Working under the rule, judges have discretion to refuse protective orders where secrecy would compromise public health and safety.[35] Opponents claim that secrecy agreements are beneficial because they keep defendant's private affairs confidential, bring suits to their fruition more quickly, and compensate plaintiffs in a risk-free and efficient manner.[36] Opponents of antisecrecy legislation also believe that confidentiality orders are necessary to protect the public from inaccurate safety and health information that otherwise would become public upon settlement.[37]

Opponents of antisecrecy legislation contend that an avalanche of additional suits will result from any legislation that prevents the sealing of settlements from public access.[38] If litigants are not firmly assured that a settlement will put an end to a suit, then incentive to settle is lost, and the result is an increase in litigation.[39] This influx of litigation, opponents argue, will increase congestion in the already overburdened court system.[40] Moreover, widespread publication of settlements will hinder the ability of a company, or other defendant, with multiple lawsuits pending to obtain an impartial jury in subsequent litigation.[41]

Openness legislation, its opponents argue, will encourage frivolous lawsuits.[42] Business interests believe an influx of frivolous litigation will directly threaten the protection of trade secrets, presently safeguarded through protective orders issued under FRCP 26(c).[43] With a decrease in the issuance of protective orders, many in the business

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[33] *See Senate Panel, supra* note 15, at A-14; Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). "The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."*Id.*

[34] FED. R. CIV. P. 26(c); *see supra* note 19 and accompanying text.

[35] *See* Baltz, *supra* note 6, at 1.

[36] *See* Dolores Ziegler, *Letting 'Sunshine' in; California Joins Trend to Strip Secrecy from Court Files*, S.F. DAILY J., Oct. 29, 1990, at 1.

[37] *See Senate Panel, supra* note 15, at A-14. Testimony of Arthur R. Miller, Harvard University Law Professor, before the Senate Judiciary Subcommittee on Courts and Administrative Practice, May 17, 1990. *Id.*

[38] *See* Baltz, *supra* note 6, at 1; Abrahamson, *supra* note 28, at 1, Metro, part B.

[39] *See Texas High Court Cuts into Secrecy in Civil Suits*, N.Y. TIMES, Apr. 23, 1990, at 17.

[40] *See Senate Panel, supra* note 15, at A-14.

[41] *See* Abrahamson, *supra* note 28, at 1, Metro, part B.

[42] *See* Marcus, *supra* note 10, at 1, § B.

[43] *See id; see also* note 19 and accompanying text.

community fear that competitors will initiate suits solely to unearth business secrets,[44] and that "special interest" groups will use antisecrecy legislation to further their efforts to obtain information for future, related trials.[45]

The privacy right of the litigant is the major concern of antisecrecy legislation opponents.[46] The privacy argument stems from the belief that public access to the confidential information that a defendant reveals to defend itself is not a right established simply because another party has elected to sue the defendant.[47] Opponents to open court records argue that the role of the American civil justice system is not to act as a means of disseminating information, but is to resolve disputes efficiently and fairly.[48] Defense attorneys, the most vocal opponent to antisecrecy legislation, contend that the public may have a right of access to non-confidential court records, but that pre-trial discovery is, and should remain, private.[49]

Defense attorneys criticize the plaintiffs' attorneys fervent support of the antisecrecy movement as a self-interested attempt to benefit commercially their industry.[50] Many defense attorneys believe that by grandstanding public settlements for media coverage, plaintiffs' attorneys are selfishly trying to gain public exposure that will lead to future clients.[51] Opponents of the movement point to abuses already prevalent in the discovery process, for example the sale of discovery documents to other plaintiff's attorneys for future litigation, as indicia of the plaintiffs' bar's motivation for support of antisecrecy measures.[52]

Finally, opponents of antisecrecy legislation suggest that the present system of issuing protective orders does not block the plaintiffs'

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[44] *See* Baltz, *supra* note 6, at 1. If trade secrets become revealed as a result of antisecrecy legislation, then "industrial espionage will be put out of business." *Id.*

[45] *See* Abrahamson, *supra* note 28, at 1, Metro, part B.

[46] *See* Diane Burch, *Record-Sealing Plan Already Drawing Fire*, TEX. LAW., Feb. 26, 1990, at 4.

[47] *See* Baltz, *supra* note 6, at 1. *Id.*

[48] *See* Andrew Blum, *Anti Secrecy Drive Spreads in the States*, NAT'L L.J., Jan. 14, 1991, at 3, 28.

[49] *See* Barry Siegel, *Dilemmas of Settling in Secret; Companies Offer Hefty Sums in Exchange for Keeping the Details of Public-Hazard Lawsuits Quiet. Plaintiffs Must Choose their own Interest or the Public Good*, L.A. TIMES, Apr. 5, 1991, at 1. Siegel argues that not all lawsuits are meritorious and that a company's private files should not immediately be subject to disclosure at commencement of a suit when the action may be little more than a "fishing expedition" on the part of plaintiff's attorney. *Id.*

[50] *See id* at 1.

[51] *Id.*

[52] *See* Terry O'Reilly, *Put an End to Secret Settlements*, CAL. LAW., Oct. 1990, at 128.

attorneys from obtaining information and creating public awareness of hazardous products.[53] Defense attorneys claim that protective orders are already difficult to obtain,[54] and forecast the ineffectiveness of antisecrecy legislation by predicting that the judge faced with a crowded docket will not risk losing a settlement over the issue of confidentiality.[55]

C. Arguments for Antisecrecy Legislation

Most states have no statute or court rule that either establishes a uniform method for issuing protective or sealing orders, or mandates guidelines for judges to follow in dismissing a lawsuit in the wake of a confidential settlement.[56] On the federal level, FRCP 26(c) provides that a judge consider solely the privacy interests of the litigants in determining "good cause" for the issuance of a protective order.[57] The results of this "good cause" analysis are an almost casual disregard by some judges for Rule 26(c) because of their overwhelming case load, and the lack of a disinterested party to present the public interest viewpoint in the decision-making process.[58] Proponents of antisecrecy legislation are of the opinion that this "good cause" standard is inadequate to safeguard the public from hidden hazards, and is easily manipulated by business interests to conceal health and safety information.[59]

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[53] *See* Ziegler, *supra* note 36, at 1.

[54] *See* Baltz, *supra* note 6, at 1.

[55] *See, e.g.*, Abrahamson, *supra* note 28, at 1, Metro, part B.

[56] *See* Ziegler, *supra* note 36, at 1.

[57] *See* FED. R. CIV. P. 26(c); Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 657 (1991).

[58] *See* Baltz, *supra* note 6, at 1; Ziegler, *supra* note 36, at 1. The media challenges only 2% of sealing order or gag order cases (usually for high-profile, criminal cases). This leaves 98% of all cases involving confidentiality orders of any sort uncontested. Ziegler, *supra* note 36, at 1. According to Roderic Duncan, an Almeda County Superior Court judge, "[i]n those cases (the remaining 98%), most judges do not stop to question whether to approve confidentiality agreements." *Id.* Justice Lloyd Doggett of the Texas Supreme Court feels that judges have not taken to heart the import of sealing agreements. According to Doggett, "[m]any judges have shirked their responsibilities." Ronald J. Ostrow, *Secrecy Accords in Product Liability Lawsuits Debated*, L.A. TIMES, Apr. 26, 1990, at 16, part A.

[59] *See Senate Panel*, *supra* note 15, at A-14; *cf.* Daniel Wise, *Abrams Advocates Government Access to Court-Sealed Files*, N.Y.L.J., Apr. 12, 1991, at 1. New York State Attorney General Robert Abrams, in advocating antisecrecy legislation for New York, said that this type of legislation is needed because of a "disturbing trend toward secrecy agreements." *Id.* He asserted that "potentially life-saving information about unsafe products or toxic exposure may be locked away in sealed court files or concealed by private agreements, forcing the government and the public to wait for years to find out about possible health hazards." *Id.*

Proponents of antisecrecy legislation believe that secrecy agreements have increased at an alarming rate[60] because the overburdened court system is not checked for abuses, and because the discretion to seal court records and dismiss suits after confidential settlements is in the hands of a busy judge.[61] Secrecy agreements, these proponents point out, were originally intended to safeguard trade secrets and highly personal information.[62] Proponents argue that judges now routinely sign protective orders for a wide variety of documents if all the parties have agreed to the order.[63]

Central to the openness movement is the belief that the public has a "right to know" what transpires in the publicly funded court system.[64] "Right-to-know" supporters contend that when private litigants use publicly funded courts to resolve their disputes, these suits become public business, and the public has a basic right to know how the parties are resolving them.[65] Right-to-know theorists hold that the public should have access to information about courts and their proceedings on the basis of the public's First Amendment right to freedom of speech[66] and the common law grant of access to court records.[67]

Proponents of the "openness movement" believe antisecrecy legislation will not discourage settlements or significantly increase litigation.[68] They contend that if parties act in good faith and with the knowledge that judges will not approve settlement agreements that run counter to public health and safety interests, then large money settlements that conceal public hazards will disappear, thus leaving the cases that would naturally settle to continue to do so.[69] These

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[60] *See* Andrew Blum, *A Public Gathering Discusses Trial Secrecy*, NAT'L L.J., May 7, 1990, at 14. A 1988 *Washington Post* investigative report *"Public Courts, Private Justice,"* found 200 lawsuits sealed in 1988 in Washington D.C., along with hundreds of confidentiality orders. *See id. The Dallas Morning News* uncovered 282 sealed cases in Dallas County in 1987. *See id. The Chicago Daily Law Bulletin* unearthed over 500 cases sealed in Cook County Circuit Court in the last decade despite an Illinois law allowing for public access to court records. *Id.*

[61] *See* Ostrow, *supra* note 58, at 16, part A.

[62] *See* Weaver, *supra* note 2, at 701; FED. R. CIV. P. 26(c); *supra* note 19 and accompanying text.

[63] *See* Jaffe, *supra* note 4, at § 3, 1; Ziegler, *supra* note 36, at 1.

[64] *See* Ziegler, *supra* note 36, at 1.

[65] *See* Prepared Statement of Justice Lloyd Doggett, Supreme Court of Texas, before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate, 101st Cong., 2d Sess. 2 (May 17, 1990); Weaver, *supra* note 2, at 701.

[66] U.S. CONST. amend. I, § 2.

[67] *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). Baltz, *supra* note 6, at 1.

[68] *See* Weaver, *supra* note 2, at 701.

[69] *Id.*

proponents state that if antisecrecy legislation passes, there will be a small group of cases that may not settle without a confidentiality agreement, but that these are exactly the type of cases at which the legislation is aimed, namely "hush money" exchanges for the concealment of public hazards.[70] Thus, proponents of antisecrecy legislation believe that even if such legislation produces more litigation, this result is in the public's best interest.

In addition, proponents argue that antisecrecy legislation will also alleviate an ethical dilemma confronting plaintiffs' attorneys. An attorney has an ethical duty to serve his or her client's best interest and legally fulfill his or her client's objectives.[71] If a client, for whatever reason, is not concerned with the effect that a confidential settlement may have on the health and safety of the general public, then the client's attorney is obligated to defer to the client's preference for a high settlement in exchange for a secrecy agreement.[72] The terms of the settlement may bar any involved party from discussing any aspect of the case with any third party.[73] Thus, if antisecrecy legislation prevents judges from sealing settlement records that contain information pertinent to public health and safety, plaintiffs' attorneys will be confronted with such ethical dilemmas in fewer instances.[74]

Proponents of antisecrecy legislation, most notably plaintiffs' attorneys, refute defense attorneys' claims of the evils of information-sharing and the plaintiffs' bar's self-interested impetus behind their support of the openness movement. Plaintiffs' attorneys argue, sharing information promotes efficiency and saves court time and client money.[75] The probability that one attorney will share information about a specific case with another attorney is not sufficient "good cause" to justify a protective order under FRCP 26(c).[76] United States District Court Judge H. Lee Sorkin, famous for his tough stance against manufacturer secrecy in the cigarette industry, believes that plaintiffs begin suits at a disadvantage in having to invest

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[70] Marcus, *supra* note 10, at 1, sec. B.

[71] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1990). "A lawyer shall not intentionally: Fail to seek the lawful objectives of his client through reasonably available means . . ." *Id.* at (A)(1).

[72] *See* Siegel, *supra* note 49, at 1.

[73] *See* Jaffe, *supra* note 4, § 3, at 1.

[74] *Id.*

[75] *See* Larry E. Coben, *Protective Orders; Manufacturers Hide Behind Them*, TRIAL, Aug. 1986, at 34.

[76] *See* Patterson v. Ford Motor Co., 85 F.R.D. 152, 153–54 (D. Tex. 1980).

considerable time and money into the discovery process, and that requiring each plaintiff to duplicate the steps of a lengthy discovery wastes the court's and the plaintiffs' resources.[77] Plaintiffs' lawyers also summarily dismiss the charge that the Plaintiffs' bar support of openness legislation is a self-interested attempt to drum up business by pointing to the fact that people rarely remember an attorney's name from a previous case.[78]

III. TEXAS' RULE 76A AND FLORIDA'S SUNSHINE IN LITIGATION ACT

Two distinct approaches to antisecrecy legislation have emerged from the myriad of state initiatives. Texas' Rule of Civil Procedure 76a (Rule 76a) creates a "presumption of openness" affirming public access to all court records.[79] This "presumption of openness" is only overcome if a party seeking to seal court records, demonstrates, after a public hearing, a specific, serious and substantial privacy interest in sealing the record in question.[80] The moving party's privacy interest must outweigh any adverse effect on public health and safety, and there must exist no less restrictive means than sealing the document to protect that interest.[81]

The Florida Sunshine in Litigation Act is the type of antisecrecy legislation most commonly proposed in other states.[82] In contrast to the hearing procedure of Rule 76a, the Florida statute categorically forbids courts from entering any order that has the effect of concealing a public hazard or information pertaining to a hazard.[83] The statute further empowers the court to void contracts or agreements designed to conceal public hazards, and requires disclosure of any information brought to the court's attention which may involve potential public hazards.[84]

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[77] Jaffe, *supra* note 4, at § 3, 1.

[78] *See* O'Reilly, *supra* note 52, at 128.

[79] TEX. R. CIV. P. ANN. r. 76a(1) (West Supp. 1991).

[80] *Id.*

[81] *Id.*

[82] FLA. STAT. ANN. § 69.081 (West Supp. 1991). Legislation similar or identical to the Sunshine in Litigation Act was proposed in California, Hawaii, Maine, New Jersey, and Pennsylvania. *See Summary of Developments on Secrecy Issue*, American Trial Lawyers Association, Oct. 18, 1991. In Michigan, a court rule incorporating the "public hazard" concept was also proposed. *Id.*

[83] FLA. STAT. ANN. § 69.081 (3) (West Supp. 1991).

[84] *Id.* at 4.

A. Texas Rule of Civil Procedure 76a: "Justice—not just us"[85]

After much debate and compromise, the Texas Supreme Court, by a five-to-four vote, adopted Rule 76a.[86] A response to the growing abuse of secrecy agreements,[87] Rule 76a chipped away at the traditional shape of the American civil suit by creating a "presumption of openness" for all civil court records.[88] In essence, Rule 76a is a restructuring of the process in which courts issue protective, or sealing orders.[89]

1. The Rule 76a Balancing Test

Following the common law tradition,[90] Rule 76a mandates that any civil suit filed in the state of Texas proceed with the presumption that all "court records" involved in the suit are open to the public.[91] Under Rule 76a, a movant must do more than simply establish the "good cause" required under FRCP 26(c) to receive a protective or sealing order to shelter the movant from the risk of possible "annoyance, embarrassment, oppression, or undue burden or expense."[92] The Texas approach differs from the approach of those federal courts that do not weigh the public interest in their "good cause"/protective order decision-making process.[93]

Under the Rule 76a balancing test, the movant must demonstrate,

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[85] *See* Blum, *supra* note 60, at 14. (Justice Lloyd Doggett's slogan for future of public involvement in decision to seal court records).

[86] *See* Lloyd Doggett, *Keeping Court Records in the Open; Texas Supreme Court Adopts New Rule*, TRIAL, July, 1990, at 62, 62. The Texas Supreme Court was inundated with warnings from the Product Liability Advisory Council, the Texas Association of Defense Counsel, and the American Tort Reform Association about the ill-advised choice the Court was making in the adoption of this rule and the dire economic consequences that would result. *Id.*

[87] *See*, Doggett & Mucchetti, *supra* note 57, at 645. In Dallas County, in non-child-related cases between 1980 and 1987, judges entered 200 sealing orders covering cases involving environmental hazards, medical malpractice, and defective products. *Id.*

[88] TEX. R. CIV. P. ANN. r. 76a(1)(a)(1) (West Supp. 1991).

[89] *See* Clara Tuma, *Court Passes Sweeping New Rules on Sealed Records; Hightower Casts Deciding Vote on Access to Discovery Documents*, TEX. LAW., Apr. 23, 1990, at 4.

[90] *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); *see also supra* note 26 and accompanying text.

[91] TEX. R. CIV. P. ANN. r. 76a(1) (West Supp. 1991). This section provides that court records, as defined in this rule, are presumed to be open to the general public. *Id.*

[92] *See* Doggett, *supra* note 86, at 63; *supra* note 19 and accompanying text.

[93] *Id.*

by a preponderance of the evidence, a specific, serious and substantial interest that clearly outweighs the presumption of openness that attaches to all civil suit court records.[94] This balancing test assumes that a judge will take the time[95] to weigh the privacy interest of the movant against both the strong presumption of openness and the possible adverse effects that sealing may have on public health and safety.[96] In other words, Rule 76a's balancing test retains the judicial discretion inherent in the "good cause" standard of FRCP 26c, yet establishes guidelines that the court must follow to protect the public interest.[97] The rule does not assure public access to every court file, but theoretically does guarantee that the public safety and welfare are given more than a passing consideration.[98]

2. Definition of "Court Records"

In an effort to prevent attorneys from creatively maneuvering their case documentation beyond Rule 76a's reach, the rule's authors drafted the term "court records" to include most documents involved in a civil suit.[99] Rule 76a's "court records" definition is expansive. It even includes settlement agreements that, although not filed of record, contain provisions restricting the disclosure of information that

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[94] TEX. R. CIV. P. ANN. r. 76a(1) (West Supp.1991). The section provides that

> [c]ourt records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:
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> (a) a specific, serious and substantial interest which clearly outweighs:
>
> (1) this presumption of openness;
>
> (2) any probable adverse effect that sealing will have upon general public health or safety;
>
> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

Id.

[95] *See* Mark Ballard, *Courts Defang Much-Feared Rule: In Keeping Records Secret, It's Business as Usual*, TEX. LAW., Dec. 3, 1990, at 1. In only one of nine secrecy hearings conducted as of Dember 3, 1990, did a judge take longer then five minutes to pass on the secrecy request. *Id.* Even if the judiciary takes the balancing test procedure to heart, the terms of the balancing test may be so vague that they lend themselves to vastly differing judicial interpretations. *See* Herring, *infra* note 108, at 24.

[96] *See* Doggett, *supra* note 86, at 63.

[97] TEX. R. CIV. P. ANN. r. 76a(1) (West Supp.1991); *see supra* note 94 and accompanying text.

[98] *See* TEX. R. CIV. P. ANN. r. 76a(1) (West Supp. 1991).

[99] *See*, Doggett & Mucchetti, *supra* note 57, at 658.

may have an adverse effect upon public health or safety or concern the administration or operation of government.[100] This provision broadens the scope of documentation within the rules' coverage in an attempt to prevent parties from eluding Rule 76a by conditioning settlement on private nondisclosure or document destruction agreements.[101]

Excluded from Rule 76a's balancing test are discovery documents exchanged in cases initiated to protect bona fide trade secrets[102] and intangible property rights.[103] Like FRCP 26(c),[104] Rule 76a explicitly provides that courts must consider trade secrets as a substantial privacy interest under the balancing test analysis.[105] To discourage the use of discovery as a substitute for research and innovation,[106] Rule 76a's protections for trade secrets include requirements that the trade secret itself must be discoverable before the court applies the balancing test, that an opportunity for *in camera* inspection of the documentation must exist and, in the event the court denies a sealing or protective order for a trade secret, that the secret itself is not disclosed, but the court will reveal the hazardous effects of the product or procedure in question.[107]

The most controversial provision of Rule 76a defines court records to include pretrial discovery documents.[108] Any discovery, excluding

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[100] TEX. R. CIV. P. ANN. r. 76a(2)(a)–(b) (West Supp. 1991). The section provides that

> [f]or purposes of this rule, court records means:
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> (a) all documents of any nature filed in connection with any matter before any civil court, except:
>
> (1) documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents;
>
> (2) documents in court files to which access is otherwise restricted by law;
>
> (3) documents filed in an action originally arising under the Family Code.
>
> (b) settlement agreements, not filed of record, excluding all references to monetary considerations, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government;. . . .

Id.

[101] *See* Doggett & Mucchetti, *supra* note 57, at 659.

[102] BLACK'S LAW DICTIONARY 776 (5th ed. 1983). A trade secret is a "formula, pattern, device or compilation of information which is used in one's business and which gives one opportunity to obtain advantage over competitors who do not know or use it." *Id.*

[103] TEX. R. CIV. P. ANN. r. 76a(2)(c) (West Supp. 1991).

[104] FED. R. CIV. P. 26(c)(7). Protective orders may be authorized for "a trade secret or other confidential research, development or commercial information. . . ." *Id.*

[105] TEX. R. CIV. P. ANN. r. 76a(2)(c) (West Supp. 1991).

[106] *See* Baltz, *supra* note 6, at 1.

[107] *See* Doggett & Mucchetti, *supra* note 57, at 675.

[108] *See* Chuck Herring, *Sealing Court Records, Unanswered Questions and Unsolved Problems*, TEX. LAW., May 21, 1990, at 24; Tex. R. Civ. P. Ann. r. 76a(2)(c) (West Supp. 1991).

correspondence, exchanged or examined between counsel that may adversely effect public health or safety is subject to the balancing test.[109] Defense attorneys argue that Rule 76a's inclusion of pretrial discovery within the definition of "court records" that are open to the public is a departure from established American law.[110] In *Seattle Times v. Rhinehart*,[111] the Supreme Court of the United States concluded that under the common law, traditional discovery documentation, including unfiled depositions and interrogatories, was not open to the public as a matter of right.[112] Thus, defense attorneys feel justified in arguing that pretrial discovery materials, such as unfiled depositions and interrogatories, are inherently private,[113] and should not be subject to the Rule's balancing test. The discovery provisions of Rule 76a requiring retention of unfiled documents also have raised questions about attorneys' obligations to keep records, the length of time they must keep records, their responsibilities for closed files, and the extent of public access attorneys must allow to documents.[114]

In defense of Rule 76a's inclusion of pretrial discovery within its "court records" definition, Justice Lloyd Doggett, the architect of Rule 76a, points to *Anderson v. Cryovac, Inc.*,[115] which he believes resolves the ambiguities of *Rhinehart*.[116] In *Anderson*, the Supreme Court held that within FRCP 26(c)'s "good cause" framework, protective discovery orders are subject to First Amendment evaluation.[117] Doggett believes that Rule 76a fits neatly under the *Anderson* view that the court must consider the First Amendment right to access in its determination of whether good cause exists under the rules for the issuance of a protective order.[118] Under Rule 76a, only unfiled pretrial discovery documentation that contains matters

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The court records definition includes

> discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government. . . .

Id.

[109] *See* TEX. R. CIV. P. ANN. r. 76a(2)(c) (West Supp. 1991); Doggett & Mucchetti, *supra* note 57, at 662.

[110] *Id.*

[111] 467 U.S. 20 (1984).

[112] *Id.* at 33; *see also* Doggett & Mucchetti, *supra* note 57, at 660.

[113] *See* Siegel, *supra* note 57, at 1.

[114] *See* Herring, *supra* note 108, at 24; Doggett & Mucchetti, *supra* note 57, at 663–68.

[115] 805 F.2d 1 (1st Cir. 1986).

[116] *See* Doggett & Mucchetti, *supra* note 57, at 660–61.

[117] *Anderson*, 805 F.2d at 7.

[118] Doggett & Mucchetti, *supra* note 57, at 661.

concerning public health, safety or the operations of a governmental agency are even considered court records for purposes of the Rule 76a balancing test.[119] According to Doggett, Rule 76a is consistent with common law discovery privileges and is calculated to disclose only discovery evidence reasonably believed to be admissible.[120] Under the Rule, Texas courts may continue to issue protective orders regarding discovery, but now must make such decisions in accordance with the Rule 76a balancing test.[121]

3. Notice, Hearings, and Temporary Sealing Order

Rule 76a requires the holding of a public hearing before any sealing order is issued.[122] As part of the hearing process, movant must post notice of the hearing where meetings of county governmental bodies are usually posted.[123] This public notice must contain a brief description of the documents that the movant is requesting to have sealed, the moving party's identity, the location and time of the hearing, and the fact that the hearing is open to any party or nonparty intervenor.[124] The court will hold a hearing on the motion no earlier than fourteen days after proper notice is posted and the motion is filed.[125] In the interim period between the filing of the motion and

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[119] *See* TEX. R. CIV. P. ANN. r. 76a(2)(c) (West Supp. 1991); Doggett & Mucchetti, *supra* note 57, at 662.

[120] Doggett & Mucchetti, *supra* note 57, at 662.

[121] *See* Doggett, *supra* note 86, at 63.

[122] *See infra* note 124 and accompanying text.

[123] TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991). The section provides that

> [c]ourt records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted. . . .

Id.

[124] *Id.* The section provides that

> notice must state that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

Id.

[125] *Id.* (4). The section provides that

> [a] hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the pro-

the hearing, the court may issue a temporary sealing order if the movant sufficiently demonstrates that it will suffer irremediable injury before the posting of notice or the hearing.[126] A judicial order on a motion to seal court records is based on pleadings, affidavits, discovery results and oral testimony, and such order must contain, in writing, the specific balancing test findings and reasons for those findings along with the portion of the record sealed and the duration of the sealing order.[127]

4. Challenging a Rule 76a Sealing Order

Another controversial provision of Rule 76a recognizes the public's right to challenge a sealing order at any time.[128] Under Rule 76a, the court that issued the sealing order retains continuing jurisdiction over the sealed documents.[129] This continuing jurisdiction empowers the court to enforce, alter, or vacate any order.[130] Rule 76a allows

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ceedings, upon payment of the fee required for filing a plea of intervention. The court may inspect records *in camera* when necessary.

Id.

[126] *Id.* (5). The section provides that

[a] temporary sealing order may issue upon . . . showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. . . . The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

Id.

[127] *Id.* (6) (1990). The section provides that

[a] motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for the finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgement or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

Id.

[128] *See* Doggett & Mucchetti, *supra* note 57, at 681.

[129] TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991).

[130] *Id.* The section provides that

[a]ny person may intervene as a matter of right at any time before or after judgement to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing

any person to intervene before or after the rendering of judgment on the sealing petition.[131] The Texas Supreme Court intended to allow for public access to sealed documents when circumstances surrounding the original sealing order significantly changed and thereby rendered the sealing order invalid.[132] This provision has sparked opposition from defense attorneys who criticize the lack of security and finality that accompany a sealing order under Rule 76a.[133]

5. The Rule 76a Appeal Process

Rule 76a sets forth a process for appeal of sealing order decisions.[134] Any party that participated in the original sealing hearing may appeal any court order or portion of an order or judgment.[135] The appellate court is not only empowered to reverse trial court decisions but also is free either to reapply Rule 76a's balancing test or to redetermine whether the documents in question are properly categorized as "court records."[136]

6. Rule 76a's Past and Future

As of March 1992, available statistics showed that 181 Rule 76a hearing notices have been filed with the Texas Supreme Court Clerk.[137] These motions have involved cases covering a variety of topics, including business information, academic records, trade se-

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changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

Id.

[131] *Id.*

[132] *See* Doggett, *supra* note 86, at 64.

[133] *See* Tuma, *supra* note 89, at 4.

[134] TEX. R. CIV. P. ANN. r. 76a(8) (West Supp. 1991).

[135] *Id.* The section provides that

[a]ny order (or portion of an order or judgement) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgement which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

Id.

[136] *See* Doggett & Mucchetti, *supra* note 57, at 683.

[137] *See* Janet Elliott, *Ford's 76a Loss Sets Stage for Appeal*, TEX. LAW., Mar. 23, 1992, at 4.

crets, settlement accords, and the identity of a sexual abuse victim.[138] Defense attorneys, working with statistics from only the first fourteen motions to seal court records, paint a discouraging picture of Rule 76a's effectiveness.[139] Statistics show that courts granted eight of the nine motions for secrecy filed as of December 3, 1990.[140] In five of those cases, the judge sealed the entire file.[141] Of the nine requests for confidentiality, only five were opposed, and in only one of the nine hearings did the proceedings last more than five minutes.[142] Nonetheless, to date, there has been no appellate review of Rule 76a.

Despite mixed reviews of the effectiveness of the Texas model, the Wisconsin Senate has proposed an even more radical version of Rule 76a that creates stringent standards for judicially approved limiting access orders.[143] The most far-reaching of the antisecrecy legislation proposed to date, the Wisconsin statute would adopt Rule 76a's "presumption of openness" for court records, but would go further to include all discovery in any matter before the court within the statute's broad definition of "court records." This expands 76a's inclusion within the "court record" definition of only discovery that has an adverse effect on the general public health or safety.[144] Finally, Wisconsin's bill would immediately grant to any public official or other litigant access to information or documents within the statute's "court records" definition.[145] This access to court records would

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[138] *See* Doggett & Mucchetti, *supra* note 57, at 678, n.177.

[139] *See* Ballard, *supra* note 95, at 1.

[140] *Id.*

[141] *Id.*

[142] *Id.* In the one case in which the sealing hearing lasted more than five minutes, it appears the judge placed the burden on the plaintiff's lawyer to show why the court should not grant the motion. This is a misreading of the rule and cuts against Rule 76a's presumption of openness of all civil court records. *Id.*

[143] WIS. S. 213, 90th Leg.,(1991). (As of May 22, 1992 the Wisconsin Senate Committee on Judiciary and Consumer Affairs has amended and recommended a substitute bill for Senate Bill 213. Both bill proposals are pending). *Id.*

[144] *Id.* at § 3 (1)(b). The section provides that "the records of all civil actions include all discovery in any matter before the court, whether or not the discovery is filed with or submitted to the court." *Id.*

[145] *Id.* at § 3 (3).

> ACCESS BY GOVERNMENT OFFICIALS AND LITIGANTS. No court may enter an order limiting the access of any of the following persons to any of the information or documents referred to in sub. (1), even when the standards in sub. (2) have been met, if those persons submit themselves to the jurisdiction of the court for the purpose of enforcement of the court's order limiting access: (a) A federal, state or local official with regulatory, investigative, administrative, legislative, judicial, law enforcement

be absolute, regardless of the outcome of a party's motion to limit access, if the information is relevant to the public official or litigant.[146]

B. Florida's Sunshine in Litigation Act

Similar to Texas' Rule 76a, the Sunshine in Litigation Act ("the Act") is the Florida legislature's attempt to eliminate protective and sealing orders, as well as private agreements and contracts that conceal information concerning public hazards.[147] The Act provides that courts may not enter an order or judgment that conceals either a public hazard or any information pertaining to a public hazard.[148] The Act further prohibits courts from entering protective orders or judgements that conceal any information that the general public may find useful to protect itself from the dangers of a public hazard.[149]

Under the Act, any person "substantially affected" by an order, judgment, agreement, or contract that violates any of the Act's provisions has standing to contest the violating instrument.[150] To contest an order or judgment, a person may file a motion with the court that originally entered the order or judgment.[151]

To void a contract or agreement, a person may bring a declaratory judgment action in any court.[152] The primary purposes of the Act are to provide greater public access to information concerning

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or other responsibility in regard to which the information or documents are relevant;
(b) A litigant or an attorney for a litigant in a case or potential case in regard to which the information or documents are relevant.

Id.

[146] *Id.*

[147] *See* FLA. STAT. ANN. § 69.081 (West Supp. 1991).

[148] FLA. STAT. ANN. § 69.081(3) (West Supp. 1991). The provision states that "except pursuant to this section, no court shall enter an order or judgement which has the purpose or effect of concealing a public hazard or any information concerning a public hazard. . . ." *Id.*

[149] *Id.* The provision states that a court shall not ". . . enter an order or judgement which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard." *Id.*

[150] *See,* FLA. STAT. ANN. § 69.081(6) (West Supp. 1991). The provision states that "[a]ny 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." *Id.*

[151] *Id.* The provision states that "[a] person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered the order or judgment. . ." *Id.*

[152] *Id.* The provision also states that a declaratory judgement action may be brought pursuant to chapter 86 of Florida law to contest an order or judgment, agreement or contract. *Id.*

hazards[153] and to give every individual, including representatives of the news media,[154] a means to nullify secrecy deals.[155]

Unlike its Texas counterpart, the Act moved quickly through the Florida legislature despite resistance from the powerful automobile and drug manufacturing lobbies.[156] The Act's passage immediately sparked opposition among defense attorneys and business interests, but opponents have yet to mount a legal challenge to the statute.[157] No state wide empirical data is currently available to evaluate the Act's effectiveness from a numerical standpoint.

1. The Act's Definition of Public Hazard

The Act defines "public hazard" as any device, instrument, person, procedure, product, or condition thereof, that has caused and is likely to cause injury.[158] The inclusion of individuals, products, and procedures in the definition of potential hazards is an attempt to address three major categories of secrecy agreements: those in medical malpractice, products liability, and environmental contamination suits.[159] The open-ended phrase "including but not limited to" within the definition of "public hazard" allows courts to apply the Act to any potential "public hazard." As a result, this phrase has become a focal point of opposition attack.[160] Critics feel that the definition of "public hazard" is overly broad and will be the source of constant interpretive legislation for years to come, thus rendering the Act ineffective.[161]

2. Voiding Agreements of Contracts that Conceal Public Hazards

The protection of the public from the concealment of "public hazards" provided in the Act extends beyond the confines of the court-

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[153] *See Secrecy Doesn't Serve Safety,* ORLANDO SENTINEL, May 19, 1990, at A-18.

[154] *See* FLA. STAT. ANN. § 69.081(6) (West Supp. 1991). Members of the media are included in the paragraph six definition of "substantially affected person(s)." *Id.*

[155] *See Secrecy Doesn't Serve Safety, supra* note 153, at A-18.

[156] *See* Adrienne C. Locke, *Florida Law Opens Settlement Records,* BUS. INS., June 15, 1990, at 21. (bill swept through Senate 34-2, and reached 2/3 majority needed in House by 79-30 vote); *House Passes Legislation on Open Records for Products,* TALLAHASSEE DEM., May 29, 1990, at 4C.

[157] *See* Jud Magrin, *Senate OKs Sunshine Bill; Martinez is Next,* GAINESVILLE SUN, May 31, 1990, at 1. (critics believed Florida courts would overturn Act first time anyone sought to apply it). *Id.*

[158] FLA. STAT. ANN. § 69.081(6) (West Supp. 1991).

[159] *See* Abraham Fuchsberg, *The Blindfold of Justice,* N.Y.L.J., Oct. 4, 1990, at 2.

[160] *See* Jud Magrin, *Public Hazards Bill Gets First OK,* THE GAINESVILLE SUN, Apr. 25, 1990, at 1B, 6B.

[161] *Id.*

room to reach private contracts and agreements.[162] The Act provides that any portion of a contract or agreement that conceals either a "public hazard", or information pertaining to a hazard or useful to the public in safeguarding themselves from injury that may result from a hazard, is contrary to public policy and void.[163]

The Act, however, offers protection for parties from unsubstantiated attempts to reveal the contents of documentation or gain the release of specific information.[164] The Act provides a mechanism by which, upon motion and good cause by a party seeking to prevent information disclosure, the court may grant an *in camera* review of the materials in question.[165] If, upon review, the court finds that the materials or any portion of the materials violate any provision of the Act, then the court must allow public disclosure of the materials.[166] Privacy interests such as corporate trade secrets are an appropriate subject for *in camera* review.[167] The Act further endeavors to protect the privacy interests of the parties by requiring courts ordering disclosure to release only that portion of the materials in question that pertains to the "public hazard."[168]

The Florida legislature passed amendments to the Sunshine in Litigation Act in 1991 in an effort to hold the Florida state government to a higher level of accountability in its efforts to settle claims against the state.[169] The amendment declares void and unenforceable any settlement agreement that conceals information relating to the

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[162] *See Secrecy Doesn't Serve Safety, supra* note 153, at A-18.

[163] FLA. STAT. ANN. § 69.081(4) (West Supp. 1991). The provision states that "[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced." *Id.*

[164] *Id.* (7). The provision states that "[u]pon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials *in camera.*" *Id.*

[165] *Id.*

[166] *Id.* The provision states that

> [i]f the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials.

Id.

[167] *Id.* (5). The provision states that "[t]rade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688." *Id.*

[168] *Id.*(7). The provision states that if the court allows for disclosure, "the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public health." *Id.*

[169] *See generally* FLA. STAT. ANN. § 69.081(8)–(9) (West Supp. 1991).

resolution of a claim against the state or its agencies.[170] Standing requirements are identical to that of the "public hazard" provisions,[171] and a failure to disclose any agreement, contract, record, or document in connection with the settlement of a claim against the state is punishable by sanctions.[172]

IV. FEDERAL ANTISECRECY GOALS AND PURPOSES

The time has come for federal legislation that will put an end to the proliferation of secret settlements and limited access orders. Congress must create a comprehensive yet manageable federal judicial standard for the sealing of court records and the issuing of protective orders to prevent business interests and individuals from withholding information concerning public hazards from the public. "Openness" legislation can work at the federal level even though similar state efforts have failed because there is less threat of creating an unattractive business environment on the national landscape than there is within any individual state that may weigh this consequence of antisecrecy legislation heavily in its adoption process.[173]

The goals of federal antisecrecy legislation should be threefold. First and foremost, such legislation should provide the public with access to information concerning hazards that may adversely affect its health and safety. In addition, legislation should discourage attempts to use the federal court system as a vehicle to conceal public hazards. Finally, federal antisecrecy legislation should curtail judicial discretion to limit access to court records by reestablishing and reaffirming the adversarial system as the proper judicial process to foster informed decision making.

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[170] *Id.* (8)(a). The provision states that

> [a]ny portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced.

Id.

[171] *Id.; see supra* note 152 and accompanying text.

[172] *Id.* (8)(c). The provision states that "[f]ailure of any custodian to disclose and provide any document, record, contract, or agreement as set forth in this section shall be subject to the sanctions as set forth in chapter 119." *Id.*

A government entity that settles a tort claim for more then $5000 must post notice of the settlement in the county in which the claim arose if the settlement has not first been approved by a Florida court. *Id.* at (9).

[173] *See* Saundra Torry, *Texas Supreme Court Curbs Secrecy of Lawsuit Records; Far-Reaching Action Focuses on Public Health, Safety*, THE WASH. POST, Apr. 21, 1990, at A2.

A federal antisecrecy law would serve complimentary purposes. First, legislation creating a presumption of openness for all court records would work to dissipate the "hush money" factor which is a powerful tool for defense attorneys and a risk-free solution for defendants who wish to minimize the possibility of future similar litigation.[174] A federal law that guarantees secrecy only for nonhazardous trade secrets[175] and personal and confidential business information should dissolve a business interest's desire to enter into hush money settlements because the presumption of openness that would accompany all court records, including settlements, would allow public access to the settlement.

Second, such a statute would eliminate the ethical dilemma that accompanies a large monetary offer to settle a suit at the expense of concealing a hazard.[176] Incentive to settle would still exist for all the reasons that make settlement attractive in the first place, yet the "hush money" exchange for a no-fault resolution will no longer be the stimulus. Finally, the public will benefit from a federal antisecrecy law because information concerning public hazards of every kind would become available to the public.

Federal antisecrecy legislation would go a long way to change the perception of the civil lawsuit.[177] If the courts, and the lawsuit in particular, are the current vehicle for change,[178] then legislation is needed that will provide both access to the courts to those willing to fight for change, and protection for those unable to afford the fight. The question then arises as to what would constitute a comprehensive yet manageable federal law that will effectively safeguard the public from concealment of future public hazards.

The federal law that this Comment proposes in Section IV attempts to replace the ineffective FRCP 26(c) by combining the goal of disclosing public hazard information that underlies the Sunshine in Litigation Act with the due process-oriented, adversarial mechanism of Rule 76a. This proposed statute should work to frustrate attempts to conceal environmental, product, and medical malpractice hazards. This proposal attempts to reach a compromise between the

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[174] *See* Jaffe, *supra note* 4, § 3, at 1.

[175] *Cf.* FLA. STAT. ANN. § 69.081, (2) (West Supp. 1991); *supra* note 158 and accompanying text.

[176] *See supra* notes 71–73 and accompanying text.

[177] Abrahamson, *supra* note 28, at 1, Metro, part B. Professor Mary Cheh of George Washington University Law School feels that "the fight over secrecy signals that the legal system is in the throes of completely changing the perception of a civil lawsuit." *Id.*

[178] *See id.*

business interests of corporate America, specifically the protection of the trade secret, and the public right of access to court records.[179]

V. THE MODEL ACT: A FEDERAL ANTISECRECY LAW ESTABLISHING JUDICIAL GUIDELINES FOR LIMITING ACCESS TO COURT RECORDS IN CIVIL ACTIONS

1) **Public Hazard.** As used in this section a public hazard means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product, that has caused and is likely to cause injury.[180]

2) **Court Records.** The following information or documents are considered court records for the purposes of this statute:

A) all documents of any nature filed with, submitted to, or issued by the court, except:

1) documents filed with a court *in camera,* solely for the purpose of obtaining a ruling on the discoverability of such documents;[181]

2) documents in court files to which access is restricted by law;[182]

B) discovery, in any matter before the court, whether or not filed with, or submitted to the court, not including:

1) any information qualifying as a trade secret that does not conceal a public hazard, or information which may be useful to the public in protecting themselves from a public hazard.[183]

C) all settlement agreements, whether or not filed with the court, excluding all references to monetary considerations.[184]

3) **Balancing Test for Motion to Limit Access to Court Records.** All court records, as defined by this statute, are presumed open to the general public's inspection. A party seeking a protective order, the dismissal of a suit predicated on a confidential settlement, or a sealing order shall bear the burden for its justification.

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[179] *See supra* notes 33, 42–45 and accompanying text.

[180] FLA. STAT. ANN. § 69.081 (2) (West Supp. 1991).

[181] TEX. R. CIV. P. ANN. r. 76a(2)(a)(1) (West Supp. 1991).

[182] *Id.* at (2)(a)(2).

[183] *Cf. id.*(2)(c) (West Supp. 1991); *supra* notes 103–21 and accompanying text.

[184] *Cf.* TEX. R. CIV. P. ANN. r. 76a(2)(b) (West Supp. 1991). The provision includes within its' definition of court records "settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health and safety, or the administration of public office, or the operation of government." *Id.*

A) Upon motion to limit access, a court shall conduct an *in camera* examination of the materials in question. A court shall approve the release of notification for a pending public hearing upon a finding that:

1) there is a specific, serious and substantial interest in limiting access that clearly outweighs the public right to access;

2) the materials in question do not conceal a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the hazard;[185]

3) no less restrictive means than limiting access to the court records will protect the parties privacy rights.

Upon completion of a public hearing, a court may enter an order limiting access to any of the information or documents referred to in section (2) only upon finding, in light of information obtained through the hearing process, that the requirements of section (3)(A) have been met.[186]

4) **Access by Government Officials.**

A) No court may enter an order limiting access to information or documents referred to in section (2), to any federal or state government official with regulatory, investigative, administrative, legislative, judicial, law enforcement or other responsibility in regard to which the information or documents are relevant, even when the standards in section (3) have been met.

B) Any federal or state government official with regulatory, investigative, administrative, legislative, judicial, law enforcement or other responsibility shall comply with any order or agreement to limit access to the information or documentation in question, unless disclosure is necessary as part of a proceeding, undertaken by the federal or state governmental official against or involving the party that the information or documentation concerns, to protect the health and safety of the general public.[187]

5) **Notice.** Within 4 days of court approval of a public hearing, movant must post a notice in a location accessible to the public in

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[185] *Cf.* FLA. STAT. ANN. § 69.081 (3) (West Supp. 1991); *supra* note 148–49 and accompanying text.

[186] *Cf.* TEX. R. CIV. P. ANN. r. 76a(1) (West Supp. 1991); *supra* note 94 and accompanying text.

[187] *Cf.* WIS. S. 213, 90th Leg., § 3 (3) (1991); *supra* note 145 and accompanying text.

the federal courthouse in a place provided for that purpose by the court. Movant must also file notice with the United States Attorney General's Office assigned to the court. Movant must provide a copy of the notice, free of charge, to any person who requests a copy. The notice shall include all of the following:

A. The time and place the public hearing will be held.

B. The identity of the person who filed the motion, including names, addresses, and phone numbers of the attorneys for the parties in the civil action.

C. The caption and file number of the civil action.

D. A brief, specific description of the nature of the case and the information or documents that the person requests be withheld from access.

E. Notification that any person may intervene and be heard concerning the request to limit access.

Immediately after posting such notice the movant shall file a verified copy of the posted notice and an affidavit stating that the notice was posted and filed with the assigned United States Attorney General's Office with the clerk of the court in which the case is pending. The clerk of the court shall maintain a file of notices, filed under this subsection, and orders issued under section (3) that will be open to the public during regular business hours.[188]

6) **Hearing and Temporary Sealing or Protective Orders.**

A) A public hearing on the motion shall be held as soon as practicable, but not less then 14 days after the motion is filed and notice is posted. Any party may participate in the hearing. Non parties may go on record as intervening for the limited purpose of participating in the proceedings. If, upon the discretion of the court,

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[188] *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991); *supra* note 123–24 and accompanying text; *cf.* Wis. S. 213, 90th Leg., § 3(5) (1991). The Wisconsin provision states that

> (a) [o]n the day on which a motion is filed requesting a court to issue an order limiting access to records in civil actions, the person who filed the motion shall post a notice in a location accessible to the public in the county courthouse in a place provided for that purpose by the county. The person who filed the motion shall provide a copy of the notice, free of charge, to any person who requests a copy. The notice shall include all of the following: 1. The identity of the person who filed the motion. 2. The names, addresses and phone numbers of the attorneys for the parties in the civil action. 3. The caption and file number of the civil action. 4. The time and place when a hearing will be held on the motion. 5. A brief, specific description of the nature of the case and the information or documents that the person requests be withheld from access. 6. A statement that any person, subject to 803.09, may intervene for the limited purpose of being heard on matters relevant to the motion.

Id. WIS. S. 213, 90th Leg., § 3 (5) (1991).

it is not feasible to conduct an open hearing, an *in camera* review may be undertaken with the aid of affidavits.

B) Upon motion and notice to all parties, the court, in its discretion, may issue a temporary sealing or protective order upon a showing of compelling need from specific facts demonstrated by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before a formal *in camera* review can be held. A temporary sealing or protective order may be modified or withdrawn by the court upon *in camera* review of the motion to limit access to court records as provided in section (3), and is automatically withdrawn upon commencement of the hearing as provided in part A of section (5).[189]

7) **Order on Motion to Limit Access.** A motion to limit access shall be decided by written order that rules solely on the motion and states the specific reasons for finding whether or not the standards required in section (3)(A) have been met. The written order shall state a) the style and number of the case, b) the time and place the public hearing was held, c) the identity of the movant including names, addresses, and phone numbers of the attorneys for the parties in the civil action, d) a brief, specific description of the nature of the case and the information or documents that movant requests be withheld from access, e) all parties and nonparties that participated in the hearing, f) the specific reasons for finding and concluding whether the showing required by section (3) has been made, g) and the information or documents to which an order limiting access applies, who is denied access, and the time period that access is denied. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, failure to comply with this requirement shall not affect its appealability. A copy of the order shall be filed with the clerk of the court for inclusion in the files created under section (5)(e), and with the applicable United States Attorney General's Office.[190]

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[189] *Cf.* TEX. R. CIV. P. ANN. r. 76a(4)–(5) (West Supp. 1991); *supra* notes 125–27 and accompanying text.

[190] *See* TEX. R. CIV. P. ANN. r. 76a(6) (West Supp. 1991); *supra* note 127 and accompanying text; *see also* Wis. S. 213, 90th Leg., § 3(8) (1991). The provision states that

> [a] motion to limit access shall be decided by a written order that rules solely on the motion and states the specific reasons for finding and concluding whether or not the standards required under sub. (2) have been met. If the court finds and concludes that the standards have been met, the court shall, except as provided in sub. (3), issue a written order limiting access. The written order shall specify the information or documents that the order applies to, who is denied access and the time period that

8) **Appeal of Order on Motion to Limit Access.** Any order or portion of an order ruling on a motion to limit access or any other request to limit access to information or documents referred to in section (3) shall be appealable by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may, in light of section (3) requirements, reverse the order, or abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.[191]

9) **Continuing Jurisdiction.** A court that enters an order under this section limiting access to court records retains continuing jurisdiction to enforce, alter, or vacate the order. Any person may bring a motion to enforce, alter, or vacate that order, subject to this section. An order shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, or who subsequently challenged the order, unless the party or intervenor shows that circumstances materially affecting the order have changed. Such circumstances need not be related to the case in which the order was issued. No order limiting access shall remain in effect unless the standards in section (3) are met at the time when the order is challenged or reconsidered.[192]

> access is denied. Any order limiting access shall ensure that access is denied only to information or documents in regard to which the standards required under sub. (2) have been met. A copy of the order shall be filed with the clerk of the supreme court and the clerk of circuit court for inclusion in the files created under sub. (5)(b).

Id. WIS. S. 213, 90th Leg., § 3(8) (1991).

[191] *See* TEX. R. CIV. P. ANN. r. 76a(8) (West Supp. 1991); *supra* notes 132–34 and accompanying text; *see also* WIS. S. 213, 90th Leg., § 3(9) (1991). The provision states that "[a]ny order or portion of an order ruling on a motion to limit access or any other request to limit access to information or documents referred to in sub. (1) shall be appealable pursuant to Section 808.03 (1) by any person who had the right to be heard in the hearing."

WIS. S. 213, 90th Leg., § 3(9) (1991).

[192] *See* TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991); *supra* notes 129–33 and accompanying text; *see also* WIS. S. 213, 90th Leg., § 3(10) (1991). The Wisconsin provision states that

> [a] court that enters an order under this section limiting access retains continuing jurisdiction to enforce, alter or vacate that order. Any person may bring a motion to enforce, alter or vacate that order, subject to this section. An order shall not be reconsidered at the request of a party or intervenor who had actual notice of the hearing preceding issuance of that order unless the party or intervenor shows that some relevant circumstances, not necessarily related to the case in which the order was entered, has changed. No order limiting access shall remain in effect unless the standards in sub. (2) are met at the time when the order is challenged or reconsidered.

WIS. S. 213, 90th Leg., § 3(10) (1991).

10) **Return and Destruction of Documents.** No court may enter an order requiring any litigant, attorney, government official, or member of the public to return or destroy any legally obtained information or document referred to in section (2).[193]

11) **Agreements and Orders to the Contrary are Void.** Any portion of any agreement, contract, stipulation, or court order that is contrary to the provisions of this section are void, contrary to public policy, and may not be enforced.[194]

VI. THE MODEL ACT: EXPLAINED

> 1) **Public Hazard.** As used in this section a public hazard means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product, that has caused and is likely to cause injury.

Paragraph 1 of the Model Act, defines "public hazard" as used in the Sunshine in Litigation Act.[195] This definition, in conjunction with the paragraph (3) balancing test of the Model Act, specifically targets environmental hazards, medical malpractice or misconduct, and defective products[196] as the most prominent and dangerous sources of public hazard. This broad definition would leave the classification of a public hazard open to judicial interpretation and provide for the adaptability of the Model Act to undiscovered future hazards.[197]

Critics have attacked this definition of "public hazard" as overbroad and dangerously inclusive.[198] Certainly this definition gives a judge discretion to determine what constitutes a public hazard.[199] "Device", "instrument", "person", "procedure" and "product" are

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[193] WIS. S. 213, 90th Leg., § 3(11) (1991).

[194] *See* FLA. STAT. ANN. § 69.081 (4) (West Supp. 1991); *supra* note 162–63; *see also* WIS. S. 213, 90th Leg., § 3(14) (1991). The provision states that "[a]ll provisions in contracts, agreements, stipulations and court orders that are contrary to the provisions of this section are void."
WIS. S. 213, 90th Leg., § 3(14) (1991).

[195] *See* FLA. STAT. ANN. § 69.081(2) (West Supp. 1991); *supra* note 158 and accompanying text.

[196] *See supra* notes 158–61 and accompanying text.

[197] *Id.*

[198] *See* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 482–83. Marcus argues that the Sunshine in Litigation Act is overinclusive. He states that even an individual who carries the AIDS virus can be classified under the Act as a "proven risk of injury to others" and thus a public hazard. *Id.*

[199] *See id.*

broad terms, but are restricted by the clause "that has caused and is likely to cause injury."[200] To qualify as a public hazard for purposes of the Model Act, there would have to exist, in the judge's discretion, a continuing threat to public safety from a source proven to cause injury in the past.[201] Difficult cases that call for line-drawing by the judge in weighing the privacy rights of the individual versus the need for public disclosure will exist. Yet this type of judicial discretion exists in most legislation and in time will be determinative in assessing the law's overall effectiveness.

> 2) **Court Records.** The following information or documents are considered court records for the purposes of this statute:
> A) all documents of any nature filed with, submitted to, or issued by the court, except:
> 1) documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents;
> 2) documents in court files to which access is restricted by law;
> B) discovery, in any matter before the court, whether or not filed with, or submitted to the court, not including:
> 1) any information qualifying as a trade secret that does not conceal a public hazard, or information which may be useful to the public in protecting themselves from a public hazard.
> C) all settlement agreements, whether or not filed with the court, excluding all references to monetary considerations.

Modeled after the similar provision in Rule 76a, the Model Act's definition of "court records" encompasses the wide spectrum of information exchanged in civil litigation.[202] Like in the Rule 76a provision, Model Act section 2(a) includes much of the documentation comprising a civil suit in order to prevent creative lawyers from circumventing the reach of the Act.[203] The "court records" definition, however, creates an exception for documents filed with the court as part of an *in camera* review to determine the discoverability of the documents, and documents to which access is restricted by law. The purpose of these exceptions is to give parties the procedural safeguards that the law has traditionally provided.[204]

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[200] *See* FLA. STAT. ANN. § 69.081(2) (West Supp. 1991); *supra* note 158 and accompanying text.

[201] *See* FLA. STAT. ANN. § 69.081(2) (West Supp. 1991).

[202] *See* Doggett & Mucchetti, *supra* note 57, at 658; *supra* notes 100–21 and accompanying text.

[203] *See supra* notes 99–101 and accompanying text.

[204] *See* Doggett & Mucchetti, *supra* note 57, at 659.

In order for the public to have access to documentation containing information pertaining to public hazards, the Model Act includes pretrial discovery documentation within its definition of "court records." On the one hand, allowing access to discovery materials may create more lawsuits and facilitate the role of the plaintiffs' attorney in subsequent litigation by granting plaintiffs access to possibly damaging documentation of the defendant at no cost.[205] On the other hand, if the goal behind the presumption of openness is to prevent the concealment of information pertinent to public health and safety, then the Model Act must open to public inspection and analysis any documentation that reveals a public hazard. Thus, the definition of "court records" must include pretrial discovery so that a meaningful Rule 76a-type balancing test is applied and information pertaining to public hazards is disclosed.[206]

To protect innovation and investment in business, the definition of "court records" excludes trade secrets unless the trade secret conceals either a public hazard or information that may be useful to citizens in protecting themselves from a public hazard.[207] This public hazard scrutiny ensures that secrets that have the effect of concealing information pertinent to preventing injury to the public are no longer exempted under the catch-all categorization of trade secrets.[208]

Permitting the disclosure of trade secret information that may be useful for citizens' self-protection would appear to put highly technical corporate secrets in a precarious position by classifying them as court records and subjecting them to the Model Act's balancing test.[209] Nevertheless, it is precisely the technical nature of the trade

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[205] *See supra* notes 38–45 and accompanying text. Defense attorneys have charged that the impetus behind the plaintiffs bar support for the "openness movement" is a well-disguised effort to obtain marketable information. *See* Baltz, *supra* note 6, at 1.

[206] *See supra* notes 38–45 and accompanying text. *But see* Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986) ("A public right of access would unduly complicate the [discovery] process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals"); Marcus, *supra* note 198, at 484–85.

[207] *See supra* notes 102–07 and accompanying text. The Supreme Court has held that confidential business information and trade secrets are protected under the 5th Amendment takings clause. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984); Gale R. Peterson, *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*, 53 TEX. B.J. 344, 345 (1990).

[208] *See* TEX. R. CIV. PRO. ANN. r. 76a(2)(c) (West Supp. 1991); *supra* notes 102–07 and accompanying text.

[209] *See* Gale Peterson, *Proposed 76a: A Radical Turning Point for Trade Secrets*, TEX. B. J., April 1990, at 344. Peterson considers Rule 76a a serious threat to the security of trade secrets in the state of Texas and to the desirability of doing business in Texas in general. *Id.*

secret that makes this provision necessary. Judges cannot easily identify the concealed public hazards within a highly sophisticated and industry-specific trade secret. Thus, the Model Act's adversarial hearing process and its special *in camera* review for potentially sensitive information are necessary to allow judges to make educated decisions regarding whether trade secrets contain pertinent health and safety information.

Finally, paragraph 2(c) includes all settlement agreements within the Act's definition of "court records." No longer would a cash offer be sufficient to assure the confidentiality of damaging and potentially hazardous information.[210] The aim of this provision is to reach not only those settlements filed with the court but also private settlement contracts that are employed in an attempt to circumvent the "court records" definition.[211]

> 3) **Balancing Test for Motion to Limit Access to Court Records.** All court records, as defined by this statute, are presumed open to the general public's inspection. A party seeking a protective order, the dismissal of a suit predicated on a confidential settlement, or a sealing order shall bear the burden for its justification.
>
> A) Upon motion to limit access, a court shall conduct an *in camera* examination of the materials in question. A court shall approve the release of notification for a pending public hearing upon a finding that:
>
> 1) there is a specific, serious and substantial interest in limiting access that clearly outweighs the public right to access;
>
> 2) the materials in question do not conceal a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the hazard;
>
> 3) no less restrictive means than limiting access to the court records will protect the parties privacy rights.
>
> Upon completion of a public hearing, a court may enter an order limiting access to any of the information or documents referred to in section (2) only upon finding, in light of information obtained through the hearing process, that the requirements of section (3)(A) have been met.

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[210] *See* Siegel, *supra* note 49, at 1. A woman who sued two laboratories for misreading her Pap smear results settled for an undisclosed monetary figure on the conditions that she could not talk about the details of her case, and that her file would be sealed. *Id.* This settlement is indicative of the ethical dilemma that arises when plaintiffs must choose between settling for large amounts of money, at the expense of keeping relevant public health and safety information confidential, and taking their chances with a drawn-out trial while disclosing the damaging information to the general public. *Id.* 1.

[211] *See* Doggett & Mucchetti, *supra* note 57, at 659.

The paragraph 3 balancing test is the heart of the Model Act. Like in Rule 76a, the Model Act asserts that all court records are presumed open to the public.[212] The Model Act targets sealing and protective orders, and suit dismissals predicated on confidential settlements, in an effort to cover most court orders to limit access to court records.

Instead of immediately initiating the hearing process as in Rule 76a,[213] the Model Act provides for an *in camera* review to screen all motions to limit access to court records. The burden of justifying the motion falls squarely on the shoulders of the party moving for limited access. The movant shall present all information and documentation supporting its motion. As a means of weeding out unworthy motions, a judge would apply the balancing test after viewing only the documentation for which a sealing order is sought and the moving party's supporting documentation for limiting access. If, on the basis of the information presented by the movant only, the judge were to find that the movant has a specific, serious, and substantial privacy interest that clearly outweighs the public right to access, then the judge would approve the release of notice to the general public of a subsequent hearing date.

Whether the movant's privacy interest constitutes such a substantial interest would be a fact-specific and discretionary judicial decision. Judicial discretion is fundamental to the development of efficient and consistent law. In order to supplant the "good cause" standard of FRCP 26(c) with an effective system of review, the courts would have to take seriously the presumption of openness and the requirement that the movant show a substantial privacy interest before a limiting access order is granted.[214] If the judiciary were to faithfully follow this balancing test, the result would be fewer motions to limit access, less of a drain of court time and resources,[215] and a greater protection of the public from hidden hazards.

Section 3(A)(2) of the balancing test employs the Sunshine in Litigation Act's definition of "public hazard."[216] The use of this def-

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[212] *See supra* note 80 and accompanying text.

[213] *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991). The provision states that "[c]ourt records may be sealed only upon a party's written motion . . . stating that a hearing will be held in open court on a motion to seal court records . . . ." *Id.*, WIS. S. 213, 90th Leg., § 3(4) (1991). The provision states that "[a]n order limiting access to records in civil actions may only be entered after a hearing requested by motion under Section 802.01." *Id.*

[214] *See supra* notes 34–35, 56–59 and accompanying text.

[215] *See* Weaver, *supra* note 2, at 701. As of March 23, 1992, there had been 181 documented attempts to seal records since the court rule became effective on September 1, 1990. Elliott, *supra* note 137, at 4.

[216] *See supra* note 158 and accompanying text.

inition focuses the balancing test process on public health and safety, providing a party or non party seeking to oppose a motion to limit access with court recognition of public concern for the environment, defective products, medical malpractice, and other established causes of injury. In addition, judicial evaluation of a motion to limit access in the preliminary *in camera* setting for public hazard content would become standard procedure.

The balancing test also requires the court to determine whether there exists a less restrictive means of protecting the movant's interest than a limiting access order. This provision thus decreases the likelihood that a court will issue a complete limiting access order.

> 4) **Access by government officials.**
> (A) No court may enter an order limiting access to information or documents referred to in section (2), to any federal or state government official with regulatory, investigative, administrative, legislative, judicial, law enforcement or other responsibility in regard to which the information or documents are relevant, even when the standards in section (3) have been met.
> (B) Any federal or state government official with regulatory, investigative, administrative, legislative, judicial, law enforcement or other responsibility shall comply with any order or agreement to limit access to the information or documentation in question, unless disclosure is necessary as part of a proceeding, undertaken by the federal or state governmental official against or involving the party that the information or documentation concerns, to protect the health and safety of the general public.

Section 4 of the Model Act ensures that government agencies can obtain immediate access to information or documentation relevant to their agency's activities. This provision would enable a government agency to bypass the time consuming discovery process by allowing the agency access to all court records regardless of the presence of any judicial order limiting access. This easing of the discovery process may save lives by shortening agency's response time to existing public hazards. No longer will the duplicative discovery process contribute to the public's increased exposure to environmental and product hazards.[217]

The grant of access to court records to government officials would not permit agencies to disclose requested information. If a limiting access order accompanies any government-requested court record, then the requesting agency must comply with the limiting order

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[217] *See* Marcus, *supra* note 10, at 1, §B.

unless the agency uses the information as part of a "formal proceeding" against or involving the party whom the information concerns.

The "formal proceeding" requirement for public disclosure of limited-access court records of the Model Act attempts to remove the possibility that political influence, threats or personal vendettas by an agency will result from this increased government access. The Model Act thus would prohibit a government official from targeting a business interest, accessing sealed documents, and then indiscriminately releasing information. Only after an investigation resulting in a formal proceeding would a judge allow an agency to disclose the court records that the agency requested and analyzed. In addition, this provision would act as a check on judicial enforcement of the balancing test provisions. With the increased knowledge and specialization of government agencies in general, public hazard threats not unearthed during the course of the public hearing, for purposes of the balancing test analysis, will be addressed and disclosed by the agencies, if warranted, as part of a formal proceeding.

> 5) **Notice**. Within 4 days of court approval of a public hearing, movant must post a notice in a location accessible to the public in the federal courthouse in a place provided for that purpose by the court. Movant must also file notice with the United States Attorney General's Office assigned to the court. Movant must provide a copy of the notice, free of charge, to any person who requests a copy. The notice shall include all of the following:
>
> A. The time and place the public hearing will be held.
>
> B. The identity of the person who filed the motion, including names, addresses, and phone numbers of the attorneys for the parties in the civil action.
>
> C. The caption and file number of the civil action.
>
> D. A brief, specific description of the nature of the case and the information or documents that the person requests be withheld from access.
>
> E. Notification that any person may intervene and be heard concerning the request to limit access.
>
> Immediately after posting such notice the movant shall file a verified copy of the posted notice and an affidavit stating that the notice was posted and filed with the assigned United States Attorney General's Office with the clerk of the court in which the case is pending. The clerk of the court shall maintain a file of notices, filed under this subsection, and orders issued under section (3) that will be open to the public during regular business hours.

As in Rule 76a, the Model Act's notice provisions provide parties and non parties the right to intervene in order to contest a motion

to limit access.[218] By requiring the posting of notice in the appropriate federal courthouse, this provision attempts to ensure that the public is advised of impending hearing dates. The Model Act takes the notice requirement of Rule 76a one step further by guaranteeing representation of the public interest at limiting access hearings by requiring a movant to file notice with the applicable United States Attorney General's Office. After reviewing the notice, the Attorney General's office could decide either to oppose the motion personally at the hearing, to notify the parties it believes will be most interested and knowledgeable in opposing the motion, or to refrain from action. As a result of the Attorney General's participation in the hearing process, a politically accountable party that possesses significant financial, legal, and professional resources would represent the public interest.

The Model Act requires that the notice's content be sufficiently thorough to inform interested parties of the type of information and documents under consideration at the limited access hearing, and of the fact that any party has the right to participate. The Act's notice provision also requires movant to file both notice, and an affidavit of posting and filing with the Attorney General's Office, with the clerk of the appropriate court.[219] This is done to ensure that proper procedure is followed, as well as to provide a record of motions to limit access and of the disposition of these motions for future legislative analysis of the Model Act's effectiveness.

> 6) **Hearing and Temporary Sealing or Protective Orders.**
> A) A public hearing on the motion shall be held as soon as practicable, but not less than 14 days after the motion is filed and notice is posted. Any party may participate in the hearing. Non parties may go on record as intervening for the limited purpose of participating in the proceedings. If, upon the discretion of the court, it is not feasible to conduct an open hearing, an *in camera* review may be undertaken with the aid of affidavits.
> B) Upon motion and notice to all parties, the court, in its discretion, may issue a temporary sealing or protective order upon a showing of compelling need from specific facts demonstrated by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before a formal *in camera* review can be held. A temporary sealing or protective order may be modified or withdrawn by the court

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[218] TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991); *see supra* note 123–24 and accompanying text.

[219] *See* Doggett, *supra* note 86, at 63.

> upon *in camera* review of the motion to limit access to court records as provided in section (3), and is automatically withdrawn upon commencement of the hearing as provided in part A of section (5).

The hearing procedure of the Model Act is identical to that of Rule 76a[220] with one exception. Unlike Rule 76a,[221] the Model Act does not require payment of a fee to file a plea of intervention. If the notice procedure's purpose is to provide interested parties with the opportunity to intervene on behalf of the public good, then there should be no obstacles preventing access to the hearing process. Restricting access to the hearing process to those who can pay a fee would risk suppressing information that may be of critical importance to public safety. If a party with little stake in the hearing's outcome but possessing relevant information regarding the sealing of specific court records is discouraged from participating in the hearing process because of an unwillingness or inability to pay a court fee, then the public interest will suffer.

Antisecrecy legislation opponents argue that mandating a hearing process for motions to limit access to court records would flood the courts with a multitude of parties seeking to be heard on a particular motion to limit access.[222] Although this possibility does exist, numerical data from hearings held under Rule 76a indicate that these hearings probably would be quick and sparsely attended affairs.[223] Nevertheless, such hearings would provide the public with a voice in the limiting access process while at the same time contributing necessary factual information to allow the judiciary to make educated limiting access decisions.

The Model Act also provides for temporary sealing and protective orders. Under the terms of the Model Act, a moving party would have the opportunity to obtain from a court a temporary order limiting access to specific documents and information before the court applied the initial *in camera* balancing test. Temporary sealing or protective orders would be issued by the court under the Model Act only upon a finding that immediate and irreparable injury would result to the party's privacy interests before the court held its formal

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[220] *See* TEX. R. CIV. P. ANN. r. 76a(4) (West Supp. 1991).

[221] *Id.* The provision states that "[n]on-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea of intervention." *Id.*

[222] *See* Tuma, *supra* note 89, at 4.

[223] *See* Ballard, *supra* note 95, at 1. As of February 11, 1991 sealing requests were opposed in only 5 cases. *Id.*

in camera review.[224] Following this review process, the court could continue, modify or withdraw the temporary order pending hearing. The court automatically would withdraw the temporary order upon commencement of the hearing.

Section 6(B) of the Model Act, which differs substantially from that in Rule 76a,[225] would protect sensitive information from a plaintiffs' possible bad faith attempt at disclosure. Unlike Rule 76a's requirement,[226] the Model Act's *in camera* review requirement would eliminate the need to allow a party or intervenor to seek judicial dissolution or modification of a temporary order. The *in camera* review would be a one-sided judicial evaluation with only the movant's arguments under consideration. The use of the balancing test, however, combined with the earliest possible hearing date, should safeguard the public from the concealment of hazardous information and, at worst, would result in only a short delay until disclosure.

> 7) **Order on Motion to Limit Access.** A motion to limit access shall be decided by written order that rules solely on the motion and states the specific reasons for finding whether or not the standards required in section (3)(A) have been met. The written order shall state a) the style and number of the case, b) the time and place the public hearing was held, c) the identity of the movant including names, addresses, and phone numbers of the attorneys for the parties in the civil action, d) a brief, specific description of the nature of the case and the information or documents that movant requests be withheld from access, e) all parties and nonparties that participated in the hearing, f) the specific reasons for finding and concluding whether the showing required by section (3) has been made, g) and the information or documents to which an order limiting access applies, who is denied access, and the time period that access is denied. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, failure to comply with this requirement shall not affect its appealability. A copy of the order shall be filed with the clerk of the court for inclusion in the files created under section (5)(e), and with the applicable United States Attorney General's office.

The Model Act is designed to ensure that written findings, demonstrating whether a particular motion to limit access meets the balancing test requirements are thorough and informative. In an

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[224] See also TEX. R. CIV. P. ANN. r. 76a(5) (West Supp. 1991); *supra* note 126 and accompanying text.

[225] *See supra* note 126 and accompanying text.

[226] *See* Doggett, *supra* note 86, at 63–64.

effort to avoid blanket decisions limiting access to entire files, this provision requires specificity as to the documentation an order limiting access covers and the duration of the order.[227] The specific written reasons for the finding would serve as a reference, and in turn a deterrent, to similar attempts at limiting access. Inclusion of these orders in the files of the clerk of the court would provide any party with the opportunity to research the history of a particular motion's success.

> 8) **Appeal of Order on Motion to Limit Access.** Any order or portion of an order ruling on a motion to limit access or any other request to limit access to information or documents referred to in section (3) shall be appealable by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may, in light of section (3) requirements, reverse the order, or abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

The Model Act provides an appeal standard virtually identical to Rule 76a's appeal standard.[228] As in Rule 76a, the Model Act would allow an appellate court to abate an appeal and order the trial court to adhere to the standards and procedures of this legislation.[229] The Model Act provides expansive appellate power in an effort to impress upon the judiciary the requirement of strict compliance to the balancing test provisions of this legislation.[230] All parties and nonparties that participated in the limiting access hearing would be recorded by the court clerk to create a list of those parties eligible to appeal a decision.

> 9) **Continuing Jurisdiction.** A court that enters an order under this section limiting access to court records retains continuing jurisdiction to enforce, alter, or vacate the order. Any person may bring a motion to enforce, alter, or vacate that order, subject to this section. An order shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, or who subsequently challenged the order, unless the party or intervenor shows that circumstances materially affecting the order have changed. Such circumstances need not be related to the case in which the order was issued. No order limiting access shall remain in effect unless

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[227] *Id.* at 64.

[228] *See supra* note 135 and accompanying text.

[229] *See* Doggett, *supra* note 86, at 64.

[230] *See id.*

> the standards in section (3) are met at the time when the order is challenged or reconsidered.

The Model Act would allow a court to retain continuing jurisdiction in order to entertain challenges to orders limiting access to information and documentation.[231] Any person, except one who had actual notice of the original hearing or subsequently challenged the order, would have the opportunity to ask the court to enforce, alter, or vacate the order.[232] If a party or nonparty that originally participated in the hearing or subsequently challenged the order acquires new information that materially affects the order's validity, that party would receive standing to challenge the order again. Any other scenario that gives standing to a party who already challenged the order would be repetitious and a waste of the court's time.

Opponents of such a continuing jurisdiction provision fear that an indefinite series of pretrial and post-judgement challenges and hearings would result from relaxed standing requirements to challenge an order.[233] This prospect is not encouraging in the face of the already overflowing court dockets. Judges Hecht and Gonzalez, the two Texas Supreme Court justices who dissented to Rule 76a's passage,[234] found the notice and continuing jurisdiction provisions of the rule especially troubling. According to Hecht and Gonzalez, these provisions allow anyone to challenge a sealing motion or order so long as that person did not have actual notice of the hearing preceding issuance of the order.[235] Justice Hecht is unclear regarding how movants can prevent a continuous flow of challenges to a sealing order without giving notice to the whole world.[236] It therefore appears that a party can never be assured that the court record is permanently protected under Rule 76a.[237]

A sealing order's lack of permanence under Rule 76a is a benefit, not a downfall, of the court rule. The continuing jurisdiction provision of Rule 76a, and the Model Act, ensures that no order limiting

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[231] *See* TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991); *supra* notes 129–33 and accompanying text.

[232] *Cf.* TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991).

[233] *See* Tuma, *supra* note 89, at 4.

[234] *See* TEX. RULES OF COURT, Concurring and Dissenting Statement 2 (Gonzalez & Hecht, JJ.) (West Supp. 1990).

[235] *See id.* at 4.

[236] *Id.* Intervenors who did not have "actual notice" of the previous motion to seal may force reconsideration of the order. *See* TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991). It does not matter if this challenge is identical to a challenge the court previously denied. *See* Tuma, *supra* note 89, at 4.

[237] *See* Tuma, *supra* note 89, at 4.

access will remain in effect unless it continuously meets the balancing test requirements.[238] It is unlikely that a particular order limiting access will face a continuous stream of frivolous challenges.[239] The real possibility exists that technology, public awareness, and education about environmental, product, and other hazards will advance, leading to the development of new information that may render a previous order to limit access void for public health and safety reasons. For example, chemicals or designs deemed harmless today may someday be classified as public hazards. Information about this newly discovered public hazard's past uses and distribution will become extremely relevant to past and future judicial decisions to limit access to court record information.

> (10) **Return and Destruction of Documents.** No court may enter an order requiring any litigant, attorney, government official, or member of the public to return or destroy any legally obtained information or document referred to in section (2).

The amount of time a party is required to maintain documents under Rule 76a is not clear.[240] If Rule 76a required parties to file all case documentation with a court for storage, then there would quickly develop the costly need to build court storage warehouses all over the country. On the other hand, forcing parties to retain documents carries with it the risks of spoilation.[241] Rule 76a, and the Model Act, leave the decision to retain documents to the good faith judgment of the parties.[242] Under the Model Act, parties are responsible for retaining documents in a manner generally regarded as proper given the type of document and the nature of the case.[243] This provision of the Model Act also seeks to augment the parties' responsibility to retain documents in good faith by forbidding a court

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[238] *See* TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991).

[239] *See* Doggett & Mucchetti, *supra* note 57, at 681. Justice Doggett believes that the continuing jurisdiction provision will not tax the already burdened court system. *Id.* First, few cases will gain the public attention that would result in repeated attempts to alter an order. *Id.* Second, by involving members of the local media or other non parties who may develop a future interest in the matter of the original hearing, the movant reduces the likelihood of relitigation of the order. *Id.* Third, a party who had actual notice of the original hearing will not be given standing to challenge a sealing order without showing a change in circumstances that materially affect the order. *Id.* at 681–82.

[240] *See* Herring, *supra* note 108, at 24. Defense attorneys fear having to keep documents forever under Rule 76a's ambiguous guidelines. *Id.*

[241] *See* BLACK'S LAW DICTIONARY 1401 (6th ed. 1990). Spoilation is defined as the destruction or significant alteration of a document or instrument. *Id.*

[242] *See supra* note 114 and accompanying text.

[243] *See* Doggett & Mucchetti, *supra* note 57, at 664.

to sanction either the return of discovery materials to their original parties or the destruction of documents.[244]

> (11) **Agreements and Orders to the Contrary are Void.** Any portion of any agreement, contract, stipulation, or court order that is contrary to the provisions of this section are void, contrary to public policy, and may not be enforced.

Unlike Rule 76a, the Model Act would not castigate attempts to withhold injurious information to the public by merely disclosing the documentation, while at the same time sanctioning those agreements.[245] As a matter of public policy, the Model Act deems void and unenforceable any agreement, contract, stipulation, or court order that is counter to its letter and/or spirit. The net effect of this provision would be to expand the judiciary's role to affect those agreements reached outside the courtroom which conceal public hazards.

VII. CONCLUSION

The current process for reviewing a movant's "good cause" for the issuance of a protective order under FRCP 26(c) is ineffective. Public health and safety are not priorities in judicial decision-making regarding the limiting of public access to court records. As a result, information concerning public hazards is locked away in courthouse files.

A federal antisecrecy law is needed so that "hush money" settlements are no longer legitimized through court-approved confidentiality stipulations, and plaintiffs are no longer forced to choose between personal and public interests.

The time has come to enact a federal antisecrecy law that establishes a specific procedure to which judges must adhere when deciding to limit public access to court records. The proposed Model Act in this Comment suggests that this procedure should entail a hearing process similar to that in Texas Rule of Civil Procedure 76a, with an emphasis on restricting the concealment of public hazard information as in Florida's Sunshine in Litigation Act. Access to public court records should only be limited upon judicial determination that

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[244] *See supra* note 193 and accompanying text.

[245] *See* TEX. R. CIV. P. ANN. r. 76a(West Supp. 1991). Rule 76a attempts to avoid the sealing of documentation of agreements that may have an adverse affect upon the general health and safety of the public. Yet the Rule falls short of automatically rendering the harmful agreement void, contrary to public policy, and unenforceable. *Id.*

the records in question do not conceal public hazard information, and upon a movant's showing of a specific, serious, and substantial privacy interest that can not be protected short of limiting access. Overall, antisecrecy legislation will provide the public with access to information that can be used to foster change and work to safeguard the world in which we live.