Notre Dame Law Review

Volume 66 | Issue 1 Article 4

6-1-1999

Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know

Anne-Therese Bechamps

NOTES

Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?

When officials at the Xerox plant near Webster, New York discovered that a hazardous chemical had leaked into the groundwater and contaminated a private well, they disclosed the leak to the community and assured local residents that there were no long-term health risks. However, two families later sued Xerox on allegations that air and water discharges from the plant had caused members of both families to suffer health problems, including a rare form of cancer in one teenage girl. The parties reached a settlement in 1988. Pursuant to the agreement, Xerox paid the families approximately $4.75 million and relocated them, but admitted no liability. Under the terms of the settlement, the trial judge sealed all the court records and prohibited the parties and their attorneys, on penalty of contempt, from discussing the matter with the media or the general public. The secrecy surrounding the settlement has distressed other local residents who are uncertain about what the real health risks are. They are thus unable to make informed decisions about the precautions they should take on their own behalf. The confidentiality order has also frustrated the efforts of health officials as they attempt to determine the long-term consequences of exposure to toxic chemicals.[1]

The sealing of court records and the enforcement of covenants of silence are becoming increasingly common practices in the settlement of civil lawsuits. Defendants typically request confidentiality to avoid disclosure of sensitive or potentially damaging information, while plaintiffs' attorneys may agree to confidentiality in an effort to obtain larger settlements for their clients.[2] Although the terms of a settlement have traditionally been consid-

---

1 Weiser, *Forging a 'Covenant of Silence'*, The Washington Post, March 13, 1989, at A1, col. 1. As Weiser notes, with the exception of lead and asbestos, little is known about the health consequences of many toxic chemicals. Scientific and medical knowledge about the long-term effects of low-level toxic exposure is still evolving. *Id.* at A8, col. 1.

2 *Id.*

ered a private matter between the parties,[3] different concerns surface when a judge participates in the secrecy by sealing the file and ordering the parties not to discuss the case except among themselves. Prior to 1983, few cases directly addressed the issue of sealing settlement agreements along with the rest of the case file. As one judge has commented, "many trial judges regard it as self-evident that secrecy is often necessary and they therefore order settlement agreements filed under seal as a matter of course."[4] Through media and other public interest group intervention, appellate courts are just beginning to scrutinize sealing orders more closely.

American courts have long recognized that decisions concerning access to court records are committed to the discretion of the trial judge.[5] The specific exemption of courts from the public disclosure requirements of the Freedom of Information Act reinforces this common law principle.[6] However, acknowledging the trial court's discretion on access matters does not mean that the discretion is unfettered. Rather, it is constrained by legal rules and standards.

This Note will explore the rules and standards that govern a judge's decision to permanently seal the court records of a settled case and to order the parties to remain silent about the case. Part I will examine the public's right of access to court records under both the common law and the first amendment. Part II will then evaluate ways of protecting the public interest. Part III will analyze the constitutionality of court orders enforcing the litigants' stipulation to not discuss the case with third parties. Finally, Part IV will propose some ethical considerations for the parties and their counsel to discuss before consenting to a covenant of silence.

For purposes of this Note, the term "court records" will refer to all documents filed with the court, such as pleadings, motions,

---

3 *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).

4 Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 351 (3d Cir. 1986) (Garth, J., dissenting). In support of this conclusion, Judge Garth noted the frequent references to "sealings made without comment or challenge in reported cases." *Id.* (citing as examples Marine Midland Bank, N.A. v. Kilbane, 739 F.2d 958, 959 (4th Cir. 1984); Owen v. United States, 713 F.2d 1461, 1462 (9th Cir. 1983); EEOC v. Strasburger, Price, Kelton, Martin & Unis, 626 F.2d 1272, 1274 (5th Cir. 1980)).

5 Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978); *Hotel Rittenhouse*, 800 F.2d at 344.

6 *See* 5 U.S.C. § 551(1)(B) (1988).

supporting affidavits, and orders. The term also includes settlement agreements filed with the court. Although the parties may not be required by statute to file such agreements with the court, the parties will frequently opt to do so in order to obtain a consent decree that will enable them to enforce the agreement by use of the court's contempt power without filing an entirely new lawsuit.[7] In addition, court records encompass judicial opinions and evidentiary materials used at trial. This Note, however, will not focus on these aspects of court records because they have been addressed in other writings.[8]

I. SEALING COURT RECORDS

Entities seeking to challenge sealing orders most frequently assert a public right of access to court records under both the common law and the first amendment. Challengers occasionally argue access under the Freedom of Information Act,[9] but courts have uniformly rejected this argument.[10] In addition, several

---

7 *See generally* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324-31 (1988) (discussing the nature of consent decrees—why parties want them and why courts agree to enforce them); Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43.

8 *See* Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659 (1982) [hereinafter Note, *The Common Law Right*] (discussing access to audio and video tapes introduced into evidence); Note, *Sealed Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access*, 16 IND. L. REV. 861 (1983).

9 5 U.S.C. § 551 (1988).

10 Courts have held that the Freedom of Information Act does not apply to court orders; in fact, courts are specifically excluded from the Act's disclosure requirements under 5 U.S.C. § 551(1)(B) (1988). Therefore, a court does not have to limit a sealing order to documents exempted from the Act. *See, e.g.*, Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) ("FOIA does not apply to a court's order directing an agency not to reveal the terms of an agreement crucial to the settlement of an action."), *aff'g In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468 (E.D.N.Y. 1981).

This line of cases is distinguishable from those cases holding that settlement documents which involve public agencies and officials, but are not filed with the court, are public records to which the public has a right of access under the various state freedom of information/public records laws. *See, e.g.*, Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 901, 205 Cal. Rptr. 92, 96-97 (1984) (settlement documents in negligence claim by county inmate against sheriff); Dutton v. Guste, 395 So.2d 683, 684-85 (La. 1981) (settlement documents in action by state against architects and engineers for defective design and construction of Superdome, a public building); News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 12-13, 284 S.E.2d 542, 549 (1981) (settlement documents in actions against county hospital), *petition denied*, 305 N.C. 302, 292 S.E.2d 151, *cert. denied and appeal dismissed*, 459 U.S.

states have created a statutory right of access to judicial records.[11] These statutory rights, though, are generally treated as codifications of the common law right and do not offer protection beyond the common law.[12]

The common law and first amendment arguments are very similar, although the common law right is generally recognized while the first amendment right is not.[13] Both are rooted in history and invoke strong policy considerations. Theoretically, a first amendment right of access would afford the public interest greater protection than the common law right. To override a first amendment right there must be a compelling governmental interest and a narrowly tailored order, whereas the common law right at most receives a strong presumption of access.[14] In practice, however, courts often confuse the two rights. In some jurisdictions, the first amendment right is limited by common law exceptions,[15] and sometimes the common law right receives strict scrutiny/compelling interest protection.[16] This lack of clarity about the nature of the public's right of access and the standards to be applied has produced widely varied outcomes in sealing order disputes.

A. The Common Law Approach

Both English and American common law have long recognized the public's right to inspect and copy judicial records, often referred to as a "right of access."[17] Under the English system all

---

803 (1982); Daily Gazette Co. v. Withrow, 350 S.E.2d 738, 743-44 (W.Va. 1986) (settlement documents in civil rights action against county sheriff); *see also* Society of Professional Journalists v. Briggs, 675 F. Supp. 1308, 1310 & n.4 (D. Utah 1987) (citing the above and other cases).

11 *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 251(A) (West Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 2-203 (1989); VA. CODE ANN. § 17-43 (1988); WIS. STAT. ANN. § 19.35(1)(a) (West 1986).

12 *See* Shenandoah Publishing House, Inc. v. Fanning, 235 Va. 253, 258, 368 S.E.2d 253, 255 (1988) (construing § 17-43 of the Virginia Code along common law principles); WIS. STAT. ANN. § 19.35(1)(a) (West 1986) ("Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect.").

13 *Compare infra* note 17 *with* infra notes 88-89 and accompanying text.

14 Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986); Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986); Mokhiber v. Davis, 537 A.2d 1100, 1108 (D.C. 1988).

15 *See, e.g.*, Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

16 *See, e.g.*, FTC v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985).

17 For a discussion of the history of the public's right of access under both the

persons enjoy the common law right of access, but only those with a proprietary or evidentiary interest in the documents can enforce the right if access is wrongfully denied.[18] American common law does not so restrict the public's right;[19] nevertheless, American courts have uniformly held that the public's right of access is not absolute, and that a court has discretion to limit access to court records in some situations.[20] The exact scope of the public's right is not clear, and the courts have widely varying views on the matter. Specifically, three issues are involved: (1) the documents to which the public's right of access attaches; (2) the strength of the common law right in relation to competing interests favoring limited access; and (3) the scope of the public's right of access once a court has entered a sealing order.

1. The Documents to Which the Public's Right of Access Attaches

One way that courts have tried to limit the public's right of access is by defining categories of documents to which the public right attaches. Generally, the line of distinction centers around the role that a document plays in the adjudication process. Some courts have held that the common law right extends only to those materials upon which the court relies in determining the substantive rights of the parties.[21] This limitation is based on the assumption that the primary purpose of the public's right of access to court records is to check the exercise of judicial authority, and not to provide information about the dispute being resolved.[22]

English and American common law, see Note, *The Common Law Right*, *supra* note 8, at 660-72.

18 *Id.* at 666.

19 Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); *Ex parte* Uppercu, 239 U.S. 435, 440 (1915).

20 *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); *In re* Knoxville News-Sentinel Co., Inc. 723 F.2d 470, 473 (6th Cir. 1983); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980); Vassiliades v. Israely, 714 F. Supp. 604, 605 (D. Conn. 1989); State v. Cottman Transmission Sys., Inc., 75 Md. App. 647, 656, 542 A.2d 859, 863 (1988); Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 202 (Minn. 1986).

21 *See, e.g.*, FTC v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987); Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986); *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985); Simon v. G. D. Searle & Co., 119 F.R.D. 683, 684 (D. Minn. 1987).

22 Mokhiber v. Davis, 537 A.2d 1100, 1110 (D.C. 1988) ("right of access is grounded primarily in the need for scrutiny of the legal process, not simply in the public's desire to learn more about the deeds and misdeeds of the parties.").

This limitation upon the public right of access significantly affects access to the records of cases settled out of court because settled cases never reach full determination, by the court, of the parties' substantive rights. Several courts confronting this problem have tried to resolve it by expanding the categories of documents to which the common law right of access attaches to include procedural motions and supporting documents, motions never ruled on, and settlement agreements enforced by consent decree. In *Mokhiber v. Davis*,[23] the Court of Appeals for the District of Columbia held that the common law right applied to procedural motions, such as motions to compel discovery and motions to amend the pleadings, evidence submitted with such motions, and the court's dispositions of those motions.[24] The court said that "[b]y submitting pleadings and motions to the court for decision, one enters the public arena of courtroom proceedings and exposes oneself, as well as the opposing party, to the risk, though by no means the certainty, of public scrutiny."[25] The court reasoned that although the pretrial materials "may tell the public little about what actually happened to the parties and who ought to win, . . . they may reveal a great deal about the character of the judicial process."[26] Pretrial rulings in modern litigation, the court said, "generally 'play a significant role in the administration of justice.'"[27]

Mokhiber also involved a question of access to two pretrial motions that the trial court had never ruled on because the case was settled. The court of appeals held that the presumptive right of access also applied to these materials—the right having attached when the documents were submitted to the court for decision.[28] The court reasoned that motions may affect how the trial court perceives a case and manages it toward settlement. The trial court may defer ruling on certain motions in order to develop opportunities for settlement. The information contained in the motions may also influence the trial court's decision to ratify the

23 537. A.2d 1100 (D.C. 1988).

24 *Id.* at 1111-13; *accord* Atlanta Journal v. Long, 258 Ga. 410, 369 S.E.2d 755 (1988).

25 537 A.2d at 1111.

26 *Id.* at 1113.

27 *Id.* (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986)).

28 *Mokhiber*, 537 A.2d 1100, 1112-13 (D.C. 1988); *accord In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1309-10 (7th Cir. 1984) ("withdrawal of motion is immaterial to whether presumption of access applies").

settlement in a consent decree.[29]

The First Circuit reached a similar conclusion in *Federal Trade Commission v. Standard Financial Management Corp.*[30] That case involved access to financial statements contained in the administrative record of a case settled by consent decree. The defendants tried to argue that the trial judge did not rely on the financial statements in approving the settlement and thus the public right of access did not attach to the particular documents. Although the trial judge admitted in retrospect that the documents were material and important to his decision to approve the settlement,[31] the First Circuit held that any "relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies."[32] The court said that when a public agency requests judicial approval of a negotiated consent decree, the court must determine whether the agreement is equitable, adequate, and reasonable. Because the agency presumably relied upon the totality of the administrative record in deciding to agree to the settlement, the record was clearly relevant to the court's determination. Thus, once the record was submitted to the judge, it could be assumed to have played a role in the judge's deliberations.[33]

The Third Circuit, in *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*,[34] explicitly held that the common law right of access to court records applied to settlement agreements filed with the court and embodied in a consent decree. Significant to the court's holding was the fact that the parties had voluntarily filed the settlement agreement with the court in order to obtain a consent decree that would allow them to enforce their agreement by use of the court's contempt power.[35] The court said:

> Having undertaken to utilize the judicial process to interpret

---

29 *Mokhiber*, 537 A.2d at 1113.

30 830 F.2d 404 (1st Cir. 1987).

31 *Id.* at 409 n.5.

32 *Id.* at 409.

33 *Id.* at 408-09.

34 800 F.2d 339 (3d Cir. 1986).

35 The common law right of access also attaches to settlement documents which are required to be filed with the court, although other factors may, nonetheless, allow the court to seal the documents. *See* Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986). *See generally* Forman, *Sealing and Unsealing Wrongful Death and Minor Settlement Documents*, 13 WM. MITCHELL L. REV. 505 (1987).

> the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.[36]

The court suggested that if the parties had wanted to prevent public access to their settlement agreement, they could have filed a voluntary stipulation of dismissal.[37]

Although these expansions of the reliance rule eliminate the difficulty of trying to divine the thought processes of the trial judge[38] and allow the public to inspect the court records of settled cases, this ad hoc approach to defining the scope of the common law right belies the spirit of the right.[39] The philosophical reasoning behind the common law right of access is not only to allow the public to oversee and thus acquire an understanding of the judicial process, but also to promote confidence in and respect for the system. A system that limits access to court documents not on the basis of the information they contain, but on the basis of the label they bear, is not conducive to the goals of confidence, understanding, and respect. It projects an image of secrecy and distorted truth around what should be an open judicial system. A better rule would recognize a general right of access to all documents filed with the court limited by exceptions pertaining to subject matter.[40] In fact, the state legislatures that have codified the common law right to inspect judicial records have not limited its application to certain categories of documents, but rather have said that all judicial records shall be open for inspection, except as otherwise provided by statute.[41] Because trial courts may now order that discovery materials not be filed with the court,[42] and because the parties may file a voluntary stipulation of dismissal instead of the actual settlement agreement, the interests in protecting these traditionally private documents

---

36 *Hotel Rittenhouse*, 800 F.2d at 345.

37 *Id.* at 344; *accord* H. S. Gere & Sons, Inc. v. Frey, 400 Mass. 326, 332 n.16, 509 N.E.2d 271, 275 n.16 (1987).

38 FTC v. Standard Fin. Management Corp., 830 F.2d 404, 409 (1st Cir. 1987).

39 *See* Morrison, *Protective Orders, Plaintiffs, Defendants, and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 119 (1989) (criticizing this approach as creating artificial boundaries to avoid addressing the substantive competing interests).

40 *See infra* section II.C., *A Proposal.*

41 *See supra* note 11.

42 Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 n.19 (1984).

would not be compromised.[43] It would be better for trial courts to exercise some of their discretion over their records before documents actually become public records than to apply ad hoc rules to limit access retrospectively.

2. The Strength of the Common Law Right of Access in Relation to Competing Considerations

Having determined that the common law right of access applies to court records that the parties have requested to be sealed, a court must then decide what weight to give the public's right when balancing it against competing interests favoring nondisclosure. Most appellate courts agree that the parties' desire or agreement to seal the court records does not justify automatic sealing by the court.[44] The court must make its own determination, and the parties bear the burden of showing independent reasons for restricting access.[45] Trade secrets, potentially defamatory material, and national security issues are generally recognized exceptions to the common law right,[46] but beyond these there are no uniformly applicable principles.

In *Nixon v. Warner Communications, Inc.*,[47] the Supreme Court acknowledged the existence of a common law right to inspect and copy judicial records. But, since the court based its decision on a federal statute rather than on the common law, it did not elaborate upon the scope of the common law right.[48]

---

43 *See generally* Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

44 Wilson v. Am. Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) ("litigants do not have the right to agree to seal what were public records"); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) ("confidentiality agreement between the parties does not bind the court in any way"); Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 318 n.4, 196 Cal. Rptr. 871, 877 n.4 (1983) ("It is doubtful that a trial court could find good cause to seal all court records solely because one party paid money to the other or because the parties stipulated"); H. S. Gere & Sons, Inc. v. Frey, 400 Mass. 326, 329, 509 N.E.2d 271, 273 (1987); Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 206 (Minn. 1986); Shenandoah Publishing House, Inc. v. Fanning, 235 Va. 253, 259, 368 S.E.2d 253, 256 (1988). *But see* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1073-74 (3d Cir. 1984) (suggesting in dicta that a binding contractual obligation between the parties not to disclose certain information would override the presumption of access because "disclosure would deprive the litigant of his right to enforce a legal obligation").

45 *E.g.*, Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986).

46 *E.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); *Brown & Williamson*, 710 F.2d at 1179.

47 435 U.S. 589 (1978).

48 *Id.* at 603. In *Warner Communications*, several members of the news media re-

The Court merely said that the common law right was entitled to a "presumption—however gauged."[49] This dicta has given state and lower federal courts ample leeway to develop their own varying formulations for balancing the competing interests. Some courts hold that the presumption is merely one factor included among other interests favoring disclosure.[50] Others characterize it as a strong presumption of openness which can only be overridden by strong countervailing reasons.[51] Still others would raise the common law right to near constitutional status by requiring a compelling interest and a narrowly tailored order.[52]

Another approach is to scale the weight of the presumption of access in proportion to the public's interest in the controversy. For example, in *H. S. Gere & Sons, Inc. v. Frey*,[53] the Massachusetts court held that only a showing of good cause or a legitimate expectation of privacy was needed to seal the records of a case involving private individuals, whereas if a public figure was involved, the parties would be required to demonstrate an overriding necessity for sealing.[54] This approach embodies a philosophy that civil litigation is primarily for the litigants and that privacy interests should generally outweigh the public interest in access. This, however, is not the case.

The American legal system offers many methods of resolving disputes, one of which is to bring the dispute into the public forum of the court. Once the parties choose to bring their dispute before the court, their privacy interests fade.[55] "While the

---

quested access to audiotapes introduced into evidence during the prosecutions of four Watergate defendants. The Court denied the press physical access to the tapes on the ground that the Presidential Recordings and Materials Preservation Act specified an alternate procedure for the release of the Watergate tapes. *Id.*

49 *Id.* at 602.

50 *See, e.g.*, Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (10th Cir. 1980); Atlanta Journal v. Long, 258 Ga. 410, 369 S.E.2d 755 (1988); C.L. v. Edson, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).

51 *See, e.g.*, FTC v. Standard Fin. Management Corp., 830 F.2d 404, 410 (1st Cir. 1987) (presumption is not overpowering but only the most compelling reasons justify sealing); Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986).

52 *See, e.g.*, Wilson v. Am. Motors Corp., 759 F.2d 1568 (11th Cir. 1985); Shenandoah Publishing House, Inc. v. Fanning, 235 Va. 253, 258, 368 S.E.2d 253, 256 (1988) (the moving party must establish an interest so compelling that it cannot be reasonably protected by alternate measures).

53 400 Mass. 326, 509 N.E.2d 271 (1987).

54 *Id.* at 329-32, 509 N.E.2d at 273-75; *see also* FTC v. Standard Fin. Management Corp., 830 F.2d 404, 412 (1st Cir. 1987) (threshold for sealing is elevated because the case involves a government agency and matters of public concern).

55 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975); *accord* C. L. v.

judicial process should not be used solely to expose previously private matters, the significance of events that become entangled with the judicial system, and the system's response, can become indistinguishable from the significance of the system itself."[56] The public thus has an interest in knowing and understanding the kinds of disputes that are presented for resolution in the public forum.[57] The public also has an interest in assuring that courts are fairly run and that judges are honest.[58] In addition, whether or not the right of access to judicial records is a directly enforceable constitutional right,[59] it undeniably has constitutional underpinnings.[60] Public access to court records is important for informed discussion of governmental affairs. It promotes respect for and understanding of the legal system. Thus, the common law right to inspect judicial records is deserving of a strong presumption independent of the public's interest in the subject matter of the controversy before the court, though this may be an additional factor weighing in favor of disclosure.[61]

A strong presumption of access does not mean that all privacy interests pale by comparison. Rather, the parties seeking to restrict access must make a particularized showing of harm that will result if the information contained in court records is revealed.[62] General assertions that the case is a private dispute between pri-

---

Edson, 409 N.W.2d 417, 422 (Wis. Ct. App. 1987) ("private party gives up a certain expectation of privacy when it commences a civil suit").

56 Mokhiber v. Davis, 537 A.2d 1100, 1117 (D.C. 1988).

57 *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1314 (7th Cir. 1984); Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980); *see also* Morrison, *supra* note 39, at 118 ("Litigation is not just for the litigants, at least not in our system. In our system, we are concerned with overall justice. We are concerned about the next case. We are concerned about public controversies that arise in public forums and are decided there.").

58 *In re Continental*, 732 F.2d at 1314; *Dobbins*, 616 F.2d at 461.

59 *See infra* notes 88-140 and accompanying text.

60 *See* O'Brien, *The First Amendment and the Public's "Right to Know"*, 7 HASTINGS CONST. L.Q. 579 (1980).

61 *See* Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (parties' desire to shield prejudicial information from public records "cannot be accommodated without seriously undermining the tradition of an open judicial system"); C. L. v. Edson, 409 N.W.2d 417, 422 (Wis. Ct. App. 1987) (strong presumption in favor of disclosure reflects interests independent of the parties status as private individuals).

62 *E.g.*, Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 346 (3d Cir. 1986); FTC v. Standard Fin. Management Corp., 830 F.2d 404, 412 (1st Cir. 1987); *see also*, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986) (litigants produced evidence of harassment and physical intrusion into their lives as a result of litigation concerning airline crash).

vate parties or that disclosure will embarrass or damage the reputation of the parties are not sufficient.[63] As one court observed, "[i]njury to corporate or personal reputation is an inherent risk in almost every civil suit."[64]

In requests to seal the judicial records of settled cases, the public policy of encouraging dispute settlement without litigation is also pitted against the strong presumption of public access to court records. Settlement is favored because it not only saves the parties the time, delay, expense, and publicity of an open trial, but also serves the public interest by conserving judicial resources and clearing court dockets, thus promoting a more effective and efficient judicial system. It is argued that a policy allowing access to the records of settled cases will discourage future settlements and may even dissuade prospective litigants from bringing their disputes before the court at all. The problem becomes more acute when the parties condition their settlement on obtaining a court order sealing the record. This places the trial judge in the awkward position of having either to honor the parties' request to the detriment of the public right of access, or to force the parties to go to trial to the detriment of the public policy favoring settlement.

By way of example, *In re Franklin National Bank Securities Litigation*,[65] was a complex multi-district case arising out of the failure of Franklin National Bank. After five years of preparation, the case went to trial. On the first day of what promised to be at least a six-month trial, the parties reached a settlement. The parties would not have settled without an agreement to keep the terms of the settlement confidential because one of the parties was concerned that disclosure might affect unrelated legal disputes.[66] The trial court consequently sealed all the settlement documents and upheld the order against a public interest group's subsequent challenge. The court reasoned that a six-month trial would have required enormous expenditures of both litigant and

---

63 *E.g., In re* Analytical Systems, Inc., 83 Bankr. 833, 836 (Bankr. N.D. Ga. 1987); Wilson v. Am. Motors Corp., 759 F.2d 1568, 1570-71 (11th Cir. 1985); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Shenandoah Publishing House, Inc. v. Fanning, 235 Va. 253, 259, 368 S.E.2d 253, 256 (1988).

64 State v. Cottman Transmission Sys., Inc., 75 Md. App. 647, 658, 542 A.2d 859, 864 (1988).

65 92 F.R.D. 468 (E.D.N.Y. 1981), *aff'd sub nom.* FDIC v. Ernst & Ernst, 697 F.2d 230 (2d Cir. 1982).

66 92 F.R.D. at 469-70.

judicial resources. The court was concerned that litigation expenses might have consumed the remainder of the defendants' insurance coverage leaving little or nothing to satisfy a judgment. In order to avert these consequences, the court ruled that sealing was justified.[67]

Other courts, though, have found that the public interest in encouraging settlement does not override the strong presumption favoring access. In one case,[68] a Wisconsin court held that the chilling effect on future litigation and settlement was mere speculation.[69] In *Wilson v. American Motors Corp.*,[70] the Eleventh Circuit acknowledged that courts should encourage settlements. Nevertheless, the court said that monetary settlement between the parties was not even entitled to consideration in deciding whether to seal the record.[71] The court also held that the parties' desire to prevent the use of the trial record in other litigation was not an adequate justification because judicial economy would mandate that court records which are relevant to issues in other proceedings be made available.[72]

Unquestionably the interest in encouraging settlements is important. The fact that the Federal Rules of Evidence exclude settlements and offers of settlement from the realm of admissible evidence is indicative of this strong public policy.[73] However, decisions which hold that the public interest in encouraging settlement is stronger than the public interest in access set dangerous precedent. In a system in which approximately ninety percent of all cases are settled without trial,[74] such rulings pave the way for a largely secretive judicial system.

---

67 *Id.* at 472. A few state courts have reached similar conclusions, although these cases have had other justifications for sealing, in addition to the public policy favoring settlement. *See* Crain Communications, Inc. v. Hughes, 135 A.D.2d 351, 521 N.Y.S.2d 244 (1987), *appeal dismissed*, 71 N.Y.2d 993, 524 N.E.2d 878,529 N.Y.S.2d 277, *appeal granted*, 73 N.Y.2d 701, 533 N.E.2d 673, 536 N.Y.S.2d 743, *aff'd*, 74 N.Y.2d 626, 539 N.E.2d 1099, 541 N.Y.S.2d 971 (1988) (trade secrets); Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986) (evidence of harassment and physical intrusion).

68 C.L. v. Edson, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).

69 409 N.W.2d at 423; *accord* Shenandoah Publishing House, Inc. v. Fanning, 235 Va. 253, 260 n.2, 368 S.E.2d 253, 256 n.2 (1988).

70 759 F.2d 1568 (11th Cir. 1985).

71 *Id.* at 1571 n.4.

72 *Id.* at 1571 & n.3.

73 *See* FED. R. EVID. 408.

74 Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 28 (1983).

Giving preference to the public interest in access should not seriously hinder efforts to settle. The incentives for settling, such as saving time and expense and avoiding the publicity of a trial, are still valid whether or not the parties are allowed to seal the case files. Litigants who want to protect the confidentiality of their settlement have the option of filing a voluntary stipulation of dismissal,[75] but they should not be entitled to seal court records simply because they succeeded in reaching a settlement agreement. The public policy favoring settlements is not so strong that sealing court records should be a reward for settling early.

3. The Public Right of Access Once Records Have Been Sealed

The balance of interests shifts slightly once a court has made the decision to seal records and the time for appealing the order has expired. The presumption favoring the correctness of a trial court's actions becomes operative.[76] In addition, the parties' reliance on the court order of confidentiality and the importance of preserving the judgment's stability must be considered. Because of the public right to inspect judicial records, a third party always has standing to subsequently challenge an existing sealing order and is usually permitted to intervene in order to do so.[77] However, the burden of producing evidence and persuading the court to vacate or modify the order then falls upon the intervenor. The parties who originally requested the sealing order have presumedly already satisfied their burden of proof.[78]

A party seeking to vacate an existing sealing order may always attack the order on the ground that the court improperly granted the order in the first place.[79] As the Second Circuit stated in *Palmieri v. New York*,[80] "no amount of . . . reliance could substantiate an unquestioning adherence to an order improvidently granted."[81] The intervening party, however, must show that

---

75 *See* Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986).

76 Mokhiber v. Davis, 537 A.2d 1100, 1116 n.15 (D.C. 1988).

77 *Id.* at 1113, 1117. *See also* Palmieri v. New York, 779 F.2d 861, 864 (2d Cir. 1985); *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 471 (E.D.N.Y. 1981), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).

78 *But see* Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 318, 196 Cal. Rptr. 871, 877 (1983) (burden is upon original the parties to show compelling reasons for continuing the sealing order).

79 *Mokhiber*, 537 A.2d at 1116 n.15.

80 779 F.2d 861 (2d Cir. 1985).

81 *Id.* at 865.

the substantive standard for sealing court records was clearly not met at the time the order was entered.[82]

Assuming, though, that the court properly granted the original order, courts differ regarding the burden that a challenging party must satisfy before the court will vacate or modify the existing order. Some courts, such as the Second and Sixth Circuits, impose a heavy burden upon the intervening party and require a showing of extraordinary circumstance or compelling need to modify the order.[83] Such a standard gives overwhelming weight to the parties' reliance and virtually ignores the public right of access. The rule, in effect, creates a presumption in favor of secrecy over access.[84]

The Court of Appeals for the District of Columbia has developed a more balanced approach that equitably accommodates the competing interests. In *Mokhiber v. Davis*,[85] the court refused "to adopt a *per se* rule that protective orders, once properly entered, cannot be lifted absent 'extraordinary circumstance[s]' or 'compelling need.'"[86] Rather, the court suggested that by invoking the common law right of access, the intervening party establishes a prima facie case that continued confidentiality is unjustified. The opponents may then cite the properly entered order to satisfy their burden of showing a countervailing interest that outweigh the interest favoring public access. The intervening party then must produce evidence showing why the opponents' interest in secrecy is no longer sufficiently strong to outweigh the public interest in disclosure. The practical effect of this approach is to recognize the public's right of access, but also to give stability to court orders by requiring the intervening party to produce sufficient evidence to convince the court that the initial reasons for secrecy are no longer present or are substantially weaker than they originally were. In other words, the order has become an anachronism.[87]

---

82 Mokhiber v. Davis, 537 A.2d 1100, 1116 n.15 (D.C. 1988).

83 *See Palmieri*, 779 F.2d at 864; *In re* Knoxville News-Sentinel Co., Inc., 723 F.2d 470, 478 (6th Cir. 1983); FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982); Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979).

84 *Mokhiber*, 537 A.2d at 1116.

85 537 A.2d 1100 (D.C. 1988).

86 *Id.* at 1116.

87 *Id.* at 1117; *see also* Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 317, 196 Cal. Rptr. 871, 877 (1983) ("a sealing or confidentiality order in a civil case is always subject to continuing review and modification, if not termination, upon changed circumstances.").

B. The First Amendment Approach

A second argument frequently raised against sealing court documents is a right of access based on the first amendment. The Supreme Court has never explicitly recognized such a right, but several state and lower federal courts have considered the issue. Only the Third, Fourth, Sixth, Seventh, and Ninth Circuits and one state court have found that a constitutional right to court records exists.[88] The Eleventh Circuit, while not explicitly recognizing a constitutional right to court records, has nevertheless fashioned a common law right protected by the constitutional compelling interest standard.[89]

Most of the courts explicitly recognizing a first amendment right of access have reasoned by analogy from the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*,[90] which held that the public has a right under the first and fourteenth amendments to attend criminal trials. In that case the defendant, who was being tried for the fourth time,[91] requested that the courtroom be cleared of all persons except the witnesses when testifying. The prosecution did not object, and the trial judge granted the motion.[92] A newspaper and two of its reporters later protested the closure, but their motion to vacate the order was denied.[93] After the trial resulted in an acquittal, the newspaper

---

88 *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988) (documents filed in connection with summary judgment motion); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (hearing transcripts); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) (special litigation committee report admitted into evidence in connection with a motion to dismiss); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (all documents filed in case); Associated Press v. United States Dist. Court, 705 F.2d 1143 (9th Cir. 1983) (pretrial documents in a criminal case); Hearst Corp. v. State, 60 Md. App. 651, 484 A.2d 292 (1984) (court records).

The District of Columbia Circuit distinguishes between pretrial/prejudgment access and post-judgment access and has rejected both a first amendment and a common law right of prejudgment access to court records. In doing so it has indirectly recognized the possibility of a first amendment right of access after judgment. *See In re* Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1339 (D.C. Cir. 1985) ("To the extent a First Amendment right to post-judgment civil records exists, it does not exceed . . . the traditional common law right.").

89 *See* Wilson v. Am. Motors Corp., 759 F.2d 1568 (11th Cir. 1985).

90 448 U.S. 555 (1980).

91 The first trial had resulted in a conviction of second-degree murder, which was reversed by the Virginia Supreme Court. The second and third trials had ended in mistrials. *Id.* at 559.

92 *Id.* at 559-60.

93 *Id.* at 560-61.

and the reporters intervened and petitioned the Virginia Supreme Court for an appeal. The petition was denied.[94] The appellants then sought review in the United States Supreme Court.

In reasoning toward the recognition of a first amendment right to attend criminal trials, Chief Justice Burger, writing a plurality opinion, began his analysis by tracing the evolution of the criminal trial in the English and American legal systems and concluded that historically criminal trials have been presumptively open.[95] He then examined the philosophical reasons for open criminal trials. Openness discourages perjury, misconduct by the participants, and decisions based on secret bias or partiality.[96] Chief Justice Burger emphasized the importance of open trials in promoting confidence in the legal system and a public perception that justice was being fairly administered. He noted the therapeutic and prophylactic value of open trials in providing an outlet for community concern, hostility, and emotion over criminal conduct and for preventing vigilante enforcement of the criminal laws.[97] Finally, he stressed the educative effect of public attendance at trials in promoting a general understanding of the system and a respect for the law.[98]

The Chief Justice then proceeded to inquire into the basis for a constitutional right to attend criminal trials and focused on the first amendment, specifically the freedoms of speech and press, and the rights of assembly and petition.[99] He recognized that the Constitution did not explicitly guarantee a right to attend criminal trials but noted that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open."[100] Therefore, "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."[101] The Chief Justice cited earlier Supreme Court cases recognizing a right to receive information and ideas as implicit in the rights of free speech and

94 *Id.* at 562.

95 *Richmond Newspapers*, 448 U.S. 555, 564-69 (1980).

96 *Id.* at 569.

97 *Id.* at 571.

98 *Id.* at 572.

99 "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

100 *Richmond Newspapers*, 448 U.S. 555, 575 (1980).

101 *Id.*

press.[102] "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."[103] The Chief Justice noted that the right of assembly was also relevant because the drafters of the Constitution intended that right "to augment the free exercise of the other First Amendment rights."[104]

In *Richmond Newspapers*, the Court limited its holding to a right to attend criminal trials, but it noted "that historically both civil and criminal trials have been presumptively open."[105] Justice Stewart, who concurred in the judgment, stated that he would find a constitutional right of access to both civil and criminal trials.[106] Given the historical concession by the Supreme Court, the extension of *Richmond Newspapers* to the civil proceeding context is easy to make,[107] and several state and lower federal courts have done so.[108]

Openness plays a significant role in the function of civil, as well as criminal, trials. It equally promotes true and accurate fact-finding by discouraging perjury and encouraging witnesses to come forward with new information. Public access to civil trials also serves as a check upon the judicial process by exposing misconduct, incompetence, and corruption. It fosters an appearance of fairness and heightens public respect for the legal system.[109]

---

102 *Id.* at 576 (citing First Nt'l Bank of Boston v. Belotti, 435 U.S. 765, 783 (1978); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

103 Id.

104 *Id.* at 577.

105 *Richmond Newpapers*, 448 U.S. 555, 580 n.17 (1980).

106 *Id.* at 599 (Stewart, J., concurring).

107 *But see* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring). *Globe Newspaper* held that mandatory closure of sex offense trials involving victims under the age of eighteen violated the first amendment. In her concurring opinion, Justice O'Connor cautioned that she interpreted "neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials." *Id.*

108 *See, e.g.*, Westmoreland v. Columbia Broadcasting System, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Publicker Indus., Inc. v Cohen, 733 F.2d 1059 (3d Cir. 1984); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (limiting its holding to civil proceedings involving prison inmates); Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); State v. Cottman Transmission Sys., Inc., 75 Md. App. 647, 542 A.2d 859 (1988).

109 *Westmoreland*, 752 F.2d at 23; *Publicker*, 733 F.2d at 1069-70; *Brown & Williamson*, 710 F.2d at 1179.

In addition, civil trials frequently involve public concerns, such as discrimination, products liability, bankruptcy and environmental regulation. Thus, "community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases."[110] In fact, the Supreme Court alluded to the advantages of open civil trials in a footnote in the earlier case of *Gannett Co. v. DePasquale*:

> many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.[111]

Some courts have further extended the *Richmond Newspapers* holding to find a constitutional right of access to the judicial records of civil cases.[112] In *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*,[113] for example, the Sixth Circuit held that the first amendment guaranteed a public right of access to all documents filed in a civil case. The court reasoned that the principles respecting public access to judicial proceedings apply equally "as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision."[114] Similarly, in *Rushford v. New Yorker Magazine, Inc.*,[115] the Fourth Circuit held that the first amendment protected access to documents filed in connection with a summary judgment motion in a civil case.

These cases apply a broad interpretation of the *Richmond Newspapers* holding and make little distinction between the right of access to court proceedings and the right of access to court records.[116] These courts understand *Richmond Newspapers* to rec-

---

110 *Brown & Williamson*, 710 F.2d at 1179.

111 443 U.S. 368, 386 n.15 (1979) (citations omitted). *But see In re* Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1337 (D.C. Cir. 1985) (doubting that the functions served by access to criminal trials are as important in the context of civil trials).

112 *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

113 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

114 *Id.* at 1177.

115 846 F.2d 249 (4th Cir. 1988).

116 *Cf.* Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir.

ognize the public's general right to receive information within a court's control. The language of Chief Justice Burger's plurality opinion allows for such an interpretation. In his opinion the Chief Justice stated that the first amendment freedoms of speech and press, *standing alone*, served as the basis for the public's right to attend criminal trials.[117] The people's right to assemble in a public place was only subsequently mentioned as additional support for the Court's holding.[118]

The breadth of the court's two-prong analysis used to define the scope of the right also permits application of the constitutional right of access in the judicial records context. [119]As a general rule, court records have historically been open to the public,[120] and openness serves an important purpose in the functioning of the court. Not only does it allow the public to check the abuse of judicial authority, but it also educates the public about how the courts are being used. Openness promotes confidence in the legal system and a public perception that justice is being fairly administered.[121]

Other courts, however, have taken a narrower view of *Richmond Newspapers*—limiting its holding to a right to participate in certain court proceedings and to receive information from those proceedings. Such an interpretation has a significant impact upon access to the records of settled cases because most of these cases never culminate in a trial which the public would have a constitutional right to attend. For example, in *Minneapolis Star & Tribune Co. v. Schumacher*,[122] the Minnesota Supreme Court applied the

---

1983) (reversing the trial court's order to seal all documents in a widely publicized criminal case when the court found "no reason to distinguish between pretrial proceedings and the documents filed in regard to them").

117 Richmond Newpapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980). For the exact text, see *supra* text at note 103.

118 *See id.* at 577-78.

119 One criticism of the historical analysis used by the Court is that it proves too much. It elevates virtually every common law right to constitutional status because most common law rights have withstood the test of time and function. *Cf.* Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979) (critiquing application of the historical analysis in a sixth amendment context).

120 *See supra* note 17. Some courts limit the common law presumption of openness to certain categories of documents. *See supra* notes 21-37 and accompanying text. In addition, some documents, such as discovery pleadings, are a fairly recent invention and thus do not share the historical tradition of access. Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986); Mokhiber v. Davis, 537 A.2d 1100, 1111 (D.C. 1988).

121 *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1314 (7th Cir. 1984); Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980).

122 392 N.W.2d 197 (Minn. 1986).

two-prong analysis of *Richmond Newspapers* and refused to recognize a constitutional right of access to settlement documents and the transcripts of hearings approving the settlement and the distribution of funds.[123] *Schumacher* involved several wrongful death actions arising out of an airline crash. All the cases were settled prior to trial, and pursuant to statute, separate hearings were held to oversee the distribution of the settlement funds among the various heirs in each case and to approve the settlement figure in one case involving a minor child.[124] The hearings were held in open court, but because no notice was given to the public or to the media, only the litigants attended.[125] At the parties' request, the settlement documents and the hearing transcripts were sealed.[126]

Several news organizations sought access to the files. In declining to apply a constitutional standard to the request for access, the Minnesota Supreme Court noted that historically most cases have been settled in private, outside the courtroom and without court involvement.[127] The court explained that the statutes requiring the settlement agreements to be brought before the court did not affect the historical analysis because the statutes were enacted with the intent to facilitate the proper distribution of settlement funds and to protect minors, and not for the purpose of subjecting settlement agreements to public scrutiny.[128] Philosophically, the court reasoned that access to settlement documents would undermine the public policy favoring settlement of disputed claims without litigation because one reason that litigants settle is to avoid going to trial and publicly exposing their disputes.[129] *Schumacher* denied a constitutional right of access to documents filed with the court because those documents resulted from a phase of litigation which the public did not have a consti-

123 The trial court originally sealed the entire case file, but later, after the Minnesota Court of Appeals vacated the sealing order, the trial judge amended the order to include only the settlement documents and transcripts. It was this amended order that the Minnesota Supreme Court reviewed. *Id.* at 201 n.3. The court stated that it did not intend its decision to apply to other civil trial records or documents. *Id.* at 203.

124 *See* MINN. STAT. §§ 573.02, 540.08 (1984).

125 392 N.W.2d at 200.

126 *See supra* note 123.

127 *Schumacher*, 392 N.W.2d 197, 204 (Minn. 1986). The court supported its historical conclusion with the fact that the rules of evidence precluded the admissibility of settlement agreements, offers to settle, and statements made during settlement negotiations to prove liability. *Id.*

128 *Id.* at 205.

129 *Id.*

tutional right to attend under the two-prong test of *Richmond Newspapers*.[130]

In *Mokhiber v. Davis*,[131] the Court of Appeals for the District of Columbia rejected the first amendment argument for access to documents filed under seal in a civil case settled prior to trial on the grounds that no court proceedings were conducted at all. Only access to court records—pleadings and motions—was at issue.[132] The court found wholly inapplicable the line of Supreme Court cases dealing with access to criminal proceedings.[133] The court reasoned that the public interest in the pretrial disputes between private parties was significantly different from the public interest in preliminary criminal proceedings where the state *ab initio* is seeking to vindicate a wrong to society at large.[134] The court ultimately did hold that the common law right of access attached to these pretrial documents.[135]

The Supreme Court itself seems to take this narrower interpretation of *Richmond Newspapers*. Subsequent Supreme Court cases applying the holding of *Richmond Newspapers* have been limited to other aspects of the criminal process and have never addressed access to records.[136] In *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*,[137] Chief Justice Burger, this time writing a majority opinion for seven justices, restated the two-prong inquiry of *Richmond Newspapers* to be "whether the *place and process* have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular *process* in question."[138] Thus, the constitutional right of access to information, as it currently stands, is not as broad as the correlative freedom of expression,[139] and

130 *Id.* at 203.

131 537 A.2d 1100 (D.C. 1988).

132 *Id.* at 1107.

133 *Id.*

134 *Id.* at 1108.

135 *See supra* notes 23-29 and accompanying text.

136 *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II) (preliminary hearings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I) (jury selection); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (rape trials involving a minor).

137 478 U.S. 1 (1986).

138 *Id.* at 8 (emphasis added).

139 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585 (1980) (Brennan, J., concurring in judgment) ("While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed, the First Amendment has not been viewed by the court in all settings as providing an equally categorical assurance of the correlative freedom of access to information.")

does not really encompass all court records. At most, without further guidance from the Supreme Court, it is a right which attaches to civil court records only a public trial or hearing has begun.[140]

II. LIMITING JUDICIAL DISCRETION: CLARIFYING THE COMMON LAW APPROACH

Confusion about the nature of the public's right of access to judicial records and about the proper weight to be given to the various competing interests has bred much litigation over sealing orders and some abuse of the procedure as well. The current system affords the trial judge broad discretion in granting and denying access and consequently results in inconsistent, unpredictable, and sometimes unfair outcomes, as in the Xerox case discussed at the beginning of this Note. Judges in this context are often not detached decisionmakers. When a case reaches the settlement stage, the judge has probably already become involved in the case and may have even encouraged or assisted the parties to settle. The judge most likely has preexisting attitudes and ideas about the parties and their claims and cannot be depended upon to adequately represent the public interests adversely affected by sealing the record.[141]

Clearer standards for issuing sealing orders are needed to limit judicial discretion while still protecting the public interest. Clearer standards may even encourage the parties to settle their dispute sooner. If the litigants know what information can be filed under seal and what cannot, they may be more willing to settle and to make larger concessions to avoid generating an extensive public record that they may not be able to seal later.[142]

(citations omitted).

140 *See* Wilson v. Am. Motors Corp., 759 F.2d 1568 (11th Cir. 1985). The Eleventh Circuit reversed an order sealing the pleadings, docket entries, orders, filed affidavits and depositions, and transcripts of a civil case that went to trial but settled before the jury rendered a verdict. The court applied a constitutional standard and noted that the fact that the case actually went to trial was a significant factor in its decision. *See also* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (granting access to transcripts of a hearing which the court held that the public had a constitutional right to attend).

141 Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 417 n.16 (1981); *see also In re* Knoxville News-Sentinel Co., Inc., 723 F.2d 470, 475 (6th Cir. 1983) (district court should not be the sole guardian of the first amendment).

142 Morrison, *supra* note 39, at 124. By way of example, Morrison mentions the cases involving the Shiley heart valve, which the company settled before discovery started

This would certainly deflate the argument that sealing orders are necessary to promote settlement.[143]

Reform, however, does not depend solely upon the recognition of an enforceable first amendment right of access. With its constitutional underpinnings, the common law right to inspect and copy judicial records is sufficiently strong and firmly established by history and case law.[144] Even if a constitutional right of access were to become generally acknowledged, courts would most likely recognize only a qualified right of access, limited by common law exceptions.[145] Rather, reform lies in providing guidelines specifying the procedure courts should follow and the weight judges should accord the competing public and private interests in a decision to seal a case file in whole or in part.

A. State Reforms

A few states have recognized the need for reform and have implemented procedural rules for sealing court records. In 1985, the Georgia Supreme Court adopted Rule 21 of that state's Uniform Rules for the Superior Courts.[146] The rule provides that all court records are public and available for public inspection unless a statute or an order entered pursuant to the procedures established in the rule limit access. The prescribed procedures permit a court to limit access to the court files of a civil action only after a hearing on the matter.[147] Before limiting access the trial court must make specific and adequate findings "that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest."[148] These findings must be stated in the sealing order. The order must also specify the part

---

by paying large sums of money. *See also* Comment, *Common Law or First Amendment Right of Access to Sealed Settlement Agreements*, 54 J. AIR L. & COMMERCE 577, 625 (1988).

143 *See supra* notes 65-67 and accompanying text.

144 *But see* Mokhiber v. Davis, 537 A.2d 1100, 1118 (D.C. 1988) (Ferren, J., concurring in part and dissenting in part) (arguing that a first amendment right of access is needed because a legislature or a court can amend or repeal the common law protection).

145 *See, e.g.*, Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (recognizing a constitutional right of access to civil court documents, but then limiting that right with common law exceptions); *cf.* Fenner & Koley, *supra* note 141, at 438-44 (suggesting that the limits on the public right of access to criminal trials recognized in *Richmond Newspapers* will be the historical and public policy limits already recognized by law).

146 Valenzeula v. Newsome, 253 Ga. 793, 801, 325 S.E.2d 370, 374 (1985).

147 GA. UNIF. R. SUPER. CTS. 21.1.

148 *Id.* Rule 21.2.

of the file to which access is limited, as well as the nature and duration of the limitation.[149]

In 1986, Massachusetts also adopted its own set of guidelines for sealing court records in civil proceedings. The Massachusetts Uniform Rules on Impoundment Procedure[150] require that the party request to seal documents by written motion, stating the grounds and supporting reasons for the motion and describing with particularity the material sought to be impounded and the desired duration of impoundment.[151] The moving party bears the burden of showing good cause for the sealing order.[152] As under the Georgia rules, a hearing is required before a court may seal the records,[153] but unlike Georgia, Massachusetts also requires that notice be given to all parties and interested third persons.[154] Additionally, as in Georgia, the judge must make written findings, and the sealing order must specify the material to be impounded and the duration of the order.[155]

B. Critique of the State Reforms

Both the Georgia and the Massachusetts rules show an awareness of the need not only to establish a procedure for sealing court records, but also to specify the substantive standard to be applied. On a procedural level, both states require a hearing and specific written findings supporting the sealing order. Such procedures protect the public's interest in access by preventing the trial judge from automatically sealing court records upon stipulation by the parties. The Massachusetts rule carries the protection one step further by requiring that notice be given to third parties potentially affected by the sealing order.

The Georgia Supreme Court's decision in *Atlanta Journal v.*

---

149 *Id.* Rule 21.1.

150 Impoundment is defined as "the act of keeping some or all of the papers, documents, or exhibits, or portions thereof, in a case separate and unavailable for public inspection" (i.e. sealing). MASS. UNIF. R. IMPOUNDMENT PROC. 1.

151 *Id.* Rule 2.

152 *Id.* Rule 7. As the Supreme Judicial Court of Massachusetts has subsequently interpreted the good cause standard, an agreement of all the parties does not, in itself, constitute good cause, but a legitimate expectation of privacy does. *See* H. S. Gere & Sons, Inc. v. Frey, 400 Mass. 326, 329 n.7, and 330, 509 N.E.2d 271, 273 n.7, and 274 (1987).

153 MASS. UNIF. R. IMPOUNDMENT PROC. 7. The rules allow a court to enter an ex parte order of impoundment without a hearing, but a hearing must be held within ten days. *Id.* Rule 3.

154 *Id.* Rule 4.

155 *Id.* Rule 8.

Long,[156] however, weakened the procedural protections that Rule 21 appears to offer. That case held that a trial court's failure to satisfy the procedural requirement of adequate findings does not constitute reversible error.[157] The court found grounds to reverse the sealing order only after reweighing the balance of interests and concluding that the substantive standard of Rule 21 had not been met, that is, that the harm to privacy interests did not clearly outweigh the public interest in disclosure.[158] Such an interpretation defeats the purpose of Rule 21's procedural safeguards. It allows the trial court, without fear of reversal, to routinely seal court records without articulating its reasons. Instead, it depends upon the appellate court to decide the substantive weight of the competing interests. The *Atlanta Journal* holding also contradicts the majority of courts that have found abuse of discretion when the trial court fails to state findings that justify sealing.[159]

On a substantive level, both the Massachusetts and the Georgia rules fall short of the discretion-limiting guidance that is needed to adequately protect the public interest in access to court records. The Massachusetts rules require merely a showing of good cause in order to seal court records.[160] Good cause is the standard usually required for the entry of a protective order sealing discovery materials that are not part of the court record.[161] Most courts, however, require a stronger showing in order to permanently seal a case file.[162] The Massachusetts rules make no distinction between the showing required to impound discovery materials and that necessary to permanently seal court records. Thus, as interpreted by the Supreme Judicial Court of Massachusetts in *H. S. Gere & Sons, Inc. v. Frey*,[163] good cause can be any legitimate expectation of privacy held by a person who is not a

156 258 Ga. 410, 369 S.E.2d 755 (1988).

157 *Id.* at 413, 369 S.E.2d at 757.

158 *Id.* at 413-15, 369 S.E.2d at 757-60.

159 *See, e.g.*, Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253-54 (4th Cir. 1988); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1176 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Newman v. Graddick, 696 F.2d 796, 802-03 (11th Cir. 1983). *But cf. In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1313 (7th Cir. 1984) (declining to remand *order granting access* despite lack of specific findings by the district court).

160 MASS. UNIF. R. IMPOUNDMENT PROC. 7.

161 *See* FED. R. CIV. P. 26(c); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).

162 *See, e.g., In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1311 (7th Cir. 1984); Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). *See also supra* notes 51-52 and accompanying text.

163 400 Mass. 326, 509 N.E.2d 271 (1987).

public official.[164] *Frey* involved a civil suit arising out of the rape of a child, naturally a matter of public interest and concern. The case was settled prior to trial and the entire case file was impounded. Noting the intensely personal nature of the information contained in the record and the fact that the parties were not public officials, the trial judge found good cause for impounding the case file.[165] The appellate court affirmed, thus illustrating how little protection the good cause standard affords the public interest in access to court records.

The Georgia rules establish a slightly different type of standard. They create a balancing test that requires the trial judge to find "that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest" before limiting access to court records.[166] Such a balancing test is typical of the approach used by the majority of courts in deciding access questions.[167]

The philosophical ideal behind the balancing approach, a product of legal realism, is that if the decisionmaker knows the facts and policies involved in a particular case, then the correct answer to legal disputes will follow.[168] Thus, the rules give the judge a broad range of choices and permit policy decisions that might be more appropriate for the legislature. The increased judicial discretion, however, has not necessarily resulted in better decisions.[169] The problem is that when judges are given no more guidance than a list of many interrelated and independent factors to be weighed in a complex mix of competing considerations, they face the dilemma of either trying to do the impossible and reason their way to a single correct result or to exercise their own intuitive discretion. This predicament leads to inconsistent outcomes.[170]

The balancing approach presents an additional problem that is particularly acute in questions of access to court records. As one commentator noted, "even if a court could come up with

---

164 *Id.* at 330, 509 N.E.2d at 274.

165 *Id.* Another factor in the trial court's decision was that most of the documents contained in the file were discovery documents. Nevertheless, the entire case file was sealed.

166 GA. UNIF. R. SUPER. CTS. 21.2.

167 *See supra* notes 44-75 and accompanying text.

168 Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 764.

169 *Id.* at 765.

170 Henderson, *Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845, 848 (1983).

relatively concise and yet meaningful statements of the interests involved in a particular case, one would face the further problem of deciding whether the interests identified were really comparable enough to permit balancing them against each other."[171] In sealing decisions, the public interest in disclosure is pitted directly against individual privacy interests, and trial judges have received little guidance from either the legislatures or the appellate courts on how to balance these two distinct categories of interests. Trial judges would best be guided by a legislative determination of the weight to be accorded the public right of access. The legislature is the appropriate body to make this public policy evaluation, as it is more representative of and accountable for the public interest.

C. A Proposal

Although the Massachusetts and Georgia rules are a step in the right direction, they could be improved by further clarification of the substantive standards that govern sealing decisions. Legislators should attempt to codify the common law right to inspect judicial records, along with its exceptions, as Congress has done for the federal bankruptcy courts.[172] A model statute might be drafted as follows:

> (1) All documents filed with the court are public records and available for inspection unless access is limited by statute or by court order entered according to the procedures set forth below.
> (2) Upon the entry of a final judgment or consent decree, any party to a civil action may move to seal specific documents or portions thereof contained in the court records.
> (3) Before limiting access to court records, the court shall give notice to all parties and interested third parties and shall hold a hearing on the motion. The court shall not seal court

171 Christie, *supra* note 168, at 766.

172 *See* 11 U.S.C. § 107 (1988):

> (a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
> (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

Id.

records except upon finding that the moving party has proved by clear and convincing evidence that information contained in the document sought to be sealed:

(a) constitutes a trade secret or other confidential commercial research or information;

(b) is a matter of national security;

(c) promotes scandal or defamation;

(d) pertains to wholly private family matters, such as divorce, child custody, or adoption;

(e) poses a serious threat of harassment, exploitation, physical intrusion, or other particularized harm to the parties to the action; or

(f) poses the potential for harm to third persons not parties to the litigation.

(4) The sealing order shall specify the documents to be sealed, the reasons for sealing, and the duration of the order.

This model is designed merely to address the specific problem that is the subject of this Note, namely the permanent sealing of the case files of civil actions settled out of court. Other provisions setting forth the standards governing criminal records and the sealing of civil records prior to trial would have to be included because these situations involve additional considerations, such as preserving the integrity of the trial process. This statute would not preempt other statutes establishing procedures for access to specific types of documents.[173]

Procedurally, the model is very similar to the Georgia and Massachusetts rules. It provides for a hearing and notice to third parties, thus preventing the trial judge from simply rubber-stamping an agreement among the parties. Substantively, though, the model more clearly defines the relation between the competing public and private interests, which are not easily compared in a balancing test, and thus limits, without abolishing, the range of judicial discretion. The clear and convincing burden of persuasion establishes the strength of the presumption in favor of openness.

The statute specifies six instances in which individual privacy interests may become more important than the public interest in access. The first three are well recognized exceptions to the com-

173 *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (holding that the common law right to inspect and copy judicial records did not authorize the release of tape recordings played for the jury because the Presidential Recordings Act provided an alternative means of access).

mon law right.[174] The fourth protects privacy when the public has little interest in the controversy and is supported by the constitutional right to privacy that the Supreme Court has recognized in certain family matters.[175] The fifth exception allows the court to seal certain settlement agreements, particularly portions disclosing a large settlement amount, which might expose the parties to theft, exploitation or other physical intrusion.[176] The threat of harm, however, must be more than mere speculation and does not necessarily mandate sealing the entire case file.[177] Finally, the last exception protects third parties who have involuntarily become subjects of public scrutiny through court records, such as bank records filed as part of a civil action. The requisite showing of harm is less than that required under subsection (e) because these third persons have not purposely availed themselves of the court processes.

III. CHALLENGING COURT ENDORSED STIPULATIONS OF SILENCE

When litigants settle a case and stipulate to sealing the court records, they usually also agree to a court order, commonly called a "gag order," restraining the parties, their counsel, and possibly others involved in the case from discussing the case with members of the media or the general public. The first amendment implications of a permanent restraint on communication are readily apparent; nevertheless, few such orders entered pursuant to a settlement agreement have ever been challenged. The parties have little motivation to challenge the court's order because they stipulated to it, and third parties face procedural difficulties in seeking review of the order.

---

174 *See supra* note 46 and accompanying text.

175 *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

176 *See, e.g.*, Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986) (heirs of airline crash victims were subject to harassment and physical intrusion); *see also In re* Estate of Hearst, 67 Cal. App. 3d 777, 785, 136 Cal. Rptr. 821, 825 (1977) (suggesting that threats of terrorist attacks might be sufficient justification for *temporarily* sealing court records).

177 In *Schumacher*, the litigants produced evidence of physical intrusion in their lives that had already occurred. 392 N.W.2d at 206. Only the settlement agreements and transcripts of the settlement hearings were sealed. *Id.* at 201 n.3.

A. The First Amendment Challenge

1. Challenges by Third Parties

The federal circuit courts of appeal are currently split on the ability of third parties to challenge gag orders.[178] All the circuits agree that third parties have standing to seek review,[179] but differ on the rights that a third party may assert. The Second and the Ninth Circuits have held that a difference exists between the first amendment rights that the gagged party may raise to challenge the order and the first amendment rights that a third party may assert. The gagged party may challenge the order as a prior restraint on the freedom of speech,[180] which bears a heavy presumption of invalidity.[181] However, in *In re Application of Dow Jones & Co., Inc.*[182] and *Radio & Television News Association of Southern California v. United States District Court*,[183] the Second and Ninth Circuits respectively held that third parties could not assert the first amendment rights of the parties directly restrained by the order.[184] A gag order, when challenged solely by a third party, was held to be less intrusive of first amendment rights and to not amount to a prior restraint.[185] In the case of a third-par-

178 *Compare In re* Application of Dow Jones & Co., Inc., 842 F.2d 603 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988) *and* Radio & Television News Ass'n of Southern Cal. v. United States Dist. Court, 781 F.2d 1443 (9th Cir. 1986) *with* CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1985).

179 *In re* Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1561 (11th Cir. 1989); *Application of Dow Jones*, 842 F.2d at 607; *Radio & Television News*, 781 F.2d at 1446; *CBS Inc.*, 522 F.2d at 237-38. The basis for standing is the right to receive information and ideas where there is a willing speaker. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976). Willingness to speak on the part of the restrained parties may be inferred from the entry of the gag order itself. If the parties were unwilling to speak, a gag order would be unnecessary. The parties' stipulation to the order does not mean that they are unwilling to speak. *See Application of Dow Jones*, 842 F.2d at 607-08.

180 *See, e.g.*, Levine v. United States Dist. Court, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). *See also infra* note 191 and accompanying text.

181 New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

182 842 F.2d 603 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988).

183 781 F.2d 1443 (9th Cir. 1986).

184 842 F.2d at 609; 781 F.2d at 1448. Both of these cases involved news agencies challenging gag orders restraining the trial participants from communicating with the media.

185 842 F.2d at 609; 781 F.2d at 1447.

ty challenge, a gag order need only be justifiable[186] or reasonable,[187] meaning that the order will stand if supported by adequate factual findings[188] of state interests that override the order's very limited effects on first amendment rights.[189]

The Sixth Circuit, on the other hand, has taken the opposite view in holding that third parties may challenge a gag order as a prior restraint.[190] Whether challenged by a third party or by the restrained parties themselves, a court order classified as a prior restraint on the freedom of speech is subject to strict scrutiny. It will be upheld only if the government satisfies a three-prong test: (1) the speech or activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available.[191]

Most cases challenging gag orders as prior restraints concern orders restraining extrajudicial statements made before or during trial. The competing interest sought to be protected is the right to a fair trial guaranteed by the sixth amendment for criminal trials and by the due process clauses of the fifth and fourteenth amendments in the context of civil trials.[192] However, when a gag order is entered pursuant to a settlement agreement, the right to a fair trial is not implicated at all, and other possible competing interests must be evaluated.

Numerous other important interests could be argued, including many of the same interests that might justify a sealing order at common law, such as protecting privacy rights or preventing the dissemination of defamatory material, but courts have held that these interests *alone* do not override the more significant first

---

186 842 F.2d at 609.

187 781 F.2d at 1447.

188 *See, e.g.*, New York Times Co. v. Rothwax, 143 A.D.2d 592, 533 N.Y.S.2d 73 (1988) (gag order vacated for lack of adequate factual findings).

189 Radio & Television News Ass'n of S. Cal. v. United States Dist. Court, 781 F.2d 1443, 1447 (9th Cir. 1986); *see also* Cummings v. Beaton & Assocs., Inc., 192 Ill. App. 3d 792, 798 n.2, 549 N.E.2d 634, 638 n.2 (1989) (noting in dicta the possibility of situations in which the privacy interests of litigants may be served by an order restricting the dissemination of information, such as trade secrets or other confidential information).

190 *See* CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).

191 *E.g.*, Levine v. United States Dist. Court, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

192 *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (criminal trial); Levine v. United States Dist. Court, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (criminal trial); CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (civil trial); Kemner v. Monsanto Co., 112 Ill. 2d 223, 492 N.E.2d 1327 (1986) (civil trial).

amendment interests in freedom of expression.[193] Only when a valid sealing order has actually been entered does it seem possible for a post-settlement gag order to withstand the strict scrutiny of a prior restraint analysis. In this context, a gag order may be deemed necessary to give effect to the court's sealing order. Without a sealing order, a gag order would serve no useful purpose because the information sought to be kept secret would be part of the public record.[194]

In *Seattle Times Co. v. Rhinehart*,[195] the Supreme Court held that a protective order restricting dissemination of information acquired through the trial court's discovery processes did not violate the litigants' first amendment rights. The Court noted "that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny."[196] "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit."[197] Because access to the information was obtained solely by virtue of court processes, the Court concluded that "continued court control over the discovered information [did] not raise the same specter of government censorship that such control might suggest in other situations."[198]

The Court based part of its decision on the fact that the information was obtained through discovery, a non-public component of a civil trial, and concluded that the restraints were not restrictions on a traditionally public source of information. A rough analogy can be made to a restraining order issued in conjunction with an order sealing a court record, a traditionally public source of information. In *Seattle Times*, the Court recognized that "to the extent that courthouse records could serve as a source of public information," the trial court had discretion to

---

193 *See, e.g., In re* Providence Journal Co., 820 F.2d 1342, 1350 (1st Cir. 1986) (infringement on privacy rights or potential for embarrassment are insufficient bases for a prior restraint); Crosby v. Bradstreet Co., 312 F.2d 483 (2d Cir. 1963) (court lacked authority to enjoin possible defamatory statements); Reiter v. Mason, 563 So.2d 749 (Fla. Dist. Ct. App. 1990); Minneapolis Star & Tribune Co. v. Lee, 353 N.W.2d 213 (Minn. Dist. Ct. App. 1984) (protection of child in juvenile dependency case did not rise to the level required to justify a prior restraint).

194 Oklahoma Publishing Corp. v. Oklahoma County Dist. Court, 430 U.S. 308 (1977); Cox Broadcasting v. Cohn, 420 U.S. 469 (1975); Reiter v. Mason, 563 So. 2d 749 (Fla. Dist. Ct. App. 1990).

195 467 U.S. 20 (1984).

196 *Id.* at 33.

197 *Id.* at 32 (citing Zemel v. Rusk, 381 U.S. 1, 6-17 (1965)).

198 *Id.*

control access to that source.[199] Thus, if a court has found adequate justification for sealing certain records, it should be able to enjoin dissemination of the information that the litigants may have obtained from those records in order to give effect to the sealing order.[200] The difference in the analogy between restricting access to traditionally private information obtained through the court's discovery process and restricting access to court records, traditionally public sources of information, is reflected in the higher standard required to seal court records,[201] as opposed to the "good cause" needed to issue a protective order over discovered material.[202]

It must be noted, however, that a crucial consideration for the Court's holding that the protective order in *Seattle Times* did not offend the first amendment was the fact that the protective order prevented the parties from disseminating only information obtained through the discovery process. The order did not restrict disclosure of identical information if that information was acquired from independent sources.[203] The Court has recently reemphasized this point in *Butterworth v. Smith*.[204] In that case the Court struck down a Florida statute which prohibited a grand jury witness from ever disclosing the content of his testimony even after the term of the grand jury had ended. In the Court's view neither the state's interests in preserving grand jury secrecy during the term nor in protecting the reputation of exonerated individuals warranted a permanent ban on disclosure of witness testimony.[205] The Court distinguished *Seattle Times* on the ground that *Butterworth* involved only the witness's right to divulge information that he had before he testified, as opposed to information that he obtained as a result of his participation in the grand jury proceedings.[206] The Court also noted the dramatic impact of the restraint: before testifying a witness possesses information on

199 *Id.* at 33 n.19.

200 Buzbee v. Journal Newspapers, Inc., 297 Md. 68, 465 A.2d 426 (1983) (sealing order could be "rendered ineffective if matters restricted by [the order] were revealed by persons privy to the information.").

201 *See supra* notes 51-52 and accompanying text.

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

203 Seattle Times v. Rhinehart, 467 U.S. 20, 34, 37 (1984).

204 110 S. Ct. 1376 (1990).

205 *Id.* at 1381-82.

206 *Id.* at 1381; *see also In re* Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1564 (11th Cir. 1989) ("If [the] order prevents disclosure of documents prepared and assembled independent of the grand jury proceedings, . . . it would be too broad.").

a matter of public concern and is free to speak at will, but after testifying the witness is no longer free to communicate this information.[207]

Such an observation is a relatively accurate description of the effect of stipulated gag orders. Prior to their involvement in a lawsuit, the potential parties, particularly the plaintiffs, are free to discuss their claims and injuries with interested third parties. But once the case is settled and a stipulated gag order is entered, a wall of silence supported by the threat of contempt is erected surrounding the transactions and events that gave rise to the lawsuit. The court order thus frustrates the efforts of government officials and the private sector to find solutions to contemporary social problems and prevents other potential plaintiffs similarly situated from educating themselves about their situation, perhaps to their detriment. Because these third parties have limited first amendment interests with which to challenge such orders, the responsibility for giving consideration to these interests falls upon the parties, their counsel,[208] and the court.

The court, in particular, should not be persuaded by the parties to abuse its powers and rubberstamp a stipulated covenant of silence "with penalty of contempt" simply because such an order is not likely to be challenged.[209] Arguably, the court does not have the power to issue such a broad order. A gag order issued in this context should be limited to information obtained through the discovery process or from documents properly sealed. The order should not restrict dissemination of information which the parties acquired prior to the litigation or from independent sources. Although under a narrower order a party is still free not to speak, it is that freedom to choose to speak or to not speak that the first amendment protects against infringement by the court.

2. Challenges by the Parties Restrained: The Problem of Waiver

If a party, despite having agreed to the entry of a gag order, later wishes to challenge the validity of the order, that party could theoretically argue that the order is a prior restraint on speech as

---

207 110 S. Ct. at 1383.

208 *See infra* part IV, ETHICAL CONSIDERATIONS.

209 *See* United States v. Petro-Processors of Louisiana, Inc., 548 F. Supp. 543 (M.D. La. 1982) (court vacated its order approving stipulated confidentiality when parties made public statements that the court had ordered them to keep the information contained in certain environmental reports confidential).

discussed in the previous section.[210] In such a case, nonetheless, the effect of the stipulation must be considered. The issue becomes whether the parties, by agreeing to entry of the order, have waived their first amendment rights to challenge the order. The waiver doctrine does not mean that the court must automatically issue an order corresponding to the parties' agreement, but only that the parties should be estopped from later asserting their right to disseminate the protected information. The court must still undertake the proper evaluation in its decision to issue the order.[211]

Nevertheless, at least one court has held that a party may challenge an invalid gag order at any time even despite a prior stipulation. In *Crosby v. Bradstreet Co.*,[212] a libel action was settled on the stipulation that the defendant, a credit rating bureau, would refrain from publishing any report or statement about the plaintiff or his business. The trial court entered an order pursuant to that stipulation. Thirty-nine years later, the plaintiff, realizing the business advantage of having a credit rating from the defendant (now Dun & Bradstreet), sought to have the order terminated. The Second Circuit held that the trial court was without power to make such an order as it constituted a prior restraint against publication of facts which the community had a right to know. The fact that the parties agreed to the order was considered immaterial.[213]

B. The Public Policy Challenge

Finally, at least one court has invalidated a stipulated gag order on public policy grounds without consideration of the first amendment interests. In *Mary R. v. B. & R. Corp.*,[214] a California court held that a trial court's stipulated gag order was against public policy. A civil lawsuit alleging that a licensed physician had sexually molested a fourteen-year-old female patient had been settled, and, pursuant to stipulation by the parties, the trial court had issued an order sealing the court records and enjoining the parties, their agents or representatives from ever discussing the underlying facts of the case with anyone. A family counselor

---

210 *See supra* notes 191-207 and accompanying text.

211 The concept of waiver has been urged in the context of subsequent challenges to stipulated protective orders. *See* Marcus, *supra* note 43, at 68-73.

212 312 F.2d 483 (2d Cir. 1963).

213 *Id.* at 485.

214 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).

learned of the allegations and filed a complaint with the Division of Medical Quality of the State Board of Medical Quality Assurance (Division). The Division attempted to investigate, but the court order frustrated its efforts. The girl stated that she would willingly supply the Division with information if she were not prohibited from doing so by the court order. The Division then sought modification of the court order, but the trial court denied the request because the physician would not consent.

The appellate court reversed the order of confidentiality because it effectively blocked the Division from fulfilling its statutory obligation to investigate all complaints of physician misconduct—"thus giving a judicial stamp of approval to a ploy obviously designed by the physician to aid him to avoid professional regulation."[215] The court noted that a law designed for the public welfare could not be circumvented by private stipulation. Such an agreement violated public policy and was unenforceable, and it was improper for a court to sanction such a stipulation with a court order.[216]

The holding in *Mary R.* is significant for its potential application to other regulatory areas of public interest. For example, in the environmental area, courts might refuse to approve stipulations that prevent toxic tort plaintiffs from discussing their illnesses with local and federal health officials trying to study the long-term effects of exposure to toxic chemicals. In the securities area, courts might not enforce agreements among the parties to not disclose insider trading information to the Securities and Exchange Commission.[217]

Even though a court may not have the power to grant a comprehensive gag order, the parties are not left without a remedy for unlawful disclosure of private information by other parties. A party can still bring an action for defamation or invasion of privacy or for product disparagement. Such legal remedies have a less chilling effect on speech than a court order, the violation of which results in punishment for contempt.[218]

---

215 *Id.* at 316, 196 Cal. Rptr. at 875-76.

216 *Id.* at 317, 196 Cal. Rptr. at 876.

217 Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 1028 (1988) (suggesting potential applications of *Mary R.* in the securities and antitrust areas).

218 *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986) (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931)).

IV. ETHICAL CONSIDERATIONS

The law concerning sealing entire case files and restraining litigants from discussing the facts of their case with third parties is still very unsettled. Until the standards for entering such orders are defined more precisely, almost anything goes. Under current law, a good faith argument certainly exists for sealing the entire record and ordering the parties to keep silent. The fact that the law permits these procedural devices, however, does not mean that the lawyers and their clients who use them are without reproach.

Some would argue that a lawyer's duty is to serve the client's best interests within the bounds of the law.[219] If agreeing to seal the case file will result in a higher settlement for the client, then the lawyer should urge the client to agree.[220] The lawyer has no ethical obligation to consider the interests of third parties whom the lawyer does not represent. The lawyer is supposed to be morally neutral and nonaccountable for the client's actions and decisions.[221]

This reasoning reflects the adversarial ethic which has dominated American legal ethics for some time. Although still believed necessary in criminal defense to protect against overzealous infringement of individual liberties by the state, the application of the adversarial ethic to civil litigation and nonadversarial situations has come under attack in recent years.[222] As the practice of law increasingly involves issues affecting the public interest, the question that arises is whether the lawyer is a morally autonomous professional or simply a technical expert—a hired gun. On the one hand, lawyers are still generally perceived as professionals, as

---

219 This argument has its origins in MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) [hereinafter the MODEL CODE] which advocates that "[a] lawyer should represent a client zealously within the bounds of the law." The Model Rules of Professional Conduct which succeeded the Model Code, replaced the standard of zealousness with one of reasonable diligence, which does not bind the lawyer "to press for every advantage that might be realized for a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 & comment (1) (1987) [hereinafter MODEL RULES].

220 Under MODEL RULES, *supra* note 219, Rule 1.2(a), and MODEL CODE, *supra* note 219, EC 7-7, the Model Code, the decision whether to accept a settlement offer rests with the client.

221 *See generally* Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 372-89 (1988).

222 *See, e.g.*, Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421 (1984); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

are doctors, architects, and teachers. Part of what distinguishes a professional from the average business person, at least in the public's mind, is an expected commitment to the social good. On the other hand, lawyers are not supposed to impose their personal morality on the client.

The American Bar Association's Model Rules of Professional Conduct reflect this tension.[223] For example, Rule 4.4 requires the lawyer to respect the rights of third persons, but the lawyer is supposed to defer to the client regarding concern for third persons who might be adversely affected.[224] The Model Rules also provide that in rendering advice, the lawyer may refer not only to the law but also to other relevant moral, economic, social, and political considerations.[225] However, nothing in the Model Rules obligates the client to heed the lawyer's nonlegal advice, or holds the lawyer responsible for the client's morally objectionable decisions.[226] The Model Rules permit a lawyer to withdraw from representing a client if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent, [or if withdrawal can be] accomplished without material adverse effect on the interests of the client."[227] For a lawyer settling a case conditioned upon stipulated sealing and gag orders, this provision offers a minimal outlet. It is doubtful whether a sealing order rises to the level of a repugnant or imprudent objective, and withdrawal from a case at the point of settlement would likely have a materially adverse effect on the client's interests.

Overall, withdrawal is not an adequate remedy, for there will always be some lawyer who will do what the client wants. A more effective solution lies in redefining the lawyer-client relationship. One suggestion is to create and protect a sphere of moral autonomy in which lawyers would "align themselves more with the courts and their peers and less with their clients."[228] This re-

---

223 *Cf.* Penegar, *supra* note 221 (discussing how the Model Code contains many internal contradictions which reflect two distinct views of the legal profession: the dominant view of a highly individualistic, adversarial system versus the lesser tradition of the more cooperative, communal society seeking to avoid conflict and struggle).

224 MODEL RULES, *supra* note 219, Rule 1.2 comment.

225 MODEL RULES, *supra* note 219, Rule 2.1; *cf.* MODEL CODE, *supra* note 219, EC 7-8.

226 *Cf.* MODEL CODE, *supra* note 219, EC 7-8 ("In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.").

227 MODEL RULES, *supra* note 220, Rule 1.16 (b)(3).

228 Elliston, *Ethics, Professionalism and the Practice of Law*, 16 LOY. U. CHI. L. J. 529,

alignment would place limits on the client's use of lawyers to achieve immoral ends.[229] Another more immediate solution is for lawyers and clients to engage in a dialogue regarding their joint responsibility for certain community-shared values, such as fairness to others, especially in cases of public interest.[230] In a case such as the one discussed at the beginning of this Note, where a defendant client insists upon sealing the entire record, perhaps a compromise could be reached in which the plaintiffs would be allowed to discuss their illnesses with public health officials.

V. CONCLUSION

The process of settling cases without trial has traditionally been a private matter among the parties. However, to the extent that parties take advantage of court processes to resolve their dispute, the case should not be shielded from public scrutiny. Documents that are filed with the court to advance litigation should be open for public inspection, with limited exceptions. If the parties opt to receive the benefit of being able to enforce their settlement agreement with the court's comtempt power, the public is entitled to know the ends for which the court's power is being used. Openness is an important feature of the American judicial system. Not only does it serve to check the exercise of judicial authority and to provide an understanding of how the legal system operates, but more importantly it fosters an appearance of fairness and promotes confidence in the system. When cases presented for resolution in the public forum are surrounded with secrecy, there is a natural tendency to question whether justice is being equitably administered. The public and private interests in settling cases without litigation should not be allowed to compromise the importance of a generally open judicial system.

Changes are needed to halt the increasingly common practice of sealing the court records of settled cases and enforcing covenants of silence. Reform must occur in the law so that judges and litigants receive clearer guidance about the procedures and standards that govern the sealing of court records. Courts should limit their enforcement of covenants of silence to orders that are necessary to give effect to sealing orders. Responsibility for

546 (1985).

229 *Id.*

230 Penegar, *supra* note 221, at 382-85.

change also rests with lawyers and their clients. They should discuss the ethical implications of confidentiality agreements and explore compromise solutions which will diminish the adverse effect of such agreements on third parties.

Anne-Thérèse Béchamps