S. HRG. 110–263

THE SUNSHINE IN LITIGATION ACT: DOES COURT SECRECY UNDERMINE PUBLIC HEALTH AND SAFETY?

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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THE SUNSHINE IN LITIGATION ACT: DOES COURT SECRECY UNDERMINE PUBLIC HEALTH AND SAFETY?

TUESDAY, DECEMBER 11, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS,
Washington, D.C.

The Committee met, Pursuant to notice, at 2:29 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Committee, presiding.

Present: Senators Kohl and Hatch.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. This hearing will come to order. Today, we will examine the important issue of court secrecy.

Far too often, court-approved secrecy agreements hide vital public health and safety information from the American public, putting lives at stake. The secrecy agreements even prevent government officials or consumer group from learning about and protecting the public from defective and dangerous products.

The following example demonstrates how this issue arises and the devastating implications secret settlements can indeed have.

Back in 1996, a 7-year-old boy in Washington State took an over-the-counter medicine to treat an ear infection. Within hours, he suffered a stroke, fell into a coma, and he died 3 years later. The child's mother sued the drug manufacturer, alleging their product caused the stroke.

Unknown to the mother and to the public, many similar lawsuits alleging harm caused by this very same medicine had been secretly settled. It was not until the year 2000 that the FDA banned an ingredient found in the boy's medicine.

If it were not for this court secrecy in the previous lawsuits, the boy's mother may well have known about the risks.

While this case is tragic, it is not unique. In these types of cases, the defendant requires the victim to agree to secrecy about all information disclosed during the litigation or else forfeit the settlement.

That individual victim recovers the money that they need to pay medical costs, but, as a result, the public is often kept in the dark about potential dangers.

We are all familiar with well known examples of these types of cases involving complications from silicone breast implants, adverse reactions to prescription or over-the-counter medicine, side-saddle gas tanks prone to causing deadly car fires, park to reverse problems in pickup trucks, defective heart valves, dangerous birth control devices, tire malfunctions, and collapsing baby cribs, just to name a few.

Information about these defective products and the dire safety consequences did not deserve court-endorsed protection. In fact, that protection prevented the public from learning vital information that could have kept them far safer.

The most famous case of abuse involved Bridgestone and Firestone tires. From 1992 to 2000, tread separations of various Bridgestone and Firestone tires were causing accidents across the country, many resulting in serious injury and even fatalities.

Instead of owning up to their mistakes and acting responsibly, the company quietly settled dozens of lawsuits, most of which included secrecy settlements. It was not until 1999, when a Houston public television station broke the story, that the company acknowledged its wrongdoing and recalled 6.5 million tires.

By then, it was too late for the more than 250 people who had died and more than 800 injured in accidents related to these defective tires.

Legislation that I've introduced in the past and that I intend to reintroduce today seeks to restore the appropriate balance between secrecy and openness. Under our bill, the proponent of a protective order must demonstrate to the judge's satisfaction that the order would not restrict the disclosure of information relevant to public health and safety hazards.

This legislation does not prohibit secrecy agreements across the board, for indeed there are appropriate uses for such orders, such as protecting trade secrets, and this bill makes sure that such information is kept secret.

But protective orders that hide health and safety information from the public, in an effort to protect the company's reputation or its profit margin, should not be permitted.

The bill does not place an undue burden on judges or our courts. It simply states that where the public interest in disclosure outweighs legitimate interests in secrecy, courts should not shield important health and important safety information from the public.

We take great pride in our court system and in its tradition of fairness for plaintiffs and defendants alike. However, courts are public institutions, meant to do more than simply resolve cases. They must also serve the greater goods of law, order and justice.

We believe that our legislation will help to restore this balance.

We thank everybody for being here. We look forward to your testimony.

[The prepared statement of Senator Kohl appears as a submission for the record.]

And we turn now to the ranking member on this subcommittee, Senator Orrin Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I want to begin by thanking you for organizing this hearing. You have put together a balanced panel and the witnesses have submitted thoughtful testimony on a complicated issue, and I want to thank all of you witnesses, as well.

Mr. Chairman, you have championed the Sunshine in Litigation Act for many years, and this proposal had its first Judiciary hearing in April 1994.

To put that in some perspective, in 1994, Republicans were also in the minority. In the intervening decade, much has changed in the practice of litigation. Specifically, we have witnessed the use of electronic discovery, and one question I want to examine today is whether this practice of e-discovery should impact our judgments about this legislation.

The Sunshine in Litigation Act addresses court secrecy. More specifically, it addresses the lack of public access to materials obtained in discovery and to the content of settlement agreements.

To provide greater public access to these essentially private matters, previous proposals have modified the use of protective orders in Federal courts, limiting the discretion of the presiding judge to issue a protective order for information that might be relevant to the protection of the public health and safety.

There are strong arguments on both sides of this proposal. Yet, in preparation for this hearing, I found that the explosion of e-discovery has only strengthened the views of those opposed to this legislation.

For example, some years ago, Professor Arthur Miller of New York University Law School criticized sunshine litigation in the Harvard Law review.

In preparation for this hearing, however, Professor Miller wrote to me and stated that "My views on the subject are even stronger today, reinforced by dramatic changes in the litigation landscape. The massive expansion of discovery in today's electronic world magnifies the need for broad judicial discretion to protect all litigants' privacy and property rights."

Now, I think that going forward, the committee should heed this warning.

I would ask, Mr. Chairman, that Professor Miller's article and letter be submitted for the record at this point.

Chairman KOHL. It will be done.

Senator HATCH. These practical concerns also implicate constitutional interests of privacy and due process. The U.S. Supreme Court has addressed these privacy issues in *Seattle Times* v. *Rhinehart*. The Court found that "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit."

Now, some appear to believe that materials obtained in discovery and the content of settlement agreements are essentially public matters that are made private by protective orders. In my view, this gets it backward. While there are public elements to litigation, most obviously, the complaint, the Supreme Court has indicated that privacy interests deserve protection in litigation.

The committee should also consider the potential unintended consequences of any legislation modifying the use of protective orders. Given the burdensome character of discovery, it is not clear what the consequences of this legislation will be on the incentives to settle rather than to go to trial.

Some believe that an agreement of confidentiality facilitates the informational exchange necessary to the adversary process. Greater public access to materials obtained through discovery and to settlement agreements might create disincentives to settlement, increasing litigation costs and, of course, the caseload of the various Federal courts.

Finally, Congress should be mindful that the courts are an independent branch of government and that the management of its caseload is a quintessentially judicial function. Yet, this legislation would fundamentally rework Rule 26(c) of the Federal Rules of Civil Procedure, which provides judges with broad discretion to issue protective orders.

Now, at this point, the Judicial Conference is not considering a change to these rules. In part, this might be owing to a finding by the Federal Judicial Center that of the 288,846 civil cases terminated in 2001 or 2002 in the 52-district study, 1,270 of them had sealed settlement agreements, which is .44 percent, less than one-half of 1 percent.

Now, Mr. Chairman, I ask that an article by Robert Reagan detailing these findings be included in the record.

Chairman KOHL. Without objection.

Senator HATCH. Now, Mr. Chairman, our courts exist to adjudicate cases and controversies. When the parties to a dispute agree to settle, that particular case or controversy becomes moot. We need to consider whether it is consistent with our commitment to due process to require judges essentially to make fact findings about the public health impact of information obtained through discovery, without the truth-seeking benefits of the adversarial process.

Mr. Chairman, I have great respect for you. Thank you again for your work on this hearing. I look forward to the hearing with you and working with you on this issue in the coming year.

Unfortunately, I can't stay very long, because I've got the full Intelligence Committee, on which I sit, in an also equally important hearing and I'm going to have to slip out to that.

But I appreciate you holding this hearing on this very important matter.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you very much, Senator Hatch, for coming here today.

We'd like now to introduce our panel of witnesses. Our first witness testifying today will be Johnny Bradley, Jr. Mr. Bradley is a former petty officer second class with the U.S. Navy.

Mr. Bradley sued Cooper Tire and Rubber Company after an SUV rollover accident, allegedly caused by defective tires, killed his wife and left him and his son seriously injured.

Mr. Bradley, we thank you for coming today and we offer our condolences to you and your family for your loss.

Our next witness today will be Judge Joseph Anderson. Judge Anderson currently serves as a judge for the U.S. District Court for the District of South Carolina. Prior to his judgeship, Judge Anderson practiced law in Edgefield, South Carolina, and he served as a representative in the South Carolina General Assembly.

Our next witness will be Robert Weiner. Mr. Weiner is a partner at Arnold and Porter in Washington, D.C., where he litigates in antitrust, toxic tort, patent and commercial matters. He also served in the Office of the Counsel to the President under President Clinton.

Our next witness will be Leslie Bailey. Ms. Bailey is an attorney with Public Justice, a public interest law firm, where her practice focuses primarily on consumer and civil rights.

Our next witness will be Stephen Morrison. Mr. Morrison is a partner at Nelson Mullins in Columbia, South Carolina, where he practices in the areas of technology law, business and product liability. He serves an adjunct professor of law at the University of South Carolina.

Our final witness today will be Richard Zitrin. Mr. Zitrin is an adjunct professor of ethics at the University of California at Hastings, and he practices law at Zitrin and Frassetto. From 2000 to 2004, he served as the Director of the Center for Applied Legal Ethics at the University of San Francisco School of Law.

We thank you all for appearing at our subcommittee's hearing to testify today.

We now ask all of our witnesses to rise and raise your right hand, as I administer the oath.

[Witnesses sworn.]

Chairman KOHL. We thank you so much.

We will now begin to hear from our witnesses, starting with Mr. Bradley, and we'd like to request that you keep your remarks to 5 minutes or less.

Mr. Bradley?

STATEMENT OF JOHNNY BRADLEY, JR., PACHUTA, MISSISSIPPI

Mr. BRADLEY. Good afternoon, Chairman Kohl, Ranking Member Hatch and the members of the subcommittee.

My name is Johnny Bradley and I am from Pachuta, Mississippi. I am here today to represent those who live every day with the devastating consequences of court secrecy.

Unfortunately, I know firsthand what it feels like to lose someone because of a defective product.

On July 14, 2002, my life changed forever. I became a widower and my young son, Diante, lost his mother. My wife died in a car wreck when the tread separated on one of the rear Cooper tires on our Ford Explorer. As a result, our car rolled over 4.5 times, killed my wife instantly, and rendered me unconscious for approximately 2 weeks.

With my son in the back seat and me and my wife in the front, my cheerful family had been driving from California to visit my family in Mississippi. Since we were traveling across the country, we even had our vehicle checked at a nearby repair shop prior to leaving California.

You see, my wife and I were both in the Navy, previously stationed in Guam, and we had the rare opportunity to finally visit my family on our way to a new post in Pensacola, Florida. Though I worked on torpedoes and my wife was an E–5 postal clerk, we were both selected to become Navy recruiters, a real honor for both of us to broaden our Navy careers.

My son, who was six, was also excited to see his grandmother in Mississippi. It was like Christmas in July to visit our family on the mainland after being stationed in Guam, and he anticipated lots of presents and delicious southern cooking.

We never made it past New Mexico. The last thing I remember about that tragic day was that I dozed out, with my wife driving. When I woke up from my coma 2 weeks later, I was told that my wife had died. My family had waited 2 weeks to hold my wife's funeral, because they wanted me to be able to attend.

Sadly, my young son had to go in place, because my own injuries were so severe.

My left leg had to be fused at the knee and my intestines were cut in half from the force of the seatbelt in the wreck. To this day, I cannot walk properly and I must always travel with my colostomy bag.

I believe that if we had known about the dangerous tread separation defect in Cooper tires, my wife would still be alive today. You see, only after the death of my wife and through litigation in Federal court with my highly specialized attorney, I did learn about a series of design defects in Cooper tires that Cooper had known about previously.

To my horror, I found out that Cooper had faced numerous incidents like mine since the 1990's and had in its possession thousands of documents detailing these defects.

Why have the details from as any 200 lawsuits against Cooper remained covered up? Why were these dangers never discovered by the public? Why were all of these tragic stories never shared before?

I found out through my attorney that almost all of these documents were kept confidential through various protective orders, demanded by the tire company and entered by courts around the country, so that vital information that could have saved our family would never be disclosed to the public.

We bought these Cooper tires because we thought they would be safer than Firestone tires. If I had known that they were even worse than Firestone, and my attorney found out through these confidential documents, I would have never touched these tires.

You might be wondering how my attorney came across these documents if they were confidential. I was lucky enough to obtain counsel from Bruce Kaster, who has specialized in this type of litigation for over two decades.

To this day, I would never even have known about the dangers of Cooper Tires and four specific design defects if Bruce had not known to ask for these documents.

I can sit here today and give you the facts about what happened to me, but the protective order issued by the Federal court forbids me from talking about the documented evidence of Cooper tire defects uncovered by my attorney during litigation.

I know some Cooper tire problems were reported in the newspaper prior to my wife's death, but without specific documents, evidence not cloaked in secrecy, these defects were not nearly as publicized.

Chairman KOHL. Thank you very much, Mr. Bradley.

[The prepared statement of Mr. Bradley appears as a submission for the record.]

Judge Anderson?

STATEMENT OF HON. JOSEPH F. ANDERSON, UNITED STATES DISTRICT COURT JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Judge ANDERSON. May I remain seated?

Chairman KOHL. Yes, certainly. That would be just fine.

Judge ANDERSON. Chairman Kohl, Ranking Senator Hatch, thank you for allowing me to appear before you to discuss sunshine in litigation, a subject of particular interest to me as a trial judge with 21 years experience on the Federal bench.

I should say at the outset that I am not here representing the United States Judicial Conference or any other organization. I am here simply to convey my thoughts on the need for awareness of the adverse consequences of what I prefer to call court-ordered secrecy.

As civil litigation has mushroomed in the United States courts in the past two or three decades, litigants frequently request that judges approve settlements, often in cases where court approval is not necessary, and, as part of this approval process, judges are sometimes asked to enter orders restricting public access to settlement information and perhaps the procedural history of the case.

In these instances, litigants are not content to simply agree between themselves to remain silent as to the settlement terms. Instead, they prefer to involve the trial judge in a take-it-or-leave-it consent order that would bring to bear contempt sanctions on anyone who breaches the court-ordered secrecy.

Unfortunately, we trial judges often struggle under the crush of burgeoning caseloads. Eager to achieve speedy and concrete resolutions to our cases and ever mindful of the need for judicial economy, many judges all too often acquiesce in the demands for court-ordered secrecy.

In late 2002, the judges of my district court in South Carolina voted unanimously to adopt a local rule that would restrict court-ordered secrecy associated with settlement in civil cases. We were then and we remain today the only Federal district in the country with such a rule.

In the brief time allotted to me, I'd like to relate several events which prompted me to propose our rule to our court and to say just a word about our court's experience operating under this rule.

In 1986, when I was a 36-year-old newly appointed Federal trial judge, I was assigned a case that had been pending on another judge's docket for several years. The case was ready for trial, which the lawyers predicted would take a grueling 6 months. The case was brought by 350 plaintiffs who lived around a large fresh water lake in upstate South Carolina. The plaintiffs contended that the defendant in the case had knowingly deposited excess amounts of

PCBs into the lake and that they had experienced severe health problems from being exposed to this toxic substance.

Much to my relief, shortly before the trial was to begin, the parties announced that they had reached an amicable settlement. The defendant would pay $3.5 million into a fund to be set up for a medical monitoring program and primary health care program for the 350 plaintiffs and a small amount of settlement money would be set aside for a per capita distribution to each plaintiff.

There was one catch. The settlement was contingent upon my entry of a gag order prohibiting the parties from ever discussing the case with anyone and, also, requiring a return of the allegedly smoking gun documents produced in the litigation.

I was advised by counsel that if I did not go along with their request, the carefully crafted settlement package would disintegrate and the case would proceed to a contentious 6-month trial.

As a judge with less than a year's experience on the bench, with other complex cases stacking up on my docket and believing it was the fairest and in the best interest of all parties, I agreed to the request for court-ordered secrecy.

When I signed the order, everyone was content. The plaintiffs recovered a handsome some. The lawyers for both sides were paid. The defendant received its court-ordered secrecy. There were no objections to the order and the judge had one less case to try.

In the ensuing years, I questioned my decision to enter a secrecy order in that particular case. I also became troubled by what I viewed as a discernable trend in civil litigation. Lawyers were sometimes requesting court-ordered secrecy both at settlement and in connection with the exchange of documents during discovery.

I was aware of instances in both state and Federal courts in South Carolina where judges had agreed to requests for court-ordered secrecy in cases where one could reasonably argue that the public interest and public safety should have required openness.

Responding to this series of events, I proposed to our court that we adopt a local rule prohibiting, in most cases, court-sanctioned secret settlements. When our rule was released for public comment, we received heated objections from around the country.

Virtually every opponent of our rule suggested that an inevitable byproduct of such a local rule restricting secrecy would be a substantial increase in the number of cases going to trial, which would, in turn, overwhelm our court.

The rule was nevertheless adopted and we now have a 5-year operating perspective. The dire predictions of those who suggested that the rule would cause settlements to disappear proved to be wrong. In fact, according to statistics provided by our clerk of the court, our court tried fewer cases in the 5 years following the rule's enactment than we did in the 5 years immediately preceding its enactment.

In short, our rule has worked well and our court has not been overwhelmed as a result.

Trade secrets, proprietary information, sensitive personal identifiers, national security data and the like remain protected. New business investments in South Carolina continue to go up each year.

However, in those rare cases where the public interest or safety could be adversely affected by court-ordered secrecy, judges on our court have not hesitated to enforce the rule and keep the docket transparent.

The national furor created when our rule was proposed for public comment, perhaps together with the tendency of the Kohl Sunshine Act, began a vigorous debate and much needed review of the adverse consequences associated with court-ordered secrecy.

While the issue has not been entirely resolved, I'm of the opinion that the secrecy trend seems to be waning. More importantly, I believe that both state and Federal judges have become more sensitive and enlightened to the need for sunshine in litigation.

Thank you for allowing to share my sentiments with you.

[The prepared statement of Judge Anderson appears as a submission for the record.]

Chairman KOHL. Thank you very much, Judge Anderson.

Mr. Weiner?

STATEMENT OF ROBERT N. WEINER, PARTNER, ARNOLD AND PORTER, LLP, WASHINGTON, D.C.

Mr. WEINER. Chairman Kohl, Senator Hatch, thank you for inviting me to testify on this subject.

I have been a defense lawyer for nearly 30 years and the views I offer today were formed by that experience, but are not those of my firm or any client.

In fact, I testified on this subject in 1990 before the Senate, your subcommittee, Senator, and the key issues haven't changed. But the world has and the most important change is the accelerating erosion of privacy as a result of the internet.

Public disclosure now is far more public than public disclosure back in 1990, and that makes compelled disclosure more problematic. Many people who put a premium on civil liberties take for granted the extraordinary intrusion that litigation authorizes in this country.

If two people disagree privately, no one expects that either one of them can delve into the files of the other for information relevant to the dispute, but if you file a lawsuit, whether it's meritorious or not, you get that right and you get the right to take a deposition, asking anything conceivably relevant to the lawsuit.

That can encompass, depending on the claims, personal information for a corporation. It can encompass personnel records, secret formulas of the product, all sorts of information, and electronic discovery makes this problem worse, because the volume of discovery, the enormous volume of discovery makes it more likely that commercial information, sensitive commercial and personal information will be disclosed.

Now, these materials exchanged in discovery didn't start out public and the fact that an opening asks for them doesn't make them public.

Let's take a hypothetical case. The plaintiff files a complaint. It may be wrong, but the court has to accept it as true at the outset. And suppose the plaintiff serves a discovery request for a defendant's secret formula for its product, says it's relevant to the toxic effect of the product.

Well, if the defendant is not sure that its secret formula is going to be protected in discovery, then what's going to happen? It's going to fight. It's going to fight producing it, and that takes time and resources of the court and the parties.

And the court rules that it is not protected, what happens? Well, then the plaintiff has leverage for settling the case based not on the merits, but based on the risk of disclosure of commercially sensitive information.

Now, Federal courts have discretion under the court rules to balance the competing interests of the parties affected by discovery and to enter a protective order on good cause based on the individual facts, and there's no reason to depart from that.

There is lots of discussion about things that are concealed by protective orders, but I submit that that allegation strains plausibility, because protective orders cover the information exchanged in discovery.

To star a suit, you need to file a complaint. That complaint is a public document. The plaintiff who files it can issue a press release. It is available electronically around the globe.

Protective orders affect none of that and, at any time, a judge weighing the circumstances of the individual case can determine that information merits disclosure.

Now, a statute like the Sunshine in Litigation Act that compels disclosure that is relevant, with respect, relevant to safety, with respect, is unwise, because all product liability cases involve allegations of safety and, presumably, in discovery, the documents produced are somehow relevant to safety.

The question is whether there is a real risk of the product, whether the risks of the product outweigh its benefits, and that is the ultimate question in most cases, product liability cases, for the jury to decide after a full trial, discovery, after all the proceedings.

But the statute asks judges to decide it at the outset, without a developed record, and that invites unfair and ill-informed results.

Now, the experts on this issue have no axe to grind. The Federal Judicial Center, the Federal Rules Advisory Committee have determined that this system is working, and I submit there is no need for rules that strip the courts of their discretion to decide each case on the merits.

Thank you, Senator.

Chairman KOHL. Thank you, Mr. Weiner.

[The prepared statement of Mr. Weiner appears as a submission for the record.]

Ms. Bailey?

STATEMENT OF LESLIE A. BAILEY, BRAYTON–BARON ATTORNEY, PUBLIC JUSTICE, OAKLAND, CALIFORNIA

Ms. BAILEY. Thank you, Mr. Chairman, for inviting me to testify today on the issue of court secrecy.

I'm an attorney at Public Justice. We're a national public interest law firm based here in Washington, and we have a special litigation project that is dedicated to fighting unwarranted court secrecy. Among other things, we intervene in cases and object to secrecy orders on behalf of the public and the press.

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It is undisputed that much of the civil litigation in this country is taking place in secret. Whether it's protective orders, secret settlements or sealing of court records, the public courts are being used to keep smoking gun evidence of wrongdoing from the public eye.

Court secrecy is at least as common today as it was in the 1990's, when the Firestone tire and breast implant scandals came to light. A Seattle Times series earlier this year uncovered more than 400 cases in a single court that had been wrongly sealed, many involving matters of public safety.

Also, earlier this year, it came to light that Allstate Insurance Company had implemented a program where it was intentionally underpaying its policyholders on legitimate claims in order to increase shareholder profits.

It worked. The program resulted in record operating income during a time marked by some of the worst natural disasters in recent history, including Hurricane Katrina. And the documents about this program were produced in litigation, but were kept secret from the public pursuant to a protective order.

It was not until a lawyer who had seen them published his notes that the contents of the documents became known.

The reason this happens is that defendants want secrecy and plaintiffs and judges do not do enough to oppose it. Defendants want secrecy, for the most part, because information about hazardous products and fraudulent business practices is bad PR and can lead to more lawsuits against them.

Plus, in the settlement context, the defendant sometimes just does the math. It's cheaper to pay off the occasional individual who figures out the evidence, as long as you can keep it secret, than it would be to fix the product or change the practice.

Plaintiffs, for their part, might well go into a case thinking one of their goals is to help make sure what happened to them doesn't happen to anyone else. But then they're offered a settlement that will pay their medical bills or rebuild their home in exchange for their silence.

They feel horrible taking the deal, because they know someone else might get a hurt as a result of them keeping their mouth shut, but they need the money.

Judges, meanwhile, are overburdened. And as long as the parties agree, it's all too common for a judge to sign off on secrecy without considering the public's interest at all.

All the while, we continue to drive unsafe cars, drink unsafe water, take unsafe drugs, and put our money and our trust into institutions that are defrauding and deceiving us.

That's the first and most obvious effect of secrecy, but there are other costs. Secrecy makes discovering the truth much more difficult and costly. When a defendant is able to keep its wrongdoing secret, it doesn't have to pay as much to the next person who is injured, and cases that would be resolved easily if the truth were known instead take years or never reach resolution.

The current system is not working. And the reason it's not working is that as long as each party pursues his or her own narrow interest, no one in the process, in many cases, is protecting the interests of the public.

My organization, Public Justice, has fought several secrecy orders in recent years and, in some cases, though certainly not all, we've succeeded in making documents public that should never have been concealed in the first place.

For example, an expert witness in a case brought against Honda by a 17-year-old girl who was paralyzed in a crash was observed intentionally destroying the evidence that showed she had been wearing her seatbelt.

When the judge found out, he issued a scathing 36-page sanctions decision detailing his findings and entering a verdict against Honda. But within a few days, the case settled and, as a condition of settlement, the judge was asked to vacate and seal his decision.

He did. And once the court record of what had taken place was sealed, this same expert was used over and over again by car companies sued by other people hurt in car crashes, and no one was allowed to ask him about what he had done.

We challenged that sealing order, and we were able to get it reversed. But for every success story, there are hundreds of equally harmful secrecy orders that remain in force.

It shouldn't take intervention by a public interest group to make sure unnecessary secrecy is avoided. Hundreds of thousands of cases are handled each year by the courts, and it's not possible for a small number of nonprofits with a handful of lawyers to intervene in more than a tiny fraction of them, especially since challenges to secrecy orders offer no possibility of recovering attorney's fees.

But if Federal judges were required by law to weigh the potential harm to the public interest before entering a secrecy order, this would help counter the factors that encourage secrecy to flourish.

Thank you bringing this issue to the attention of Congress.

[The prepared statement of Ms. Bailey appears as a submission for the record.]

Chairman KOHL. Thank you very much, Ms. Bailey.

Mr. Morrison?

STATEMENT OF STEPHEN G. MORRISON, PARTNER, NELSON MULLINS RILEY & SCARBOROUGH, LLP, COLUMBIA, SOUTH CAROLINA

Mr. MORRISON. My name is Steve Morrison. I am a trial lawyer who usually defends people who get sued.

I have tried over 240 cases to jury verdict and argued over 60 appeals in the highest courts of the Federal and state systems of this nation. It has been my privilege to be lead counsel in 27 states. I have represented large multi-nationals, Fortune 500s. I've also represented individuals and families.

I usually represent people who get sued, so I'm usually on the defense side. I have been a past president of the Defense Research Institute, an organization of 21,000 defense lawyers in the United States, a past president of Lawyers for Civil Justice, which is a group of corporate lawyers and corporate members, as well as defense bar organizations, trying to strive for a civil justice system that we can all be proud of.

I've testified before the United States Judicial Conference and their rules committees going forward.

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Having said that, I do not represent any of those entities at this point in time. I speak only for myself and not for any client.

I want to speak on three fundamental subjects very quickly. The first you might call the ham sandwich and the hog farm, Mr. Chairman.

The second is the power of due process, and the third is the outrageous presumption of evil.

The first part is essentially about the litigation environment that we operate in. For $100, you can file a lawsuit saying your ham sandwich made me sick and then, for that same $100, you can invoke the power of the Federal court to do discovery on a hog farm.

That is, you can do discovery way outside of whether the ham sandwich was defective and unreasonably dangerous or had a public health issue.

And as you gather up those documents on the hog farm and the electronic discovery on the hog farm and so forth, if this bill were to pass, you could then just put that out into the public domain. So that's the context within which we work.

Let's look at the power of due process. If you have private information, private property, if you will, it should only be presented to the public in context and what the power of the Federal court does is produces a context for private information to be published in the context of a private dispute.

You say my product is unsafe. I say that it is safe and my data is out in the process where I have a say and you have a say. It's not posted on the internet, on the Channel Islands. It's not posted out of context. It's not posted in snippets.

It's not unfairly presented as evil with no opportunity to respond.

What the Federal courts do and should continue to do is simply have within their discretion the ability to have information produced to the public in open court in the context of evidentiary rules, cross-examination, and the adversarial process.

It works and it has worked and it produces in the tort system the ability to produce a safer public.

Let's talk about the presumption then of evil, the outrageous presumption of evil. In the context that people are arguing you here today, there is a suggestion that if a document is held private in a piece of litigation, that document is evidence of evil, or that if an individual settles a lawsuit, that is evidence that they are an evil doer, that they have a bad motive.

In fact, what happens in litigation is someone will find a document that they perceive to be embarrassing and they can spin it in a certain way in their adversarial process and they want to put that out in the public to embarrass someone.

Why is that? For leverage, for leverage to produce a higher settlement in a civil case. It has nothing to do with protecting the public. It has to do with economics.

So what we're about to embark on is a process whereby the courts would be limited in the tools that they have to maintain private property as private until such time as appropriate showings have been made for it to be shown in open court.

I want to comment briefly on the so-called secret settlements. In South Carolina, as Judge Anderson has said, where I live, we have this court rule. But if I want to enter a contract with a plaintiff

for the settlement to remain confidential and not ask for the court approval, the court doesn't participate in that, and the vast majority of confidential settlements are done on private contracts.

So rarely is a court, as the U.S. Judicial Conference and the National Center for State Courts have produced data, rarely does a court actually approve a settlement being confidential. It's a very unusual circumstance.

In sum, we should maintain the status quo, giving the judges the absolute power to manage the due process by which information is disclosed to the public.

Thank you.

[The prepared statement of Mr. Morrison appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Morrison.

Mr. Zitrin?

STATEMENT OF RICHARD A. ZITRIN, ADJUNCT PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT HASTINGS, SAN FRANCISCO, CALIFORNIA

Mr. ZITRIN. Thank you, Chairman Kohl, for inviting us here today and for having a hearing on this very important issue and for enlightening both the U.S. Senate and the American people about a hidden, but very, very significant issue that affects our public health and safety.

I have some prepared remarks, but I'm going to abandon them. There are some things that have been said by Mr. Morrison and Mr. Weiner and, indeed, Senator Hatch.

First, these are not confidential settlements. They're secret settlements. Confidential is what my clients tell me, a lawyer-client confidential privilege. This Senate has various confidentialities.

What we're talking about is secrecy. There is nothing confidential about documents that are exchanged in the discovery process and, indeed, our entire system of justice is based upon a reaction to the Star Chambers in Britain that made these pieces of litigation private.

We do not engage in private litigation. We have public courts and, as I know the Senator knows, the United States Constitution and the Bill of Rights talks about the right to a speedy and open trial.

So when Mr. Weiner says that these are private disputes and Mr. Morrison repeats that, they are private disputes, but they happen in a public forum. They happen under the jurisdiction of judges and they are subject to the scrutiny of the American people.

So to start off with a presumption they are private is simply antithetical not only to the laws of the United States, but to the very foundations of our country that reacted against the Star Chamber.

That's the first point I want to make.

The second one is this. I'm glad we had Mr. Bradley go first, because I think we very, very carefully have to not lose sight of the fact that in this procedural debate about whether we're going to have this kind of protective order of that, what's presumptive, what's not presumptive, we lose the fact that thousands and thou-

sands of people are being killed and maimed and permanently harmed because we have these secret settlements.

Before December 2006, 8,000 cases involving the Lilly drug Zyprexa were settled secretly in the Eastern District of New York complex multi-district litigation, and, at that point, in December of 2006, just a year ago, the New York Times did an expose about the fact that Zyprexa caused great weight gain in 30 percent of the people who received the drug.

And within 2 weeks, 18,000 more cases were settled. Lord knows how many people were misprescribing—how many doctors were misprescribing Zyprexa because they didn't know about the severe weight gain and the dangers of diabetes.

Also, there were internists who were being encouraged by Lilly to prescribe Zyprexa for uses that were absolutely contraindicated by the FDA, with absolutely no evidence that they would work.

Thousands of internists prescribed Zyprexa for Alzheimer's, when it had absolutely no effect on Alzheimer's, thus jeopardizing other remedies that could have helped those patients, and endangering them with diabetes, as well.

What stopped it was disclosure. What stopped it was shining the light of the law on that information. And how we can sit here and debate the niceties of procedural protections versus the lives of American citizens is, frankly, beyond me.

I come to this as an expert in legal ethics. That's my field. Fifteen years ago, I realized how can I or my students be ethical lawyers if they will allow themselves to engage in this kind of process.

A couple of other points that were made by Mr. Weiner and Mr. Morrison that I want to briefly mention.

Courts have discretion under the Sunshine in Litigation Act that, Senator, you have proposed, Senator Kohl, and they will continue to have discretion. We're not saying that all protective orders are illegal. What we're saying is if Mr. Morrison is representing the defendant and, say, I representing the plaintiff, can't make a backroom deal to stipulate to a protective order, take all the smoking gun documents, stick them under the table and never have the see the light of day, without a judge, like Judge Anderson, scrutinizing it to make sure that these documents don't relate directly to the public health and safety.

We're not giving carte blanche to judges to make frivolous decisions. What we're doing is giving the power to judges to make judicious decisions so they can continue with their mandate to protect the American public.

And what your legislation would do is prevent us from secretizing this information so that no one will ever know that it exists. So that people like Mr. Bradley and his wife and family are not jeopardized by the fact that the information about Cooper tires was secret, while the information about Firestone tires has been made known.

No one is trying to prevent legitimate protective orders. No one is trying to embarrass anybody and no one is trying, I'm sure the Senator is not trying to reveal trade secrets to the public.

This legislation is designed to protect the American public from lawyers who put money first and safety second, who make back-

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room deals with hush money to prevent the American public from getting the knowledge that they need to know.

And the idea, and I'll be just a second, the idea that we can't get this information out to the public, which Mr. Morrison suggested, the idea that the public can't deal with this information is to denigrate our American public.

You know, Americans are pretty savvy about sorting out the wheat from the chafe. When given the information, Americans can figure out what is right and what is wrong, what is safe and what us unsafe.

It is only where there is a veil of silence that we don't have the information for our citizens to make that decision.

If we shine the light of the law on this information, we leave it to our very, very able citizens to make a decision about what to do, which they can't do right now at the cost of lives in the thousands.

Thank you, Chairman.

[The prepared statement of Mr. Zitrin appears as a submission for the record.]

Chairman KOHL. Well, we thank you all for your testimony.

Just to summarize or synthesize this legislation as Mr. Zitrin and others have very succinctly indicated, the purpose of the legislation is to give a judge an opportunity to rule on whether or not a public health and safety hazard is involved in a protective order, that there is information, and that that whole arrangement between a defendant and a plaintiff that prevents very important public health and safety issues from coming to the surface.

A judge has the discretion to make that decision. He has a requirement that the take a look at it and then he can decide whether or not a protective order is necessary or not necessary.

I mean, obviously, you know where I'm coming from, because I wouldn't be here having this hearing if I wasn't coming from that point of view.

And several on this panel, including a sitting judge, have indicated that it's an important issue. The judge himself says that he has had something like that in the manner in which he conducts, in his district court, now in place for many years, and he thinks it's a good thing.

You're from the same State, is that right?

Mr. MORRISON. Yes, sir.

Chairman KOHL. So I'm sure you have some familiarity, if not considerable familiarity with how the issue is resolved in the judge's court.

So what I'd like to encourage here is an interaction between members of the panel, one to challenge another, and all of you are experts in some fashion or another, so that we can bring as much information to the table as possible in this hearing, which is, after all, the purpose of the hearing.

So I guess I'll just start out and we'll go from there.

Mr. Morrison, Judge Anderson is a good man.

Mr. MORRISON. He sure is and Judge Anderson and I graduated from law school in the same class. He was No. 1 in our class, I guess I should tell you.

Chairman KOHL. He is a smart man.

Mr. MORRISON. Not only a good man, but a smart man.

Chairman KOHL. What is the criticism of the way in which he handles this issue in his court?

Mr. MORRISON. Well, in fact, in the way that it has worked over the last 5 years with regard to the settlements, Judge Anderson's approach and our local rule basically indicates that if you're going to have a confidential settlement approved by the court, then you have to make certain showings and the judge gets involved.

The practicality of that, in my practice, is that normally you don't ask the Federal court for a confidential settlement. Normally, you don't ask them for anything.

There are three kinds of settlements that have to be approved by the court. One is a class action, one is a death settlement, and one is a minor settlement for a child.

Now, those require approval by the court and when those come into play, then the rule comes into play. We do have a rule one in our court and that is that rule one of the local rules is that each judge can do what they want to do as opposed to follow the rule, but, in fact, most of the judges follow the rule that's set forth.

But most of the settlements we engage in as the plaintiff's bar and the defense bar in South Carolina are not submitted to the court for approval.

So there are many confidentiality agreements that are entered into that simply say that the case has been settled.

A confidentiality agreement does not mean that the public doesn't know the case has been settled and, as Mr. Weiner pointed out, it also doesn't mean that they don't know why the case was brought, because their complaint is fully public.

So the thought that there would be 8,000 settlements in 8,000 individual cases, nobody knew they were brought and nobody knew they were settled, is a little bit distant from my personal experience.

So the way we actually work in South Carolina is that unless the case is a class action or a minor or a death settlement, you don't ask for the court approval and, therefore, the court doesn't interfere in any way in the confidentiality of the settlement, if the parties want it.

Another point I would make, Mr. Chairman, is that in the context of paying someone a lot of money, a million dollars or more, that's a lot, a lot of people don't want that public. They don't want all the public aspects that come upon them.

They don't want the amount to be public. They don't mind if somebody says it's settled or it didn't settle. So what usually is held confidential is simply the amount of a settlement, and that gets me to that presumption of evil that I think is the wrong presumption for us to make.

Just because you pay a lawsuit to be resolved doesn't mean that you're a wrongdoer or an evildoer. There are lots of reasons to resolve a lawsuit that have nothing to do with anything other than the jurisdiction or the amount of defense costs or the entire process, maybe your product is not even being produced anymore, you don't want to spend a lot of money on it.

So you don't want any presumptions built in there. So in the context of our rule in South Carolina, it is only involving settlements and it is only involving court approval of the settlements.

It's not involving protective orders. We operate under the regular Federal Rules of Civil Procedure. So if I'm in Judge Anderson's court, which I am frequently, then he or his colleagues on the bench will make a decision as to whether or not they will enter a protective order protecting the data that's being exchanged during the lawsuit and, generally speaking, they will protect that data if it is confidential, if it's not already public.

If it's private data, they will protect that until such time as it needs to be disclosed for a motion or for evidence and so forth, and that's where the due process comes in, because they are literally, in our state, supervising the evidence as it comes in and they supervise the private data.

So if one side is spinning it one way, the other side gets to be fully heard. And if the press wants to watch, they can watch both sides and, generally, they're fair enough to report on both sides.

It's only when data is taken from a private source and pushed out into the public out of context and without due process that there's real significant harm done.

Judge ANDERSON. (OFF-MIKE) to be emphasized that we are talking about the rare case, the case where a teacher is accused of molesting a child and the judge knows that the teacher is going to stay in the classroom and the judge is asked to put his signature on an order keeping that from the public.

The Federal Judicial Center study indicated it was a very small minority of cases that we're talking about here that are sealed, and I agree. I would note, for the record, though, that flies in the face of the predictions that we were told, the dire predictions that we were told that we would have hundreds and hundreds of cases going to trial.

I mean, those two arguments are, to me, inconsistent. And as I said, our rule has worked well. In those rare cases—I didn't have enough time, but I can point to instances in South Carolina where some of our state judges and Federal judges have refused to acquiesce and request that they put their signature on an order gagging the parties, requiring the return of documents, the destruction of documents, no discussion of the case, or even instances, and I've cited it in my written submission, where not only are the lawyers and parties prohibited from ever talking about the case, but the plaintiff's lawyers are prohibited from ever becoming involved in a similar case for a future plaintiff.

So the ramifications go on and on. I certainly do agree with what's been said, that it's a rare case that we're talking about, but it's precisely those rare cases where court-ordered confidentiality is not good for the public interest and it hurts the legal system.

Chairman KOHL. We're all going to participate in this, but I just want to give Mr. Morrison 30 seconds to respond.

The judge is saying in those rare cases, and we are talking about rare cases here, I think we all admit that instances where a judge would have to make a decision that the public health and safety is involved in this settlement and I'm not going to allow it to be secret.

In those rare cases, the judge there has the opportunity to say I'm not going to allow this.

Thirty seconds, and stay on point, please. What's wrong with that?

Mr. MORRISON. Well, in staying on point, that's the way it works right now. The judge has the power at any point in time to stop—

Chairman KOHL. But many judges don't use that power, because they're busy, as Judge Anderson said, they have many things to do and they're not required to look at it. The law doesn't require them to take a look at public health and safety considerations.

So all we're doing in this legislation is requiring the judge to take a look at that issue when he finally disposes of the case.

Mr. Morrison, again, please stay on point. What's wrong with that?

Mr. MORRISON. It's not the role of the court in a single tort case to try to make that judgment.

Chairman KOHL. Well, now, wait a minute, wait a minute. If the judge is convinced that public health and safety is involved, and this is a public court, serving the people's interest.

Mr. MORRISON. Right.

Chairman KOHL. He's a judge put in place to represent the public interest and we believe in the veracity of the judge.

If the judge decides that this protective order violates the public's need to know in this case and he says I can't let that happen, and this does not happen every day, it's rare, what is the problem?

Mr. MORRISON. A, he has the absolute power to do that now with no legislation.

Chairman KOHL. But he is not required to do it and I'm saying isn't it the purpose of the public's court that the judge should be asked to make a judgment, in his mind, when he allows a protective settlement to go forward, should make a judgment that the public interest is being served in allowing it to go forward.

Mr. MORRISON. No.

Chairman KOHL. He should not be asked to make that judgment.

Mr. MORRISON. No, sir. The protection of the public on these issues that you're talking about lies in the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, and any number of other agencies where you have passed laws in Congress requiring people to self-report.

Like the Mattel lead paint came to light because Mattel reported it themselves under a regulatory process. So that when you have a piece—the judge is not—Your Honor—not very often in a case where there's more than just the two parties involved in the case.

He's not a social regulator. He's not in the process of being in that social regulation standpoint and he always has the power, either sua sponte or at the request of the other side, to lift a protective order if he feels that that is in the interest of the public.

He always has that. But to require basically a regulatory overlay by the Federal courts every time they are exposed to one tort case is to cause mischief, I believe.

Chairman KOHL. OK. Mr. Zitrin?

Mr. ZITRIN. Senator Kohl, the most frequent forum for secret agreements is a protective order entered into by stipulation. And judges are busy people. We can hardly expect judges to go back behind the stipulated protective order and do an analysis of whether what's being secretized, as I've coined the word, we haven't gotten

on Wikipedia yet, but hopefully it will get there, what's being secretized is actually something that's a danger to the public health and safety.

I believe that's why you have proposed a bill that isn't talking just about agreements, but very significantly and centrally about protective orders.

It doesn't mean that judges are going to leap out and start investigating every single case. What it does mean is that protective orders should not be entered into merely by stipulation until the judge gives his or her actual imprimatur based on what's actually going on in that case.

In my experience, and I have tried not quite as many cases to verdict as Steve Morrison has, but dozens, and I continue to practice trial law part-time. In my experience, these stipulated protective orders are routine. I practice in the legal malpractice area. They're in every case, because the law firms involved don't want to be embarrassed by information.

But, there, we're not talking about dangers to the public health and safety of the kind that victimized our first witness and his family.

So it makes all the sense in the world to me to have a judicial imprimatur on those protective orders before they are approved.

And I do want to mention one other thing that I am stealing from my friend, Judge Anderson down there, because Joe Anderson has written that, in his experience, it is actually not a cost of time to the court to go through one time the issue of whether there should be disclosure or should not be a protective order as to one particular item, whether it be the GM side impact gas tank cases or the Zyprexa drug or the other Lilly drugs that they've failed to report in the past, because what happens when the protective order is automatically entered on stipulation is that every time that issue comes up in another court, the litigation, discovery process, motions to compel, responses to motions to compel, appeals on a motion to compel, that process is fought out every single time anew.

So in GM, according to the Montana Supreme Court, GM gave $500 million in settlements because of side impact gas tank cases, at the same time that they were engaged in a public relations campaign about how these things were merely an NBC Dateline piece of fluff and not dangerous.

As a result, 240 cases, at least, were settled. Each of those 240 cases had to go through the discovery process anew. If it had happened one time in the District of South Carolina or under this Sunshine in Litigation Act, then the word would be out the first time, the public would know, and you wouldn't have to start out from ground zero every time an order to conduct a discovery.

The best evidence that we have is this actually will save the court some time. So I respectfully disagree with Steve Morrison, as I did down in South Carolina when we met down there. I guess I'll leave it at that.

Chairman KOHL. Thank you.

Ms. Bailey, and then Mr. Weiner.

Ms. BAILEY. Thank you. I'd first like to respond to an argument that Mr. Morrison made about regulatory agencies being charged with safety, so we don't need courts to pay attention.

I think if self-reporting actually worked, we wouldn't see so many of the problems that we see with products harming people after information has come out about safety in litigation, but before a regulatory agency has acted.

So my point is that even if the parties do comply with a regulatory requirement to report on their products, it could be months or years before the FDA issues a black box warning or pulls a dangerous drug off the market and, in the meantime, because the public didn't know, people are continually at risk, and I think that we need to not forget about that important window of time.

Second, I just would like to second what Professor Zitrin said about this being a very small number of cases. I think that when corporate defendants and others argue that the burden is going to be too great on them to go through all these documents and produce everything, unless it is subject to a blanket protective order, I think we're forgetting that if they believe that they are not in possession of any documents that prove that they did something wrong, the problem is solved. They can just produce it. There's no need to push for secrecy. It's only in the very small number of cases where there is something that the public really needs to know and has a right to know that we need a law like this.

Chairman KOHL. Very good.

Mr. Weiner?

Mr. WEINER. Yes, Mr. Chairman. I think that one of the things we do as lawyers is we focus on distinctions and many distinctions, I'm concerned, are being ordered here today.

Because a plaintiff—I represent defendants almost exclusively. I don't recall my clients ever volunteering to be sued. They are in court because someone else has chosen to make an accusation.

And because someone chooses to make an accusation doesn't mean that my clients sacrifice their right of privacy. If you want to talk about something that is inconsistent with our democratic values, I would submit that that proposition would be inconsistent with our democratic values.

Another distinction I think that is blurred is the distinction between a dispute being private, a lawsuit being private, which is not something I've contended, and the documents that are exchanged in discovery between the parties, with minimal supervision by the court, whether those are private, and they are private.

The Supreme Court has said they're private. Just because my opponent chooses to ask for the client's documents that were otherwise private before the lawsuit was ever brought doesn't make my client's documents public.

And the use of—if there were such a word as secretized, it would connote that you're taking something that is public and open and you're making it secret, and that is not true of documents that are produced in discovery.

Now, in many cases, in some cases, at least, documents should be open and available and courts have the ability to require that now.

Last, the suggestion was made that when lawyers enter into settlements or enter into protective orders that protect the confidentiality of private information, they are somehow unethical.

Mr. Zitrin may wish to change the rules of ethics. In fact, I believe he has proposed to do that, but right now, my obligation as a defense lawyer is within the bounds of the law to seek to serve zealously the interests of my client, and that is the obligation of the plaintiff's lawyer, as well.

And the theory of our adversary system is that through that clash, the truth and the public interest will emerge and by serving those interests, a lawyer acts ethically, not unethically, and to say otherwise, I think, under our current system, is wrongheaded.

Chairman KOHL. Mr. Weiner, I'm sure you're familiar with how Judge Anderson conducts his court in this area.

What has occurred there that offends you? We don't have to theorize that there's something. We have a real life situation here.

Mr. WEINER. Well, I don't know enough about the rule in South Carolina. I would say this, that it is an unusual settlement where people go to the court and ask for the court's approval.

And when you enlist the offices of the court in order to approve a settlement, then I think that that incorporates a different standard as to what may be confidential and what not with regard to that disclosure.

They've asked the court to make a decision and the bases of that court decision, there is a stronger argument in that circumstance that the bases of that decision should be public.

But that doesn't mean when parties—if someone sues me, sues my client, my client is involuntarily brought into court and then they decide that maybe it wasn't a good idea and maybe the costs of defending the case are greater than the costs of settling it, whatever reason, they settle that case without the intervention of the court, then I think there are very different issues at stake regarding the confidentiality of documents that started out confidential and should stay that way.

Chairman KOHL. Judge Anderson?

Judge ANDERSON. Well, Senator, in the written materials I submitted, I didn't talk hypothetically. I cited chapter and verse of actual cases.

For example, a case in Greenville, South Carolina, where a child was killed on a go-cart, allegedly, with a defective steering mechanism. The settlement was $1.4 million, conditioned on an order of confidentiality signed by the judge.

When I checked, that model go-cart was still on the market, still being marketed. Opponents say that, "Well, you can go look at the complaint."

The complaints are always public documents and if there's any bad information the public needs to know about, all they need to do is read the complaint.

But I would submit that's a specious argument. We have 250 to 300,000 Federal lawsuits filed a year. Many, many of those fall by the wayside. Many of those are thrown out by the trial judge on summary judgment or go away with nuisance value settlements.

But when a case settles for $1.4 million, to me, that raises a red flag that there may—there may, and I'm not casting aspersions, but there may have been a problem with that product that the public deserves to know about, and that's just one example, and I've cited many others in the article that I submitted.

So I think we sit here and we talk in generalities, but I've, in my written submissions, tried to give you specific examples of real life cases that I've come to be familiar with.

As I've said, I carefully picked the case that I mentioned, because it involved myself. I pointed the finger at myself. I wouldn't really be casting aspersions on someone else.

But I think that was a typical example of the incredible amount of pressure that is put upon a judge to go along with it.

In the case I mentioned involving PCBs in the lake, we had engaged in sort of an experimental summary jury trial, which was popular at one time, in which you bring in essentially an advisory jury.

They think they're a real jury. They think they're trying a real case. You give a very abbreviated presentation of the evidence in a 1-day forum and then the jury goes back and comes back with a verdict.

In this case, we used advisory verdict on the water contamination case and they came back in 20 minutes with a defense verdict. So it looked as though the plaintiffs were going to lose that case if we went to trial.

So here I am faced with a $3.5 million settlement, primary medical care for life for all 350 plaintiffs, and to say, well, the judge didn't have to go along with it if he didn't want to kind of ignores the issue.

There was incredible pressure on me to go along, because I did not want to take that favorable settlement off the table for those plaintiffs.

So I signed the order and, as I said, it kind of was a bellwether case that I remember in my formative years that helped me come to the conclusion it was wrong to do so.

And your legislation, I think, is a very nuanced middle ground approach that just requires judges to engage in the balancing process. We do that all the time. We balance interests in civil and criminal litigation day in and day out. It's nothing we're not used to doing and I think your legislation is sort of a wakeup call to us judges to be mindful of the other side of the equation.

Chairman KOHL. This is posed to whomever wants to respond.

What this legislation is intending to do is to arrive at what Judge Anderson suggested is a balance and to prevent the kind of activity in court which involves powerful companies with enormous assets and a lot at stake and plaintiffs who have been injured and have an opportunity to recover a lot of money if they will just stay quiet from engaging in that process, both the defendant and the plaintiff, at the expense of the public interest, that's the whole point here, and giving a judge the right to look at this thing in a nuanced way and to make some judgment as to what the public interest is.

I think you, Mr. Morrison, said that's not a judge's responsibility, we have regulatory agencies, and so on. If that isn't a judge's responsibility to make these right at the point of attack, which is where the trial is taking place, if the judge doesn't have that responsibility or the right to exercise that—no, doesn't have that responsibility to take a look at it, then I would submit that we're tak-

ing away an awful lot of what a judge is supposed to do in our society.

But that's what this legislation is intended to do, to prevent money, that is to say, money flowing from a defendant to a plaintiff, from preventing very important information that could theoretically have an impact on the lives of hundreds of thousands of people from coming to the surface.

Well, if that isn't a reasonable application of a court of law, in a very few cases, which has been pointed out here, again, tell me, in 30 seconds, please, what's the problem?

Mr. MORRISON. Let me use the example I think Judge Anderson, who is a very good friend of mine and I hope he's telling me the truth that we will be after the hearing, in the context of the PCB case that he had, and I want to defend his decision to sign the order.

But here's what you had. I think you had 350 people in the case and they're getting medical monitoring, which is going to cost about $10,000 a year for life.

The defendant has won the case in the summary jury trial or the advisory jury trial. The defendant doesn't think that the PCBs in the water are sufficient to cause any health or human hazard.

But if the judge insists on telling everybody in the public that they paid $3.5 million for the PCBs, under those circumstances, then how many more people are going to line up at the pay window and say, "Wait a minute, I want the $10,000 for medical monitoring and I want this and that and so forth."

So what the judge did in that case, and he may have felt under a lot of pressure and it was his case and not mine, was a very rational thing.

Remember, the defendant had won the case on the science with 12 tried and true in a summary jury trial where they're presenting a summary of the evidence on both sides, with jury arguments.

And under those circumstances, how unfair would it be to require the defense to publish in the newspaper that they're settling for what amounts to a nominal amount. There's no way they could defend the case for $3.5 million, and to put that out there.

It would be unfair. The presumption of a health and human safety problem would be tremendous there.

Now, if the judge made an independent decision that the PCBs are, in fact, causing cancer, et cetera, et cetera, et cetera, of course, he's not the EPA, the EPA actually regulates PCBs and they have a lot of data and a lot of scientists they call in in hearings just like this to take care of the social regulatory issues as to what is an appropriate admissible level of PCBs in a water source, and they're geared up to do it.

And so I don't think you're taking anything away from the judge. I think the judge made a rational decision at the time that he now feels bad about and I'm sure that he knows more about the case and can argue back on that point.

Chairman KOHL. Let's give him a chance.

Judge Anderson?

Judge ANDERSON. As I say, it's a difficult call, it really is, and Steve has pointed out the other side of the equation.

It's rare to have a summary jury trial. They have been disfavored by the appellate courts and we don't really do that much anymore, but that was a unique case where we did have a sort of a peak at what a jury might do.

Of course, another jury exposed to the full evidence might have gone the other way. But suffice it to say I was concerned about the part of my order that required all the documents to be returned and destroyed, so forth, documents that had been laboriously fought over for several years about their relevance and production and so forth.

Mr. ZITRIN. May I comment on Mr. Morrison's statement?

Chairman KOHL. Mr. Zitrin?

Mr. ZITRIN. Thank you, Mr. Chairman.

I don't think this legislation and I don't think anyone, and I know the written materials that I have submitted certainly don't suggest that the amount of money awarded as a result of the settlement be public.

We've been spending the afternoon discussing the documentary evidence, the information that the public is entitled to know.

And Mr. Morrison, I thought I heard him say is the defendant going to have to go out to the press and announce how much the settlement was for, and the answer to that is no.

No one is suggesting that. We're not talking about having the defendant go through the old mill with a sign saying $3.5 million. Rather, we're talking about a situation where the information is available to the public.

It's not the money amount of the settlement that's important. It's the information.

Now, Judge Anderson's case, which I've heard him talk about before, is a difficult one, but I do think that there is another issue that's important to mention, which is that all of the evidence, and there have been some empirical studies done on this by, among other people, James Rooks, who is here in the hearing room today, show that even when you don't allow the secrecy, cases continue to settle, that there is a disincentive for the toxic polluter or potential toxic polluter to take that case to trial in a public forum.

So while they may not settle for some kind of premium paid for in silence, these cases still settle.

So I think that we should—I think Judge Anderson deserves a bit more credit than his good friend, Mr. Morrison, is prepared to give him at this point.

Chairman KOHL. Ms. Bailey, and then Mr. Weiner. Ms. Bailey?

Ms. BAILEY. Thank you. Mr. Morrison referred to potential plaintiffs lining up at the pay window and I think what he's suggesting is that if the public knows the truth, they will be more likely to sue.

And if that's the case, I think that should be a consequence that we're all willing to accept. If facts do come out showing a product to be unsafe or a business to be defrauding its customers, discouraging lawsuits is not a good reason to hide the truth.

And I would also say that a law like the Sunshine in Litigation Act would actually take some of the burden off judges, in the sense that parties who know that the judge is not permitted to enter a

secrecy order if the case involves public health or safety won't be able to request it.

And so meritorious cases will still be able to be settled for good reasons rather than just for hush money.

Chairman KOHL. Mr. Weiner, would you like to make one comment?

Mr. WEINER. Yes, Mr. Chairman. I think that the proposed legislation goes beyond what may be intended, maybe not what was intended, but I think it goes beyond what descriptions of it have suggested.

What the legislation says is that the order would not restrict disclosure of information which is relevant to the protection of public health or safety.

Suppose you have a case involving a pharmaceutical product. Every pharmaceutical product has—every prescription drug has side effects. When the FDA approves a prescription drug, they do so based on a weighing of the risks and the benefits.

All the evidence about the drug is going to be relevant, particularly in the way the relevance is defined under the Federal rules, is relevant to public health and safety.

And so saying that an order won't restrict disclosure of information that is relevant to the public health and safety is really to say that in such a suit, you can't restrict disclosure at all, and I think that simply is not conducive to a fair adjudication of issues in our courts.

Chairman KOHL. Any other comments, folks? This has really been a great panel.

Mr. Morrison?

Mr. MORRISON. Mr. Chairman? Thank you, Your Honor. If I might, the issue of doing the discovery over again, let me just mention, in the side saddle gas tanks, what General Motors did was put together a reading room where anybody who was involved in any of those cases could go in and look at the documents.

What Ford did in the Firestone-Bridgestone tires was set up a reading room where anybody could go in and look at the documents. It wasn't a matter of you had to start de novo on discovery.

But the documents themselves could not be disclosed piecemeal outside the context of due process supervised by a judge, so that they were confidential until determined otherwise.

And then with regard to this opening of the pay window, which suggests that if people knew the truth, they would sue more and that would be OK. But what is the truth in a difficult case? Is the truth that the defendant won the summary jury trial because there was no causal connection between the chemical and the sickness or that the plaintiffs couldn't prove that there was a causal medical connection?

And if that's the truth and the people still got $10,000, that's the pay window I was talking about. I wasn't talking about trying to prevent people from knowing the truth for the lawsuit.

But the truth is a nuanced piece that only the court knows when they've been through the whole process that they have worked with. It's not, as Mr. Zitrin suggests, you just take a document from somebody with the police power of the state, because you had $100 and could file against the ham sandwich, and then you reach

out and get all their documents and then you're free to do whatever you want with them, publish them in the New York Times or put them on the internet without any context at all.

That would be grossly unfair and it would be really, truly, undemocratic.

Thank you, Mr. Chairman.

Chairman KOHL. Well, we thank you all for coming. You've shed an awful lot of light and information on this very important topic.

Let's see how it all makes its way through the process. Thank you so much.

[Whereupon, at 3:52 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

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QUESTIONS AND ANSWERS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
901 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201

JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

TELEPHONE (803) 765-5136

January 2, 2008

Senator Herb Kohl
330 Hart Senate Office Building
Washington, DC 20510

In re: Sunshine In Litigation Testimony — Followup Questions

Dear Senator Kohl:

Thank you for your letter of December 19, 2007, posing followup questions regarding the Sunshine in Litigation Act. Attached are my responses to those questions. I am also sending an electronic version of my responses to Margaret Horn.

Should you need anything further, please don't hesitate to contact me.

With warmest personal regards, I remain

Sincerely yours,

Joseph F. Anderson, Jr.

JFAjr:gh
Enclosure

Responses to Follow-up Questions

United States District Judge Joseph F. Anderson, Jr.,

regarding the hearing entitled

"The Sunshine in Litigation Act:

Does Court Secrecy Undermine Public Health and Safety?"

before the

Subcommittee on Antitrust, Competition, and Consumer Rights

Committee on the Judiciary

United States Senate

Tuesday, December 11, 2007

Question 1 from Senator Kohl:

Q. *Judge Anderson, critics of my bill are concerned that as a result of limitations on secret settlements, cases will not settle and judges will have to deal with more trials. What has your experience been in South Carolina?*

A. When our local rule was published for public comment, nearly every writer who opposed the rule predicted that if our court adopted the rule, we would see a dramatic rise in the number of cases going to trial, overwhelming an already overburdened court system. This has not been the case. In none of the five calendar years following the enactment of Local Rule 5.03 we have tried as many cases as we did the year immediately preceding the Rule's adoption. In other words, our trials have held steady or decreased in number despite the fact that civil filings have increased virtually every year. This five-year experience should completely debunk the argument that sunshine reforms will result in more trials.

Question 2 from Senator Kohl:

Q. *Judge Anderson, some people say that the civil justice system should focus on settling private disputes between parties and that it is the role of regulators, not the court system, to protect the public health and safety. Would you agree with that?*

A. I believe that the court system is more than just a mechanism to resolve private disputes between the parties. Many times, civil litigation exposes hazards and products and other threats to public safety that have gone unnoticed by state and federal regulators. Often, the regulatory machinery begins operating once dangers are brought to light through civil litigation. Of course, when a judge signs a consent order requiring secrecy, there is no way for the regulators to find out about the problem.

Moreover, as I mentioned in the law review article that I submitted as part of my testimony before your subcommittee, some have suggested that litigants hide behind the judge's confidentiality order to escape reporting requirements. For example, in an article entitled "System Helps Hide Hospitals' Mistakes," Durham, North Carolina Herald Sun Writer Jim Shamp reports that "closed door settlements may allow hospitals and doctors to deny culpability and circumvent error-reporting requirements of regulatory agencies." He explains that hospitals are required to report to the Joint Committee on the Accreditation of Health Care Organizations ("JCAHO") all "sentinel events" meaning any expected outcome resulting in a patient death or permanent loss of function. Shamp contends that under-reporting to the JCAHO is rampant. Since the sentinel event reporting requirements started in 1995, there have been 1,959 events reported. Meanwhile, a 1999 report by the National Academies of Sciences Institute of Medicine entitled "To Err is Human" linked as many as 98,000 deaths per year to medical errors in United States' hospitals. Shamp's premise is that some institutions may not report because the institutions hide behind gag orders issued by judges – orders that they invited the judges to sign.

A similar phenomenon may be occurring in the products liability area. The Consumer Product Safety Act requires that the manufacturer of a consumer product self-report to the Consumer Product Safety Commission (CPSC) when the product is the subject of three verdicts or settlements arising out of claims for death or severe bodily injury. Between 1991 (when the reporting requirement began) and 2002, there have been 551 reports to the CPSC. During this same period of time, there have been 156,085 product liability lawsuits filed in the federal court system alone. Of course, it is possible, though unlikely, that the vast majority of those cases were resolved with a verdict for the defendant. It is also possible that massive under-reporting is occurring because litigants hide behind gag orders issued by the court at settlement.

Question 3 from Senator Kohl:

Q. *Judge Anderson, as you know, the Federal Judicial Center studied sealed settlements and the Judicial Conference conducted follow-up research and concluded that information found in complaints and accompanying public documents were enough to notify the public of a potential health or safety hazard. How do you respond to this?*

A. To suggest that members of the public can learn of dangerous products and other safety threats through reading a complaint filed in civil cases is absurd. For the calendar year 2006, the last year for which figures were available, there were 335,868 civil actions filed in the United States District Courts. Some of these cases are totally frivolous and many others are dismissed by way of summary judgment. Anyone reading the complaints in those cases would be wasting time. It is only after the allegations have been tested through the adversary process, and the facts explored through civil discovery, that real dangers to the public safety and health are made clear.

Question 1 from Senator Harch:

Q. *Could you please explain in greater detail the operation of Local Rule 5.03(E), adopted by the District of South Carolina? Is it a complete ban on court approval of protective orders? Could you compare the ban on secret settlements in South Carolina with the ban proposed in the Sunshine in Litigation Act of 2007, S. 2449?*

A. Actually, the ban on secret settlements in South Carolina is much broader than I had proposed to the members of our court. My original proposal was almost identical to the legislation proposed by Senator Kohl. That is to say, it would address a small number of cases where public safety or the public interest was implicated. Some judges on our court, however, were of the mind that the prohibition on sealed settlements should be made more broad. As enacted, it purports to be a complete ban on all secret settlements. There is, however, an escape valve which allows our court to continue to preserve confidential information in those cases where confidentiality is appropriate.

Specifically, Local Rule 1.02 provides that for good cause shown, any of our district's local rules may be overriden by a judge in a specific case. This gives judges the leeway to continue to seal proprietary information, trade secrets, personal identifiers, sensitive government information, and the like. As I explained in my law review article, these two rules, read together, express a preference for openness at settlement, with the understanding that some situations deserve confidentiality, and in those cases, the local rule is no impediment.

Responses of Leslie A. Bailey to Follow-up Questions on Sunshine In Litigation Act Hearing

January 7, 2008

1. In his testimony, Mr. Weiner argues that plaintiffs have the opportunity to raise objections to protective orders because of health and safety hazards. Can you address the burden this places on the plaintiff?

The notion that the public's interest in information relevant to health and safety is protected because plaintiffs have the opportunity to object to overly broad protective orders ignores the reality of litigation.

First, under the law, the party that wants to keep a document secret is supposed to bear the burden of showing why secrecy is necessary—not the other way around. Thus, even if plaintiffs were in a position to be responsible for protecting the public's interest—which they are not—making plaintiffs responsible for this would put the burden on the wrong party.

Second, as a practical matter, even though the proponent of secrecy is required to show why there is good cause for secrecy, what often happens is that the defendant refuses to produce a smoking gun document, or refuses to settle the case, unless the plaintiff agrees to secrecy. In our experiences, plaintiffs often do not want secrecy (indeed, many specifically say they want to make sure nothing like what happened to them happens to anyone else), but individual plaintiffs are often pressured to agree to secrecy orders to get the documents they need to go forward with their case without extensive delays, or to get settlements that are crucial to their ability to take care of her family. Thus, the mere fact that plaintiffs are technically not *prohibited* from raising objections to protective orders every time the protective order would bar disclosure of information relevant to the protection of health or safety does not mean that most individual plaintiffs are in a position to fight on principle. It makes more sense to have a legal system that automatically protects the public interest than to hope and expect that an injured individual plaintiff will be willing and able to put the public interest above her own needs and her family's needs and her right to be compensated for the harm she has suffered.

The fact is that under the current system, the parties often agree to secrecy—the defendant in order to keep evidence of wrongdoing from the public, and the plaintiff because of necessity. When the parties agree, the judge nearly always goes along. But if they were required to weigh the public's interest—separate and apart from the interests of either of the parties—judges would have the power and the duty to ensure that critical information is not kept secret.

2. Ms. Bailey, why do plaintiffs agree to confidentiality agreements? Why would the parent of a child who was injured or killed by a defective product, such as an over-the-counter medicine or toy, agree to a confidentiality agreement that puts other children at risk?

Certainly no parent of a child injured or killed by a defective product goes into a lawsuit intending to let the manufacturer of that product keep putting others at risk. Yet parents, and other plaintiffs, commonly do end up agreeing to confidentiality as a condition of settlement, even in cases involving severe injuries or death. The reason is simple: these individuals are forced to choose between a protracted and expensive fight, with the possibility that even after trial they may not recover any (or enough) damages from the corporation, and a monetary settlement that would help their family to recover from horrific loss or to care for a loved one who now needs long-term medical care. In situations like this, defendants have the leverage to extract secret settlements.

There is simply no good reason for our public courts to facilitate such secrecy agreements when the public interest is at stake. If judges have the duty to consider the public interest, plaintiffs will no longer be forced to choose between not getting the money they need and deserve and hiding the truth from others who may be at risk.

Follow Up Questions
Sunshine in Litigation Act Hearing
Stephen Morrison

From Senator Kohl

1. **As some witnesses testified, protective orders are often issued in cases where "good cause" has not been properly established. Do you agree that courts ought not to grant protective orders absent a rigorous, bonafide showing of good cause?**

Response to Question 1:

First, I would strongly disagree that federal courts often issue protective orders in cases where "good cause" has not been properly established. Nearly all the cases cited in the hearing testimony and materials were merely concluded by the witnesses to have involved "wrongful, secret" protective orders and settlements, without any such finding by an appellate court or other authority. Additionally, many cases cited in the hearing also involved protective orders granted in state courts under state court law and rules, some of which contain a heavier burden of proof than the federal rule.[1] There was only one federal appellate case cited in the hearing testimony and materials on the issue, Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122 (9th Cir. 2003). In that insurance fraud case, the 9th Circuit found that the district court erred in issuing an overbroad protective order and order to seal, but acknowledged that some of the discovery documents discussed confidential, proprietary information and third-party medical information, and as such, that information was entitled to protection from discovery in other litigation against State Farm. Importantly, Foltz is actually a prime example of why our current system works and needs no other layer of legislative intervention. As discussed in that case, the courts already interpret "good cause" under Rule 26(c) to require movants to make specific demonstrations of fact, often involving in-camera review, before granting the court's protection. And, pursuant to the current rules, anyone, including a non-party, has numerous devices available at the district and appellate court level to challenge the grant of protection. That is precisely what happened in Foltz, where private and public intervenors challenged the scope of the protective order.

Second, in answer to your specific question, I believe that current rules and case law give the federal courts the proper guidance and discretion in granting protective orders to facilitate the exchange of private and valuable property and information in litigation. The court already has the power to weigh the interests and need for the information against privacy and property rights to determine the level of proof that is required to make a showing of good cause.

2. **In your written testimony, you refer in several instances to the "right" of privacy in discovery materials. For example you state that "litigants have a right to**

[1] Please refer to Ms. Bailey's statement citing Ken Armstrong, Justin Mayo & Steve Miletich, *Your Courts, Their Secrets*, Seattle Times, March 5-15, 2007, discussing orders to seal granted in Washington state courts.

privacy in pretrial matters." I understand that the Supreme Court in *Seattle Times* has established that there is no right of access to discovery and I do not dispute that there are legitimate privacy interests in discovery that justify protective orders, but are you saying that there is also an established "right" to keep discovery private? If so, can you please cite supporting case law.

Response to Question 2:

In your question, you already acknowledge the Constitutional principals and Supreme Court's rule that there is a right to private discovery. The discovery *process* cannot be distinguished from the *materials and information* exchanged in discovery. Of course, the fact that parties in a case engage in discovery is not protected information. But the right to conduct discovery outside the public eye derives naturally from the nature and scope of the information exchanged. Simply because a person pays a $100 filing fee and makes allegations that the defendant caused an injury-- which may or may not be true-- that person is entitled to use the enormous power of the state to force a defendant reveal private and valuable information. Beyond proprietary and trade secret information, modern discovery practices may yield millions of electronic documents from a company, including private information such as employee emails with friends and family. A defendant unwillingly called into court does not waive its rights to protect that information, especially when only a small percentage of the information exchanged in electronic discovery is ever admissible in the case. On the flip side, our discovery rules also allow the defendant to inquire into the plaintiff's deeply private matters, down to his favorite websites and cell phone records, and including information about his medical history, criminal history, personal relationships, education and employers. The plaintiff also does not automatically waive his right to privacy by seeking access to our court system in order to resolve a dispute. Moreover, discovery is not limited to the parties, and armed with subpoenas, anyone in the suit can reach out and grab testimony and information from third persons to which they would not otherwise be entitled.

If we imagine the opposite—that the government fails to recognize the right to private discovery -- what would be the result? Envision a public discovery practice, with videotaped depositions and document productions made available via the federal court website. Would witnesses see snippets of their testimony published on U-Tube without their permission, taken out of context, distorted or ridiculed? What about their private emails, calls, and letters? Would documents produced by parties and non-parties be visible to the marketplace? Almost all documents created within an organization contain value in that they reveal an organization's strategies, processes, policies, communications, staffing, and relationships. If the presumption is that discovery will be public and conducted in our electronic age, litigants with valid claims would likely turn away from our court system in fear of seeing their life and business published on the internet for the whole world to see. Moreover, once the cat is out of the bag, it's too late. The court would not have any realistic power to retrieve the data and undo the harm, as we have observed in the Zypreza litigation.

Discovery is a vast process that must remain private to facilitate the exchange of information that leads to truth-seeking and a peaceful resolution of disputes. The burden of conducting

discovery falls on the parties, not on the court. It works like a funnel. Only after the immense process of production, review, and negotiation, do the parties identify a few, key pieces of information for the court to consider under the Rules of Evidence. And, even then, due process requires cross examination of the evidence to ensure a fair presentation to the public. I believe the effect of this bill would be to reverse the presumption and right of privacy in discovery, inject the federal court more squarely into that process on the front end, and task the court to apply due process balancing and analysis to much more of the information being exchanged as it attempts to sort out the burdensome procedures proposed. Congress must continue to respect and recognize the right to keep discovery private to avoid this kind of crushing burden on our judicial system.

3. **You argue that we should let judges decide protective orders and that legislative bodies ought not interfere. Do you believe that judge has an obligation to take into consideration the public's interest in knowing about a serious hazard, perhaps like the example Judge Anderson cited of the go-carts that injured young children and remained on the market? Should a judge do something beyond simply adjudicating the case before him or her?**

Response to Question 3:

The role of a federal judge in our system of civil justice is to help resolve disputes between private parties. Our court system seeks justice and the transference of wealth from people who cause harm to people who suffer a harm. A federal judge considering the isolated facts of one case should not be tasked with the responsibility of public watchdog, helping to regulate products in the American marketplace, nor should the judge assume the jury's role in deciding the ultimate issue in any product case before the case is even tried.

As I testified, Congress has already established numerous government agencies to regulate and oversee issues regarding public health and safety, including the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, the Food and Drug Administration, Federal Aviation Administration, and many others. For example, pursuant to 15 U.S.C. § 2064(b), the Consumer Product Safety Commission requires manufacturers, importers, distributors, and retailers to self-report within 24 hours of obtaining information which reasonably supports the conclusion that a product does not comply with safety rules, or contains a defect which could create a substantial risk of injury. Further, manufacturers are also required to report information about settled or adjudicated suits to CPSC. This is an effective system, as demonstrated recently when Mattel self-reported a lead paint hazard to the CPSC and initiated a recall of its toys.

This bill also appears to have the effect of undermining the jury's role in products cases because its terms are so broad and undefined. In every single products case, the public's "health and safety" is implicated because the test for recovery in each case is whether a product is unreasonably dangerous. The question of whether the case is "relevant" to the public's health and safety would be presumed, blindly satisfying the first element in the proposed §1660(a)(1)(A). The bald allegations of the complaint would be sufficient to

implicate the additional procedures outlined in this bill upon the parties' request for court approval of any confidentiality or protective order. This would inevitably trigger excessive, costly, and unnecessary discovery battles. All of this before the jury even has the opportunity to consider whether the product at issue did, in fact, cause the injury and present an unreasonable danger. What if it is a defense verdict or the defendant wins on summary judgment? And, even in the result of a settlement, many reasons exist to end the litigation by agreement, other than wrongdoing on the part of the defendant. Is it efficient use of judicial resources for the federal court to have been forced through additional, burdensome fights in the discovery process because the allegations in the case were "relevant to the protection of public health and safety", even when the product is not determined to be unreasonably dangerous? Is it fair to defendants to be forced to expend additional resources to protect privacy and property in that situation? What is the benefit to the public?

As a result, whether any kind of confidentiality order would "restrict the disclosure of information which is relevant to the protection of public health or safety" is an unworkable test for federal judges to apply in helping private people litigate their disputes. Moreover, where does "public health and safety" stop? Could it extend to insurance fraud cases like the Foltz case above, where the insurer was accused defrauding insureds for their legitimate medical claims? I can conceive of many types of non-product cases, even pure contract disputes between corporations, that could arguably involve public health or safety. The danger of this bill lies in the erosion of the constitutionally protected right of privacy, especially as it relates to discovery. Judges already have the discretion to weigh the relative factors in granting confidentiality orders to help litigants seek the truth and resolve their personal disputes. If judges have concerns that the public interest is not being sufficiently protected, they also have the opportunity and responsibility to advocate those interests through their work with community, professional, and legislative agencies and organizations. An obvious example of this type of advocacy is Judge Anderson's testimony to this subcommittee.

4. **You express concerns for a defendant company's privacy, especially because of the ability of plaintiffs to make broad requests for a defendant's files. My bill would only impact cases involving public health and safety and only when the information sought to be protected involves potential health and safety hazards. And, even then, judges have the discretion to weight the interests in privacy. Are you concerned that federal judges will not respect recognized privacy interests when making such decisions?**

Response to Question 4:

First, although your question frames your bill as a narrow one, the scope of cases that could be impacted by this bill is *not* narrowly defined, as discussed in my Response to Question 3 above. Second, I believe the effect of your bill would be to turn the presumption of privacy on its head, so that if privacy or property questions were a close call, the language in this bill would restrict the court's discretion to grant protection. If the decision resulted in the public release of information that harmed to someone, it would not be fixable in today's electronic

communication age. I believe the federal law and rules provide a fair framework in which judges already exercise proper discretion, and in which their decisions are subject to challenge and appellate review. The system works, and judges' discretion should not be restricted further by the proposals in this bill.

5. **In your testimony, you cite concerns that documents exchanged during discovery could be released immediately to the broadcast media or the internet without context, without judicial supervision, without due process. Under my bill, judges have the discretion to balance interests and proponents of protective orders have ample opportunity to explain why information should be subject to a protective order. Are you concerned that judges will not afford litigants "due process" when they have legitimate reasons to keep information private?**

Response to Question 5:

As discussed in my responses above, my concern is that the proposals in the bill would place additional restrictions on a federal judge's discretion in the application of due process. When the test is whether a case is "relevant to the protection of public health and safety," there is *no* judicial discretion as to whether the additional requirements and burdens of proposed §1660 would apply in a products case. And, as discussed above, the scope of cases potentially affecting "public health and safety" is not a narrow one.

6. **In your statement you say that our current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate.**

   (a) **If this is so, how do you explain the many examples, such as Firestone and Cooper tires, that have been cited here today?**

Response to Question 6(a):

Information about public hazards is already abundantly available to the public under existing law, without enacting legislation that would restrict judge's discretion and require judges to assume additional responsibilities. Google any product. Countless blogs, chatrooms, and websites are immediately available, replete with facts, news, discussion, rumors, and parodies. All of the government agencies concerned with public health and safety have websites that allow easy searching related to any product. Check out Consumer Reports, or even sites like microsoftsucks.org. An avalanche of information is available to American consumers today in helping them to make decisions about their health and safety, and the amount of information available is ever expanding. As to the Firestone case, Professor Arthur Miller addressed that case in his statement, pointing out that the NHTSA was alerted by early claim data submitted by manufacturers and insurers in that case, the companies voluntarily produced millions of pages of documents, and the few settlements that were confidential, were sealed at the request

of the claimants, not the manufacturers. In the testimony we heard regarding Cooper tires, Mr. Bradley acknowledged that problems had been publicly reported prior to his accident.

The point is, this bill is not necessary to protect the public, and instead, presents a danger to Constitutionally protected rights of litigants and an undue restriction and burden on the federal courts. The fact that we have the new E-discovery rules is evidence of the judiciary's recognition of the complexity of issues we face in managing and sharing information in the electronic age. Federal judges should be trusted to properly exercise discretion under the current rules, and they are much more educated on these issues than ever before.

(b) **If judges already consider public interest, how would a requirement that judges consider the public's interest, when it relates to health and safety hazards only, be a burden?**

Response to Question 6(b):

As discussed above, under current law in private litigation, the court has discretion in granting confidentiality and protective orders to consider whether a public interest in implicated, and weigh that factor in its balancing of the interests and requirements of proof. By its broad and undefined language, the proposed Act would further burden the court by mandating another layer of detailed judicial analysis, and heavier burdens of proof for the parties, especially during the discovery process in product cases.

(c) **Is it unreasonable to ask the judge to at least explain, in regard to public health and safety hazards, his or her decision for issuing a protective order?**

Response to Question 6(c):

Federal law already requires the court's order to discuss the factors and evidence considered by the judge in granting protection, which is necessary to allow appellate review. Those orders are already publicly available, as are the complaint and other pleadings. No other more specific requirement of analysis or explanation is necessary.

From Senator Hatch

1. **Could you please discuss the impact of the proposed Sunshine in Litigation Act of 2007, S.2449 on constitutional commitments to due process? Specifically, would it publicize evidence that does not benefit from the adversarial process?**

Response to Question 1:

Yes, I believe the proposed Act presents a clear threat to the litigants' rights of due process, privacy, and ownership of property under the United States Constitution, and similarly poses a danger to the rights of subpoenaed third-parties. As discussed extensively above, in product cases particularly, the broad terms of the proposed bill would effectively reverse the presumption of privacy during discovery, and force a stricter burden of proof upon the parties and others seeking to protect their property and information. When modern discovery yields such a massive amount of information, the proposed process presents an enormous judicial drain, as well as a colossal risk and cost to the parties. The bill would limit the court's discretion to protect that information, and the danger is for private and valuable information to become instantly, and irretrievably, publicized to the world, where it would be subject to misuse and distortion. Information relating to a private dispute in our American legal system only becomes properly public after it is subjected to the Rules of Evidence, and both sides are allowed to explain and cross examine it pursuant to due process.

2. **Witnesses at the hearing on the Sunshine in Litigation Act used a number of product liability cases to demonstrate the need for this litigation. Could you please provide any additional details that would assist the Committee in considering any lessons from litigation involving breast implants, Zyprexa, and Firestone tires?**

In his statement for the hearing, Professor Arthur Miller thoughtfully addressed lessons learned from the litigation involving breast implants and Firestone tires, but the Zyprexa litigation presents a particularly useful warning about passing any law that would erode the right of litigants to protect their information or property.

In the *Zyprexa* multidistrict litigation,[2] the plaintiffs alleged that Eli Lilly's antipsychotic drug caused them to develop obesity and diabetes, and that Lilly failed to warn of the risks and over-marketed the drug. In discovery, Lilly produced millions of documents to the plaintiffs under Protective Order limiting the disclosure of Lilly's private information to the specific litigation context in which the information was provided. A plaintiffs' consulting expert, Dr. David Egilman, received the confidential documents only after the plaintiff's firm diligently required his signed commitment to abide by Judge Weinstein's Order, which gave Court protection from disclosure to Lilly's private information.[3] However, Dr. Egilman and a *New York Times* reporter, Alex Berenson, conspired to find a way to get the documents to the newspaper. Berenson gave Dr. Egilman the name of an Alaska attorney, James Gottstein, who was pursing unrelated litigation for mentally ill patients in his state.[4]

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[2] Zyprexa Litigation, In Re Injunction, No: 07-CV-0504 (E.D.N.Y Feb. 13, 2007).
[3] Zyprexa Litigation, In Re Injunction, No: 07-CV-0504 (E.D.N.Y Feb. 13, 2007), at 20, 21.
[4] Id. at 21-23.

Then, the three of them cooked up their plan for what I call the "sideways subpoena sneak." Gottstien subpoenaed the protected confidential Zyprexa documents from Dr. Egilman on December 6, 2006, who faxed a copy of the subpoena to Lilly, but not to the plaintiff's firm who had hired him.[5] On December 11, before Lilly had an opportunity to respond to the first subpoena and seek protection, Gottstein sent Dr. Egilman a second subpoena in the unrelated Alaska case with an expedited deadline for production of Lilly's private information. Again, the subpoena was not served on Lilly, the plaintiffs firm, or the court in the Zyprexa litigation.[6] The very next day, without informing anyone else in the Zyprexa case, Dr. Egilman rushed to get electronic and hard copies of the documents to Gottstein, who immediately shared them with Berenson and others.[7] Within a week, the *New York Times* began publishing unflattering articles discussing the information in Lilly's confidential, private, and court-protected documents. The day after the first article appeared, the court issued an emergency temporary restraining order against Gottstein, but was too late. Some of the organizations and individuals who had received copies from Gottstein had already been scrambling to get the documents out on the internet so that they could never be retrieved. While Judge Weinstein continued to gather evidence about the conspiracy and prepare his final injunctive order, free speech and futility arguments circulated in the press. One blog headline read: "Judge Tries to Unring Bell Hanging Around Neck of Horse Already Out of the Barn Being Carried on Ship That Has Sailed."[8]

Within the year, and by the date of Judge Weinstein's final injunctive order on February 13, 2007, almost all the cases had settled. In the Order, Judge Weinstein found that a substantial number of the documents that had been produced and shared outside the Protective Order were "annoying, embarrassing, oppressive, and burdensome to Lilly; they reveal trade secrets, confidential preliminary research, development ideas, commercial information, product planning and employee training techniques."[9] Dr. Egilman, Gottstein, and certain others who had received the documents were ordered to return all copies and enjoined from disseminating them further. Although Judge Weinstein found Berenson's conduct "reprehensible," the Court did not enjoin him or the *New York Times* because Lilly didn't seek an injunction against them. The publishing websites also escaped injunction after a lengthy discussion by Judge Weinstein about the public policies involved and likelihood that the court could effectively enforce its order against them.

In the meantime, the private, court-protected Lilly documents remain on servers in Sweden, under a domain registered at Christmas Island, off the coast of Java, outside of Judge Weinstein's jurisdiction.

Who benefited by the publication the information in Lilly's private documents? The *New York Times* got an exclusive, front page story to sell papers, and Berenson got his byline. What

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[5] Id. at 23-24.
[6] Id. at 24, 25.
[7] Id. at 26-28.
[8] TortsProfblog (snipurl.com/Torts), William G. Childs, assistant professor at Western New England School of Law, Springfield, Mass.
[9] Zyprexa Litigation, In Re Injunction, No: 07-CV-0504 (E.D.N.Y Feb. 13, 2007), at 29,30.

about the people who claimed to have been hurt by the drug? What about the ability of our justice system to peacefully resolve disputes?
The theft and dissemination of information like this does not encourage settlements or enhance the ability of people to litigate in our court system. It is a total invasion of privacy at the corporate level, just as it would have been a total invasion of privacy to put copies of the *Zyprexa* plaintiffs' medical records on the internet. The information exchanged in litigation only becomes public when it's actually used in a courtroom. Why does it become public then? Because in the courtroom, due process of law applies under the eye of the judge, where both sides have the opportunity over the course of days or weeks to explain the information and provide context. The information is not put out in three columns on the front page of the *New York Times* or in some 90-second satire on the internet. And, until the documents become evidence in a court proceeding, the dispute remains private. This system justifies the ability of litigants to use the awesome police power of the state to exchange private information and property.

Does this mean that there is no way to fairly challenge the confidentiality of documents if there is a question of public health? Of course not. In the *Zyprexa* case, the Court's Protective Order specifically allowed petitions for declassification of discovery materials. Instead, Berenson, Dr. Egilman, and Gottstein substituted themselves for the American civil justice system.

As Judge Weinstein explained in his Order; "Even if one believes, as apparently did the conspirators, that their ends justified their means, courts may not ignore such illegal conduct without dangerously attenuating their power to conduct necessary litigation effectively on behalf of all people. Such unprincipled revelation of sealed documents seriously compromises the ability of litigants to speak and reveal information candidly to each other; these illegalities impede private and peaceful resolution of disputes."[10]

3. **One of the witnesses suggested in her testimony that corporate defendants seek to maintain the privacy of their corporate information "because they are interested in maximizing profits." Assuming that not all product liability lawsuits are meritorious are there other reasons why a corporation might request the maintenance of confidentiality?**

First, acknowledging that it is a goal of every business to be profitable, businesses have many other goals, including goals to produce products to improve the health, safety, and quality of life of Americans, as well as to be responsible taxpayers and corporate citizens who contribute heavily to social causes.

That being said, there are many, very important reasons why corporations seek confidentiality. Like all private citizens, corporations have the Constitutional right to protect their property. Even if information does not rise to the level of a trade secret, almost all documents created

[10] Id. at at 13.

within a corporation contain value in the marketplace. The types of information typically sought and produced by defendant businesses in a products case include, for example, all reports, memos, contracts, meeting minutes, emails and attachments, presentations, studies, and any other kind of hard-copy or electronic document, as well as testimony, that relate to:

- research and development;
- testing, including, for example, field reports discussing private individual cases of persons engaged in medical testing;
- marketing plans, policies, procedures;
- sales and profit information;
- public relations;
- client communications, which also often reveal propriety and confidential information about clients;
- subcontractor and supplier communications, which also often reveal proprietary and confidential information about subcontractors and suppliers;
- recruiting, staffing, and evaluations of employees;
- employee communications inside and outside the business, including those that discuss employee relations with colleagues, clients, and even family and friends;
- information technology, computer codes, software and other scientific information.

This list is not exhaustive, and often, the information concerning the product at issue in the case is intermingled with information about many other products and potential products, not at issue in the case. All of this information, if revealed in the marketplace, jeopardizes the ability of the business to function and compete. Moreover, businesses are not faceless. They are made up of private people, and businesses have the right to protect the privacy of its employees. During depositions, employees may be forced to discuss and reveal an abundance of private personal information pursuant to our broad rules of discovery. For all these reasons, businesses zealously guard their right to privacy and property during litigation, and they should be able to continue to seek protection and confidentiality pursuant to the existing legal framework, and without the further unnecessary and burdensome procedures contemplated in this proposed Act.

Respectfully submitted,

Stephen Morrison

Responses of Robert N. Weiner

QUESTIONS FROM SENATOR KOHL

1. **You argue that we should let judges decide protective orders and that legislative bodies ought not interfere. Do you believe that a judge has an obligation to take into consideration the public's interest in knowing about a serious hazard, perhaps like the example Judge Anderson cited of the go-carts that injured young children and remained on the market? Should a judge do something beyond simply adjudicating the case before him or her?**

If a judge became aware that maintaining the confidentiality of information in litigation would in fact impair the ability of members of the public to protect themselves from danger, the judge, under current law, would have discretion to consider that fact in determining whether to grant or sustain a protective order. If that situation arose -- and I have not encountered such a scenario -- I would expect the judge to exercise his or her discretion in a manner that would protect the rights of the litigants insofar as it is possible to do so without endangering others.

The judge's obligation in our constitutional system is to adjudicate the case before him or her. There is sufficient discretion built into the Rules of Civil Procedure to allow the judge to perform that function without being blind to any broader impact of the his or her orders.

2. **In your testimony, you highlighted the advent of electronic discovery and the increased potential for sensitive commercial or personal information to be produced in discovery.**

   (a) Do you agree that courts ought not to grant protective orders absent a rigorous, bona fide showing of "good cause," as required by Rule 26(c)?

Rule 26(c) of the Federal Rules of Civil Procedure requires a showing of "good cause" for the entry of a protective order. The Rule does not add the adjectives "rigorous" and "bona fide." I believe the standard in the Rule does not need amplification.

   (b) Does electronic discovery provide a more efficient means of distinguishing between documents that may be relevant to public safety and those that clearly are not?

No.

3. **On page three of your written testimony, you cite the several examples where you are concerned about the privacy of litigants. Can you please explain how legislation that requires a judge to weigh the public's interest in disclosure of information "relevant to the protection of public health and**

safety" could result in an "invasion of privacy" in three of the examples you cite:

(1) a newspaper sued in a libel action

Consider this hypothetical case. A newspaper story alleges that a particular drug causes some users to stop breathing and that the manufacturer knew about, but did not disclose, the problem. In fact, a tiny percentage of patients who take the drug experience a severe allergic reaction known as anaphylactic shock -- about the same percentage as experience that reaction to aspirin. Anaphylactic shock can obstruct a patient's breathing. The labeling for the drug, which is appropriately directed to doctors as the law requires, prominently warns of anaphylactic shock in language that the FDA specifically considered and approved. But the labeling does not say in terms that the drug can cause people to "stop breathing." The drug company sues the newspaper for libel and requests the reporter's notes of interviews with sources. Under the standard in the bill, the information in the reporter's notes may be "relevant to the protection of public health and safety." That does not mean the information is correct, or that there is indeed a health problem with the drug. It just means that the notes *pertain or relate to* an issue of health and safety, as that is the definition of "relevant."

(2) a health insurer sued for insurance fraud

Consider a hypothetical case in which a health insurer refuses to pay for a bone marrow transplant that a cancer patient needs. The patient cannot afford the treatment unless insurance pays for it. By the time the insurance company relents and agrees to pay, it is too late, and the patient dies. The patient's family sues the insurer for fraud, alleging that it has routinely denied payment for treatments needed by policyholders who have cancer, putting them at risk of death or injury. To establish this pattern of conduct, the plaintiffs ask for medical records of every other cancer patient to whom the insurer denied payment. The company can redact the names of patients, but that may or may not prevent knowledgeable reviewers to match the records to specific individuals. The medical records may be "relevant to the protection of public health and safety." At the end of the case, the evidence may well show that the insurer only denied coverage for inappropriate treatments. Nonetheless, at this stage, the standard in the legislation could require that medical records exchanged in discovery be publicly available.

(3) an employment discrimination case.

Consider a hypothetical case in which a former employee sues a manufacturer of medical devices, alleging that she was fired because she was a minority. She claims that she had more training and was more productive than employees who were not fired, and that substance abuse, lack of training, and the general incompetence of employees on the assembly line create a danger to users of the device. In discovery, she asks for employment records of other employees. .Given the allegations, this information may be "relevant to the protection of public health and safety," and therefore, under the standard in the bill, a protective order may be inappropriate.

4. You argue that public access to complaints and other public court filings is sufficient to alert the public to a potential health and safety problem. How do you respond to Mr. Bradley's assertion that if information currently subject to a protective order, which his lawyer has unsuccessfully fought, were made public that Cooper Tire would be pressured to fix the problem with its tires?

Mr. Bradley suffered a terrible tragedy and deserves the greatest sympathy and respect. But at the time of his accident, there were already so many lawsuits involving Cooper Tire that the federal cases had been consolidated in a multi-district litigation proceeding. In New Jersey, a court had before it a nationwide class action settlement involving allegedly defective Cooper tires. Cooper Tire was already receiving significant adverse publicity, including stories in the Wall Street Journal and New York Times on Cooper Tire settlements. There is simply no reason to believe that protective orders contributed to Mr. Bradley's accident.

5. In your written statement, on page 7, you state that "those arguing for compelled disclosure of information that 'concerns' or 'relates to' public safety would impose impossible burdens on courts and would give litigants leverage to extract settlements based on the risk that their opponents' trade secrets will be disclosed." As you know, the Sunshine in Litigation Act does not compel or require the disclosure of any information, and it requires a judge to consider whether the information is "*relevant to the protection public health and safety*," (emphasis added), not simply information that "concerns" or "relates to" public safety. Indeed, it gives the judge discretion to balance this public interest with privacy interests, including trade secrets.

With respect, the draft legislation does not simply require a court to consider whether information is relevant to public health and safety. It requires a court to make a specific finding when entering a protective order that the order would not "restrict the disclosure of information which is relevant to the protection of public health and safety." § 1660(a)(A). And the Court is directed to enter the narrowest order possible.

As regards the word "relevant," the first definition in the Oxford English Dictionary is "[b]earing upon, connected with, pertinent to, the matter in hand." Requiring that the documents be relevant to the "protection" of public health and safety does not narrow the scope of the statute. For example, any document regarding pharmaceutical products -- which, after all, are intended to protect public health -- is arguably "relevant" to that issue, particularly given that every drug has side effects, which are often at issue when pharmaceutical companies are sued.

(a) Do you think that a judge should have the discretion to reject a protective order when he or she determines that such an order would prevent critical public health and safety information from reaching government officials and consumers?

I think judges have that discretion now.

(b) Are you concerned that judges will not respect recognized privacy interests, such as trade secrets, when using the discretion that the Sunshine in Litigation Act allows them?

Yes. The Act does not clearly afford discretion, but rather restricts it. A judge can only grant a protective order if he or she finds that the interest in public health and safety is outweighed by a specific interest in confidentiality. At the outset of a case, before the evidence has been developed and submitted to a trier of fact, the judge will have a very difficult time assessing this balance. Because the default position in the statute is denial of a protective order and disclosure of information, the consequence could well be disclosure of trade secrets and private information. At the very least, in a case involving many documents -- and electronic discovery has increased the magnitude of document productions --sorting this issue document by document out will be backbreaking.

QUESTIONS FROM SENATOR HATCH

1. Mr. Weiner, in your testimony you made note of the burden of e-discovery, and the need to consider this practice in the Sunshine in Litigation Act of 2007, S. 2449. Could you discuss in greater detail what e-discovery entails, when it arose, and how it has changed the ordinary course of litigation?

E-discovery has been around for years, but the burdens mushroomed with the rise of e-commerce, the increasing prevalence of email, and the adoption of the amendments to the Rules of Civil Procedure, effective on December 1, 2006. Parties must identify potentially relevant electronic documents that are reasonably accessible and those that are not. Many, if not most, companies do not have an inventory of the electronic systems that have been used historically through their business, the data created on those systems, and how that data has been stored, recycled, or otherwise maintained.

Compiling and reviewing information even from the reasonably accessible sources can be enormously burdensome. One commentator estimated that for a large company to search for, review, and produce electronic documents from 100 custodians would cost an average of $5 million. Experts in e-discovery estimated that the total cost for all litigants in 2007 would be $2.4 billion.

Moreover, the possibilities of error -- either in missing caches of material, or in failure to suspend operation of some automatic system deleting old records -- are legion, and can result in sanctions. Most lawyers went to law school because they are *not* technologically adept, which often compounds the problem.

The result is that litigation has become more costly, and discovery is even more a game of "gotcha" than it was previously. Given the costs, some companies simply turn over the electronic files of many custodians and tell the opponents to search. That increases the risk of disclosure of private matters, particularly in light of the ways employees frequently use email for personal communications. Even companies that attempt to sift out such materials from discovery will miss some in the enormous volume of materials reviewed.

2. Mr. Weiner, your testimony highlighted the privacy concerns that courts must protect in litigation, specifically with respect to information exchanged between parties but not filed with the court. Could you elaborate on the interests of plaintiffs in maintaining privacy during discovery? In your view, would this legislation adequately protect the privacy interests of plaintiffs?

The hypothetical cases outlined in answer to Senator Kohl's question illustrate how discovery can require production of personal and private information. Business litigants often have to produce the personnel files of employees and executives for purposes of impeachment or to establish lack of training or oversight. Employees' email is often produced. People frequently make observations in emails to close colleagues that they

would not make publicly. They reveal private information about themselves. They make comments about other employees. All of this information can be, and often is, produced in discovery.

In addition to document discovery, both plaintiffs and defendants have to testify in depositions. They frequently must answer questions that could provide material for impeachment at trial -- whether they have been convicted of a crime (even if the record of it was expunged), whether they are taking drugs that could affect their ability to remember or testify, whether they have lied, or made stupid mistakes, or uttered unfortunate remarks. This kind of discovery implicates privacy interests.

A plaintiff who brings a lawsuit claiming to be injured by a defective product generally must produce his or her medical records to substantiate the injury, and to demonstrate that it did not result from some prior condition. These records may "relate to the protection of public health and safety," and therefore this statute could disable the Court from maintaining their confidentiality.

3. Mr. Weiner, the Sunshine in Litigation Act would prohibit court approval of settlements restricting access to materials obtained through discovery unless the court finds that such an order "would not restrict the disclosure of information which is relevant to the protection of public health or safety." In your opinion, would this requirement allow a judge to enter a protective order in a product liability case?

The legislation would preclude a protective order in many, if not most cases. To begin with, the standard appears to shift the burden to the defendant to prove that its product is *not* harmful, and to do so at the outset of the case before the factual record has been developed. Judges who apply this standard strictly may insist that information produced in discovery about an allegedly harmful product must be disclosed unless and until the defendant shows that the product is safe.

This is particularly problematic in cases involving pharmaceutical products. As noted, every drug has side effects. Therefore, most of the information produced in a product liability case involving an alleged side effect of a drug could well be "relevant" to the protection of public health or safety. The standard is also problematic in cases involving automobiles. We know that there will be crashes of automobiles In a lawsuit about the crashworthiness of a car, virtually all the documents and testimony may be "relevant" to the protection of public health and safety.

I cannot say that this provision would doom *all* protective orders in product liability cases. But it could inflict a mortal wound.

Z&F

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January 11, 2008

Senator Herb Kohl
Senate Judiciary Committee
United States Senate
Washington, DC

Attn: Caroline Holland
BY EMAIL ONLY

Dear Senator Kohl:

You have asked me three follow-up questions regarding your Sunshine in Litigation Act as a result of the subcommittee hearings a few weeks ago. My responses to each of your questions follow below, after the texts of each of the questions. Please let me know if I can be of any further assistance to you.

1. At the hearing we heard Mr. Bradley's compelling testimony about Cooper Tire protective orders. But we have also heard that plaintiffs are free to broadcast their complaints and other information publicly available in court records, just as Mr. Bradley did at our hearing. Why is that not enough?

Answer: First, plaintiffs are *not* generally free to "broadcast" their complaints, at least with any supporting evidence, whenever the information proving the basis of the complaint has been made secret. That is, plaintiffs may usually state their version of events as Mr. Bradley did, just as their complaints filed with the court remain public.[1] But if the key documents supporting the allegations are not "publicly available in court records" (as your question asks) the key information will not be part of the "broadcast."

That is, if the information plaintiffs have recourse to is limited to their own accusation and "sanitized" court records, the *evidence* of the truth of their complaints remains locked behind an agreement to keep the most information secret. It is that "secretization," as I call it, that is so dangerous to the public.

Second, the goal of this legislation, as I understand it, is not primarily to allow plaintiffs to hold press conferences, but to enable the public to educate itself. This requires the public to have the opportunity to access the evidence of danger that a particular product (etc.) presents. This

[1] Actually, in some cases, complaints themselves can be sealed, or the names of the parties changed, and in California at least, if a case is settled after a verdict, stipulations are allowed that *reverse* the verdict as part of the settlement. I have addressed both these issues in several published articles, including two in Hofstra academic journals, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 Hofstra L. Rev. 1565 (Summer 2004) and *The Case Against Secret Settlements (Or What You Don't Know Can Hurt You)*, 2 [Hofstra] J. Inst. for Study of Legal Ethics 115 (1999). Stipulated reversals in California are expressly authorized by *Neary v. Regents of Univ. of California*, 3 Cal.4th 273 (1992).

can only occur if this key information is publicly available. This information is not generally made available through press conferences, *60 Minutes* segments and the like, but by sharing information in the marketplace of ideas, primarily through lawyers with similar kinds of cases and consumer advocacy groups that focus on providing the public with information on dangers to the public health and safety.

2. Mr. Zitrin, some critics argue that my bill could threaten personal and corporate privacy of litigants, particularly with the development of electronic discovery. How do you respond to these concerns?

Answer: First, as I remarked at the hearing, our courts are public, not private, forums. Indeed, public scrutiny of our judicial system is one of the most significant cornerstones of that system as created by our Constitution. There are no Star Chambers in this nation, no secret tribunals. Absent very rare and specific circumstances (protecting juveniles, national security reasons) our courts have been, are, and will continue to remain open.

Second, privacy considerations generally come under one of two headings: embarrassment and trade secrets. While corporations, through a "legal fiction," are generally given the status as "persons" in most jurisdictions, our courts have also widely held that cannot be "embarrassed" as individuals are. This, of course, stands to reason. (I see no adverse effects on personal privacy, as people like children, individuals who were molested, and those with severe injuries can always have their identities protected. The *legitimate* use of protective orders to ensure individual privacy will remain in place under this legislation.)

As for trade secrets – the "state of the art" technologies that companies use to create their products – proper trade secrets can and *will* be protected with this legislation. The decision on protection will rest with our judges, but *not* with the litigants alone. The reason for this is that litigants by themselves are too often tempted by expediency and financial gain to *stipulate* to secrecy based on "trade secrets" even though no legitimate trade secrets are involved. For example, after the tire-shredding scandal, a senior Firestone executive testified before Congress that their demands for secrecy were predicated on "trade secrets." But no one needs to protect the trade "secrets" of a defective product, because no other company would ever use that design.

Other than the ability to disseminate information widely and quickly (generally considered a plus in our society), I see little effect that electronic discovery has here. It is really a question of the ease with which available information may be obtained, and not an issue of the availability itself.

3. Do defendants have a legitimate concern that without protective orders the documents they produce during discovery will be posted on the internet?

Answer: To an extent I've already answered that question in the last part of my answer to number 2, above. To the extent that dangers are exposed in discovery documents, there is a public interest in their wide dissemination. A corporation's rejoinder also has the opportunity to be that wide, and will undoubtedly be a sophisticated response.

Of course privacy concerns remain important, especially in an Internet age. But one of the consequences of an open society with free speech and freedom of the press is that some

segments of our society get little privacy.[2] Brittany Spears and Paris Hilton, even Bill Cosby, have received publicity can be disastrous to their public image. But it is how they have *behaved* in the aftermath of that publicity that determines public perception. In the case of a corporation, even if it's not a "celebrity" company, such publicity can also be harmful. But unlike Ms. Spears or Ms. Hilton, corporations have the means and the tools to avoid damaging *but inaccurate* publicity becoming harmful. Like Mr. Cosby, their subsequent behavior and their own credibility, built up over time, will outweigh any publicity, even if it is public exposure of a serious mistake.

That is what happened with Ford after the Pinto case, and has happened to countless other corporations since. In Pinto, a plaintiff discovered a Ford memorandum that set forth a cost-benefit analysis of fixing the rear gas tank danger vs. paying off the victims of gas tank fires and determined it would be cheaper to not make the fix. Despite the justifiable disapprobation Ford received, it successfully handled the situation and remains a leading car manufacturer. More recently, GM suffered few bad effects from the side-impact gas tank cases – in which the merits of the claims are still debated by some – even though it was revealed that GM paid one-half billion dollars in damages for secretly-settled cases. (See my written testimony for further reference.)

However, this legislation absolutely does not mean that protective orders have lost their purpose. Indeed, this legislation when enacted will serve to limit these orders to their original and appropriate purpose. It will curb only those protective orders that interfere with public access to information without the *legitimate* need for that protection.

Respectfully yours,

Richard Zitrin

rz/mcm

[2] While there is a difference between standards of *defamation* as applied to the famous as opposed to ordinary people, the right of free expression pertains equally in discussing people of celebrity, "ordinary" individuals or corporations thrust into the news.

SUBMISSIONS FOR THE RECORD

Prepared Testimony of

United States District Judge Joseph F. Anderson, Jr.,

for the hearing entitled

"The Sunshine in Litigation Act:

Does Court Secrecy Undermine Public Health and Safety?"

before the

Subcommittee on Antitrust, Competition, and Consumer Rights

Committee on the Judiciary

United States Senate

Tuesday, December 11, 2007

Chairman Kohl, Ranking Member Hatch, and Members of the Committee, thank you for inviting me to appear before you to discuss "Sunshine in Litigation"—a subject of particular interest to me as a trial judge with 21 years on the federal bench.

I should say at the outset that I am not here representing the Judicial Conference of the United States or any other organization. I am here simply to convey my thoughts on the need for awareness of the adverse consequences of court-ordered secrecy.[1]

As I am sure you are all aware, civil litigation has mushroomed in the United States courts in the past two decades. The question of the proper role of the judiciary in approving, and thereby sanctioning, the litigants' demands for secrecy at settlement has been the subject of extensive discussion.

To give you a brief background, litigants frequently request that judges "approve" settlements, often when court approval is not even required by law. As part of this "approval" process, judges are typically asked to enter orders restricting public access to the settlement information and perhaps the case history. In many instances, litigants are not content to simply agree between themselves and off the record to remain silent as to the settlement terms. Instead, the preference is to involve the trial judge in a "take it or leave it" consent order that would bring to bear the might and majesty of the court system on anyone who breaches the court-ordered secrecy.

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[1] A copy of my 2004 law review article on the subject of open court records is attached.

Unfortunately, trial judges often struggle under the crush of burgeoning case loads. Eager to achieve speedy and concrete resolutions to their cases, and ever-mindful of the need for judicial economy, many judges all too often acquiesce to the demands for court-ordered secrecy.

In late 2002, the judges of my district court in South Carolina voted unanimously to adopt Local Rule 5.03(E) which restricts court-ordered secrecy associated with settlements in civil cases. We were then, and we remain, the only federal district court in the country with such a rule. In the brief time allotted to me, I would like to relate several events which prompted me to propose the rule to our court, and also say just a word about our court's experience operating under this rule.

In 1986 when I was a 36-year-old newly-appointed federal trial judge, I was assigned a case that had been pending on another judge's docket for several years. The case was ready for trial which the lawyers predicted would take a grueling six months. The case was brought by 350 plaintiffs who lived around Lake Hartwell, a 56,000 acre freshwater lake in upstate South Carolina. The plaintiffs contended that the defendant in the case had knowingly deposited large amounts of PCBs into the lake, and that they had experienced severe health problems from being exposed to this toxic substance.

Much to my relief and shortly before the trial was to begin, the parties announced that they had reached an amicable settlement. The defendant would pay $3.5 million into a fund to be used to set up a medical monitoring and primary care

program for all 350 plaintiff-residents and a small amount of the settlement money would be used for a per capita distribution to each plaintiff. There was one catch: The settlement was contingent upon my entry of a gag order prohibiting the parties from ever discussing the case with anyone and also requiring a return of all "smoking gun" documents. I was advised by counsel that if I did not go along with their request, the carefully crafted settlement package would disintegrate and the case would proceed to a contentious six-month trial.

As a judge with less than a year's experience on the bench, other complex cases stacking up on my docket, and believing it was in the fairest and best interest of all parties, I agreed to the request for court-ordered secrecy. When I signed the order, everyone was content: The plaintiffs recovered a handsome sum; the lawyers for both sides were paid; the defendant received its court-ordered secrecy; there were no objections to the order; and the judge had one less case to try.

In the ensuing years, I questioned my decision to enter a secrecy order in that particular case. I also became troubled by what I viewed as a discernable trend in civil litigation: Lawyers were requesting court-ordered secrecy both at settlement and in connection with the exchange of documents during discovery. I was aware of instances in both the state and federal courts in South Carolina where judges had agreed to requests for court-ordered secrecy in cases where one could reasonably argue that public interest and public safety should have required openness.

For example, I knew of a judge who restricted access to case information where a child died while riding an allegedly defective go-cart. The settlement was $1.4 million, and the judge imposed a strict obligation of secrecy on the parties. I later learned that the model go-cart which the child had been riding was still being sold and marketed. I was also cognizant of judges in the South Carolina state courts who entered confidentiality orders in medical malpractice cases where even the identities of the physicians who were named as defendants were shielded from public view.

Responding to this series of events, I proposed to our court that we adopt a local rule prohibiting, in most civil cases, court-sanctioned secret settlements. When our rule was released for public comment, we received heated objections from around the nation. Virtually every opponent of our rule suggested that an inevitable byproduct of such a local rule restricting court-ordered secrecy would be the substantial increase in the number of cases going to trial which would, in turn, overwhelm our court.

As I mentioned earlier, our court unanimously passed Rule 5.03(E) and we now have a five-year operating perspective. The dire predictions of those who suggested that the rule would cause settlements to disappear proved to be wrong. In fact, according to statistics provided by the Clerk of Court, our court tried *fewer* cases in the five years *after* the rule's enactment than in the five years before it was adopted.

In short, our rule has worked well and our court has not been "overwhelmed" as a result. Trade secrets, proprietary information, sensitive personal identifiers,

national security data, and the like remain protected. However, in those situations where the public interest or safety could be adversely affected by court-ordered secrecy, judges on our court have not hesitated to enforce the rule and keep the docket transparent.

The national furor created when our rule was proposed for public comment began a vigorous debate and much-needed review of the adverse consequences associated with court-ordered secrecy. While the issue has not been entirely resolved, I am of the opinion that the secrecy trend seems to be waning. More importantly, I believe that both state and federal judges have become more sensitive and enlightened to the need for "Sunshine in Litigation."

Thank you for allowing me to share my sentiments with you and I will be happy to answer any questions you may have.

STATEMENT OF

LESLIE A. BAILEY
PUBLIC JUSTICE

BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE SUNSHINE IN LITIGATION ACT: HOW UNNECESSARY COURT SECRECY UNDERMINES OUR CIVIL JUSTICE SYSTEM AND THREATENS PUBLIC HEALTH AND SAFETY

DECEMBER 11, 2007

Introduction

Mr. Chairman and Members of the Subcommittee:

I am pleased to accept your invitation to testify today on the issue of unnecessary court secrecy. I am an attorney at Public Justice, a national public interest law firm based in Washington, D.C. and supported by the non-profit Public Justice Foundation. My testimony is based on Public Justice's work for nearly two decades fighting unnecessary secrecy in the courts.

It is a fact that much of the civil litigation in this country is taking place in secret. This secrecy takes many forms. First, corporate defendants often refuse to produce documents in pretrial discovery unless the documents are subject to a protective order that prohibits the plaintiff or her attorney from distributing them to anyone else. Second, corporations often refuse to settle a case unless the settlement is confidential, insisting upon gag orders that bar the injury victim from publicly discussing the cause of her injury or the terms of the settlement, or even disclosing that the case existed. Third, courts are often asked to seal the record of a case in part (for example, certain pleadings or a decision) or its entirety. Once a case is sealed in its entirety, it becomes nearly impossible for any member of the public or press to learn what happened or to obtain any information about why the case is sealed.

Thus, through protective orders, secret settlements, and sealing of court records, the public courts are being used by private corporations to keep smoking-gun evidence of wrongdoing from the public eye. Plaintiffs' lawyers, obligated to put their clients' interests first, often feel they have no choice but to consent to secrecy in order to achieve justice for a particular victim. Judges, facing ever-escalating dockets and mounting time pressures, often sign off on overbroad protective orders and approve settlements with secrecy provisions, grateful for any

instance in which both parties agree. All the while, Americans unsuspectingly continue to drive unsafe cars, drink unsafe water, entrust our financial well-being to institutions that engage in fraud and deception, and seek treatment from incompetent doctors.

This secrecy subverts our system of open government, undermines public trust in the court system, and threatens public health and safety. Unfortunately, while Public Justice and other public interest groups have successfully challenged abusive sealing orders and protective orders by intervening in litigation, secrecy orders go unchallenged in the vast majority of cases. If federal judges were required by law to consider the public interest before entering a secrecy order, this would provide a substantial counterweight to the factors that allow secrecy to flourish.

Background on Public Justice

Public Justice (formerly Trial Lawyers for Public Justice), founded in 1982, is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. We specialize in precedent-setting and socially significant individual and class action litigation designed to further consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, workers' rights, America's civil justice system, and the protection of the poor and powerless. Through our Access to Justice Campaign, we strive to keep the courthouse doors open to all by battling federal preemption of injury victims' rights, unfair mandatory arbitration, class action bans and abuse, unnecessary secrecy in the courts, attacks on the right to counsel and jury trial, and unconstitutional legislation.

Public Justice is the principal project of the Public Justice Foundation, a non-profit membership organization. We are supported by a nationwide network of over 3,500 attorneys and others, including trial lawyers, appellate lawyers, consumer advocates, constitutional

litigators, employment lawyers, environmental attorneys, civil rights lawyers, class action specialists, law professors and law students. Public Justice and the Public Justice Foundation are headquartered in Washington, D.C., and have a West Coast Office in Oakland, California.

For nearly two decades, through a special litigation project called "Project ACCESS," Public Justice has opposed unnecessary court secrecy as a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. As part of Project ACCESS, we have intervened in a wide variety of cases to fight for the public's right to know and have advised attorneys in cases implicating public health, safety, and welfare. More information on Public Justice and Project ACCESS is available on our web site at www.publicjustice.net.

Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to informational requests from legislators and persons interested in legislation, and have occasionally been invited to testify before legislative and administrative bodies on issues within our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues the Subcommittee is considering today.

Unnecessary Court Secrecy is Pervasive

There is no question that secrecy pervades the justice system. Famous examples abound of damaging information revealed in litigation but kept secret from the public for long periods of time: Bic lighters, car seats, breast implants, and all-terrain vehicles were all subject to protective orders while countless consumers continued to be at risk from using them. Doctors continued unknowingly to implant defective heart valves into patients, even though documents disclosed in

litigation—but concealed from the public for far too long—revealed a high risk of valve failure. Manufacturers of dangerous drugs settled cases brought by injured patients on terms that forbade the patients' attorneys from notifying the FDA that the drug caused harm.

In 2000, the public learned that a safety defect in Firestone tires, when combined with the susceptibility of Ford Explorers to rolling over, had caused at least 250 injuries and 80 deaths in the United States. Firestone had known about the defect for a decade. But each time a victim or her survivors sued the tire manufacturer, the corporation settled the case on condition that the documents showing that the tires had safety defects be returned to the corporation and hidden from the public and the press. While a government investigation and television exposé ultimately forced the corporation to recall 14.4 million tires—6.5 million of which were still in use at the time—many of those injuries and deaths may not have occurred if Firestone had not successfully kept the knowledge of its defective product from reaching the public.[1] As of last year, Firestone still had not notified all the owners of the dangerous tires that they had been recalled.[2]

Similar abuses continue to this day. An award-winning *Seattle Times* investigative series earlier this year uncovered more than 400 cases in a single court that had been wrongly sealed in their entirety—many of them involving matters of public safety.[3] And protective orders, which

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[1] Memorandum of Law of *Amicus Curiae* Public Citizen in Support of Plaintiff's Motion to Compel and Opposition to Protective Order, *Trahan v. Ford Motor Co.*, No. 99-62989 (61st Dist. of Harris County, Tex. Sept. 18, 2000), *available at* http://www.citizen.org/litigation/briefs/OpenCourt/articles.cfm?ID=1070.

[2] *Bridgestone Firestone to Notify Owners of Recalled Tires*, U.S.A. Today, July 21, 2006, at http://usatoday.com/money/autos/2006-07-21-firestone-recall_x.htm.

[3] Ken Armstrong, Justin Mayo, & Steve Miletich, *Your Courts, Their Secrets*, Seattle Times, March 5–15, 2007, series available at

keep information unveiled in the discovery process confidential, are routine, especially in product liability, automobile design, toxic tort, pharmaceutical, environmental, and medical malpractice cases.

For example, in several lawsuits against Cooper Tire, the families of victims killed or injured in accidents have uncovered documents allegedly showing that the accidents were caused by tread separation. But Cooper, in virtually every case, has fought to keep that evidence under seal, claiming that to release it would expose the corporation's trade secrets. In at least one case, Cooper sought and obtained a "draconian" protective order whereby the corporation was "effectively permitted to unilaterally designate any document it chose as confidential."[4] And a Mississippi court recently found that "Cooper Tires has engaged upon a course of conduct exhibiting an attitude that it does not have to provide documents or even the barest information about them unless and until plaintiffs have discovered from other sources that they exist."[5] The plaintiffs in a case in federal court in Utah cited five separate cases in which courts found that Cooper had willfully engaged in bad faith by failing to produce documents or respond to discovery.[6] But in an unknown number of other cases, courts have been persuaded to permit Cooper and other defendants to get away with hiding the truth.

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http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/. The authors of the series were honored as finalists for the 2007 Pulitzer Prize in investigative journalism.

[4] Fortunately, the order was subsequently reversed. *Mann v. Cooper Tire Co.*, 816 N.Y.S. 2d 45, 56 (App. Div. 2006).

[5] *Plaintiffs Fight Protective Order on Cooper Documents*, 26 No. 20 Andrews Automotive Litig. Rep. 14, Apr. 3, 2007 (discussing *McGill v. Ford Motor Co.*, No. 02-114 (Miss. Cir. Ct., July 30, 2002).

[6] *Id.*

In an equally disturbing example, it has recently come to light that Allstate Insurance Company had implemented a program designed to increase its shareholder profits by intentionally and significantly underpaying policyholders on indisputably legitimate claims.[7] The new paradigm, which was implemented on the advice of McKinsey Consulting in a series of PowerPoint slides now known as the "McKinsey documents," resulted in record operating income for the corporation—during a time period marked by several of the worst natural disasters in recent history, including Hurricane Katrina. The purposeful denial of valid claims clearly constituted bad faith and violated insurance laws—after all, insurance companies have a fiduciary duty to their policyholders. The McKinsey documents, which also showed Allstate was forcing victims to litigate valid claims rather than settling them, were produced in litigation. However, they were kept secret from the public pursuant to a protective order. Even after the protective order expired, Allstate refused to turn over the documents, even when this subjected the corporation to contempt of court. Finally, a lawyer who had viewed the McKinsey documents published his notes and analysis, and the contents of the slides are now known to the public.[8]

In the last few years, Public Justice has fought several overbroad protective orders and sealing orders. In some cases, though certainly not all, we have succeeded in making documents public that should never have been concealed in the first place. Although every court decision unsealing such documents is a victory, it should not take public interest litigants and lawyers being in the right place at the right time to make sure unnecessary secrecy is avoided. Literally

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[7] David J. Berardinelli, *An Insurer in the Grip of Greed*, TRIAL, July 7, 2007, at 32.

[8] *Id.*

hundreds of thousands of cases are handled each year by federal and state courts, and it is simply not possible for the handful of organizations dedicated to fighting court secrecy to intervene in more than a tiny fraction of them. Furthermore, challenges to secrecy orders offer no possibility of recovering any damages, and few lawyers can afford to undertake such cases on a *pro bono* basis. Thus, while the following examples demonstrate that it is possible, in some cases, to fight secrecy, it should also be remembered that for every success story, there are hundreds of equally harmful secrecy orders that remain in force.

***Davis v. Honda*: Unsealing of court record showing auto maker's expert witness intentionally destroyed evidence in a personal injury case (2005)**

Sarah Davis was seventeen years old when the Honda Civic in which she was riding crashed, leaving her paralyzed. She filed a lawsuit against Honda in a California state court, and a key issue of fact at trial was whether she was wearing a seat belt at the time of the accident. After Ms. Davis had presented her case to the jury and Honda had begun its defense, the court granted permission for Honda's expert, automotive engineer Robert Gratzinger, to examine the car at issue in the presence of all counsel. During the inspection, Mr. Gratzinger was observed using a rag to intentionally wipe off marks on the seat belt that would have provided evidence of Ms. Davis's seat-belt use. Honda's attorney then refused to allow Ms. Davis's counsel to preserve the rag as evidence of spoliation.

As a result of this incident, Ms. Davis moved for sanctions, and the court halted the trial in order to investigate. After hearing testimony about what had happened, the court issued a scathing 36-page sanctions decision, finding that Mr. Gratzinger had "wrongfully and intentionally altered the most significant physical evidence in the case" and that Honda's

attorney had knowingly prevented the rag from being preserved.[9] The court sanctioned Honda by entering a judgment of liability against the corporation, leaving only the question of the amount of damages for the jury.

Unsurprisingly, a settlement was announced within a few days. Apparently as a condition of the settlement, the parties stipulated to an order sealing the sanctions decision. In addition to vacating that decision, the extraordinary sealing order banned all publication and sharing of the decision, and prohibited anyone from even mentioning it in any legal proceeding. As a result, Mr. Gratzinger was shielded from questions about his actions in *Davis* and continued to serve as an expert witness for automakers in crash cases around the country.

Public Justice challenged the secrecy order on behalf of the Center for Auto Safety, a national consumer group that works to improve automobile safety, and attorneys representing car crash victims against defendants who had named Mr. Gratzinger as an expert witness in their cases. On October 26, 2005, the court that had entered the sealing order reversed itself, agreeing that the order violated California law and the First Amendment.

***Jessee v. Farmers Insurance Exchange*: Reversal of overbroad protective order designating documents showing insurer linked employee compensation to limited payouts as confidential (2006)**

After Ruth Jessee was injured in an automobile accident, she filed a lawsuit against Farmers Insurance for denying coverage of her insurance claim in bad faith. Before trial, Ms. Jessee's attorney, in addition to seeking discovery from Farmers, obtained a number of documents from an attorney representing an injury victim against Farmers in a different state. Among them were internal documents that show that Farmers linked its adjusters' compensation

[9] The sanctions decision in *Davis* is available on the Public Justice web site at http://www.publicjustice.net/briefs/davisorder.pdf.

to the amount they saved the corporation on claims. Farmers then sought a protective order that would make this key evidence secret, even though it had been obtained not from Farmers in discovery, but from an attorney in another case against Farmers where it was not sealed—and thus was already public. The trial court granted the corporation's motion.

The unusually broad protective order in *Jessee*, which was issued without any showing of good cause for secrecy, required the plaintiff's counsel to identify all documents in his possession relating to the subject matter of the case—and permitted the insurance company to label those documents "confidential" regardless of their source. It also required that any court records containing or referring to those documents be filed under seal. Finally, it obligated the crash victim and her attorney to return all "confidential" documents to the insurance company at the conclusion of the case.

Public Justice, representing the plaintiffs before the Colorado Supreme Court, argued that the order should be vacated because it violated Colorado law and the First Amendment.[10] On November 20, 2006, the court agreed, reversing the trial court's order and holding that the documents must remain public.[11]

***State Farm v. Foltz*: Unsealing of court records in consumer fraud case (2003)**

Debbie Foltz sued State Farm for conspiring with another company to conduct a phony medical review of her file in order to defraud her of medical coverage under her auto policy. After four years of litigation, the parties reached a secret settlement and asked the court to seal virtually the entire record. The court agreed to back-seal the record, and the entire case—

[10] Our brief is available at http://www.publicjustice.net/briefs/jessee_reply_021506.pdf.

[11] *Jessee v. Farmers Ins. Exchange*, 147 P.3d 56 (Colo. 2006).

including the docket sheet—was erased from the court's computer system. Following the settlement, the court also permitted State Farm to physically remove the case files from the courthouse. As a result, it was impossible for the public to determine that the case existed, much less view the record.

Public Justice intervened in 1999 on behalf of several public interest groups, and won a partial victory.[12] The court ordered the file returned to the courthouse and restored the docket sheet to the court's record-keeping system, but said it would continue to bar access to materials filed under seal pursuant to protective orders entered earlier in the case. These documents allegedly showed that State Farm was cheating its policyholders. Joined by other intervening litigants, Public Justice fought to have the remaining documents unsealed—but the district court denied further access to the evidence, holding that the parties' agreement to keep the documents secret justified the sealing orders.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the discovery materials had been improperly sealed, because there had never been any showing of the "good cause" for secrecy required by Rule 26(c).[13] Instead, the parties had simply agreed that the materials could remain secret. The court also ruled that the court records in the case had been wrongly sealed; affirmed that the "strong presumption in favor of access to court records" can only be overcome by a showing of "compelling reasons" for secrecy; and made clear that reliance on an agreed-upon protective order did not constitute a compelling reason.[14]

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[12] The Public Justice briefs are available at http://www.publicjustice.net/briefs_documents.htm.

[13] *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).

[14] *Id.* at 1135.

While these cases are success stories, the vast majority of secrecy orders are never known to anyone except the parties and the court, let alone challenged by public interest groups. In our communications with numerous plaintiffs' attorneys, we have come to understand that secrecy orders are more widespread now than ever. In order to understand how to solve this problem, it is helpful to understand why secrecy is so pervasive.

Secrecy flourishes because no party to the litigation is advocating for the public.

Secrecy continues to flourish because defendants want it, and because plaintiffs and judges do not do enough to oppose it at any stage of the process. Corporate defendants want secrecy, for the most part, because they are interested in maximizing profits. If evidence of their wrongdoing is concealed, it will be much more difficult for future plaintiffs to sue the company, and the defendant will be able to avoid paying as much as it otherwise would in damages. In addition, secrecy enables defendants to avoid the negative public relations that would result from public knowledge of their wrongdoing—and the ensuing loss in profits.

Plaintiffs' lawyers often agree to secrecy out of perceived necessity. A plaintiff's lawyer may be so concerned with gaining access to the key documents she needs to present her client's case that she does not recognize an unlawful protective order—or may decide it isn't worth slowing down the litigation to fight. And when faced with a settlement that will compensate their clients—especially if the defendant is willing to pay a premium for secrecy—few plaintiffs' attorneys balk at the condition that the case and the settlement be kept secret. To fight would be to delay justice for the client, or possibly to lose the chance to settle altogether, and many cannot afford that risk.

Judges, meanwhile, are frequently overburdened. Because neither of the parties is arguing for the public's right of access to information, it is often possible to resolve disputes without considering the public interest at all. If the parties disagree about whether a protective order is proper, a busy judge may simply insist that they work it out. Few judges are likely to reject a proposed settlement that has a confidentiality clause, as long as both parties agree to the term. The result is that as long as each participant in the legal process pursues her own narrow interest, no one in the process is protecting the public interest—and the public remains unaware of the underlying facts that prompted the desire for secrecy.

Although the public generally has a right of access to trials, this is virtually meaningless, given that the vast majority of cases settle. A recent UCLA report found that the 2002 rate of resolution by trial of cases in federal court is less than a sixth of what it was in 1962.[15] Naturally, settlement is especially likely when facts revealed in discovery show that the defendant has put peoples' health or safety at risk, or has defrauded its customers. When such facts do come out, defendants who want to shield their actions from public scrutiny have the perfect solution: pay for a secret settlement.

Unnecessary secrecy threatens public safety, undermines the civil justice system, and blocks the courthouse doors.

Whether or not unnecessary secrecy is acceptable in our nation's civil justice system depends on whether one views the publicly-funded courts as simply a means of resolving private disputes, or whether one believes that the public has a right of access to information about what happens in our court system.

[15] Henry Weinstein, *UCLA Law School Joins Others to Pry Into Judicial Secrecy*, L.A. Times, Nov. 3, 2007, at http://www.latimes.com/news/local/la-me-secrecy3nov03,1,1247556.story.

No one would deny that there are some cases in which secrecy is appropriate. For example, Coca-Cola may understandably wish to prevent its competitors from knowing the secret formula of its soft drink. In such cases, judges could easily conclude that no public interest would be harmed by confidentiality. But in cases where the information at stake would alert the public to harmful corporate practices, the costs of secrecy are too high.

This is not merely an question of ideals; it has serious practical ramifications. The first and most obvious effect of secrecy is that consumers remain unaware of risks to their safety and health, and continue to use dangerous products. But there are other, more subtle costs as well.

Unnecessary secrecy makes discovering the truth much more difficult and costly. When a defendant is able to keep its wrongdoing secret, it does not have to pay as much money to subsequent victims. In addition, many other victims will never learn that they have legal claims against the corporation. Others who know they have claims will be unable to sue because of the high cost of obtaining information that only the defendant possesses. Those who do sue will face protective orders at every corner, and the few who do prevail will likely be forced to agree to a secret settlement. Meanwhile, consumers are prohibited from making informed decisions about which companies to do business with, and the defendant continues to compete in the marketplace.

The cost to the judicial system—and to taxpayers—is enormous. Judges must decide the same discovery disputes over and over again. Cases that should be resolved easily if the truth were known take years to resolve, or never reach resolution at all. Instead of the public courtroom being the institution that ensures the truth is discovered and justice is done, the courtroom is being used all too often as a means of hiding the truth.

In light of this, federal legislation aimed at reducing unnecessary secrecy in the courts and ensuring the public's right to know is long overdue.

The Sunshine in Litigation Act

The Sunshine in Litigation Act would restrict federal judges from entering a protective order or sealing a case or settlement without making specific factual findings that the secrecy order would not harm the public's interest in disclosure of information relevant to health or safety. A requirement that factual findings be issued would charge the court with examining whether the public interest in access to the information at stake outweighs the interest the proponent of the order has in secrecy. It would also provide a valuable record on which to base appeals of—or challenges by interveners to—any secrecy order entered. Equally importantly, the bill would prohibit courts from approving or enforcing settlements or issuing protective orders or sealing orders that would restrict disclosure of information to regulatory agencies. All of these things are likely to reduce unnecessary court secrecy.

However, if the intent of the legislation is to definitively strengthen the standards that must be met before a court can enter a secrecy order, there are ways in which the bill as currently drafted may fall short of delivering this effect. In light of this, the Subcommittee might consider the following concerns when evaluating potential revisions to the bill.

1. The bill does not encompass public interests other than health and safety.

As currently drafted, several provisions of the bill are narrowly limited to ensuring public access to information "relevant to the protection of public health or safety." However, as explained above, secrecy orders are also commonly used to shield egregious misconduct that is not directly linked to health or safety; for example, refusal by insurance companies to pay

policyholders' legitimate claims after they have suffered severe injuries or lost their homes. While it is certainly true that health and safety information must not be concealed, the public has a broader interest in access to information concerning corporate wrongdoing—including fraud, discrimination, and insurance bad faith. Legislation would go much further towards eradicating the problem of court secrecy if it were not limited to information relevant to the protection of public health and safety.

2. The bill could be interpreted as supplanting or weakening the existing Constitutional and common-law right of access to court records.

As currently drafted, section (a)(1) imposes new requirements for the issuing of protective orders and orders sealing court records, but it does not make clear that these requirements must be satisfied in addition to any requirements that already exist under current law. In addition, it appears to impose a single standard for the issuing of any secrecy order, regardless of whether it is a protective order under Federal Rule of Civil Procedure 26(c) (which governs the sealing of materials produced in pretrial discovery and does not apply to court records or settlements) or an order restricting access to court records. Because of these ambiguities, the section, as currently drafted, could have the unintended effect of actually weakening existing protections against the sealing of court records.

Section (a)(1)(B), as written, provides that court records may be sealed as long as any public interest in information related to the protection of public health or safety is outweighed by a "specific and substantial interest" in confidentiality. However, under current law, court records are subject to an arguably much more stringent test. Many courts have held that, under both the common law right of access and the First Amendment to the United States Constitution, court records are subject to a "strong presumption in favor of access" that can only be overcome upon

a showing of "compelling reasons for secrecy"[16] or "exceptional circumstances."[17] While courts use varying language to describe the burden that must be satisfied before access to court records can be restricted, it is clear that this standard is different from—and higher than—the Rule 26(c) "good cause" standard for issuing protective orders. In keeping with this, numerous courts have held that the mere existence of a protective order is not enough to justify the sealing of court records.[18]

Because section (a)(1)(B) does not make clear how the provision relates to current legal standards—i.e., whether it is intended to supplement or to replace them—it could be interpreted as permitting a court to seal court records, despite a public interest, as long as an (arguably weaker) "specific and substantial interest" standard is satisfied. Thus, if the bill is intended to ensure that standards are strengthened, it should be made clear that the bill's provision does not replace the stronger standards currently applicable to court records with a weaker standard. This concern could be remedied, for example, by excluding reference to court records in the bill altogether. Alternatively, language could be added that clarifies that nothing in the bill should be interpreted as diminishing existing legal standards for the issuance of an order restricting access to court records in a civil case, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

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[16] *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1122 (9th Cir. 2003).

[17] *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

[18] *See, e.g., Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (rejecting argument that a stipulated protective order gave the defendant the power to unilaterally block public access to trial exhibits); *Bank of America Nat. Trust v. Hotel Rittenhouse*, 800 F.2d 339, 345 (3d Cir. 1986) (parties' private confidentiality agreement could not bar access to what had become judicial record).

3. The bill could be interpreted as weakening requirements for the sealing of discovery materials.

Section (a)(1)(B) could also be construed as weakening current requirements under Rule 26(c) for the issuing protective orders. Although the provision requiring a court to consider the public interest would strengthen the standard applied by courts in many jurisdictions, the other factor to be weighed in the balance—whether the proponent of secrecy can demonstrate a "specific and substantial interest" in confidentiality—is arguably a lesser standard in some contexts than that currently applied under Rule 26(c). For example, under existing law, a defendant's interest in avoiding embarrassment and possible loss of sales due to disclosure of its unethical practices would not be grounds for a protective order under Rule 26(c). But a defendant could argue that exactly that sort of interest is now cognizable under the new "specific and substantial interest" test.

Again, this concern could be remedied by including language that makes clear that nothing in the bill should be interpreted as diminishing existing legal standards for the issuance of an order restricting access to court records in a civil case, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

4. The bill could be interpreted as permitting a court to enter a secrecy order as long as it finds that the information at issue does not relate to the public interest or that the public interest is outweighed, without complying with existing legal requirements.

As written, section (a)(1) could be interpreted as permitting a court to issue a protective order or sealing order simply upon finding either (A) that the material at issue does not relate to public health and safety, "or" (B) that the public interest is outweighed—without satisfying any other requirements. Because it is not clear that the existing standards still must be met, it is conceivable that a court could interpret this provision as obviating both the good cause standard

of Rule 26(c) and the compelling interest standard applicable to court records, and permitting the secrecy order even if one of those additional requirements has not been met. This concern could also be addressed by making clear that the bill does not diminish existing standards.

Conclusion

While Public Justice has successfully unsealed court records and blocked overbroad protective orders in many cases, it is simply not possible for public interest organizations to discover and fight every instance of court secrecy that puts the public at risk. Likewise, while some federal courts and local bar associations have adopted rules regulating secrecy to some extent, these rules do not go far enough to prevent the problems described above. Without widespread change through legislation, corporate defendants will continue to invest their substantial resources into keeping evidence of wrongdoing from the public, and plaintiffs' attorneys will too often continue to have no choice but to agree to secrecy as a condition of achieving a fair outcome for their clients. Only judges have the power to protect the public's right to know in each and every case. Federal legislation that gives judges a blueprint for determining whether secrecy is actually necessary and a legal basis for refusing to sanction secrecy—even if the parties agree to it—is needed to protect the public's right to know. We cannot afford to continue to allow our historically rooted system of open government to be used as a tool for the powerful to hide the truth from the public.

I am grateful to the Subcommittee for bringing this very important issue to the attention of Congress, and I appreciate the opportunity to present this testimony.

TESTIMONY OF
MR. JOHNNY BRADLEY

"THE SUNSHINE IN LITIGATION ACT: DOES COURT SECRECY
UNDERMINE PUBLIC HEALTH AND SAFETY? "

BEFORE THE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

December 11, 2007

Good afternoon Chairman Kohl, Ranking Member Hatch, and members of the Subcommittee. My name is Johnny Bradley and I am from Pachuta, Mississippi. I am here today to represent those who live every day with the devastating consequences of court secrecy. Unfortunately, I know first hand what it feels like to lose someone because of a defective product. On July 14, 2002, my life changed forever. I became a widower, and my young son Deante lost his mother.

My wife died in a car wreck when the tread separated on one of the rear Cooper tires on our Ford Explorer. As a result, our car rolled over 4.5 times, killed my wife instantly, and rendered me unconscious for approximately two weeks. With my son in the backseat, and me and my wife in the front, my cheerful family had been driving from California to visit my family in Mississippi. Since we were traveling across the country, we even had our vehicle checked at a nearby repair shop prior to leaving California.

You see, my wife and I were both in the Navy, previously stationed in Guam, and we had the rare opportunity to finally visit my family on our way to a new post in Pensacola, Florida. Though I worked on torpedoes and my wife was an E-5 postal clerk, we were both selected to become Navy recruiters – a real honor for both of us to broaden our Navy careers. My then 6-year-old son Deante was also excited to see his Grandma Queen in Mississippi. It was like Christmas in July to visit our family on the mainland after being stationed in Guam, and he anticipated lots of presents and delicious Southern cooking.

We never made it past New Mexico. The last thing I remember about that tragic day was that I dozed off with my wife driving. When I woke up from my coma two weeks later, I was told that my wife had died. My family had waited two weeks to hold my wife's funeral because they wanted me to be able to attend. Sadly, my young son had to go in my place because my own injuries were so severe. My left leg had to be fused at the knee, and my intestines were cut in half from the force of my seat belt in the wreck. To this day, I cannot walk properly, and I must always travel with my colostomy bag.

I believe that if we had known about the dangerous tread separation defect in Cooper tires my wife would still be alive today. You see, only after the death of my wife, and through litigation battles in federal court with my highly specialized attorney did I learn about a series of design defects in Cooper tires that Cooper had known about previously. To my horror, I found out that

Cooper had faced numerous incidents like mine since the 1990s and had, in its possession, thousands of documents detailing these defects. Why have the details from as many as 200 lawsuits against Cooper remained covered up? Why were these dangers never discovered by the public? Why were all of these tragic stories never shared before? I found out through my attorney that almost all of these documents were kept confidential through various protective orders, demanded by the tire company and entered by courts around the country, so that vital information that could have saved our family would never be disclosed to the public.

We bought Cooper tires because we thought they would be safer than Firestone tires. If I had known that they were even worse than Firestone tires, as my attorney found out through these confidential documents, I would not have touched these tires.

You might be wondering how my attorney came across these documents if they were confidential. I was lucky enough to obtain counsel, Bruce Kaster, who has specialized in this type of litigation for over two decades. To this day, I would not even have known about the dangers of Cooper tires and four specific design defects if Bruce had not known to ask for these documents. He only knew to ask for access to these documents because of his own work over the years. Bruce even had to battle with Cooper and the court to gain access to these documents. Worst of all, almost every document detailing the tire defects was sealed under a protective order entered by the federal court over objection by my lawyer.

I can sit here today and give you the facts about what happened to me, but the protective order issued by the federal court forbids me from talking about the documented evidence of Cooper tire defects uncovered by my attorney during litigation. I know some Cooper tire problems were reported in the newspaper prior to my wife's death, but without specific, documented evidence now cloaked in secrecy, these defects were not nearly as publicized as the well known Firestone tire defects. I believe that if what I saw were made public, the evidence would be so similar to the Firestone tire problems that Cooper would be forced to correct the design defects in their tires as Firestone did, or that Cooper would be forced to stop producing tires. But unfortunately, I cannot disclose what my attorney found, so defects that lead to tread separation of the tire can never be uncovered, even though these tires continue to be sold and incidents like mine have not stopped.

I am here today because I want to prevent a tragedy like mine from happening to other families. Court secrecy and protective orders allowed Cooper to cover up vital information in federal court that could have saved Timica's life. And because I am not allowed to disclose evidence of tire defects, I must sit by and helplessly wait until the next tragedy occurs.

news from
HERB KOHL
United States Senator
Democrat of Wisconsin

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The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety?
Statement of U.S. Senator Herb Kohl
December 11, 2007

Today we will examine the important issue of court secrecy. Far too often, court approved secrecy agreements hide vital public health and safety information from the American public -- putting lives at stake. These secrecy agreements even prevent government officials or consumer groups from learning about and protecting the public from defective and dangerous products.

The following example demonstrates how this issue arises and the devastating implications secret settlements can have. In 1996, a seven year-old boy in Washington state took an over the counter medicine to treat an ear infection. Within hours, he suffered a stroke and fell into a coma. He died three years later. The child's mother sued the drug's manufacturer alleging their product caused the stroke. Unknown to the mother or to the public, many similar lawsuits alleging harm caused by this same medicine had been settled secretly. It was not until the year 2000 that the FDA banned an ingredient found in the boy's medicine. If it were not for this court secrecy in the previous lawsuits, the boy's mother may well have known about the risks.

While this case is tragic, it is not unique. In these types of cases, the defendant requires the victim to agree to secrecy about all information disclosed during the litigation -- or else forfeit the settlement. That individual victim recovers the money they need to pay medical costs, but as a result, the public is kept in the dark about the potential dangers.

We are all familiar with well-known examples of these types of cases involving complications from silicone breast implants, adverse reactions to prescription or over-the-counter medicine, side-saddle gas tanks prone to causing deadly car fires, "park to reverse" problems in pick-up trucks, defective heart valves, dangerous birth control devices, tire malfunctions and collapsing baby cribs, to name a few. Information about these defective products, and the dire safety consequences, did not deserve court-endorsed protection. In fact, that protection prevented the public from learning vital information that could have kept them safer.

- more -

The most famous case of abuse involved Bridgestone/Firestone tires. From 1992 to 2000, tread separations of various Bridgestone and Firestone tires were causing accidents across the country, many resulting in serious injuries and even fatalities. Instead of owning up to their mistakes and acting responsibly, the company quietly settled dozens of lawsuits, most of which included secrecy agreements. It was not until 1999, when a Houston public television station broke the story, that the company acknowledged its wrongdoing and recalled 6.5 million tires. By then, it was too late for the more than 250 people who had died and more than 800 injured in accidents related to the defective tires.

Legislation that I have introduced in the past, and that I intend to reintroduce today, seeks to restore the appropriate balance between secrecy and openness. Under this bill, the proponent of a protective order must demonstrate, to the judge's satisfaction, that the order would not restrict the disclosure of information relevant to public health and safety hazards. This legislation does not prohibit secrecy agreements across the board. Surely, there are appropriate uses for such orders, such as protecting trade secrets, and this bill makes sure such information is kept secret. But, protective orders that hide health and safety information from the public, in an effort protect a company's reputation or profit margin, should not be permitted.

The bill does not place an undue burden on judges or our courts. It simply states that where the public interest in disclosure outweighs legitimate interests in secrecy, courts should not shield important health and safety information from the public.

We take great pride in our court system and its tradition of fairness for plaintiffs and defendants alike. However, the courts are public institutions meant to do more than simply resolve cases; they must also serve the greater goods of law, order and justice. Our legislation will help restore this balance.

STATEMENT

by

LAWYERS FOR CIVIL JUSTICE
U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
U.S. CHAMBER OF COMMERCE

for

HEARING ON "COURT SECRECY AND PUBLIC HEALTH AND SAFETY"

IN THE SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

DECEMBER 11, 2007

STATEMENT FOR HEARING ON "COURT SECRECY AND PUBLIC HEALTH AND SAFETY"

ON BEHALF OF

LAWYERS FOR CIVIL JUSTICE
U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
U.S. CHAMBER OF COMMERCE

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
December 11, 2007

Lawyers for Civil Justice, the U.S. Chamber Institute for Legal Reform, and the U.S. Chamber of Commerce are pleased to submit this statement in opposition to any legislation that would have the effect of restricting the discretion of judges to protect the privacy and confidentiality of litigants, by issuing protective orders, sealing court records, and respecting and enforcing confidentiality agreements when appropriate and in the public interest.

Lawyers for Civil Justice is a coalition of corporate and defense trial lawyers, major American corporations, and defense bar associations including DRI, IADC, and FDCC representing over 21,000 defense lawyers nationwide. The U.S. Chamber Institute for Legal Reform is an affiliate of the U.S. Chamber of Commerce and was created to help make our nation's civil legal system simpler, fairer and faster for all participants. The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Our members have been involved on a first hand basis with many cases which were successfully litigated or settled precisely because the parties involved in the litigation

knew that private information which they shared in discovery would remain confidential. From this perspective, we will attempt to set forth the many reasons which provide the basis for the strong concerns outlined below.

Any legislation similar to that in bills introduced by Senator Kohl in Congresses since 1990: (1) threatens the fundamental rights of litigants to privacy and property, (2) would increase the costs, burdens, and efficiency of the court system, (3) would confer unfair, tactical advantages on certain litigants at the expense of others and, (4) the need for such legislation has yet to be demonstrated in the seventeen years since it was first introduced. Such legislation would cripple the ability of parties to reach a just determination of their disputes without offering any offsetting benefits. And, it directly contravenes the views expressed by the Judicial Conference Committee on Rules of Practice and Procedure, which addressed this issue in the context of then pending Senate legislative initiatives.
Any attempt to restrict or eliminate protective orders or curtail confidentiality agreements will have the following negative consequences:

1. Loss of Fundamental Litigant Rights:

The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by the Constitution. Both of these rights are lost when private information becomes public, or a trade secret is revealed to a competitor. If the courts' authority to issue protective orders is diminished, they cannot protect these fundamental litigants' rights. The massive amount of information generated in litigation in this electronic age often forces litigants to place their privacy and proprietary information at risk to vindicate their legal rights. Protective orders protect those rights while allowing the legal disputes to be resolved fairly and efficiently.

2. Increased Litigation Burdens and Costs:

If confidentiality cannot be protected, litigants will be more inclined to oppose every document request which an opposing party makes for information that may be sensitive or confidential. This will cause increased hearings before the court, increased legal costs to both parties, as well as increased public costs for additional court time. Overall, confidentiality also promotes settlement. In addition, the legislation would impose new burdens on courts by requiring them, at the earliest stages of litigation, to make preliminary determinations on an incomplete record regarding important questions such as whether protecting the confidentiality of any among thousands of documents requested would endanger the public health and safety. Overburdened courts are ill equipped to assume such a role and in modern trial practice the lawyers are generally able to agree on a procedure that protects the confidentiality of sensitive documents while giving opposing parties access to them. Once a preliminary protective order is entered and the key documents have been identified, the parties can then litigate whether any should be disclosed to the public.

3. Tactical Advantages to Certain Litigants:

Protective orders and settlement agreements are currently used to balance the broad and invasive nature of modern discovery; and, historically, protective orders have worked well to balance competing interests in private discovery disputes. Over the past seventeen years, however, the plaintiffs' bar has waged an unsuccessful campaign at the state level to restrict judicial authority to issue protective and sealing orders, while putting forth anecdotal evidence allegedly supporting their proposals. Such anecdotes rarely withstand closer scrutiny, but this fundamental change in American law undoubtedly would facilitate the sharing of discovery information between plaintiff's attorneys and will make it easier for contingent fee lawyers to file more lawsuits against corporate deep pocket defendants.

4. Information About Public Hazards is Available to the Public Under Existing Law and there is No Compelling Need to Consider Legislation that Would Restrict Judges' Discretion Nationwide.

In a comprehensive article, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 428 (1991) and other articles such as T*raveling Courthouse Circuses*, ABA Journal (Feb. 1999) Professor Arthur R. Miller, the nation's foremost expert on privacy and procedure set forth his view that to impose any further restrictions on a judge's discretion to protect privacy and property rights or to "favor" or "disfavor" either privacy or openness in the exercise of that discretion by legislation or court rule is not warranted by recent evidence or experience. Courts have broad discretion to balance the competing goals of promoting openness and protecting legitimate interests in privacy and confidentiality when information is sealed upon settlement, as well as when the production of confidential information is compelled in the course of litigation. Recent research on this issue concludes that the current system is working effectively and needs no change. Regulatory agencies already have the power to obtain information from companies about matters affecting "public health and safety." They do not need courts to serve as freedom of information clearinghouses. In fact, federal statutes already require regulated industries to provide a massive amount of information to government agencies about the products they produce before they go to market, as well as after they are on the market. The courts should not be asked to duplicate the role of regulatory agencies. As Professor Miller noted in his Traveling Courthouse Circuses article:

> High-profile lawsuits sell ... [but] judges would not permit litigants to conceal information about an unknown threat to public health and safety simply to clear a law-suit from their dockets. And my own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements. * * *
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> Ironically, the center's study found that protective orders most often were

> used to protect the privacy of plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctly decided to make no changes to current rules of procedure. Id

As Professor Miller concluded: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process." Id.

Overall, any legislation offered to restrict settlement agreements or protective orders would not only represent a step backward for the federal judicial system, but disregards the crucial need for confidentiality within the entire judicial system. Since we believe it would have serious adverse consequences for the American system of justice, we urge the Committee to reject any legislation that would restrict the discretion of judges to protect the privacy and confidentiality of litigants.

Respectfully submitted,

Barry Bauman,
Executive Director
Lawyers for Civil Justice

On behalf of:
Lawyers for Civil Justice
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

December 11, 2007

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on "The Sunshine in Litigation Act: Does Court Secrecy
Undermine Public Health and Safety?"
December 11, 2007

Today's hearing will address the detrimental affect that secret court filings can have for American consumers.

Allowing certain court documents to be kept secret in cases where public health and safety is at stake can and does put lives in jeopardy. The tragic events leading up to the Bridgestone/Firestone recall of 6.5 million tires seven years ago demonstrated the dire consequences of sealing records in court cases when product safety is at issue.

The national recall of Firestone tires resulted, in part, from the disclosure of internal corporate documents which demonstrated numerous consumer complaints of tire defects and design errors. These documents were discovered in litigation against Bridgestone and Firestone but kept from the public. The release of additional documents revealed that the company had known for several years that recurring problems with their tires were linked to numerous accidents; however, information pointing to this deadly pattern of product defects had been kept out of the public's view in dozens of cases because of confidentiality agreements that Bridgestone/Firestone, Inc. had secured in out-of-court settlement deals.

Hundreds of deaths, injuries and accidents could have been avoided if information about the danger of Firestone tires had instead been made public. A report issued by the National Highway Transportation Safety Administration found that defective Firestone tires were linked to 174 fatalities and 700 injuries, many of which could have been avoided if information about the faulty tires was made public. Unfortunately, in this case and many others, corporate regard for public safety took a back seat to corporate regard for profits.

We need to make sure that consumers have access to information that affects their health and safety, and that is why I am a cosponsor of Senator Kohl's Sunshine in Litigation Act. This legislation would make it more difficult for courts to seal records in cases that reveal threats to public health and safety. It would prohibit judges from sealing court records, information obtained through discovery, and certain details of a settlement

unless the public health or safety interest is outweighed by a specific and substantial interest in maintaining confidentiality. And it would require that when issued, protective orders could be no broader than necessary to protect the privacy interest asserted.

I urge Senators to support this legislation - Congress should act to make sure that the public has access to court documents that reveal when a product poses a public heath or safety risk. The American consumer deserves nothing less.

# # # #

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December 7, 2007

Via U.S. mail and email [mailto:Brendan_Dunn@judiciary-rep.senate.gov]

The Honorable Orrin Hatch
U.S. Senate Judiciary Committee
104 Hart Senate Office Building
Washington DC 20510

Dear Senator Hatch:

Re: Statement for Hearing on "Court Secrecy and Public Health and Safety."

This is in response to your request for my views regarding the subject of a subcommittee hearing Tuesday, December 11 on "Court Secrecy and Public Health and Safety." I regret that I will be unable to appear in person at the hearing due to a prior engagement, but I am pleased to submit this statement. As you noted, I have had a great deal of experience in analyzing and evaluating a variety of proposals in this area. In fact, I have observed and commented on the court confidentiality debate for many years, including authoring a comprehensive law review article[1] and many shorter written commentaries.[2] I have reviewed many state legislative proposals and court rule amendments, and have testified numerous times on this issue before the federal rulemakers as well as the United States Senate and House of Representatives. The first time I submitted a statement to the Senate

[1] Arthur R. Miller, Confidentiality, Protective Orders, and Public Access To The Courts, 105 HARV. L. REV. 427 (1991).

[2] See, e.g., Arthur R. Miller, Traveling Courthouse Circuses, A.B.A. J. 100 (Feb. 1999); Arthur R. Miller, Protective Order Practice: No Need To Amend F.R.C.P. 26(c), Prod. Safety & Liab. Rptr. 438 (BNA) (Apr. 21, 1995); Arthur R. Miller, Private Lives or Public Access? A.B.A. J. 65 (August 1991); Arthur R. Miller, Renewed Tension Between Right To Privacy, Boston Globe, March 10, 1991, § A, pg. 31, col. 1.

on this subject was at a hearing of the Subcommittee on Courts of the Senate Judiciary Committee in 1990. [3]

My views on the subject are even stronger today, reinforced by dramatic changes in the litigation landscape: I believe that the current system under the Rules of Civil Procedure that empowers the federal courts with balanced discretion to protect litigants' privacy, property, and confidentiality in appropriate cases works well and does not need to be changed. And, the massive expansion of discovery in today's electronic world magnifies the need for broad judicial discretion to protect all litigants' privacy and property rights.

The extreme restrictions on protective and sealing orders and the ability of the parties to assure confidentiality in civil litigation proposed in all prior bills on this subject introduced by Senator Kohl are, in my view, unnecessary and ill advised. Indeed, as time has passed judges have become more knowledgeable and sensitive to the balancing of interests that protects the rights of both sides in this debate and any legislation mandating more restrictive procedures has become even less advisable.

As I wrote in the Harvard Law Review article cited in footnote 1, such restrictive legislation is "ill advised" because:

> (1) such "restrictions run counter to important procedural trends designed to enhance judicial power to control discovery, improve efficiency, and promote settlement in the hope of reducing cost and delay"; (2) "proponents of the reforms have not demonstrated any clear need for constricting judicial discretion"; and (3) "constricting discretion would impair the fairness and efficiency of the existing system and would unduly impinge upon litigants' rights to maintain their privacy, to protect valuable property interests, and to resolve their legal disputes freely with minimal intrusion from outside forces." 105 Harv. L. Rev. at 432.

These are some of the reasons why over forty state legislatures and rulemaking bodies, the Congress, and the Judicial Conference of the United States have refused to enact such extreme restrictions on the discretion of judges to protect confidentiality in the courts.

Indeed, the more time that passes, the more secure I am in the knowledge that the use of protective and sealing orders and extra-judicial confidentiality agreements agreed to among the litigants is not prone to the serious abuses that the proponents of various forms of restrictive legislation suggest. At the same time, as a student of the courts and an active practitioner for almost fifty years, I have no doubt that an assurance of confidentiality often is the essential ingredient that starts the information exchange flowing among the parties during discovery. That, in turn, facilitates the truth-seeking goals of the adversary process and the resolution of cases on their merits. Similarly, it ensures production of the

[3] See Statement of Professor Arthur R. Miller, Before Subcommittee on Courts of the Senate Judiciary Committee, Privacy, Secrecy, and the Public Interest, May 17, 1990.

materials that persuade parties to settle and comforts litigants that the price of peace was fair.

Confidentiality Is Necessary To the Efficient Functioning of the Civil Justice System.

Take away or restrict the ability to protect confidentiality and the entire civil justice system will suffer, particularly in this age of electronic discovery. If the parties are prevented from agreeing to confidentiality or a protective order among themselves the entire process is adversely impacted. Not only will proceedings be slower and more contentious, but in some instances proceedings will come to a complete halt while the court attempts to sort out the unreasonable and burdensome procedures contemplated.

Thus, the federal courts are likely to become mired in a morass of motions that siphon precious judicial resources away from higher level duties, such as presiding over trials or writing opinions and that force judges to devote time to tedious, low-level tasks, such as document review and motions directed to the legitimacy of claims of, for example, "concealment of a public hazard." This drain on the federal systems limited judicial resources is particularly wasteful when we remember that discovery was designed to be self-executing. Thus, the parties generally are expected to be able to resolve discovery disputes themselves. Protective and sealing orders are devices that always have promoted that design.

Confidentiality serves several values in the civil justice system. A brief analysis of these values demonstrates that they are fundamental and often of constitutional dimension, such as rights to privacy and property. The benefit of public access to certain litigation materials simply does not rise to, much less transcend, these essential rights. The Committee also must consider the effects that a decrease in the availability of confidentiality would have on the litigation process as a whole.

Confidentiality is of paramount importance during discovery because the willingness of the parties to produce information voluntarily often hinges on a guarantee that it will be preserved. Remove this guarantee and discovery will become more contentious, requiring frequent court intervention. Less information will be produced, making it more difficult to ascertain the facts underlying the dispute. Without all the facts, rendering a fair, just resolution of the dispute becomes less likely and reaching a truly informed settlement becomes improbable. Consequently, any changes regarding confidentiality inevitably will produce a chain reaction affecting the entire litigation process.

It has long been my view that any public information purpose that public access serves is more appropriately accomplished by numerous other branches and agencies of government that are far better equipped to identify issues affecting public health or safety and to disseminate relevant information to the public. Superimposing a public information function on the courts decreases their efficiency, delays justice, and distorts the sole purpose for which courts exist. The current federal law and rules appear to me to

strike a fair, workable balance between confidentiality and public access. No change has been shown to be needed and none is warranted.

Further Restricting Judicial Discretion to Protect Confidential Information Would Deprive The Public of Constitutionally Protected Privacy Rights.

Due to the invasive nature of the litigation process in this e-discovery age, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. The Supreme Court has indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown. [4] Restricting the discretion of courts to keep sensitive information confidential would be a very costly mistake for several substantive reasons.[5] There is a strong, symbiotic inter-relationship between rules of procedure and substantive rights. Procedure exists to give effect to substantive rights. For example, procedural rules governing service of process protect certain substantive rights under the Due Process clause.[6] By protecting confidential information to make certain that it is used solely to resolve disputes, courts also protect substantive rights of the parties -- rights that may be placed in jeopardy quite unintentionally during the disclosure process by a desire to make the litigation process efficient and fair.[7]

Litigants do not give up their rights to privacy merely because they have walked, voluntarily or involuntarily, through the courthouse door.[8] The rulemakers who created the broad discovery regime of modern civil procedure in order to promote the resolution of civil disputes on the merits, never intended that rights of privacy or confidentiality be destroyed in the process. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access or to warn the public of "public hazards."

Because of my belief in the importance of the right to privacy in our computerized world, about which I have written extensively,[9] I am strongly opposed to any proposal that would restrict or eliminate the discretion of the courts to protect the privacy rights of litigants.[10]

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[4] Seattle Times v. Rhinehart, 467 U.S. 20 (1984)

[5] Id. at 34-36 (discovery process is subject to substantial abuse that could damage the litigants' interests).

[6] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[7] Seattle Times, 467 U.S. at 35.

[8] U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press. 109 S. Ct. 1468 (1989).

[9] See, e.g., A. Miller, The Assault on Privacy (1971); A. Miller, Press Versus Privacy, 16 Gonzaga L. Rev. 843 (1981).

[10] Cf. In re Halkin, 598 F.2d 176,195 (D.C. Cir. 1979) ("Only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain.").

Restrictive Legislation Would Put the Intellectual Property and Confidential Information of all Litigants at Risk

Another substantive right that litigants often are compelled to place at risk in order to resolve a dispute is the right to the exclusive use of private property. Information is often very valuable -- so valuable that it can be bought and sold for great sums of money. It is not surprising then, that our legal system considers information to be property.[11] To expedite resolution of a lawsuit, rules of procedure can compel all litigants to reveal information in which a property right exists, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may or may not be involved in the lawsuit.[12] Protective and sealing orders, limiting access to and use of proprietary information, are the most effective means of protecting the commercial value of this type of information while still making it available for use in the litigation at hand. The only alternative might be denying disclosure altogether. [13]

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Numerous provisions of the federal and various state Constitutions are intended to protect personal property and the right to its exclusive use against government abuse or appropriation without compensation. Confidentiality is the sine qua non of preserving the modern property right in information that has become the backbone of the American economy. This "property" is exceptionally fragile, for once its confidentiality is lost, the value that comes from confidentiality -- exclusive ownership and possession of the information -- is irretrievably lost and can never be restored. Although our Nation's founders never contemplated a world of semiconductors, television, the internet, and e-discovery they foresaw the need to protect property rights in industrial and artistic creativity and embedded it in the United States Constitution, Art. I, § 8, cl. 8. The states have embellished that basic theme and recognize that the courts have an obligation to protect litigants' property rights when compelled to produce informational property in discovery in civil litigation in order to promote the just resolution of civil disputes.

Protective orders, sealing orders, and confidentiality agreements are the primary means of protecting constitutionally recognized intellectual property rights in litigation. So many of the rejected "Sunshine in Litigation" bills I have reviewed, ask us to accept as gospel that a handful of documents taken out of context in highly complex litigation are evidence of widespread wrong-doing, or that the allegations set forth in a complaint are invariably true. As a consequence of these assumptions, these legislative proposals could compel the litigants to reveal personal or corporate documents, regardless of how

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[11] Carpenter v. United States, 108 S. Ct. 316, 320 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-01 (1984); see also 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 2043 (1994); Warren & Brandeis, The Right To Privacy, 4 Harv. L. Rev. 193, 193 (1890).

[12] Hoenig, Protective Confidentiality Orders, New York Law Journal, Mar. 5, 1990, at 6-7; "FBI Stings Parts Counterfeiters," "Holograms Battle Counterfeit GM Parts," Automotive News, Jan. 22, 1990, at 19 and 20.

[13] In re Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) (only alternative to use of protective order might be denial of discovery).

proprietary, how valuable, how irrelevant, how embarrassing, or how confidential they might be.

The report from the National Academy of Sciences[14] about the breast implant litigation has shown us that we cannot always place our faith solely in excerpts from a few documents, or the unproven allegations in a lawsuit, regardless of how well pled, how many other similar lawsuits have been filed, or how many other plaintiffs are lined up making the same claims. The breast implant litigation, we recall, was an early poster child for a previous wave of unsuccessful "Sunshine in Litigation" bills. Then, we had the Ford–Firestone litigation which proponents of earlier bills citeed, in highly inflammatory terms, as justification for such legislation. When we take complex, confidential information out of context during the pretrial process as "evidence" or "proof" of wrong-doing, I fear it is an invitation to go down the same road that we went down with breast implants and a number of other false alarms. With respect to Ford – Firestone, I understand that: a) the National Highway Traffic Safety Administration was alerted to a potential problem by early claim data compiled and submitted by the manufacturers and insurers; b) the companies voluntarily produced millions of pages of documents in a ocument depository which some plaintiff lawyers refused to share with other claimants; and c) the few settlements that were confidential, were sealed at the claimants' request, not the manufacturers'. As I said in a 1999 article:

> My own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements. * * * Ironically, the center's study found that protective orders most often were used to protect the privacy of plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctly decided to make no changes to current rules of procedure.[15]

It is much more rational to allow the whole truth-finding process to run its course before we require judges to make judgments about whether or not particular bits of information produced to an adversary solely for purposes of litigation demonstrate the existence of a "public hazard" or other presumed effects on "public health and safety." It is the full adversarial process, with its rules of evidence and cross-examination procedures, that acts as the crucible from which the truth will emerge. And it is the informed and experienced

[14] See, e.g., Stuart Bondurant, Virginia Ernster & Roger Herdman, eds., INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, THE SAFETY OF SILICONE BREAST IMPLANTS (Nat'l Academy Press 1999) (finding no scientific cause and effect relationship between silicone gel implants and the serious injuries alleged in thousands of highly publicized lawsuits).

[15] Arthur R. Miller, Traveling Courthouse Circuses, ABA Journal "Perspective" 100 (Feb. 1999).

judgment of Article III judges who are in the best position to make judgments of this character. If we by-pass that process and do not allow it to operate, or require the premature resolution of such difficult and important issues and the disclosure of untested information produced in the civil litigation discovery process, we will not be serving the truth – we will be serving less noble ends.

The truth is that courts rarely use their authority to seal information, especially in today's environment. When they do, there is compelling evidence that preserving confidentiality is of primary importance. Even if the courts had the resources to assume a public information function, they are not the appropriate institutions for doing so. Indeed, a multitude of executive, administrative, and law enforcement agencies exist for the purpose of protecting the public health and safety. If efforts by these agencies are claimed to be inadequate, it does not follow that their responsibilities should be shifted to the courts.

The present practice should be retained -- relying on our courts to use their balanced discretion to issue confidentiality orders to protect the legitimate interests of the parties -- and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is simply no reason to believe that existing court rules and practice create any risks to public health and safety. All indications are that the current system works quite well. The public, including the news media, already has plentiful access to the courts and court records; information affecting significant public interests is available to all. As I have said before: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process." A.B.A.J. at 100 (Feb. 1999). Consequently, I strongly recommend against enactment of restrictive legislation in this area because of the many deleterious effects it is likely to have.

I hope you find these comments helpful. I am always available to be of service to the Committee.

Sincerely,

Arthur R. Miller
University Professor

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ARTICLE: CONFIDENTIALITY, PROTECTIVE ORDERS, AND PUBLIC ACCESS TO THE COURTS.

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BIO:

* Bruce Bromley Professor of Law, Harvard University. I wish to thank Christopher Sipes of the Harvard Law School class of 1991 for his creative thoughts and research throughout the development of this article in his capacity as research assistant. This article also was assisted by a research grant from the Product Liability Advisory Council Foundation. However, I accept full responsibility for its contents.

SUMMARY:
... Like much of this country's judicial process, the right of public access to court proceedings and records derives from our English common law heritage. ... The current debate surrounding court confidentiality and public access is taking place in the context of a flood of proposed amendments to civil procedure codes that would restrict the power of courts to issue protective orders. ... Nevertheless, because the public interest in disclosure of other aspects of a settlement agreement may sometimes be particularly compelling and the importance of maintaining confidentiality may be reduced, an absolute prohibition on access would be unwise. ... If doing so creates a personal conflict of interest, the attorney should refuse to take the case or should secure the client's informed consent to the disclosure of any matter affecting public health or safety before the question of a protective order arises. ... Thus, unless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding. ...

HIGHLIGHT: *Since the adoption of the Federal Rules of Civil Procedure in 1938, court rules and procedures have evolved to limit abuses of the judicial system's liberal discovery regime. Recently, some have feared that important information uncovered during discovery relating to public health and safety has been secreted away from the public and have claimed that the public also has a right of access to other information obtained during discovery. Within the past two years, reformers have introduced proposals in over thirty states that would revamp the current discovery regime by creating a presumption of public access to both personal and corporate information accessed via discovery and by sharply limiting judges' discretion to issue protective orders under Federal Rule of Civil Procedure 26. In this Article, Professor Miller argues against such reforms. Professor Miller details the development of the current rules of discovery and shows that judicial discretion to manage pretrial processes is a necessary response to the abuse of the liberal discovery rules. He argues that the changes advocated by reformers would wreak havoc on the efficient*

functioning of the litigation process, and he explores the significant privacy and property interests -- both personal and commercial -- that would be jeopardized by adopting the reforms. Finally, Professor Miller determines that the reformers have exaggerated the extent of the problems with the current system, and he concludes that conscientious utilization of the system's tools by litigants and judges can ensure that information relating to public welfare will be channelled to appropriate government agencies.

TEXT:
[*428] I. INTRODUCTION

By longstanding tradition, the American public is free to view the daily activities of the courts through an expansive window that reveals both our civil and criminal justice systems. Through this window, people can watch an endless panoply of lawsuits, litigants, judges, and juries, sometimes garishly illuminated by television lights and dramatized by graphic, occasionally lurid, press reports. [1] Like **[*429]** much of this country's judicial process, the right of public access to court proceedings and records derives from our English common law heritage. [2] It exists to enhance popular trust in the fairness of the justice system, to promote public participation in the workings of government, and to protect constitutional guarantees. [3]

This right of access, however, is not absolute; it has never been extended beyond the confines of the courtroom and court documents. [4] Consequently, there has never been a public right of access to the parties' activities, discussions, and papers, let alone to the conduct of judges and juries outside the courtroom, either during preparation of the litigation or during settlement negotiations. [5] Further, trial judges have had great discretion "to determine whether, to whom, and under what precautions, the revelation should be made." [6] Indeed, our justice system recognizes a variety of situations in which confidentiality is not only acceptable, but essential. Discovery, grand jury proceedings, settlement negotiations, and jury deliberations are conducted far from public view. Classified government information, communications between attorney and client, the identity of news sources or police informants, and proprietary data traditionally have been treated as confidential. Valid reasons exist to deny public access to this information. In each instance, confidentiality is deemed essential to accomplish fundamental goals of the justice system that are far more important than the public's need to know every detail of a given case.

However, an intense, nationwide campaign is underway to create a "presumption of public access" to *all* information produced in litigation that would seriously restrict the courts' traditional discretion to issue protective and sealing orders shielding the litigants' documents from view. [7] This presumption is necessary, some say, because courts **[*430]** have disregarded the public interest in information produced in litigation and, as a result, have concealed important information affecting **[*431]** public health and safety from public view. Others are less discriminating and claim that *all* litigation materials should be available, regardless of whether they deal with health and safety, business matters -- such as company finances, marketing, or research and development -- or personal affairs. Although the boundaries of these categories are far from crystal clear and certain types of information might fall within two or more of them, there are obvious differences between and among them. Nonetheless, the more extreme proponents of increased public access seek to give the halls of justice walls of glass, so that nothing is withheld from the public eye, no matter how private, insignificant, or inaccurate it might be.

Heeding these voices could lead to a fundamental transformation in the role of the courts. The traditional model of civil adjudication in this country envisions private parties bringing a

private dispute to a dispassionate arbiter (a judge and sometimes a jury) for a resolution based upon neutral principles of law. [8] The court (or jury) considers only the evidence and arguments presented by the contestants, applies the law to the facts, and refrains from injecting personal views into the resolution of the case. The decisionmaker is also not supposed to consider interests or matters extraneous to the facts and issues of the case. Given these goals, public access to information produced in litigation has always been a secondary benefit -- a side effect -- of civil adjudication. If public access assumes an importance on a par with the system's concern for resolving disputes among the litigants, the traditional balance would be upset and the courts diverted from their primary mission.

Some have suggested that this traditional conception of the civil adjudicatory process is too narrow; in their view the courts, being public institutions, should aggressively promote broad social goals within the context of private litigation. [9] The current campaign to change the statutes and court rules regarding confidentiality seems to draw heavily upon the ideas advanced by these public law theorists.

This Article discusses the effects that the proposed presumption of public access could have on the judicial system and on those involved in civil litigation. It concludes that promoting increased public access to information by restricting the discretion of the courts to protect **[*432]** confidential information is ill-advised. These restrictions run counter to important procedural trends designed to enhance judicial power to control discovery, improve efficiency, and promote settlement in the hope of reducing cost and delay. Moreover, proponents of the reforms have not demonstrated any clear need for constricting judicial discretion. This Article argues that constricting discretion would impair the fairness and efficiency of the existing system and would unduly impinge upon litigants' rights to maintain their privacy, to protect valuable property interests, and to resolve their legal disputes freely with minimal intrusion from outside forces.

Proposed changes in the current system that derive from public law theories of litigation are therefore rejected in large measure -- but not entirely. The public law model has quite properly encouraged procedural changes, such as expanded class action availability and more flexible pleading and joinder rules, that have enhanced access to the adjudicatory system and protected a broader range of individual and societal interests. [10] The current pressure to restrict judicial discretion to grant protective orders, by contrast, often seeks to promote goals unrelated to the litigation before the court, such as increased data gathering by the media and aiding third-party lawyers bringing similar suits. It does so by burdening people's use of the system rather than facilitating that use. There is an important difference between the two approaches. The public law approach promotes resort to the litigation process in certain substantive contexts -- such as discrimination, the environment, safety, and health -- to achieve change in legal doctrine and, ultimately, in certain social results. A presumption of public access alters the system itself in a way that might undermine its primary goal of providing citizens an effective truth-seeking procedure for resolving their disputes without impairing their other rights.

II. A SYNOPSIS OF THE CURRENT LAW

The existing procedure for handling requests for protective and sealing orders seeks an accommodation of the competing interests and appears fundamentally sound. Federal courts in particular have given considerable attention to the subject of confidential information, and **[*433]** they have gradually developed a balancing process. [11] Most state courts have a similar practice. [12]

The party opposing discovery is initially required to demonstrate that Federal Rule of Civil

Procedure 26(c)(7) applies -- "that a trade secret or other confidential research, development or commercial information" is involved and that its disclosure might be harmful. [13] In addition, that party must show that "good cause" exists for issuing a protective order. [14] The "good cause" requirement is strict. Federal courts have interpreted the rule to mean that the party seeking confidentiality must make a particularized factual showing of the harm that would be sustained if the court did not grant a protective order. [15]

If the party opposing discovery brings itself within Rule 26(c)(7), the burden then shifts to the party seeking discovery to demonstrate that the information for which protection is sought is relevant and necessary to the action. [16] If the discovering party fails to establish either relevance or need, disclosure generally is denied. [17] But should the party seeking discovery demonstrate both of these elements, [18] the **[*434]** court then must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. [19] When the risk of harm to the owner of the trade secret or confidential information outweighs the need for discovery, disclosure cannot be compelled, [20] but this is an infrequent result.

Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c)(7) and its state counterparts. [21] Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of **[*435]** disclosure to the public. [22] Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously. [23]

Courts have limited the types of potential harm to the divulging party that they will consider in this balancing process. For example, damage to a corporation's goodwill or reputation generally is not sufficient to establish a need for confidentiality. [24] Nor does the possibility that the discovered information will be shared among litigants in different lawsuits necessarily constitute good cause to prevent disclosure. [25]

One area of controversy, however, is the amount of discretion courts have in determining whose interests in disclosure may be weighed in the balance; specifically, it is unclear to what extent courts should consider nonparty interests. These interests can take a variety of forms. As just noted, litigants in other suits against the same defendant will often seek to reduce the cost and burden of their own discovery by gaining access to previously discovered material. [26] The press may seek access to determine whether the discovery papers **[*436]** contain newsworthy information. [27] Outside interest groups and members of the general public might seek access if they believe important health or safety information or other matters of public interest are discovered. [28] In some instances, of course, their motivation may not be entirely altruistic. Finally, lawyers might seek disclosure to identify potential plaintiffs for future suits. [29] Under existing law, the courts have discretion to accept or reject these interests, and they exercise it on a case-by-case basis. [30]

III. THE EVOLUTION OF THE CONFIDENTIALITY-PUBLIC ACCESS DEBATE

A. The Constitutional Challenge to Protective Orders

The current debate surrounding court confidentiality and public access is taking place in the context of a flood of proposed amendments to civil procedure codes that would restrict the power of courts to issue protective orders. [31] But that is not how the debate began. Prior to the Supreme Court's decision in *Seattle Times Co. v. Rhinehart,* [32] many courts and

commentators argued that the First Amendment itself limited a court's power to issue a protective order, regardless of the content of the applicable procedural rules. Parties making the First Amendment argument could assert two distinct interests against the issuance of a protective order. The first, and the one more directly impaired by an order, is the litigant's interest in disseminating materials gathered or generated during the action. The second, potentially **[*437]** broader interest is the public's right of access to those materials, particularly the fruits of discovery and settlement information.

Protective orders raised serious constitutional questions, it was argued, because they could be analogized to prior restraints on litigants' speech and were therefore subject to strict scrutiny. [33] Although the exact details of the analysis varied, its main thrust was that the constitutional requirements for imposing a restraint were more strict than the "good cause" standard for protective orders set out in Federal Rule of Civil Procedure 26(c): the harm posed by the dissemination must be substantial and serious, the restraining order must be drawn narrowly and precisely, and there must be no less restrictive means of protecting the public interest in maintaining confidentiality. [34] Further, as one commentator noted, if a party "obtains access to information disclosed during pre-trial discovery in advance of any confidentiality ruling by the court, the court should not be permitted to restrict the use of this information merely on the basis that such restrictions would aid the orderly procedures of the court." [35]

The Supreme Court addressed the prior restraint issue in *Seattle Times*. [36] The discovery dispute before the Court grew out of a Washington state court libel action filed against the Seattle Times by the Aquarian Foundation, a religious organization, and Rhinehart, its spiritual leader. During discovery, the newspaper requested a list of the names of the Foundation's donors and the amounts given, as well as a list of its members. The Aquarian Foundation resisted the request and asked either that discovery not be compelled or that a protective order be issued forbidding the newspaper from disseminating the information.

The trial court compelled discovery and, initially, denied the Foundation's motion for a protective order. The Foundation, however, moved for reconsideration and filed affidavits averring that making **[*438]** the information public would reduce its membership and financial support and would subject its members to harassment and reprisals. The court issued an order prohibiting the newspaper from "publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case." [37] The Washington Supreme Court affirmed the order. [38]

The United States Supreme Court upheld the Washington courts. The Court rejected the analogy to a prior restraint and concluded that protective orders are not subject to "exacting First Amendment scrutiny." [39] Strict scrutiny is unwarranted, reasoned the Court, because a protective order is a very limited intrusion on a litigant's ability to make information public. It forbids dissemination only of material gathered through the discovery process; if a litigant obtains the identical information through independent means, distribution is allowed. [40] In addition, the Court stated, a litigant's claimed right to disseminate information gathered through the discovery process is particularly weak. [41] Because the litigant has no independent right of access to discovery, "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." [42]

The Court stressed that the validity of protective orders must be evaluated within the entire pretrial discovery context. [43] According to the Court, liberal discovery exists solely to assist the resolution of disputes; unfortunately, discovery is subject to tremendous abuse, not only by promoting delay and expense, but also by furthering the incidental or purposeful

damaging of a litigant's reputation and invasion of her privacy. The Court concluded that protective orders were justified because they serve the substantial governmental interest in controlling discovery abuse. [44]

Finally, the Court upheld Washington's procedural code under which the protective order was issued. It noted that the code conferred broad discretion on the trial court to determine when a protective order was appropriate and what type of safeguards were required. [45] The Court recognized the importance of discretion in the **[*439]** pretrial context and indicated that the trial court was in the best position to evaluate "the competing needs and interests" of the litigants in discovery. [46] In addition, obligating a trial court to conduct a heightened First Amendment analysis for every protective order request could bring the pretrial process to a halt. [47] In sum, "[t]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." [48]

The Court's *Seattle Times* opinion, although not directly on point, does bear on the question whether the public has a right of access to the pretrial discovery process. [49] Some courts had recognized that right, [50] and commentators had stressed the distinction between it and the litigant's right to disseminate discovered materials. [51] A constitutional right of access to materials used at trial does exist, and, went the argument, the same rationale supports a right of access to pretrial material. *Seattle Times* makes clear that it is not that simple.

The Supreme Court has developed a two-prong analysis to determine whether and when the public has a right of access to information produced in the litigation process. [52] Under the first prong, the Court considers "whether the place and process have historically been open to the press and general public." [53] The second prong is an inquiry into "whether public access plays a significant positive role in the functioning of the particular process in question." [54]

The claim of a public right of access to pretrial discovery fails this test. The first prong was rejected in *Seattle Times:* "pretrial depositions and interrogatories are not public components of a civil trial. . . . [R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." [55] The second prong is not satisfied because the rationale **[*440]** for a right of public access to information used at trial does not support a right to information or documents produced during pretrial discovery. [56] Discovery material generally is not considered by a court, and no court decision is based upon it. Thus, allowing access neither promotes fair and open decisionmaking by the court nor educates the public about the justice system. [57]

In addition, the broad scope of contemporary discovery means that much of the information generated will be of limited relevance to the issues in controversy. Accordingly, public access to pretrial material is not well suited to the objective of facilitating the openness of the trial itself, although the access argument is somewhat stronger when discovery material is used in connection with a motion, particularly a dispositive one. [58]

Alternatively, a right of access to pretrial materials might be seen not as an extension of the right of access to trials, but rather as an independent access right. This argument is somewhat strained. As **[*441]** the Court stated in *Zemel v. Rusk,* [59] "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." [60] Thus, the public has no right to gather information by piggybacking on the discovery process engaged in by private litigants. [61] Nor does the mere use of governmental processes to gather information generally create a First Amendment right of public access to the information collected. [62]

Seattle Times makes clear that neither a litigant's interest in dissemination nor the public's interest in access justifies a constitutional restriction on the issuance of protective orders. But a constitutional claim of a right of access to limited types of information might survive the decision. It is conceivable that the character of certain information discovered during the pretrial process might be such that it would be beyond the power of a court to prevent public access. As one commentator has suggested, some information might be "so significant to the preservation of the process of self-governance . . . that it would violate the [first] amendment to keep the press and public from that knowledge." [63]

Even this limited restriction, however, must be evaluated in light of two important caveats. First, the function of the judicial system is to resolve private disputes, not to generate information for the public. [64] Second, the smooth functioning of the pretrial process should not be impaired by subjecting pretrial management to cumbersome or repeated First Amendment review. [65] Any theory of access must accommodate the Supreme Court's warning that, "[b]ecause of the liberality of pretrial discovery . . . it is necessary for the trial court to have the authority to issue protective orders." [66]

B. The Current Attack on Protective Orders

The Supreme Court's broad rejection of a right to public access did not slow the impetus to restrict protective orders; if anything, the **[*442]** movement has accelerated and shifted gears from pressing for a constitutional interpretation to advocating procedural revision. [67] The most relentless attack on protective orders has come from the plaintiffs' bar, which, through the Association of Trial Lawyers of America (ATLA), has pledged that stopping what it characterizes as "**secrecy**" in the courts will be its highest priority. [68] According to ATLA, protective orders and sealed court records are being used with increasing frequency to hide deadly product defects or other "public hazards" from the public. [69] In the name of protecting the public, ATLA has pressed for legislation prohibiting courts from entering orders that would have the effect of "concealing public hazards." [70] In addition, ATLA has sought a presumptive right of access to *all* information produced in litigation, including everything exchanged in discovery but not used at trial, as well as the contents of settlement agreements. [71]

Enlisting the aid of both the print and electronic media, who clearly have a substantial interest in expanding their right of access to information to fill their pages and air time, [72] ATLA began its efforts in the Florida and Texas legislatures. When efforts to enact a statute in Texas reached an impasse, the legislature referred the matter to the Texas Supreme Court to see if the objective could be achieved by amending the Texas Rules of Civil Procedure. [73]

After extensive hearings at which strong opposition to a rule change was expressed, the Texas Supreme Court adopted Rule 76a **[*443]** by a five to four vote, with an unprecedented dissent by Justices Hecht and Gonzalez. [74] Rule 76a creates a presumption that court records are open to the public; defines court records to include unfiled discovery materials and settlement agreements that have a "probable adverse effect on public health or safety"; allows the sealing of information only upon a showing that serious, substantial harm could result from disclosure and a finding that the interest in sealing the information clearly outweighs any public interest in access; and gives third parties, such as the press, a perpetual right to intervene in any matter to oppose the sealing of -- or propose the unsealing of -- any records. [75]

In the Florida legislature, a bill called the Sunshine in Litigation Act, which prohibits courts from entering orders that might have the effect of concealing "public hazards" or any

information that may be useful to the public in protecting against "public hazards," [76] sailed through both houses and was signed by the Governor in a matter of days. [77] So swift was its passage, in fact, that apparently no one paused to consider whether the Act might violate the state constitution. After some time for reflection, concern surfaced that the enactment exceeded the legislature's authority, because the Florida Constitution vests exclusive authority over matters of civil practice and procedure in the state's Supreme Court. To prevent nullification of the Act in a constitutional challenge, the plaintiffs' bar asked the Florida civil procedure advisory committee to consider incorporating the statute's provisions into the Florida court rules. [78] The committee rejected the proposal as unnecessary. [79]

[*444] ATLA also has had partial success in Virginia, [80] but subsequent efforts in twenty-five other states were not as successful. [81] These setbacks undoubtedly reflect the emergence of strong opposition from the defense bar. New York declined the local ATLA organization's invitation to adopt a rule similar to that in Texas. Instead, it adopted a modest provision that conditions the sealing of court records on a finding of good cause -- essentially codifying existing practice. [82] The presiding justices of New York took this step even though the New York State Bar Association voted overwhelmingly against adoption of *any* rule on the subject and voiced its preference that the matter of sealing court records be left to the discretion of the trial judge. [83] In Rhode Island, the Governor vetoed a bill that would have made it extremely difficult for manufacturers in that state to protect trade secrets and other proprietary information; he cited the anti-business climate the bill would create. [84] And in Louisiana, Governor Roemer recently vetoed similar legislation as an unnecessary interference with judicial authority. [85]

[*445] In Alaska, Arkansas, Colorado, Connecticut, Idaho, Iowa, Kansas, Maine, Massachusetts, Mississippi, New Mexico, New York, Oregon, and Virginia, protective order legislation was not reported out of committee. [86] In California, Hawaii, and Minnesota, legislation was withdrawn by the sponsors. [87] In Illinois, Nevada, New Hampshire, and Washington, legislation passed one house of the legislature but was defeated or died in the other chamber. In Montana and South Dakota, similar legislation was defeated on the floor of the chamber of introduction. [88] Legislative and rulemaking proposals remain pending in a few states, and the battle undoubtedly will be rejoined when legislatures next reconvene. [89]

There has also been activity on the federal level. In 1990, the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on "Court **Secrecy.**" [90] A large number of witnesses gave testimony reflecting many different points of view. No legislative proposal has emerged, however. In August 1991, a report of the President's Council on Competitiveness, which reflects the work of the Office of the Vice President and the Department of Justice, recommended that the subject of protective orders be left to trial court discretion. [91] It is extraordinary that all of this federal and state activity has transpired since ATLA's call to arms less than two years ago.

IV. THE EVOLUTION OF THE DISCOVERY AND PRETRIAL MANAGEMENT PROCESSES

The shift in the public access campaign from constitutional challenge to procedural modification has transformed the debate into one of policy: what *should* the practice regarding protective orders be rather than what *must* it be. Although both sides of the controversy **[*446]** are motivated by a range of important interests and values (as well as enlightened self-interest), any inquiry into what a good procedure would be must take into account the degree to which each side's view can be assimilated successfully into the modern conception of a healthy adjudicatory system.

Each aspect of the Federal Rules of Civil Procedure (or any state code of procedure) is part

of a complex, highly interdependent system that collectively governs the litigation process. Any alteration of one structure inevitably affects the functioning of the others, which, in turn, affects the entire process. It would be a mistake to view the protective order as a disembodied device that can be modified without any effect on other elements of the system -- particularly the discovery regime. Nor can the discovery rules be viewed simply as a series of self-contained devices. Discovery is, instead, "an integrated mechanism for narrowing the issues and ascertaining the facts," [92] which is itself part of a larger integrated system.

The role that judicial discretion to issue a protective order plays in this "integrated mechanism" reflects two different litigation realities. The first, and more general, is the need for effective tools of pretrial management. Protective orders are one of several different techniques a judge may employ to ensure the efficiency and fairness of the discovery process. Issuance of a protective order (or for that matter its denial), no less than the imposition of a sanction for misconduct, can promote orderly compliance with discovery requests and minimize the amount of procedural maneuvering.

The second, more specific reality is that the protective order is a tool particularly well-adapted to minimize discovery abuse. [93] The dissemination of private or valuable information generated during discovery may produce serious harm, both to society and to litigants. A fear of that harm may chill a claimant's willingness to resort to the courts or encourage either party to settle for reasons and on terms unrelated to the merits of the underlying claim. The protective order guards against these harms without impairing the flow of information to the litigants.

[*447] *A. The Changing Face of Pretrial Procedure Since 1938*

An examination of the evolution of civil procedure since 1938 demonstrates the need for active judicial management of pretrial discovery and shows that retaining judicial discretion to grant protective orders is consistent with that active management. Indeed, viewed in the context of actual experience, the calls for change in protective order practice appear to be based on a counterfactual view of contemporary litigation that bears little relation to what pretrial practice is and demands.

The adoption of the Federal Rules of Civil Procedure in 1938 fundamentally changed in American procedure. In particular, the discovery system in Rules 26 through 37 revolutionized pretrial preparation. The prior system had limited a litigant's ability to acquire information largely to what was admissible at trial; since 1938, a litigant has been able to secure the production of information on a vastly broadened scale -- essentially, any information that conceivably could be of help in preparing the case. [94] At the same time that the litigant's ability to acquire information was enhanced, new limitations were developed to control the use of the discovered information both before and at trial. [95]

The goals underlying the expansion of the discovery process were to facilitate preparation, to avoid surprise at trial, and to promote the resolution of cases on their merits -- not to enlarge the public's access to information. [96] Nonetheless, the expanded scope of discovery under the Federal Rules and the increased amounts of information they generated created side effects outside the adjudicatory system -- it posed a threat to privacy and confidentiality. [97] To meet this new problem, the discovery rules contain provisions, such as the authorization for protective orders in Rule 26(c), to limit the discovering party's use of information beyond the litigation context.

The Federal Rules have undergone almost continual evolution since 1938 to maintain a

balance among a litigant's ability to compel **[*448]** production of information, the court's capacity to protect confidentiality and prevent misuse of the information, and the court's ability to prevent abuse of the procedural system. When the discovery regime was originally promulgated, the expectation was that it would operate party-to-party and not require significant court intervention. [98] But increased numbers of cases, the broad dimension of some of the litigation, the enormous economic or philosophic stakes of some contemporary cases, and a growing loss of civility within the practicing bar have made a self-executing discovery system impossible; the process undoubtedly requires some judicial management.

Before proceeding to the details of the discovery regime's evolution, however, it is worth noting that the movement toward active judicial involvement in pretrial matters is not unique to discovery. The erosion of the original theory began in 1951, when a committee of five circuit judges and five district court judges appointed by Chief Justice Fred M. Vinson and chaired by Judge E. Barrett Prettyman issued a report calling for active management by the trial judge of pretrial procedures in complex cases. [99] The so-called Prettyman Report was adopted by the Judicial Conference of the United States in 1951. [100] In the forty years since then, a continuous pattern of attention to pretrial management has extended and elaborated the ideas in the Prettyman Report.

The appearance of an increasing number of complex and protracted cases [101] coincided with the initial period of concern about judicial management. One of the earliest and best known examples is the electrical equipment cases, which provided much of the impetus for the judicial management movement. [102] In the early 1960s, a conspiracy among electrical equipment manufacturers in violation of **[*449]** the antitrust laws spawned a massive set of civil damage actions: more than 1800 separate lawsuits were filed in thirty-three different federal district courts. [103] To resolve the litigation fairly and efficiently, the courts established coordinated pretrial proceedings under the aegis of a group of specially selected district judges, a system of national depositions involving selected lead counsel, and a central document depository containing over one million documents that was made available to all the parties. [104] In addition, a special panel called the Coordinating Committee for Multiple Litigation of the United States District Courts was established. [105] The litigation was resolved by 1968, far earlier than anticipated. [106] Experience with the electrical conspiracy cases and other complicated disputes created an environment of procedural experimentation in which the development of pretrial management mechanisms became central. [107]

The most significant by-product of the electrical conspiracy cases was the creation of the Judicial Panel on Multidistrict Litigation in 1963 [108] and the introduction of the *Manual for Complex and Multi-district Litigation* [109] in the same year. The Panel legitimized the notion of aggregating multiple federal cases, wherever located, that had sufficiently overlapping characteristics to warrant the appointment of a single supervising district judge. The Manual and its successors, the *Manual for Complex Litigation* [110] and the *Manual for Complex Litigation, Second,* [111] have articulated the increased awareness of the need for tighter judicial control of the pretrial process and have tried to describe and propagate the constantly advancing art of trial management.

Moreover, since its creation, the Federal Judicial Center has recognized the need for increased judicial involvement in the pretrial process. Much of its research is devoted to the subject. The Center also conducts a variety of seminars for district court judges and magistrates **[*450]** advancing case management procedures that "continue to challenge the assumption that only the lawyers, not the judge, should control the progress of a case." [112]

Thus given impetus and momentum, the judicial management movement has gained adherents and has become increasingly sophisticated. The most recent, and in some ways the most dramatic, development was Congress's decision in the Judicial Improvements Act of 1990 [113] to require every district court to develop a management plan to promote efficiency and reduce cost and delay. [114] Section 473(a)(1) of the act calls for each district to consider "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management" to the need of each case. [115]

Since 1970, the Federal Rules of Civil Procedure relating to pretrial practice have undergone a transformation that very much mirrors the events just described. Understanding the past two decades of rule changes and the drafters' quest to cabin the pretrial process and prevent abuse clarifies why increasing public access and reducing judicial discretion would be counterproductive.

B. The 1970 Amendments to the Discovery Rules

The 1970 amendments to the Federal Rules significantly strengthened district judges' ability to control the pretrial process by enhancing the existing management tools and encouraging their use. Additionally, by centralizing the general principles governing discovery in Rule 26 and making them applicable to all the devices, the amendments reflected and encouraged a view of pretrial as being an integrated process subject to overarching control by the trial court.

The amendments transferred the governance of protective orders from Rule 30(b) to Rule 26(c) and made protective orders applicable to all forms of discovery. [116] To "reflect[] existing law," [117] the rulemakers **[*451]** also added a specific reference to "trade secret[s] or other confidential research, development, or commercial information." [118] The new protective order provision articulated the growing understanding that the Federal Rules provide for broad discovery and rely on the district court's discretion to decide whether protective restrictions are necessary in a particular case. [119]

The amendments also sought to "encourage more frequent imposition of sanctions in cases in which there has been an abuse of the discovery rules" [120] by strengthening judges' power to sanction. To eliminate the requirement of willfulness, the title of Rule 37 was changed from "Refusal to Make Discovery: Consequences" to "Failure to Make Discovery: Sanctions," and "refusal" was replaced with "failure" throughout the rule. [121] Similarly, the amended rule stated that evasive or incomplete answers constituted a "failure" to respond to a discovery request. [122] The amendments also eliminated the Rule 37(a) requirement that, to merit the awarding of fees, a refusal must be "without substantial justification." [123] The range of sanctions available to a district judge was expanded to provide "greater flexibility as to sanctions which the cases show is needed." [124] To this end, Rule 37(d) was amended to provide for "reasonable expenses, including attorney's fees," in addition to other sanctions already available under Rule 37 for certain violations. [125]

The 1970 amendments also strengthened the district court's discretion regarding the timing of discovery. They eliminated the common practice of automatically conferring priority in the sequence of discovery **[*452]** on the party, typically the defendant, who first serves notice of a deposition. This change was achieved by adding subdivision (d) to Rule 26, which gave the trial court plenary discretion to control the timing and order of discovery. The purpose was "to make clear and explicit the court's power to establish priority by an order issued in a particular case." [126] The change gave the district judge greater ability to custom-tailor the discovery program to the needs of individual cases and further reduced the lawyers' ability to control the progress and development of the litigation.

The amendments also rearranged the rules governing the use of the various discovery devices. Additionally, several provisions were added that increased judicial management over discovery and set the tone for the more significant changes that would be made in 1980 and 1983. Subdivisions of then-existing Rule 26, which had governed only depositions, were moved to various subdivisions of Rules 30, 31, and 32. Rule 26 became the centerpiece of the system because it contained the general principles governing all discovery devices. [127]

This rearrangement was more than an attempt to create logical symmetry among the rules. The Advisory Committee thought it "very desirable, even necessary, that the discovery rules contain one rule addressing itself to discovery generally." [128] Consolidation of the general discovery principles can be understood as a recognition of the growing need to manage the process more effectively. It was in 1970 that devices such as protective orders and sanctions were transformed from mere limitations on particular discovery techniques to mechanisms for controlling the entire discovery process [129] -- and the amendments put those mechanisms squarely in the hands of the judges.

[*453] *C. 1970-1980: The Mounting Momentum for the Reform of Discovery*

Although the 1970 amendments were significant, they neither satisfied the critics of the discovery process nor ended the evolution of the Federal Rules. Indeed, in the period between the promulgation of the 1970 and 1980 amendments, sentiment grew strongly among judges, lawyers, and commentators that stricter control of the discovery process was necessary and that the abuses in the discovery process necessitated more effective judicially applied remedies.

This discontent with the pretrial process was articulated in 1976 at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the Pound Conference. [130] The keynote speaker at the conference, Chief Justice Burger, stated that one of the major problems of the judicial system was "misuse of pretrial procedures." [131] Although reformers most fervently criticized discovery procedures for encouraging unnecessarily lengthy and costly litigation, they also complained that the general abuse of discovery jeopardized the confidentiality of information that merited privacy. For example, Judge Simon H. Rifkind, another participant at the 1976 conference, echoed Chief Justice Burger's complaint and added that "[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment." [132] Abuse was rampant, continued Judge Rifkind, because "discovery proceeds with no attempt at serious regulation." [133] Reflecting on these problems, the **[*454]** Chief Justice expressed the belief that what was needed was "fundamental changes and major overhaul rather than simply 'tinkering.'" [134]

The concern with discovery abuse and the call for increased judicial control expressed at the Pound Conference intensified the demand for reform. Attorney General Griffin Bell argued that "a high priority should be given to eliminating abuses in the use of pretrial discovery procedures." [135] Various commentators advocated the increased use of case management techniques to control discovery excesses. [136] "The leadership of the American Bar Association, determined that the [Pound] conference would not be simply another exhortation of the Bench and Bar to improve its standards to be then quickly forgotten," quickly formed a task force to prepare a follow-up report on the Pound Conference. [137] The task force submitted its report to the Board of Governors of the ABA in August 1976. [138] The document focused on the correction of discovery abuses and noted that "[o]rdeal by pretrial procedures, it has been said, awaits the parties to a civil lawsuit." [139] The Report called on

the ABA's Section of Litigation to "accord a high priority to the problem of abuses in the use of pretrial procedures." [140]

In response to the task force recommendations, the Section on Litigation formed a "Special Committee for the Study of Discovery **[*455]** Abuse." The Special Committee issued a report in October 1977 that recommended a number of reforms, most notably a narrowing of the scope of permissible discovery to the "issues" in a case instead of its "subject matter," [141] the institution of a discovery conference whenever requested by a party, [142] and changes to Rule 37 that would provide greater flexibility to judges in issuing sanctions through "a general grant of power which would enable the court to deal summarily with discovery abuses." [143] The proposals were considered by the Advisory Committee on Civil Rules of the United States Judicial Conference, and in March 1978, the Conference circulated a preliminary draft of proposed amendments that incorporated several of the ABA recommendations. [144] However, most of those proposals ultimately were deleted from the final version of the 1980 amendments, largely because they were considered too inconsistent with the basic discovery philosophy of the Rules. [145]

Even before formal changes were made in the Federal Rules, however, the judicial interpretation of the existing rules began to reflect the concerns expressed at and following the Pound Conference. Specifically, a number of courts strengthened the limits on discovery to deter abuse. In *National Hockey League v. Metropolitan Hockey Club, Inc.,* [146] for example, the Supreme Court upheld the trial court's dismissal of an antitrust action under Rule 37(b)(2) for plaintiff's failure to answer interrogatories, and it explicitly authorized the use of sanctions as a deterrent to discovery abuse. [147] Commentators greeted this shift away from judicial tolerance with widespread approval. [148] **[*456]** Thus, the 1970s were marked by increasing judicial involvement in the pretrial process.

D. The 1980 Amendments to the Discovery Rules

The final version of the Federal Rule amendments proposed by the Advisory Committee in 1980 did not respond to Chief Justice Burger's call for a "major overhaul." Rather, the amendments reflected a judgment that the primary problem with discovery resulted from a judicial hesitancy to seize control of the process and not from a lack of tools with which to do so. [149] The Committee wrote that

abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. . . . In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened. [150]

Because of this belief, and because opposition to any significant constriction of discovery had developed, the 1980 amendments did not include the ABA's central proposals to narrow the scope of discovery and to limit the number of interrogatories that could be propounded to parties. [151]

The principal change affecting discovery in the 1980 amendments was the incorporation in Rule 26(f) of the ABA proposal for a discovery conference at the request of either party. [152] The device gave district judges another means to guide and control discovery to prevent abusive behavior; it reflected the Committee's belief that the fundamental change needed was to motivate judges to undertake responsibility for correcting discovery problems. The device was intended to counter judicial hesitancy to become involved in the process by providing that "counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery [would be] entitled to the assistance of the

court." [153]

[*457] The Advisory Committee tempered its enthusiasm for the procedure by commenting that "[i]t is not contemplated that requests for discovery conferences will be made routinely." [154] However, as the Fifth Circuit noted recently, "the discovery conference is not limited to massive class actions or complex litigation; nor must it be used only as a last-ditch effort to put discovery on track." [155] The discovery conference provision has been well received by the courts, [156] although its function has been superseded by the 1983 amendment to Rule 16 and its elimination has been proposed by the Advisory Committee. [157]

E. 1980-1983: The Reaction to "Tinkering Changes"

The failure to subject the discovery regime to a major overhaul met with vigorous dissent and disappointment. Critics were not dissatisfied with the 1980 changes themselves; rather, they believed that the revision should have gone much further and, specifically, should have given district judges more power. This attitude reached all the way to the Supreme Court. Justice Powell, joined by Justices Stewart and Rehnquist, wrote a sharp dissent to the Court's authorization of the 1980 amendments:

The present Rules . . . invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds. . . .

I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' **[*458]** acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. [158]

Although Chief Justice Burger did not join the dissent, he had declared earlier that year, in his Annual Report on the State of the Judiciary, that "[t]he responsibility for control [of pretrial processes] rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act." [159] Some of the sentiments of these Justices seem to be foreshadowings of the opinion in *Seattle Times.* [160]

In the period immediately following the promulgation of the 1980 amendments, a chorus of voices called for the more comprehensive reforms advocated by the ABA, the dissenting Justices, and commentators. For example, the ABA Section of Litigation responded sharply to the failure of the 1980 amendments to incorporate the reforms it had proposed. It called the amendments "an insufficient response to a serious problem" and proposed new amendments. [161] One study of trial judges and lawyers involved in complex cases found that both believed the system would benefit from "greater judicial involvement in the framing and control of discovery, including resolution of discovery disputes." [162] Other studies published in 1979 and 1980 indicated a need for discovery reform. [163] Professor Maurice Rosenberg, who at that time was the Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice, and Warren King, his Attorney Advisor, advocated the adoption of the ABA proposals to "reduce unnecessary duplication and repetition in discovery" that had been spurned in the 1980 amendments. [164] Numerous other articles advocated increasing the power of judges to control discovery abuse. [165] Given the unremitting pressure to go **[*459]** beyond the 1980 changes, it is not surprising that the Rules were amended again only three years later.

F. The 1983 Amendments to the Federal Rules

The 1983 amendments incorporated a number of the revisions that Justice Powell and others had been insisting were necessary to control discovery. A basic shift in discovery philosophy was evidenced by the elimination of the sentence in Rule 26(a) stating that "the frequency of use of [the discovery] methods is not limited." [166] To reverse the message previously projected by the dropped sentence, a paragraph was added to Rule 26(b)(1) listing the grounds on which a court is obliged to limit discovery: if the discovery is duplicative or obtainable at lesser cost from another source, if "the party seeking discovery has had ample opportunity by discovery to obtain the information sought," or if the burden of discovery is disproportionate to the needs of the case. [167] As an additional signal of the change in attitude, the title of subdivision (b) was changed from "Scope of Discovery" to "Discovery Scope and Limits." [168]

The new Rule 26(b)(1) also gives the court power to limit discovery on its own initiative, as well as on a party's request. The Advisory Committee noted that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." [169] The Committee also observed that the grounds for limiting discovery set out in the amended rule "reflect[ed] the existing practice of many courts in issuing protective orders under Rule 26(c)," but it added that most district **[*460]** judges "have been reluctant to limit the use of the discovery devices." [170]

Rule 26 also was amended in 1983 by adding subdivision (g), which requires attorneys or unrepresented parties to sign and thereby certify the legitimacy of all discovery requests, responses, or objections. The Committee noted that "[c]oncern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision." [171] The obligation parallels that imposed by the 1983 amendments to Rule 11 [172] and was designed to give judges more power to control discovery and prevent misuse of the system. [173]

The 1983 amendments also transformed Rule 16 from a provision describing an eve-of-trial conference to a general validation of ongoing judicial management throughout the pretrial phase. The purpose was to "shift[] the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery." [174] This revision codified many of the more effective judicial practices that had emerged prior to the 1983 amendments using pretrial conferences to rule on discovery motions, to compel further discovery, or to limit or structure the discovery process. [175] It also reflected the approach of both the first and second editions of the *Manual for Complex Litigation,* which focused on the pretrial conference as the key device available to the trial court to achieve control over complex litigation. [176]

[*461] Rounding out the 1983 pretrial procedure amendments is the total revision and enhancement of sanction practice effected by changes in Rules 7 and 11 and the addition of Rule 26(g). As a result, every signature on a pleading, motion paper, or discovery document represents a certification as to its contents that subjects lawyers and their clients to potentially significant sanctions for violation of the prescribed standard. [177] The effect of increasing the availability of sanctions, of course, is to magnify even further the district judge's power over cases during pretrial stages. [178]

G. Rulemaking Activity from 1983 to the Present

The 1983 amendments relating to judicial management and discovery have been well received by many commentators as an important step in controlling discovery abuse, but

many insist that further reform is necessary. [179] Members of the judiciary also have responded favorably. The First Circuit, for example, has praised the "transformed conception of adjudication where judicial initiative and governance play major roles in shaping the progress and extent of pretrial activity," [180] which led to the amendments of the Federal Rules that "address the reality of modern litigation." [181]

The Supreme Court has acknowledged the conceptual shift effected by the Federal Rules amendments concerning discovery. In *Societe Nationale Industrielle Aerospatiele v. United States District Court,* [182] the Court held that a district judge has discretion in deciding whether to apply the Hague Evidence Convention or the Federal Rules in cases involving discovery in a foreign nation. Justice Blackmun, in an opinion concurring in part and dissenting in part that was joined by three other justices, noted that the Convention requires a court to give closer scrutiny to requests for evidence than is normal in discovery in the United States. He added, however, that this heightened **[*462]** scrutiny of discovery requests "is not inconsistent with recent amendments to the Federal Rules of Civil Procedure that provide for a more active role on the part of the trial judge as a means of limiting discovery abuse." [183]

The need to provide judges with sufficient tools to prevent misuse of the discovery regime continues to be an Advisory Committee priority. In August 1991, the Supreme Court approved a number of amendments proposed by the Committee, including a revision of Rule 45 authorizing courts to impose costs on a party seeking to require a nonparty witness to produce materials or travel more than 100 miles to attend trial. [184] Another proposed amendment to Rule 45 [185] would give the district judge greater latitude to protect "the intellectual property of a non-party witness." [186] Unless Congress takes affirmative action, the amended rule will become effective on December 1, 1991. [187]

More recently, in response to numerous proposals to reform the discovery regime, [188] the Committee has drafted a set of extensive amendments that would impose on parties a significant obligation to make automatic disclosure of certain categories of information at various stages of litigation. [189] The proposal would also establish presumptive **[*463]** limitations on the number and length of depositions and the number of interrogatories, but it would permit a court to order additional discovery. [190] The Standing Committee of the Rules of Practice and Procedure has authorized the distribution of these proposals to the bench and bar for comment. [191]

H. Summary

This review of the evolution of the pretrial process in recent decades reveals several clear trends: 1) a recognition that the discovery regime cannot operate on a self-executing basis; 2) the growing acceptance of judicial management and the need for increasing its intensity; 3) increased pressure to streamline discovery and some acceptance of cooperative or automatic discovery; and 4) a congressional expectation, expressed in the Judicial Improvements Act of 1990, [192] that judges will develop differential management plans.

In this environment, any curtailment of judicial discretion or restrictions on protective orders would be highly counterproductive. Indeed, restrictions of this type undoubtedly would increase resistance to cooperative or automatic disclosure. Judges must be encouraged to facilitate pretrial activity, and they must be given the discretion and the procedural tools necessary to do so effectively. The need for judicial involvement and control fully applies to the dissemination of discovery and settlement materials. If left unconstrained, discovery could be seriously abused and could damage litigants, the civil justice system, and society as a whole. The protective order is a particularly valuable

judicial instrument to prevent this abuse.

V. THE VALUE OF CONFIDENTIALITY AND THE HARMFUL CONSEQUENCES OF A PRESUMPTION OF PUBLIC ACCESS

The protective order is a uniquely effective management tool to prevent the unbridled dissemination of litigation information when that dissemination might be abusive and might interfere with the **[*464]** court's ability to resolve the case before it promptly. [193] Furthermore, the current availability of protective orders reflects the values served by confidentiality and the degree to which these values are likely to be impaired in a litigation world in which protective orders are largely unavailable. Therefore, when evaluating proposals to restrict protective orders, one must critically examine not only the alleged harms of **secrecy,** but also the potential benefits of confidentiality. [193]

A strong, symbiotic relationship exists between procedural rules and substantive rights -- the former exist to give effect to the latter. For example, procedural rules governing service of process protect substantive rights under the Due Process Clause. [194] Judicial protection of various types of information to ensure that it is used solely for legitimate litigation purposes also protects the substantive rights of the parties -- rights that may be jeopardized quite unintentionally by the discovery process's goals of ensuring each party's access to relevant information and their ability to prepare effectively. [195] Some of these rights have a constitutional dimension.

A. Privacy Rights

One of the substantive rights that only confidentiality can protect is the right to privacy. In the discovery context, the privacy interest is "the individual interest in avoiding disclosure of personal matters." [196] Privacy can be a matter of concern to the plaintiff, the defendant, and nonparties in a wide array of lawsuits. [197] As pointed out in a recent article by a member of the plaintiffs' bar, the plaintiff in a personal injury action is often asked to expose his or her private life to intense scrutiny. [198] These requests frequently require the plaintiff **[*465]** to seek protection from the court to prevent public disclosure of embarrassing or sensitive private facts.

The Supreme Court has indicated that litigants have privacy interest in the information produced during discovery and that courts should protect those interests by ensuring confidentiality when good cause for doing so is shown. [199] The Court has also recognized a broader right of privacy that limits the government's authority to disclose intensely personal information to the general public or the media. [200] This limitation is only proper. A legal system that does not recognize the right to keep private matters private raises images of an Orwellian society in which Big Brother knows all. [201] Although **[*466]** proponents of increased public access may not have that result in mind, there is no doubt that unfettered authority to collect and disseminate private information through the judicial process could lead to that end. Indeed, statutes and court rules restricting a court's discretion to protect privacy -- especially those that impose an affirmative duty to disclose private information to the public -- could violate the constitutional rights of the private individuals involved.

Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door. Yet precisely such a surrender of privacy can often result from litigation. The mere payment of a filing fee entitles a plaintiff to compel production of intensely personal and confidential information, such as medical records, marital information, religious documents, financial records, and even trade secrets or intellectual property. The defendant, of course, can respond in kind. The loss of privacy

through litigation is compounded when the information is disclosed to the media, competitors, political adversaries, and even curious members of the public.

The rulemakers who crafted our broad discovery regime to promote the disposition of civil disputes on their merits never intended that rights of privacy or confidentiality be destroyed in the process. The broad discovery procedures in the Federal Rules were designed solely to improve the dispute resolution system. [202] The drafters had no intention of using these procedures to undermine privacy; nor were they expanding discovery in the name of promoting public access to information. [203]

Therefore, it is consistent with the underlying goals of the Rules that the litigation system's sensitivity to privacy considerations be heightened, given today's unparalleled capacity to record, retrieve, and transfer data, as well as the range of decisions made about people on the basis on files, records, dossiers, and data banks. The informational facts of life are that institutions in this country now capture more data about more aspects of personal and organizational life regarding more people and entities than anyone thought possible only **[*467]** a few years ago. This societal phenomenon is reflected in the civil litigation taking place in both state and federal courts, in which the scale of discovery, particularly in larger cases, seems to expand ever wider. Indeed, the discovery in many complex cases is so massive that litigants commonly establish computerized data centers to store and retrieve the material. [204] The need to protect some of this data from disclosure has never been greater.

A presumption of public access would mistakenly undervalue these concerns about privacy by requiring the "public interest" to be considered every time a request to seal a court record is made; indeed, the process itself would undermine any attempt to assure confidentiality. Moreover, such a presumption essentially assumes that the public has some meaningful interest in all litigation. This implausible proposition ignores the range of information captured in the course of discovery. The vast majority of litigation is quite mundane, is exceedingly complex and technical, or deals exclusively with the application of arcane principles of law in factual situations far removed from daily life. These types of cases rarely evoke any interest from the public or media or generate any information that has any "public interest" whatsoever. The current public access proposals will simply impose a superfluous and inordinate work burden on courts and generate a risk of privacy-invading disclosure each time a request for a protective order is made.

Even when some "public interest" in the litigation exists, one must distinguish between the types of interest that range from curiosity and voyeurism, such as that aroused when a lawsuit involves a celebrity or titillating gossip or scandal, to interest in matters of legitimate public concern, such as that involving the administration of public office or matters affecting public health and safety. The proposals to create a presumptive right of access draw no distinction between these two very different aspects of "public interest." Yet it is inappropriate as well as unseemly for courts to refuse to seal court records merely to provide the public with information comparable to that found in a supermarket tabloid.

B. Property Rights

Another substantive right jeopardized by the unfettered dissemination of litigation materials -- particularly research and development and financial information -- is the litigants' right to the exclusive use of private property. In today's business world, commercial information often has a value that is tangible enough to be bought and sold for huge sums of money, and extraordinary efforts are expended to **[*468]** control it and to maintain its security and confidentiality. It is not surprising, then, that our legal system considers information to

be property. [205]

According to John Locke's *Two Treatises of Government,* [206] we protect the exclusive rights of property owners to encourage individual members of society to expend the labor needed to gather or produce that property. In fact, the English government's abuse of personal property rights in the American colonies fueled this country's drive for independence. The reaction to these practices is reflected in the provisions of the federal and state constitutions that recognize the right to own and enjoy property and protect it against government abuse or appropriation without compensation. These provisions demonstrate how well-established Locke's propositions have become.

Recent Supreme Court decisions reinforce the status of confidential information as property. Indeed, the Court's recognition of the im portance of protecting confidentiality has never been stronger. In *Ruckleshaus v. Monsanto Co.* [207] and *Carpenter v. United States,* [208] the Court significantly enlarged the protections due trade secrets and other confidential information [209] and declared that "'[c]onfidential information . . . is a species of property to which the corporation has the exclusive right and benefit.'" [210] Government disclosure of information in which parties have a property right -- which is what some of the public access legislation requires -- might amount to a taking of private property in violation of the Fifth Amendment. [211]

[*469] This expanded protection for commercial information reflects a growing awareness that the legal system's recognition of the property status of such information promotes socially useful behavior. [212] Businesses may be as creative with their intellectual property and proprietary data as with their tangible assets, especially given "the great extent to which the economy now depends on the production and sale of information." [213] Their willingness to produce information in litigation often depends heavily on the court's ability to keep the information confidential. [214]

A few examples will make this clear. The pretrial disclosure of trade secrets and other proprietary information sometimes is essential to the resolution of a lawsuit and cannot be avoided. An excellent illustration of this is a case involving the Coca-Cola Corporation, whose formula for Coke is perhaps the best protected trade secret in the world and certainly among the most valuable. The underlying litigation concerned a labor dispute in which the rights of the employees were tied to the processes by which the soft drink was made. [215] The lawsuit could be resolved only if the secret processes were revealed, and the court accordingly ordered disclosure to the plaintiff. [216] The decision makes clear that the court was acutely aware **[*470]** of the risk its order posed for Coca-Cola and that the court intended to protect the secret formula from secondary disclosure to the fullest extent of its authority. [217] Nonetheless, rather than reveal these secret processes, CocaCola settled the dispute privately and thereby relinquished its right to seek complete vindication.

This decision to forfeit legal rights in order to protect a trade secret exemplifies the *transcendent* value of certain commercial information. It also implicitly reveals the concern in the business community that even the most protective court cannot prevent the spread of valuable information beyond the confines of a lawsuit. The case further illustrates that, when the only way of getting to the heart of a legal dispute is through pretrial disclosure of a trade secret, the information generally will have to be divulged. The competing interests of commercial privacy and the efficiency of the justice system have been balanced in favor of the latter. A business entity caught up in litigation simply must assume the risk of disclosure; its best -- indeed, its only -- hope of protecting its property is the court's willingness to exert its full authority to prevent further dissemination of the information.

Another risk that businesses face in litigation, especially as defendants in product liability cases, is that the disclosure of unsubstantiated information could unjustifiably damage the reputation, profitability, and conceivably the viability of a product or even the enterprise itself. This risk exists due to a combination of two factors: the growing competition among of the media for the latest "news," and the broad access that the public and the media already have to the courts and the information filed with them.

In some instances, products have had their reputations severely damaged by the premature release of untested information, even when the courts or further studies later showed that the information was false. [218] The Audi 5000 automobile is a prime example of this phenomenon. The media, led by CBS television's "60 Minutes," claimed that the car was responsible for the injury and death of numerous people due to a defect that caused the car to accelerate suddenly. [219] Plaintiffs filed a number of lawsuits against the manufacturer, and as a result of the extensive adverse publicity in the national media, Americans all but stopped buying the Audi 5000. Painstaking studies by governmental agencies in Japan and Canada and by the U.S. National **[*471]** Highway Transportation Safety Administration, however, made clear that the sudden acceleration was caused by driver error and not by a defect in the car. [220] Nonetheless, the publicity given to unsubstantiated claims severely damaged the United States market for a product that had previously enjoyed an excellent reputation. Audi has now gone to great lengths attempting to reestablish its former status as a producer of high quality cars. But because little can be done to prevent the media from propagating unproven allegations -- other than to demand responsible reporting -- other products undoubtedly will suffer a similar fate.

Yet another risk stems from the fact that some businesses may file lawsuits simply to gain access to confidential information produced in litigation. [221] Litigation dangers exist even when the court has attempted to prevent the damaging dissemination of information. In some instances, experts hired to testify at trial have misused or redistributed information given to them for the sole purpose of assisting their preparation in the initial case. [222] This risk of disclosure stems not only from intentional wrongdoing. As one federal judge recognized:

Even with stern sanctions for unauthorized disclosure, how does one practically police a protective order? If the expert is called upon two years after [the] litigation to assist a potential competitor . . . will he really be able to compartmentalize all he or she has learned and not use any of the information obtained [in the instant litigation]? [223]

A constant danger inheres in the disclosure of confidential information, even when done under a protective order. [224] Courts have sometimes erroneously released confidential corporate information to competitors when that information had been initially produced under a protective order in litigation that did not even involve the competitors. [225]

The loss of confidentiality poses a serious threat to businesses in the United States today. Many commercial enterprises face significant **[*472]** losses from industrial espionage and a growing network of "bogus" parts and knock-offs. [226] One particularly striking problem provides a good example of the need for protective orders to reduce the fear that information produced in litigation will be disseminated improperly or otherwise misused. In a Kafkaesque bit of irony, businesses from whom confidential designs, blueprints, and other product information have been misappropriated have been sued for injuries caused by the bogus parts and knock-offs made from these stolen documents. [227] In some cases, these enterprises have been able to prove that the products were counterfeit; they have narrowly escaped liability only after investing considerable time and money in their defense. Some businesses have not been as fortunate. Allowing judges to retain their ability to issue orders

protecting the types of commercial information most easily misappropriated at least increases the courts' ability to avoid becoming unwitting contributors to this unsavory activity.

Obviously, uncontrolled dissemination of discovery materials undermines the confidentiality of research and development and threatens its investment value. In *Kewanee Oil Co. v. Bicron,* [228] the Supreme Court stressed that research and development is absolutely essential to the innovation and development of new products. [229] It went on to state that investment in research and development depends on maintaining the confidentiality of the resulting information, most of which would be classified as trade secrets. [230] Indeed, protection of trade secrets is universally recognized as necessary to foster innovation. [231] Federal law and the substantive law in every state recognize the importance of providing strong legal protection for trade secrets. [232] Availability of this mechanism for keeping information confidential is **[*473]** vital to all American businesses, particularly in the high-technology sectors of our economy.

The policies long underlying TRADE secret protection are especially relevant today. The ability of American business to compete effectively in the global marketplace depends on continued innovation and on meaningful protection for intellectual property and research and development. If incentives to experiment and develop new products, technologies, and services are undermined, American companies will be unable to compete against foreign businesses even in the United States, let alone abroad. Many believe American competitiveness already teeters on the brink of crisis.

The disclosure of sensitive business information in litigation thus significantly endangers continued innovation and competitiveness. First, the increasing frequency of discovery requests for access to valuable information has substantially magnified the risks of disclosure to competitors and of dedication to the public domain. The loss of confidentiality, the sine qua non of a trade secret, robs the owner of any advantage the secret may have provide. [233] Moreover, even a significant increase in the risk of disclosure of the property undermines a business's willingness to incur the often enormous expenses of developing information-based assets. This is especially true when manufacturers are threatened with disclosure during the research and development stage --before the product has been marketed. [234]

Second, a growing number of litigants are demanding access to trade secrets or private information regardless of whether they truly need it to prepare for trial. In the most extreme cases, plaintiffs seek an order compelling disclosure of commercially valuable data as a "bludgeon" to force a favorable settlement. This gambit is no less offensive when a defendant tactically requests sensitive or embarrassing personal information about the plaintiff with a similar objective in mind. [235] More benignly, some litigants use wide-angle discovery to conduct a private fishing expedition, hoping to find information that *might* be "useful" or otherwise "helpful" in building a theory, even though the material clearly is inadmissible. [236]

[*474] These practices are creating an especially severe problem for confidential information relating to the design of new products. Plaintiffs routinely seek disclosure without regard to whether the research was conducted long after the product involved in the suit was manufactured, whether a new product ever was created, or whether the new research and the original product have any relationship to each other. [237] If one accepts the proposition that product liability actions already threaten to undermine innovation and competitiveness, then one legitimately can be concerned that the potential disclosure during litigation of developmental research dramatically compounds the chilling effect. [238] A

manufacturer not only risks completely losing an expensive investment through disclosure of its product development plans; its very willingness to conduct such research may be used against the manufacturer even if it decides not to go forward with the new product. [239]

C. The Role of Protective Orders

The privacy and value of information produced during the discovery process need not be jeopardized. In other contexts involving comparably sensitive information, when courts and legislatures have concluded that the costs to society of disclosure are too great, they **[*475]** have recognized very strong privileges against disclosure in private litigation. [240] For example, confidentiality has been extended to foster certain relationships and to promote communications that are deemed critically important, such as those between husband and wife, attorney and client, priest and penitent, and doctor and patient. [241] Information that the government designates as a state secret is also protected from disclosure in discovery, even if the privileged designation requires dismissal of a lawsuit. [242] In the constitutional context, courts have recognized privileges against the discovery or use of certain information under the Fourth, Fifth, and Sixth Amendments, because the underlying interest in protecting individual rights is considered sufficiently important or the risks of disclosure or abuse are so great. [243]

Although an unqualified privilege generally has not been extended to trade secrets or other types of highly sensitive personal or proprietary information, [244] the information's value and the need to protect privacy and confidentiality demand that disclosure be prevented when it is not absolutely necessary. Unlike tangible property, which can change hands without necessarily diminishing in value, information can never again be in the exclusive possession of its original owner once it is disclosed. Thus, courts traditionally and justifiably have issued protective orders to prevent outsiders from gaining gratuitous access to private or proprietary information to the detriment of a litigant. [245]

Privacy and property ownership are among the most fundamental rights that we have as citizens of this country. Governmental intrusion on either right runs counter to our tradition of protecting those rights; therefore, it should be prohibited except under the most compelling circumstances. Totally unconstrained discovery, especially when it has little or no value in determining the merits of a lawsuit, provides a widespread and serious threat to these rights. In *Seattle Times,* the Supreme Court noted that litigants commonly abuse today's wide-ranging discovery by "obtain[ing] -- incidentally or purposefully -- **[*476]** information that not only is irrelevant but if publicly released could be damaging to reputation and privacy." [246] The Court stated: "It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." [247]

The protective order is an ideal mechanism for minimizing the negative side effects of modern discovery without eviscerating the value of the process. When the resolution of a lawsuit would be furthered by requiring a party to reveal either sensitive or private information or commercially valuable data, such as a trade secret that was costly to develop and would have enormous value to competitors and others who may or may not be involved in the lawsuit, [248] protection is necessary. A well-drafted protective order that limits access to and the use and dissemination of the information is the most effective means of preserving an individual's privacy or the commercial value of the data while making it available for legitimate litigation purposes. [249] That is precisely the type of discretionary judicial management modern procedure has been trying to attain for over twenty years and provides the best reason why the protective order should not be emasculated.

Indeed, if judges' discretion to issue protective orders is undercut, the courts' only means of maintaining privacy might be to deny discovery altogether. [250] Such a result would not only frustrate reformers' efforts to promote public access, but also would impair the primary goal of liberal discovery -- giving each litigant equal access to all relevant data in furtherance of the "just, speedy and inexpensive" resolution of disputes called for by Federal Rule 1. Thus, those advocating restrictions on the availability of protective orders bear a heavy burden. They not only must demonstrate that the potential gains to society of greater public access outweigh the inevitable deleterious **[*477]** effects on the effective operation of the civil justice process and the protection of valuable personal and property rights; they must also show convincingly that judges' instincts to protect privacy and property rights will not prompt the bench to increase its denial of discovery motions altogether.

VI. EVALUATING THE POTENTIAL GAINS FROM RESTRICTING PROTECTIVE ORDERS

The proposals for creating a presumption of public access to litigation materials would sharply curtail judicial discretion and would mandate that great weight be accorded to the interests of nonparties. [251] Proponents argue that this presumption would advance several important societal interests. Foremost among these is public health and safety. Protective orders, it is argued, prevent disclosure of information regarding environmental hazards, harmful consumer products, and other dangers, because their issuance is generally the result of an alliance of convenience. One party seeks to hide its misconduct or prevent the encouragement of other putative litigants. The opposing party, who could reveal the dangers, often has litigation interests other than obviating a potential risk to the public -- most commonly, securing an advantageous settlement -- and it will use acquiescence to the entry of the protective order as a bargaining chip. [252] Busy judges, the argument concludes, are unlikely to undertake the burdens of evaluating the contents of the material to be shielded by the order unless they are directed to do so by a statute or a rule. [253]

One thing is apparent from the outset: the number of cases that conceivably could contain information that has any bearing on public health or safety is minuscule compared to the corpus of litigation in this country. Clearly, any argument based on these cases is a rather slim reed for supporting a global and universal right of public access to all materials produced in every docketed case.

At least two subsidiary reasons have been offered for limiting protective orders. First, proponents claim that providing universal **[*478]** access to information generated in civil litigation will improve the system's efficiency. Preventing the disclosure of discovery materials to other attorneys, it is said, means that "each plaintiff's lawyers must reinvent the wheel." [254] Second, the current system allegedly creates a conflict for the attorney who is asked to agree to confidentiality to facilitate discovery or as part of a settlement, because the duty to act in the client's best interests often requires the attorney to agree to confidentiality, even though doing so may seal information that ultimately would benefit the public if released. [255] Each of these assertions requires closer inspection.

A. The Impact on Public Health and Safety

The allegation that protective orders are concealing information important to public health and safety obviously should arouse concern, but its validity is doubtful. Moreover, even assuming for the moment that it is true, there are ways of dealing with the problem that are less destructive to the competing values than eviscerating the availability of protective orders.

Under current practice, a court has the power to disclose information revealed during litigation, especially to relevant governmental authorities, even after the partities have negotiated an agreement to maintain confidentiality. [256] In the federal courts, this power includes the ability to order that discovery material be filed with the clerk, even though the parties have not so requested. [257] Because the courts **[*479]** have the authority to protect public health and safety when necessary -- and because judges seem to understand how to use their discretion to do just that [258] -- public health concerns do not justify curtailing the power to issue protective orders. The need for a clearly demonstrated reason for departing from the current practice is imperative, given the cascade of adverse consequences that could flow from this change. [259]

In addition, the courts, plaintiffs' counsel, and litigants have the power to release information to the appropriate governmental agencies or the press before any protective order is sought. This power diminishes the possibility that critical information will be withheld from the public. [260] Anyone who has sufficient knowledge to file a lawsuit on his or her own behalf could provide the same information, if it implicates public health or safety, to governmental agencies and to the press before or when the lawsuit is commenced. [261] These institutions then are free to pursue the matter as they see fit.

In any event, once an action is commenced, the complaint and all subsequent pleadings, filings, and court proceedings are open, and the public and the press can therefore obtain more information about the alleged danger as the litigation progresses. [262] Thus, under the present regime, those participating in the litigation have the ability to alert the public, particularly those agencies directly responsible for protecting the public, of a potential danger and the harm it allegedly causes. The participants' decision not to do so suggests that they have other motivations or are uncertain as to their position. A decision by the relevant governmental agencies and the press not to pursue a certain matter suggests a lack of basis for doing so. In either event, the court does not then become obligated to make the disclosure. Nor should **[*480]** a litigant's attempt to publicize the lawsuit necessarily deprive judges of their historic discretion to provide confidentiality to parties when that would serve systemic needs.

But the basic question remains. Is it true that protective orders and court seals keep information regarding public health and safety hidden? Thus far, assertions to that effect have been supported primarily by anecdotal evidence; research or statistical data is completely nonexistent. An examination of several of the stories that have surfaced during the debate demonstrates that they are of questionable content and do not support the wider assertions about protective orders; they simply do not show that these orders are being used to prevent the dissemination of vital information.

A good example is the evidence used to support the proposal to amend the New York Civil Practice Law and Rules to restrict protective orders. The focal point for those pressing the proposal was an incident involving Xerox. [263] The plaintiff's attorney in that case clearly refuted claims that a court seal hid information about toxic waste from the government and the public. [264] According to him, "[w]hat remains sealed, as they most certainly should be, are the medical records of the children, and those records alone." [265] Consequently, the "evidence" relied on by the advocates of the proposed rule did not demonstrate a nexus between public health and safety risks and the sealing of court records.

The experience in New York is not unusual. In Nevada, news reports and editorials claimed that the courts were concealing health and safety hazards from the public and that legislation was needed to protect the citizenry. One news story alleged that current law prevented a lawyer from revealing information about a secret Nevada "hazard" that kills and

maims. [266] The next several paragraphs of the story described the same lawyer's press briefings three years earlier and articles already published on the supposedly secret hazard. Nothing crucial to the protection of the public health had been kept secret. Information about the alleged hazard was available to the public long before the lawyer voluntarily entered into a confidential settlement agreement on behalf of his client, and it continues to be available. **[*481]** Thus, when the facts are revealed, these strident calls for "reform" demonstrate how the truth can be obscured, a non-issue sensationalized, and state legislatures and the public needlessly alarmed.

One of the most frequently used examples in the national debate regarding protective orders asserts that a court seal hid information from the public about a dangerous side effect of a particular prescription drug. A doctor, the subject of the incident, went into anaphylactic shock after taking a drug that had been prescribed in January 1983. [267] She claimed to have consulted the 1981 *Physician's Desk Reference* (PDR) (prepared and published in 1980), a professional guide to the labeling of prescription drugs, as soon as she felt ill, but she found no warning about anaphylactic shock, allegedly because the manufacturer hid this information in sealed court records. [268]

No apparent connection exists, however, between the sealing of any court records and the alleged failure to warn of the drug's possible side effects. All adverse reactions appear to have been reported in timely fashion by the manufacturer to the federal Food and Drug Administration. The first information about these possible adverse effects was reported publicly by that agency in mid-1981. [269] yet the PDR the subject claims to have consulted at the time of the incident in 1983 was published in 1980. The manufacturer issued warnings in its package inserts and in the 1982 PDR [270] and also sent a letter to over 100,000 physicians regarding the potential side effect. [271]

The information was clearly available to the subject, as well as to the public, through prescribing physicians and the contemporary PDR and package inserts. If she did not have the information, it was not because of sealed court records. In fact, no lawsuits had been filed against the manufacturer at the time of her alleged reaction. The only connection between this example and the sealing of court records is that the subject subsequently agreed to keep confidential the amount **[*482]** of money she was paid by the manufacturer to settle her lawsuit. Even that agreement has not prevented her from publicizing the experience on several occasions in the years since the settlement. [272]

Proponents of reform also claim that sealed court documents prevented a woman with a defective heart valve from learning about it and seeking appropriate treatment. [273] As in the previous example, a review of the facts from the congressional testimony by the woman's husband leads to the conclusion that information about the problem had already been disseminated to the medical community and that this was not a case in which protective orders or sealed court documents concealed vital information. [274] Instead, it appears to raise questions about a possible failure to warn, but the circumstances have been reworked to suggest that the tragedy resulted from court confidentiality. The facts, however, strongly suggest that it did not.

Another frequently recounted example stems from *Anderson v. Cryovac, Inc.*, [275] in which the plaintiff alleged that a manufacturer's toxic chemicals poisoned the water supply in a northeast city. Claiming that the public had a vital interest in learning about the safety of its water, the press sought access to information that had been sealed by a protective order. [276] If the allegations had been true, the public clearly would have had a legitimate interest in this information. The court denied access, in part because the relevant information warranted confidentiality and the court already had disclosed the possible risk to local

health authorities. [277] Following a trial on the merits, the jury concluded that the allegations were unfounded and that, in fact, the manufacturer had not contaminated the water. [278]

By looking beyond each of these accusations against protective orders and court seals to the actual circumstances, one can see that either the alarms were false or the relevant information was available from other sources. None of these anecdotes reveals a cause and effect relationship between sealed court records and harm to public health or safety. Ironically, however, some of them do remind us that mere allegations of harm do not always mature into proof of it. They also suggest that the protective order may have become a convenient scapegoat for other failures in the flow of information in our society. [279]

[*483] *B. The Impact on the Litigation System*

The claim that reducing judicial discretion and creating a presumption of universal access to all litigation materials would promote overall adjudicatory efficiency also seems unfounded. Indeed, the reverse is quite likely to be true. Even if one were to assume that free access to information from earlier cases would facilitate the resolution of subsequent related cases, that does not end the inquiry. It is necessary to go further and determine the ex ante effect of sharply limiting the availability of protective orders on other facets of the civil justice system.

1. Discovery. -- The importance of protective orders lies in their usefulness in safeguarding litigants against many of the damaging side effects of discovery while still facilitating that process. Limiting the availability of protective orders makes the discovery process more contentious, protracted, and expensive. [280] If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure. [281] The discretion courts currently have in granting protective orders has allowed them to develop one of the most significant management tools for guiding litigants through the pretrial process with a minimum of motion practice and needless friction. Depriving courts of this tool would create particular risks for the current attempts to promote cooperative or automatic disclosure of certain information, [282] which parties will resist in some contexts unless they are given protection against further dissemination. In addition, more litigants would likely pursue a full adjudication of the merits, rather than agreeing to a settlement. Of many possible motivations, one certainly is to vindicate their personal or business reputations by bringing out the complete story concerning information produced in discovery and publicized out of context.

The result of either increased discovery factiousness or resistance to settlement would be the expenditure of litigants' time and money on matters that often have no bearing on the merits. In addition, the energies of that most precious systemic resource -- our judges -- would be dissipated, and their ability to handle large cases and litigation **[*484]** involving issues of significant social importance would be compromised.

There are other potential deleterious side effects. Absent protective orders, greater incentives would exist for commencing litigation and exploiting discovery for reasons other than the adjudication of disputes. Parties might well use the courts to pursue ulterior objectives, such as seeking a competitive advantage, pressing vendettas, or acquiring information for use in collateral proceedings. [283] Conversely, the fear of public access to sensitive information might chill the enthusiasm of legitimate claimants who fear the uncontrolled release of personal or business information. That would be a totally unjustifiable barrier to access to the nation's courts.

Finally, contrary to the hopes of the proponents of public access, the net effect of banning protective orders might well be a constriction on the flow of litigation information, not an expansion. [284] If courts could deny or restrict discovery more easily than they could issue protective orders, judges might choose to do the former on the assumption that denying discovery will curb abuse and prevent protracted pretrial litigation -- especially given the current pressures to reduce litigation cost and delay. A contraction in the scope of discovery would subordinate one litigant's interest in preparing her case to a hypothetical subsequent litigant's interest in ready access to the discovery material in the original case. That result would be antithetical to the very purpose of discovery. Ironically, it also would decrease the likelihood of the public gaining access to something that might be of legitimate interest.

2. Settlement. -- One aspect of the confidentiality debate concerns agreements to keep the monetary terms of a settlement confidential. [285] In most circumstances such agreements should be allowed. It is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement of a court dispute or its terms of payment. [286] These subjects have no relationship to a **[*485]** potential public hazard or matters of public health, and unless official conduct is at issue, matters of proper governance are not involved. Thus, there is simply no legitimate public interest to be served by disclosing this information.

The parties, however, often have a compelling interest in keeping the settlement amount confidential to avoid encouraging nuisance claims and harassment of the recovering party by unscrupulous free riders. For example, when a plaintiff -- particularly a minor or other noncompetent person -- receives a substantial monetary settlement, confidentiality protects that individual from being preyed upon by hucksters and long-lost relatives or friends. Also, information that a plaintiff had settled with one defendant for a very small sum might compromise the plaintiff's ability to pursue its claims against nonsettling defendants. [287] From the defendant's perspective, confidentiality ensures that the settlement amount will not be used to encourage the commencement of other lawsuits that never would have been brought or as unfair leverage to extract a similar payment in subsequent suits that may be meritless.

Settlement agreements also often include provisions concerning private documents or information. [288] These may involve the return of documents produced in the course of the litigation (which may or may not have been under a protective order), the transfer of information not disclosed prior to settlement, or obligations limiting the use of certain information in certain ways. When these settlement terms impose confidentiality on matters concerning personal privacy or commercially valuable data, no reason exists to disregard the wishes of the parties.

Nevertheless, because the public interest in disclosure of other aspects of a settlement agreement may sometimes be particularly compelling and the importance of maintaining confidentiality may be reduced, an absolute prohibition on access would be unwise. For example, public access may be important when one of the settling litigants is a governmental agency, public entity, or official, when the **[*486]** settlement is a court-approved class settlement, or when there has been some other significant judicial participation in the process. [289] These considerations can be accommodated best, however, by leaving discretion with the trial court to weigh the competing interests in particular cases. [290]

Furthermore, whatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement. [291] Settlement not only reduces the need for further governmental involvement, but also reduces the cost of dispute

resolution to the litigants and helps free valuable judicial resources and thereby promotes more efficient operation of the courts. Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved. [292]

Thus, absent special circumstances, a court should honor confidentialities that are bargained-for elements of settlement agreements. Moreover, when a confidentiality agreement facilitates settlement, [293] a later court should hesitate to undermine the bargain, for if the effectiveness of the protective order cannot be relied on, its capacity to motivate settlement will be compromised. The presumption in favor of the continued operability of a protective order is already **[*487]** supported by current law, [294] and its continued vitality should be reaffirmed.

3. The Impact on Judicial Resources. -- Another systemic concern argues against any significant expansion of a right of public access. Because the judicial system already is unable to resolve civil disputes in an economical and timely fashion, additional burdens should not be imposed on it. [295] A recent report on state court statistics revealed "[a] strong and disturbing pattern" showing that state "courts are experiencing difficulty in keeping up with the inflow of new cases." [296] In many of our federal courts, the constantly expanding criminal docket has caused a restriction of the civil docket. Our judges cannot assume additional tasks [297] of the size that an expansion of the public's right of access would generate. Adding an information clearinghouse function (in effect, a court-administered Freedom of Information Act) to the existing judicial workload -- which is essentially what the proponents of access advocate -- is impractical, even if there are substantial reasons for doing so. [298] It is unrealistic to ask our judges to examine the masses of discovery materials generated in contemporary litigation to rule on access requests. It is particularly unwise to give standing to a host of nonparticipants in private litigation to challenge every proposed protective or sealing order or to seek modification of those orders already outstanding. [299] The Supreme Court **[*488]** recently rejected similar efforts by the press to use an executive agency as a clearinghouse for information regarding private individuals. [300] Hopefully, the Court would take the same view of the judiciary becoming an information agency.

Even if the courts had the resources to assume this function, they are not the appropriate institution to perform it. Courts are designed to resolve disputes; they are not information ombudsmen. They should not be asked to resolve issues of personal privacy or business confidentiality versus public interest divorced from truly adversarial disputes. Further, judges generally lack the scientific or medical expertise needed to evaluate the complex data and theories routinely implicated when scientific and technical materials are alleged to raise issues of health and safety. [301] Indeed, a plethora of expert executive and administrative agencies at the local, state, and federal levels already exists for precisely this purpose, and the responsibility for doing so should remain with them.

At the federal level, for example, the Food, Drug, and Cosmetic Act, [302] the Consumer Product Safety Act, [303] and the Traffic and Motor Vehicle Safety Act [304] all require various entities to report health and safety information relating to a tremendous array of products to federal agencies, which have the authority to investigate and provide appropriate information to the public. [305] Two of these acts have been strengthened significantly in recent years. In 1990, Congress amended the Food, Drug, and Cosmetic Act to apply to distributors, [306] and in **[*489]** 1991 the Department of Health and Human Services promulgated new regulations requiring facilities to report to the Department's Secretary the use of devices that have caused death or serious injury or illness. [307] Congress also amended the Consumer Product Safety Act in 1990 to require manufacturers to report to the

Consumer Product Safety Commission if three or more civil actions involving a product model have resulted in a settlement or a judgment for the plaintiff within a specified twenty-four-month period. [308] Other than trade secrets and confidential information, [309] the reported data generally is available to the public. [310] The Freedom of Information Act [311] can be used by lawyers, journalists, and members of the public to tap into these information resources.

Even if the existing agencies are thought inadequate for the task, it does not follow that their responsibilities should be shifted to the courts. Any shortfall in analyzing and disseminating data for the protection of health and safety must be remedied by reinforcing the relevant agencies and facilitating public access to these information resources. Asking courts to undertake these tasks within an adversarial framework, particularly if everyone who claims to be "affected" is given standing to invoke the courts' energies, would lead to satellite litigation that would distract judges from their primary mission without any assurance of public benefit. There simply is no reason to believe that the courts are better suited to the task of managing information than the agencies that have already been given the responsibility.

C. Conflicts of Interest Facing Attorneys

It is true that attorneys frequently come into possession of information in the course of representing a client that others, perhaps the public at large, have a legitimate interest in knowing. The effect may be a personal sense of conflict. That is an inevitable aspect of our **[*490]** adversary system and hardly is unique to protective orders. [312] The criminal attorney who seeks a not-guilty verdict for a client he knows to be guilty faces the same concerns. Yet that attorney is expected to defend the client without fear of being treated as an accomplice after the fact. The judgment has been made that society is benefitted if clients may rely on their lawyers not to disclose their confidences [313] and are assured that their lawyers' personal judgments regarding the desirability of public disclosure will not prejudice their cases. [314] The rules of professional responsibility on this issue are clear -- the attorney's duty is to pursue the client's best interests zealously. [315] If doing so creates a personal conflict of interest, the attorney should refuse to take the case [316] or should secure the client's informed consent to the disclosure of any matter affecting public health or safety before the question of a protective order arises. [317]

VII. BALANCING THE COMPETING INTERESTS OF CONFIDENTIALITY AND PUBLIC ACCESS: A PROPOSAL FOR THE REFINEMENT OF CURRENT PRACTICE

No one doubts that a rational civil justice system should have a concern for public health and safety. It is also clear that, because there are benefits from discovery sharing, it should be allowed when sharing truly promotes fairness and efficiency. However, the civil justice system also must promote effective judicial management, efficiency in the resolution of disputes, and the preservation of confidentiality. Further, the system must not lose sight of the primary objectives **[*491]** of discovery: "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." [318] Thus, the national concern for public health and safety or the openness of our courts must be addressed in a way that does not substantially hinder the achievement of these other goals.

These varied and sometimes divergent policies can be served by our civil justice process, but only by trusting trial courts to exercise their traditional discretion guided by a careful analysis of the various competing interests. No one is advocating the automatic or cavalier issuance of protective or sealing orders, let alone that they be granted without regard for

substantially deleterious effects on public health and safety. But although disclosure of health and safety information is important, disclosure must be controlled, not indiscriminate. First, a neutral arbiter -- the judge and not the litigants -- must decide what information is to be revealed in the interest of public health and safety. Second, because a trial court has neither the time nor the expertise to examine carefully every claim of confidentiality that impairs legitimate and important public interests, [319] the process would be facilitated if, after a preliminary judicial determination that information should not be kept wholly confidential, disclosure were usually made to the appropriate governmental agency for further evaluation rather than to the public at large.

The most rational approach, therefore, is to try to accommodate the concerns raised by critics of protective orders without sacrificing the utility of protective orders themselves. Public health and safety can be promoted without resort to uncontrolled and potentially damaging public dissemination of information by the litigants. The benefits and harms of providing confidentiality or permitting disclosure can be balanced to achieve the most appropriate resolution of a particular conflict. The key, however, is retaining judicial discretion. If that discretion is constricted arbitrarily, the trial court's ability to meet the divergent goals of the pretrial process will be diminished.

Because proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained. It may be true that substituting a rule that creates a presumption of access for all information, or for enumerated predetermined classes of information, would result in somewhat more predictable outcomes. Unfortunately, the results would correlate only haphazardly to notions of fairness, which are inevitably a function of the particulars of a given case. Too many relevant factors demand consideration to reduce the question of whether to grant a protective order to a simple rule or one with arbitrary criteria for disclosure or nondisclosure.

[*492] Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. [320] By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of protective and sealing orders and the unnecessary denial of confidentiality for information that deserves it, whether or not the information falls within one of the classes for which confidentiality is traditionally sought. [321]

The existing procedural framework, however, must be applied with a heightened sense of the importance of the issues raised by both sides of the current debate. Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties. [322] Thus, they must look carefully at each case and tailor appropriate responses, which should take account of a kaleidoscope of factors, including the likely outcome on the merits, the value or importance of commercial or personal data, the identity of the parties and any apparent outside interests, the existence of any threat to health and safety, and the **[*493]** presence of a governmental agency with primary responsibility for the subject matter of the data. The burden imposed by carefully considering requests for protective orders is justified by the importance of the competing values at stake and is an effective way to conserve judicial resources. Because the current practice has become increasingly well-adapted to controlling discovery abuses, it can be expected to be more efficient in balancing the various interests than other alternatives.

By contrast, a regime that has a public access presumption and removes judicial discretion in shaping protective orders invites exploitation of the discovery process by those primarily

seeking to gather information rather than to adjudicate a dispute. Moreover, the proposed public access regime holds out pernicious incentives not only to the parties to the litigation, but also to any curious member of the general public. In addition, retaining judicial discretion only requires judges to undertake a task that is familiar and appropriate to them -- balancing the right of the private parties before them. Shifting to a presumption of public access would require judges to assume the extrajudicial task of factoring in the interests of third parties and the public, which in turn would necessitate that judges become experts in the countless subjects that come before them -- a task for which they are not necessarily equipped -- and that they reach a decision outside the confines of a fully adversarial dispute. [323]

Trial courts generally should require the parties to the case or third parties to submit specific, written showings of why access should be granted, and they should feel free to review the documents in camera. [324] Based on their careful review, courts should deny disclosure of information worthy of protection unless the party seeking it establishes relevance, demonstrates a true need for the information, and shows that this need outweighs the potential harm to the party opposing discovery. [325]

When the information is subject to discovery, the question then becomes whether terms and conditions should be imposed to minimize the damage public availability of the information might cause. In **[*494]** considering terms and conditions, courts should pay attention to the possible existence of any specific nonparty interests or the importance of public disclosure. It would be a mistake, however, to establish an elaborate public notice and intervention procedure -- let alone provide for appellate review -- each time a protective order is sought. [326] These procedures would delay and distract the litigation, increase the costs to the litigants, dissipate judicial energies, and in themselves would lead to a disclosure of some or all of the information. Instead, the court usually can rely on one of the parties to represent any outside interest or to notify those persons or institutions of the proceeding so that they may seek to intervene. Moreover, the media generally have their own methods for staying abreast of potentially newsworthy cases. [327] When these safeguards might not be effective, the court can use its discretion to require the parties to present any public health and safety concerns to the court or appoint a third person to do so.

When a party requesting protection has made a meritorious showing regarding the need for confidentiality but the judge nonetheless decides that the public interest in some of the information precludes completely sealing the records, the court should limit the information made available to that which is critical to the perceived public interest. Clearly, any confidential information unrelated to the potential harm, such as sensitive marketing or financial data, trade secrets, personal information, and a variety of other items, could and should be protected, even when it is appropriate to make some other portion of the information available to the public.

Even after the information is redacted and limited to that thought relevant to the public interest, the court must consider the proper mode of its disclosure. In most cases, release to an appropriate governmental agency or a limited number of people should suffice. [328] This solution places the information in the hands of those best situated to evaluate it and spares the judge from undertaking a detailed and time-consuming analysis to balance the likelihood of risk to the public against the harm to the disclosing party -- an evaluation a judge is often ill-equipped to conduct. [329] If appropriate, further dissemination **[*495]** by the litigants and the outside recipients of the data must be prohibited.

This technique for limiting access has been used in other contexts, as when the government

has a legitimate reason to intrude into the private affairs of its citizens, but the intrusion is limited to the particular persons and the purposes necessary to achieve the government's original objective. [330] Partial disclosure is also common practice in civil litigation when documents contain a mixture of information that falls both within and outside the work product doctrine. [331] Nevertheless, there may be instances when public dissemination is appropriate and no protective order should issue, although these occasions should be rare when the data is truly confidential. [332]

In addition, if confidential information is to be disclosed under a protective order, a court must define the terms of that release with precision. [333] The trial court should consider exactly who should have access to the data other than the discovering party's attorney, and for what purpose. The court must decide whether expert witnesses, support personnel, and other litigants and their attorneys are to have access. [334] Once again, the circumstances of the particular case should control. For example, when the litigation is between business competitors, **[*496]** the court must take seriously the claim that disclosing research and development information to the opposing party can have serious negative marketplace consequences. It is unrealistic to believe that even well-intentioned scientists and managers can purge their minds of an opponent's commercially valuable information once it is disclosed through discovery. In some cases, it may be necessary to limit distribution to the discovering party's attorneys -- perhaps even restricting it to outside counsel -- under carefully drawn conditions. In other cases, the discovery objectives can be achieved by using a neutral third party or master to screen the material. In another group of cases, disclosure to the opposing party will not have any special adverse consequences, and these types of precautions will be unnecessary.

As already indicated, [335] disclosure to experts poses special difficultites and risks. If experts are to be granted access, the terms and conditions should be defined with care, and the recipients should be brought under the court's control by having them sign a pledge to adhere to the order's limitations. The court also must consider whether photocopying or computerization is to be permitted and when and on what terms the original material and any copies are to be returned to the owner. [336] Anyone receiving the protected data should be made responsible for maintaining its confidentiality and for impressing that obligation on their employees. The court should be especially careful when materials belonging to nonparties are involved.

In addition to minimizing the risks to the disclosing party, courts must allocate their resources wisely. To avoid increasing the court's workload unnecessarily, a determination regarding the public's interest in discovery materials or settlement terms and any supervision of the release may be obviated if the information can be procured from an alternative source in substantially equivalent form. This requirement is analogous to the practice under Federal Rule 26(b)(3) and under similar rules in most states regarding the discoverability of work product. [337] If the information is otherwise available, grappling with the protective order issue and imposing a supervisory burden on the courts is not justified. [338]

[*497] Discovery sharing is a particularly interesting problem. It can take either of two forms: the discovering party seeks to share the fruits of its efforts with an outsider engaged in similar or related litigation, or an outsider tries to gain access to the fruits of discovery independent of the litigants' desires. Courts have not been consistent in their treatment of these situations; [339] the nature of the problem probably makes that inconsistency inevitable.

It is difficult, and indeed unwise, to have an absolute prohibition on discovery sharing, given the extraordinarily high cost of litigation and the reality that discovery accounts for the

largest component of that expense in many cases. Barring sharing smacks too much of requiring each litigant to reinvent the wheel, and not surprisingly it has been rejected on that basis by some courts. [340] As Judge Wisdom has put it, there "is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another." [341] But always permitting sharing would be a mistake as well. Once again, leaving the decision to permit or deny sharing in the judge's discretion seems the best course to follow.

Certainly, discovery sharing should not be left to the whims or private interests of individual parties. In analyzing a discovery sharing request, the court's central inquiry should be whether granting the request will actually promote litigation efficiency and fairness. Thus, the court should be particularly hesitant when the sharing seems motivated by a desire to commercialize the data by selling it to other **[*498]** attorneys rather than by a desire to promote litigation efficiency [342] or when the action itself was brought to gain access to discovery. [343] The judge should consider whether the benefits of making the material available in other lawsuits and the economies achieved when lawyers collaborate in preparing their cases outweigh the likelihood of increasing discovery disputes in the original lawsuit and the other deleterious consequences of dissemination. For example, when a single event has given rise to complex or multidistrict litigation, the adjudicatory system will often be well-served by allowing the pooling of discovery materials in all the suits, particularly when some have been consolidated for pretrial or all purposes. [344] The same occurs naturally when disputes are aggregated into a class action.

The problem is somewhat more difficult when the cases in which the protected data would be used are not fused with the one in which **[*499]** it is originally produced and the relationship is somewhat attenuated or when the cases are dispersed in multiple judicial systems. Still, a collaborative approach in handling related litigation of this type may be best. The court must scrutinize these situations with extreme care, and it should communicate with the judges in the other pending actions when that seems desirable. Of course, if confidential information is to be shared among litigants, they all should be subject to the court's restrictions on further dissemination or any other limitations it might initially have ordered. [345] Again, the participation of the judges handling the related cases would be desirable.

The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need. This requirement will maximize the likelihood that the sharing has a legitimate litigation purpose, that the actions have a relationship to each other so that some discovery economy actually will be achieved, and that the requester is subject to the authority of a court, which might prove valuable for sanctions purposes.

An important and related problem arises when parties seek access to material that was previously disclosed under a protective order. [346] Because that order presumably was issued to prevent harm to the litigants and to promote cooperation during discovery, the court should consider the overall effect of modifying or eliminating that protection. [347] The critical question is to what degree not giving continued effect to earlier protective orders will diminish their efficacy as a discovery management device. To the extent that the parties relied on the protective order when they freely disclosed information without **[*500]** further contesting the discovery requests, [348] subsequent dissemination would be unfair. [349] A graphic illustration of this injustice would be a party or witness who chooses to forego a plausible claim of privilege under the assurance that a protective order will shield the

communication from subsequent disclosure. [350] Conversely, compulsory disclosure of information to a governmental or public entity under circumstances that make it accessible to the public, a significant passage of time, or a change in other circumstances may undermine the credibility of any claim of reliance. Indeed, some of these events might vitiate the data's sensitivity to the point of assuring that its release will not cause any injury to the original parties. If the information implicates personal privacy, however, in certain circumstances the passage of time may strengthen the privacy interest and militate against modification of the protective order. [351]

Quite understandably, a court's reaction to a modification request should depend in part on the nature of the information and the type of modification that is sought. The protection of sensitive personal or commercial information should be continued. But if the material could improve the efficiency of handling other lawsuits without jeopardizing the rights of the parties to the protective order, modification may be appropriate.

Beyond unfairness to particular parties is the reality that, the more readily protective orders are destabilized, the less confidence litigants will have in them. If protective orders are not reliable, people will be more likely to contest discovery requests when private or commercially valuable data is involved. A protective order can be effective as a management tool and as a mechanism for preventing discovery abuse only if parties believe it is credible. If the parties know that the protective order can be abrogated easily, cooperation in discovery would be compromised and one significant incentive to settle would **[*501]** be reduced. Thus, unless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding. [352] The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them. [353]

VIII. CONCLUSION

When all of the elements in the confidentiality and public access debate are placed on the scales, the balance clearly favors retaining the essence of the present practice. Courts should continue to use their discretion to protect parties' legitimate litigation, privacy, and property interests, and the parties should retain their rights to negotiate protective and sealing agreements voluntarily, subject to judicial veto in the exceptional case. This practice seems wise, because it leaves our judges free to consider the public interest and to further it when circumstances so require. Moreover, on the whole, judges appear to have exercised this authority appropriately in the past, and there is no reason to believe that their performance will change, especially if they are encouraged to continue their current practices. Because the court is the only neutral participant in the litigation process, it seems appropriate to leave the decisionmaking process with it.

Further, no evidence has been presented that the current practice has created significant risks to public health or safety. At a minimum, therefore, before we rush sheeplike down the path chosen by Texas, Florida, and Virginia and create anything in the nature of a presumption of public access, we must evaluate carefully the public health and safety claims to determine whether a problem exists. Certainly, no evidence has emerged to date that comes close to justifying the fundamental changes in the process sought by those advocating them, especially when the negative effects of these changes would be **[*502]** felt in the vast majority of civil cases, which have nothing to do with public health or safety.

Despite protestations to the contrary, the existing system gives the public, including the

media, virtually unfettered access to the courts and court records. The presumption advocated by the current public access campaign undermines the greater judicial control necessary for discovery and pretrial reform, and it comes at a time when the need for treating certain types of litigation information confidentially never has been greater. It would be folly to allow undocumented claims to move our complex and integrated procedural systems in the wrong direction.

The current debate has been quite useful, however. It has called the attention of the bench and bar to the importance of the underlying issues [354] and has increased everyone's awareness of the importance of both confidentiality and public access. The controversy should counteract any existing tendencies by judges to issue protective and sealing orders perfunctorily or cavalierly. If that awareness is coupled with a judicial willingness to follow the procedural requirements proposed earlier for resolving clashes between confidentiality and disclosure, the debate will have served a valuable purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications Law > Cable Systems > Public Access

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > Public Access

Torts > Intentional Torts > Defamation > Defenses > Fair Comment & Opinion

FOOTNOTES:

n1 The longstanding prohibition of cameras in the courtroom is largely a thing of the past. Most states now permit cameras, the federal courts are experimenting with them, and as of July 1991, a cable channel, Court-TV, devotes the great bulk of its broadcast day to live coverage of trials from various courts around the country.

n2 *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978); United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989); *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1332-36 (D.C. Cir. 1985); Publicker Indus. v. Cohen, 733 F.2d 1059, 1066-67 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); All-Tone Communications, Inc. v. American Info. Technologies, No. 87-C2186, 1991 U.S. Dist. LEXIS 10096, at *6 (N.D. Ill. July 18, 1991).

n3 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1980) (plurality opinion) (arguing that public access to criminal trials is essential to maintain confidence in the justice system).

n4 *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

n5 *See* *In re Reporters Comm.*, 773 F.2d at 1333-36. A limited exception exists for court-

approved settlements, such as in class actions. *See* FED. R. CIV. P. 23(e); *infra* note 289 and accompanying text. The Judicial Council of California recently proposed that statutorily mandated proceedings before private judges be open to the public. *See* JUDICIAL COUNCIL OF CALIFORNIA, THE REPORT AND RECOMMENDATIONS OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON PRIVATE JUDGES 29-31 (1990).

n6 E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917) (Holmes J.).

n7 To date, legislation or court rules that modify existing law regarding protective and sealing orders, access to settlements, and confidentiality in general have been enacted in Florida, *see* Sunshine in Litigation Act, FLA. STAT. ch. 69.081 (1990), Texas, *see* TEX R. CIV. P. r. 76a, and Virginia, *see* VA. CODE ANN. § 8.01-420.01 (Michie (1991). Very similar legislation and rule changes have been introduced, but not yet enacted, in Arkansas, *see* S.B. 698, 78th Gen. Ass., Reg. Sess. 1991 (referred on March 21, 1991 to a joint interim judiciary committee for consideration between sessions), New Jersey, *see* A.B. 3794, A.B. 4110, 1991 Sess., Pennsylvania, *see* S.B. 656, H.B. 751, H.B. 752, 1991 Leg. Sess., and Wisconsin, *see* S.B. 212, 1991 Reg. Sess.

Efforts to change the law regarding court confidentiality thus far have failed in the federal system and in the states of Alabama, *see* H.B. 518, S.B. 204, S.B. 320, S.B. 328, 1991 Leg. Sess. (*all bills* died in committee), Alaska, *see* H.B. 171, 17th Leg., 1st Sess. 1991 (died in committee when the legislature adjourned on May 21, 1991, but will carry over to the next legislative session), California, *see* S.B. 711, 1991 Leg. Sess. (withdrawn from the Senate calendar by its sponsor on June 13, 1991, but will carry over to the next legislative year), Colorado, *see* H.B. 1060, 58th Gen. Ass., 1st Reg. Sess. 1991 (defeated in committee on February 18, 1991), Connecticut, *see* A.B. 7304, 1991 Leg. Sess. (defeated in committee on April 29, 1991), Hawaii, *see* H.B. 2019, 16th Leg., 1991 Leg. Sess. (withdrawn in the Senate on March 25, 1991, but will carry over to the next legislative session), Idaho (draft circulated but never introduced), Illinois, *see* H.B. 276, 87th Gen. Ass., 1991 Leg. Sess. (defeated in Senate committee on June 12, 1991); S.B. 245, 87th Gen. Ass., 1991 Leg. Sess. (not reported out of committee by the deadline of May 8, 1991), Iowa, *see* H. Stud. B. 294, 1991 Leg. Sess. (not reported out of committee by the deadline of March 22, 1991, but will carry over to the next legislative year), Kansas, *see* S.B. 104, 1991 Leg. Sess. (defeated in committee on February 18, 1991), Louisiana, *see* H.B. 301, Reg. Sess. 1991 (passed by the legislature on July 7, 1991, but vetoed by the governor on July 26, 1991), Massachusetts, *see* S.B. 778, 1991 Leg. Sess. (defeated in committee on May 15, 1991), Minnesota, *see* S.F. 1229, 1991 Leg. Sess. (withdrawn from committee agenda on April 11, 1991, but will carry over to the next legislative session); H.F. 1434, 1991 Leg. Sess. (had not been acted on when the legislature adjourned May 22, 1991, but will carry over to the next legislative session), Mississippi, *see* H.B. 87, 1991 Reg. Sess. (defeated in committee on February 5, 1991), Montana, *see* H.B. 473, 52nd Leg., 1991 Sess. (defeated in full House on February 26, 1991); Nevada, *see* S.B. 373, 66th Leg., 1991 Reg. Sess. (defeated in Senate on April 30, 1991); A.B. 769, A.B. 814, 66th Leg., 1991 Reg. Sess. (died in committee when the legislature adjourned June 30, 1991), New Hampshire, *see* S.B. 91, 1991 Leg. Sess. (defeated in the full House on April 30, 1991), New Mexico, *see* H.B. 875, 39th Leg., 2nd Sess. 1991 (defeated in the House Judiciary Committee on March 16, 1991), New York, *see* A.B. 8347, 214th Leg., 1991 Reg. Sess. (died in the Assembly Judiciary Committee upon adjournment on July 3, 1991, but will carry over to the next legislative year), Oregon, *see* S.B. 579, S.B. 580, 66th Leg. Ass., 1991 Reg. Sess. (died in the Senate Judiciary Committee when the legislature adjourned on June 30, 1991), Rhode Island, *see* H. 5987, Jan. Sess. 1991 (left in the Senate Judiciary Committee on May 28, 1991, but may carry over to the next legislative year); South Dakota, *see* H.B. 1252, 65th Sess., 1991 Leg.

Ass. (defeated in the House on February 19, 1991), Virginia, *see* H.B. 1205, 1991 Gen. Ass. Sess. (stricken from Court of Justice Committee's docket on February 2, 1991), and Washington, *see* H.B. 1320, 52d Leg., 1991 Reg. Sess. (died in the House Rules Committee on April 5, 1991).

In New York, a rule was adopted that required a showing of good cause prior to sealing court records, which is essentially a codification of existing practice. *See* Daniel Wise, *Court Rule Adopted On Sealing Records,* N.Y.L.J., Feb. 5, 1991, at 1. The rule does not affect discovery or the rule regarding protective orders. *See id.* at 3. In 1990-91, protective order legislation was introduced in 30 state legislatures but was rejected in 25 of them. Legislation was enacted in Louisiana but was vetoed by Governor Roemer. *See* Veto Message Regarding H.B. 310 from Governor Roemer to the Honorable Alfred Speer (July 26, 1991).

n8 *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978) (arguing that courts are best suited to the resolve private disputes between private litigants).

n9 *See, e.g.,* Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1313-16 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term -- Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 29 (1979). As applied to the present context, the argument is that, although the dispute is private, public resources are being expended and therefore everything related to the litigation should be disclosed. The position has a certain price-tag-of-admission flavor. It is rebutted in Richard L. Marcus, *The Discovery Confidentiality Controversy,* 1991 U. ILL. REV. 457, 470-73.

n10 I have been extremely supportive of these developments over the years. *See, e.g.,* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979) (defending Rule 23). Currently I am serving as the Reporter to the American Law Institute Project on Complex Litigation, which has been developing procedures to expand transfer and consolidation to maximize the efficiency of the courts in handling a wide array of complex cases.

n11 A good survey of the federal case law can be found in Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?,* 31 B.C. L. REV. 771, 775-85 (1990). For a review of the law and underlying policy considerations governing confidentiality orders, see FRANCIS H. HARE, JR., JAMES L. GILBERT & WILLIAM H. REMINE, CONFIDENTIALITY ORDERS (1988).

n12 *See* HARE, GILBERT & REMINE, *supra* note 11, & 7.17, at 238.

n13 FED. R. CIV. P. 26(c)(7).

n14 *See, e.g.,* Harris v. Amoco Prod. Co., 768 F.2d 669, 683-84 (5th Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986); Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694, at *3 (N.D. Ind. Aug. 6, 1991); Ohm Resource Recovery Corp. v. Industrial Fuels & Resources Inc., No. S90-511, 1991 U.S. Dist. LEXIS 10297, at *12 (N.D. Ind. July 24, 1991); *see also* HARE, GILBERT & REMINE, *supra* note 11, § 6.1, at 114-17 (describing the basis upon which a good cause determination is made); 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2035, at 264-65 (1970) ("[T]he rule requires that good cause be shown for a protective order."). Some have suggested that protective orders be limited to trade secrets. *See* HARE, GILBERT & REMINE, *supra* note 11, § 6.1, at 115. The position seems to be rejected by the very language of

rules such as Rule 26(c)(7), by the decided cases, and by sound policy. *See generally* Marcus, *supra* note 9, at 488-93 (discussing the standards for issuing a protective order).

n15 *See, e.g.*, Smith v. BIC Corp., 869 F.2d 194, 201 (3d Cir. 1989); Cipollone v. Liggett Group, Inc., 822 F.2d 335, 343 (3d Cir.), *cert. denied,* 484 U.S. 976 (1987); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied,* 414 U.S. (1974); *Ohm Resource,* 1991 U.S. Dist. LEXIS 10297, at *12; Nestle Foods Corp. v. Aetna Casualty & Surety Co., 129 F.R.D. 483, 484 (D.N.J. 1990).

n16 *See, e.g.*, American Standard Inc. v. Pfizer Inc., 828 F.2d 734, 741 (Fed. Cir. 1987); Centurion Indus. v. Warren Steurer, 665 F.2d 323, 325 (10th Cir. 1981); Hartley Pen Co. v. United States Dist. Court, 287 F.2d 324, 331 (9th Cir. 1961); 4 JAMES WM. MOORE, JO D. LUCAS & GEORGE J. GROTHER, JR., MOORE'S FEDERAL PRACTICE P 26.60[4], at 26-211 (2d ed. 1991); 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 301-02.

n17 *See, e.g., American Standard,* 828 F.2d at 743; *Centurion,* 665 F.2d at 325; *Hartley Pen,* 287 F.2d at 331.

n18 It is worth noting that one cannot assume the relevance of the material sought in confidentiality disputes, as one can in general discovery requests. At a minimum, courts have stated that the standards of Rule 26(b)(1) should be applied strictly in this context. *See, e.g., American Standard,* 828 F.2d at 741, 743; *Centurion,* 665 F.2d at 325; *Hartley Pen,* 287 F.2d at 331. A number of courts have insisted that the party seeking discovery of confidential information must satisfy an even higher standard; mere relevance to the subject matter of the action is not enough. For example, in addressing a request for discovery of trade secret material, the court in Duplan Corp. v. Deering Milliken Inc., 397 F. Supp. 1146 (D.S.C. 1975), explained that this higher standard requires parties to make a clear showing that the trade secret information is relevant to the issues involved in the litigation:

Once the [trade secret] privilege is asserted by the owner, the party *seeking* discovery must make a clear showing that the documents are relevant to the *issues involved in this litigation.* In doubtful situations, production will *not* be ordered. The court is aware that this standard is higher than the hurdle for discovery of unprivileged but relevant documents but this court considers such a higher standard necessary in order to guard against the possible use of doubtfully relevant trade secrets by the opposing parties for their own business ends. *Id.* at 1185 (emphasis in original).

Similarly, the Federal Circuit held in *American Standard* that the party seeking discovery of confidential sales data to help prove the commercial success of a patented invention (evidence of nonobviousness) must show "some relationship between the claimed invention and the information sought." 828 F.2d at 742. Based on its application of Rule 26(b)(1), the court required the party seeking discovery to show that the information sought would be admissible on the issue of nonobviousness of the patented invention. Comparably high standards of relevance also have been imposed by other courts as a prerequisite to discovery of trade secret material. *See, e.g.,* Eutectic Corp. v. Co-Ordinated Indus., 183 U.S.P.Q. (BNA) 751, 752 (W.D. Pa. 1974); International Nickel Co. v. Ford Motor Co., 15 F.R.D. 357, 358 (S.D.N.Y 1954); Wagner Mfg. Co. v. Cutler-Hammer, Inc., 10 F.R.D. 480, 485 (S.D. Ohio 1950).

n19 *See, e.g.,* Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 559 (7th Cir. 1984); *Centurion,* 665 F.2d at 325; Empire of Carolina, Inc. v. Mackle, 108 F.R.D. 323, 326 (S.D. Fla. 1985); Cleo Wrap Corp. v. Elsner Eng'g Works, Inc., 59 F.R.D. 386, 388 (M.D. Pa.

1972); De Long Corp. v. Lucas, 138 F. Supp. 805, 808 (S.D.N.Y. 1956).

n20 *See, e.g., Empire of Carolina,* 108 F.R.D. at 327 (denying a motion to compel production because the materials sought were "at best of limited relevance" and their disclosure "presented . . . the spectre of catastrophic harm"); *Cleo Wrap,* 59 F.R.D. at 388 (denying discovery of a pending patent application because "the defendant's interest in keeping its application secret" outweighed "[w]hatever slight value the patent application may have to the plaintiff"); *De Long,* 138 F. Supp. at 808-09; *see also* Litton Indus. v. Chesapeake & Ohio Ry., 129 F.R.D. 528, 530-31 (E.D. Wis. 1990) (quashing the discovery subpoenas of relevant confidential information from nonparties).

n21 FED. R. CIV. P. 26(c)(7).

n22 *See In re* Knoxville News-Sentinel Co., 723 F.2d 470, 474 (6th Cir. 1983) (finding the district court's decision to seal a portion of the record to be discretionary and subject to appellate review for abuse).

n23 *See, e.g.,* Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 598 (1st Cir. 1980); *see also* 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 305-07 (listing examples of specially tailored protective orders). The classic statement is by Justice Holmes: "It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made." E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917).

n24 *See, e.g.,* Brown & Williamson Tobacco Co. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984); Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694, at *11 (N.D. Ind. Aug. 6, 1991); Smith v. BIC Corp., 121 F.R.D. 235, 242-43 (E.D. Pa. 1988). *But see* Cipollone v. Liggett Group, Inc., 106 F.R.D. 573, 577 (D.N.J. 1985) (holding that a protective order may be justified simply because discovery material is embarrassing and incriminating), *rev'd on other grounds,* 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied,* 479 U.S. 1043 (1987).

n25 *See, e.g., Wauchop,* 1991 U.S. Dist. LEXIS 11694, at *10; Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Patterson v. Ford Motor Co., 85 F.R.D. 152, 154 (W.D. Tex. 1980).

n26 *See, e.g.,* Paul D. Rheingold, *The MER/29 Story -- An Instance of Successful Mass Disaster Litigation,* 56 CAL. L. REV. 116, 127-30 (1968) (describing extensive discovery sharing among plaintiffs in related products liability cases). This interest is strong enough to have fostered the development of a discovered materials market, although the sale of these materials has had a mixed reception in the courts. *Compare In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482, 485 (E.D. Mich. 1979) (approving the sale of discovered materials under court supervision), *aff'd,* 664 F.2d 114 (6th Cir. 1981) *with* Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 630, 631 (8th Cir. 1984) (holding plaintiff's attorney in contempt for violating the district court's protective order by selling discovered information to plaintiffs in other toxic shock syndrome cases while the initial case was on appeal).

n27 *See* Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?,* 24 U. RICH. L. REV. 109, 118 (1990).

n28 *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975) ("[M]any

important social issues become entangled to some degree in civil litigation. . . . [Litigation] often exposes the need for governmental action or correction. Such revelations should not be kept from the public."), *cert. denied,* 427 U.S. 912 (1976); Philippines v. Westinghouse Elec. Corp., No. 88-5150, 1991 U.S. Dist. LEXIS 14978, at *1 (D.N.J. Oct. 18, 1991).

n29 *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 COLUM. L. REV. 669, 681 & n.36 (1986); Recent Case, 103 HARV. L. REV. 1187, 1191 n.32 (1990) (noting that some lawyers act as "'bounty hunters' who search for legal violations and then find a client on whose behalf to bring the suit").

n30 *Compare, e.g.,* Scott v. Monsanto Co., 868 F.2d 786, 792 (5th Cir. 1989) (holding that the entry of a protective order restricting plaintiff's use of materials to the present litigation was not an abuse of discretion despite plaintiff's inability to share and compare information with plaintiffs in other products liability cases) *with* Allen v. G.D. Searle & Co., 122 F.R.D. 580, 582-83 (D. Ore. 1988) (holding that the manufacturer of the CU-67 contraceptive was not entitled to a protective order prohibiting plaintiff from disclosing or disseminating the title pages of depositions in other CU-67 lawsuits against the manufacturer that covered issues directly related to plaintiff's case).

n31 The current legislative and rule-changing efforts are listed above in note 7.

n32 467 U.S. 20 (1984).

n33 *See, e.g., In re* Halkin, 598 F.2d 176, 183-86 (D.C. Cir. 1979); Michael Dore, *Confidentiality Orders -- The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-trial Discovery Process,* 14 NEW ENG. L. REV. 1, 10-14 (1978); Note, *Access to Pretrial Documents Under the First Amendment,* 84 COLUM. L. REV. 1813, 1829-33 (1984); Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause,* 1980 DUKE L.J. 766. Some courts rejected the application of First Amendment principles. *See, e.g.,* International Prods. Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963). An extensive discussion of the subject written immediately before the decision in *Seattle Times* appears in Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1025-29 (D.C. Cir. 1984).

n34 *See In re Halkin,* 598 F.2d at 191, 193-96; *see also* United States v. Exxon Corp., 94 F.R.D. 250, 251 (D.D.C. 1981) (accepting the *Halkin* standard when a protective order restricts expression).

n35 Dore, *supra* note 33, at 13.

n36 *See* 467 U.S. 20, 22 (1984) ("This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process.").

n37 *Id.* at 27.

n38 *See* Rhinehart v. Seattle Times Co., 654 P.2d 673, 691 (Wash. 1982), *aff'd,* 467 U.S. 20 (1984).

n39 *Seattle Times,* 467 U.S. at 33.

n40 *See id.* at 34; *see also In re* San Juan Star Co., 662 F.2d 108, 118-19 (1st Cir. 1981)

(finding that documents obtained independent of the court process are not subject to Rule 26); Butterworth v. Smith, 110 S. Ct. 1376, 1381 (1990) (prohibiting the state from silencing a grand jury witness with regard to his testimony and to information he had prior to testifying).

n41 *See* *Seattle Times*, 467 U.S. at 32.

n42 *Id.*

n43 *See* *id.* at 34 ("Rule 26 . . . must be viewed in its entirety.").

n44 *See* *id.* at 35.

n45 *See* *id.* at 35-36.

n46 *Id.* at 36.

n47 *See* *id.* at 36 n.23.

n48 *Id.* at 36.

n49 *See* Katherine W. Pownell, *The First Amendment and Pretrial Discovery Hearings: When Should the Public and Press Have Access?*, 36 UCLA L. REV. 609, 622 (1989).

n50 *See, e.g.,* *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308-10 (7th Cir. 1984) (noting that the presumption in favor of public access is of constitutional strength); *cf.* Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177-81 (6th Cir. 1983) (recognizing a public right of access to administrative proceedings).

n51 *See, e.g.,* Note, *Rule 26(c) Protective Orders: First Amendment Scrutiny and the Good Cause Standard,* 21 SUFFOLK U. L. REV. 909, 915 (1987).

n52 *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-81 (1980); *see also* *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1334 (D.C. Cir. 1985) (discussing Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978)).

n53 *Press-Enterprise*, 478 U.S. at 8; *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (arguing that the tradition of public access to criminal trials is a factor in the decision to uphold a First Amendment right to that access).

n54 *Press-Enterprise*, 478 U.S. at 8.

n55 Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

n56 *See* Katie Eccles, Note, *The* Agent Orange *Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery,* 42 STAN. L. REV. 1577, 1614-19 (1990).

n57 *See id.; cf.* *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987) ("[T]he press and public jointly possess a common-law right to inspect and copy judicial records and public documents . . . [but] private documents collected during discovery are not 'judicial records.'" (citations omitted)); Oklahoma Hosp. Ass'n v. Oklahoma Publishing

Co., 748 F.2d 1421, 1425 (10th Cir. 1984) (holding that a news agency had no standing to challenge a protective order, in part because the public has no right of access to information produced during pretrial discovery); Mokhiber v. Davis, 537 A.2d 1100, 1110 (D.C. 1988) ("Public access to discovery materials . . . would focus attention not at all on the courts, but solely on the presumptively private affairs of the parties."); Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.) (holding that no right of access to pretrial documents exists because knowledge of them "throws no light upon the administration of justice. Both form and contents depend wholly upon the will of a private individual. . . .").

n58 The cases are in some disarray. Access generally is granted when the material is used in a summary judgment motion. *See, e.g.,* Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1316 (7th Cir. 1984); *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 905-08 (E.D. Pa. 1981) (allowing access to pretrial exhibits used in connection with proceedings open to the public). *But see In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1330-40 (D.C. Cir. 1985) (deciding that the withholding of summary judgment documents until the end of the case did not violate the First Amendment). Access has been denied with regard to materials on nondispositive motions in some cases, *see* Anderson v. Cryovac, Inc., 805 F.2d 1, 13-14 (1st Cir. 1986), and granted in others, *see In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 44 (C.D. Cal. 1984); Mokhiber v. Davis, 537 A.2d 1100, 1117 (D.C. 1988) (remanding to allow a reporter's intervention to determine if the public interest in disclosure is greater than the parties' interest in **secrecy)**. Access has been allowed to discovery materials filed with the court. *See In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 145-48 (2d Cir.), *cert. denied,* 484 U.S. 953 (1987); *see also* Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 789-92 (1st Cir. 1988) (allowing the modification of a protective order to grant a public interest group access to discovery documents), *cert. denied,* 488 U.S. 1030 (1989).

n59 381 U.S. 1 (1965).

n60 *Id.* at 17.

n61 *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984).

n62 *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 594-98 (1978).

n63 Anne E. Cohen, Note, *Access to Pretrial Documents Under the First Amendment,* 84 COLUM. L. REV. 1813, 1833 (1984).

n64 *See Seattle Times,* 467 U.S. at 34 ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.").

n65 *See id.* at 36 n.23.

n66 *Id.* at 34. The Court had earlier stated in Herbert v. Lando, 441 U.S. 153 (1979):

There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse.
Id. at 176-77.

n67 *See, e.g.,* HARE, GILBERT & REMINE, *supra* note 11 (suggesting arguments and

approaches that plaintiffs' attorneys can take to counter defendants' confidentiality requests). Several commentators, however, have resisted the pressure and objected to restrictions on protective orders. Important articles in this regard are Campbell, *supra* note 11; Marcus, *supra* note 9; and Richard L. Marcus, *Myth and Reality in Protective Order Litigation,* 69 CORNELL L. REV. 1 (1983).

n68 Board of Governors, Ass'n of Trial Lawyers of Am., Resolution on Protective Orders (May 6, 1989); *see also* Marcus, *supra* note 9, at 463 ("The most vigorous attacks on . . . protective orders come from plaintiff lawyers.").

n69 *See, e.g.,* Russ Herman, *No More Dirty Secrets in the Courts,* ATLA ADVOCATE, Oct. 1989, at 4. *But see* John F. Rooney, *Issue of Sealed Files,* ***Secrecy*** *in the Courts Won't Be Swept Under the Rug,* CHI. DAILY L. BULL., Apr. 20, 1991, at 1 (reporting that judges feel that comparatively few sealing orders are issued).

n70 *See, e.g.,* Sunshine in Litigation Act, FLA. STAT. ANN. § 69.089 (West Supp. 1991) (prohibiting courts from concealing "public hazards").

n71 *See generally* Paul M. Barrett, *Protective Orders Come Under Attack: Plaintiffs Get Judges to Open Court Files,* WALL ST. J., Aug. 31, 1988, at 27 (describing the current controversy over blanket protective orders); Gail D. Cox, *Sunshine in San Diego for ATLA,* NAT'L L.J., July 30, 1989, at 3, 29 (discussing ATLA's plans to discuss "court **secrecy**" at their upcoming national convention).

n72 *Cf.* Marcus, *supra* note 9, at 478-79 (discussing the interests of the press in the protective order debate).

n73 *See* TEX. GOV'T CODE ANN. § 22.010 (West Supp. 1991) (directing the Supreme Court of Texas to adopt rules establishing guidelines regarding the sealing of court records).

n74 *See* Chuck Herring, *Sealing Court Records: Unanswered Questions and Unsolved Problems,* TEX. LAW., May 21, 1990, at 24.

n75 TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991). The rule also provides for a hearing, for public notice of the sealing motion indicating that anyone may intervene and be heard, and for an opinion stating the reasons for the sealing. *See id. See generally* Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging* ***Secrecy*** *in the Public Interest,* 69 TEX. L. REV. 643, 643-89 (1991) (discussing the history and purpose of Texas Rule of Civil Procedure 76a).

n76 FLA. STAT. ANN. § 69.081 (West Supp. 1991). The statute defines "public hazards" to include literally anything, including a person or a condition of a person, "that has caused and is likely to cause injury." *Id.* § 69.081(2); *see also infra* note 198 (noting the implications of this definition).

n77 *See* Joint Legis. Mgmt. Comm., Fla. Legislature: Final Legislative Bill Information, S. 278 Legis. Hist., 1990 Reg. Sess. One local attorney to whom I spoke attributed this swift success tongue-in-cheek to the Florida legislature's decided preference for any bill that has the word "sunshine" in the title.

n78 *See* Letter from Raymond Booth to Members of the Subcomm. on Sunshine in Litigation Act (Dec. 10, 1990) (on file at the Harvard Law School Library).

n79 *See* Letter from J. Richard Caldwell, Esq., state legislator, to Alfred W. Cortese, Jr., Esq., lobbyist (Mar. 18, 1991) (on file at the Harvard Law School Library).

n80 *See* VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1991) (limiting further disclosure of discoverable materials and information). The Virginia statute only deals with the sharing of discovery materials that are subject to a protective order with attorneys in similar or related matters. *See generally* Morrison, *supra* note 27, at 122-23 (discussing the ambiguities of the Virginia information sharing bill).

n81 Many of the current legislative and rulemaking proposals are cited above in note 7.

n82 *See* Daniel Wise, *Court Rules Adopted on Sealing Records,* N.Y.L.J., Feb. 5, 1991, at 1.

n83 *See* Gary Spencer, *State Bar Votes to Oppose Court Rule on Sealing Files,* N.Y.L.J., Jan. 28, 1991, at 1. The Judiciary Committees of the New York State Senate and Assembly held joint hearings on the subject on May 7, 1991. It is not clear whether further legislative activity is planned.

The new New York rule provides:

Sealing of Court Records.

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).
N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1 (1991).

In the first two reported cases under the New York rule, the courts found good cause to seal financial information in actions for accountings of law firm profits. *See* Dawson v. White & Case, N.Y.L.J., Apr. 25, 1991, at 26 (N.Y. Sup. Ct. Apr. 24, 1991); Feffer v. Goodkind, Wechsler, Labaton & Rudolph, N.Y.L.J., Feb. 19, 1991, at 25 (N.Y. Sup. Ct. Feb. 15, 1991).

n84 *See* Veto Message from Governor DiPrete to the Speaker of the House of Representatives Regarding H.B. 8522 (July 11, 1990). Another proposal, *see* H. 5987, Jan. Sess. 1991, was defeated in committee on June 16, 1991, but it will carry over to the next legislative year.

n85 *See* Veto Message Regarding H.B. 301 From Governor Roemer to the Honorable Alfred Speer (July 26, 1991).

n86 *See, e.g.,* David Heckelman, *Bills to Modify Repose, Restrict Protective Orders May Be Revived,* CHI. DAILY L. BULL., Aug. 6, 1991, at 3; *see also supra* note 7 (listing the status of legislation in each state).

n87 *See* Heckelman, *supra* note 86, at 3.

n88 *See id.*

n89 *See* Heckelman, *supra* note 86; *see also supra* note 7.

n90 *See Court* ***Secrecy:*** *Hearing Before the Subcomm. on Courts & Administrative Practice of the Senate Comm. on the Judiciary,* 101st Cong., 2d Sess. (1990). A year earlier, a bill was introduced in the House that was designed to restrict the use of protective orders in products liability cases. *See* H.R. 129, 101st Cong., 1st Sess. (1989), *listed in* 135 CONG. REC. H49 (daily ed. Jan. 4, 1989). The bill was not reported out of committee.

n91 *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, REPORT: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 19 (1991). The same conclusion had been reached a year earlier by the Federal Courts Study Committee appointed by the Chief Justice. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 102-03, 176 (1990).

n92 8 WRIGHT & MILLER, *supra* note 14, § 2001, at 16; *see also* Hickman v. Taylor, 329 U.S. 495, 505 (1947) (noting that "[t]he deposition-discovery rules create integrated procedural devices").

n93 No definition or concept of "abuse" commands universal acceptance. Because it largely lies in the eye of the beholder, abuse is occasionally referred to as what a lawyer finds an opponent doing to him. *See, e.g.,* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 31 (1984). The absence of an accepted definition means that, despite years of heated debate, discovery abuse has yet to be quantified. "Abuse" is used in this article to refer collectively to all forms of activity, whatever the motivation, that represent a use of the system that does not serve a legitimate discovery function.

n94 *See* James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I,* 38 COLUM. L. REV. 179, 1186-98 (1938) [hereinafter Pike & Willis (pt. 1)]; James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: II,* 38 COLUM. L. REV. 1436, 1436-43 (1938) [hereinafter Pike & Willis (pt. 2)]. *See generally* 8 WRIGHT & MILLER, *supra* note 14, § 2002, at 21-22 (describing the history of the Federal Rules discovery provisions).

n95 *See* Eccles, *supra* note 56, at 1597-98; Pike & Willis (pt. 1), *supra* note 94, at 1187-88; Pike & Willis (pt. 2), *supra* note 94, at 1444.

n96 *See* Marcus, *supra* note 67, at 6-7 (1983).

n97 *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure,* 137 U. PA. L. REV. 2237, 2242-43 (1989) (arguing that the fundamental source of discontent regarding federal discovery is the sense that one's privacy has been violated when documents that were expected to remain confidential must be produced).

n98 With the exception of physical examinations under Federal Rule 35, all of the discovery devices are still invoked by a simple party-initiated notice, rather than by motion and court order. *See, e.g.,* FED. R. CIV. P. 30(b).

n99 *See* PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY 14- 15 (1978) (citing COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES (1951), *reprinted in* Leon R. Yankwich, *"Short Cuts" in Long Cases: A Commentary on the Report Entitled Procedure in Anti-Trust and Other Protracted Cases,* 13 F.R.D. 41, 62 (1953)).

n100 *See id.* at 15.

n101 *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3861, at 498-99 (2d ed. 1986).

n102 Extensive examinations of this litigation are found in CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES -- THE TREBLE DAMAGE ACTIONS (1973); and Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration,* 50 A.B.A.J. 621 (1964). Congressional reaction to the electrical equipment cases can be seen in H.R. REP. No. 1130, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 898. A description of their impact on the Federal Rules is found in 15 WRIGHT, MILLER & COOPER, *supra* note 101, § 3861, at 324-25.

n103 *See* H.R. REP. NO. 1130, *supra* note 102, at 1-2, *reprinted in* 1968 U.S.C.C.A.N. at 1898-99.

n104 *See id.*

n105 *See id.*

n106 *See* 15 WRIGHT, MILLER & COOPER, *supra* note 101, § 3861, at 324.

n107 *See, e.g.,* MANUAL FOR COMPLEX LITIGATION XX (1977) ("This Manual is designed . . . to stimulate the devising of procedures appropriate in solving new problems as they arise. It is intended to be a living document into which desirable techniques proved by experience will be incorporated in the future.").

n108 *See generally* 15 WRIGHT, MILLER & COOPER, *supra* note 101, §§ 3861-67, at 320-85 (discussing the history, development, and procedures of multidistrict litigation).

n109 MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (1963). The manual superseded the *Judicial Conference of the United States' Handbook of Recommended Procedures for the Trial of Protracted Cases,* 25 F.R.D. 351 (1960). *See* CONNOLLY, HOLLEMAN & KUHLMAN, *supra* note 99, at 15.

n110 MANUAL FOR COMPLEX LITIGATION (1977).

n111 MANUAL FOR COMPLEX LITIGATION (2d ed. 1985).

n112 CONNOLLY, HOLLEMAN & KUHLMAN, *supra* note 99, at 15. A similar emphasis is found in the National College of the State Judiciary programs for trial judges. *See* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation,* 53 U. CHI. L. REV. 440, 440 n.2 (1986).

n113 Pub. L. No. 101-650, 104 Stat. 5089 (to be codified at 28 U.S.C. §§ 471-482).

n114 The act requires each federal district court to implement a "civil justice expense and delay reduction plan" within three years of the act's enactment. *Id.* § 103(b), 104 Stat. at 5096. Certain "early implementation" districts will have their plans in place before the end of 1991.

n115 *Id.* § 463(a)(1), 104 Stat. at 5091.

n116 Protective orders originally were available only with regard to depositions under Rule 30(b) and depositions on written questions under Rule 31(d). In 1948, Rules 33 and 34 were amended to allow protective orders to be issued for requests for written interrogatories and requests for admissions. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2035, at 260-61.

n117 FED. R. CIV. P. 26(c) advisory committee's note (1970), *reprinted in* Judicial Conference of the United States, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery,* 48 F.R.D. 485, 505 (1970) [hereinafter *1970 Amendments.* For examples of the pre-existing law, see Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965); and Julius M. Ames Co. v. Bostitch, Inc., 235 F. Supp. 856, 857 (S.D.N.Y. 1964).

n118 FED. R. CIV. P. 26(c)(7).

n119 *See* Chemical & Indus. Corp. v. Druffel, 301 F.2d 126, 129 (6th Cir. 1962) ("Under the rules, the extent of discovery and the use of protective orders is clearly within the discretion of the trial judge."); Allen v. First Nat'l Bank, 169 F.2d 221, 224 (5th Cir. 1948); Times Newspapers, Ltd. v. McDonnell Douglas Corp., 387 F. Supp. 189, 196 (C.D. Cal. 1974); 8 WRIGHT & MILLER, *supra* note 14, § 2036, at 267-68.

n120 8 WRIGHT & MILLER, *supra* note 14, § 2281, at 311 (Supp. 1991).

n121 FED. R. CIV. P. 37 advisory committee's note (1970), *reprinted in 1970 Amendments, supra* note 117, at 538.

n122 FED. R. CIV. P. 37(a)(3); *see also* FED. R. CIV. P. 37(a)(3) advisory committee's note (1970) (explaining the change), *reprinted in 1970 Amendments, supra* note 117, at 539.

n123 FED. R. CIV. P. 37(a)(4) advisory committee's note (1970), *reprinted in 1970 Amendments, supra* note 117, at 539.

n124 FED. R. CIV. P. 37(d) advisory committee's note (1970), *reprinted in 1970 Amendments, supra* note 117, at 541.

n125 FED. R. CIV. P. 37(d) (authorizing sanctions for failure to attend a deposition, answer interrogatories, or respond to an inspection request). Rule 37(b)(2)(E) also was amended to allow the awarding of expenses and fees for failure to comply with an order for examination under Rule 35(a). *See* FED. R. CIV. P. 37(b) advisory committee's note (1970), *reprinted in 1970 Amendments, supra* note 17, at 540.

n126 FED. R. CIV. P. 26(d) advisory committee's note (1970), *reprinted in 1970 Amendments, supra* note 117, at 506; *see also* 8 WRIGHT & MILLER, *supra* note 14, § 2046, at 1315 (discussing the 1970 amendment's elimination of the priority rule).

n127 Thus, for example, the broad scope of discovery that Rule 26(b) previously had given to depositions, and that had been applied to other devices in piecemeal fashion by the courts and various amendments to the Federal Rules, was applied expressly to all discovery devices. In practice, most courts had already applied the broad scope of Rule 26(b) to other discovery devices. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2007, at 36-37. This practice was partially codified in 1948 when Rule 33, on interrogatories to parties, and Rule 34, on production of documents, were amended to incorporate the broad discovery scope of Rule 26(b) by reference. *See id.*

n128 FED. R. CIV. P. advisory committee's explanatory statement concerning amendments of the discovery rules (1970), *reprinted in 1970 Amendments, supra* note 117, at 490; *see also* 8 WRIGHT & MILLER, *supra* note 14, § 2003, at 22-24 (discussing the 1970 rearrangement of the discovery rules).

n129 Indeed, the addition of the discovery conference to Rule 26 in the 1980 amendments, discussed below, was facilitated conceptually by the consolidation of the basic discovery principles into one rule in 1970. It was not until 1980 that provision for a specific conference on discovery was instituted, *see* FED. R. CIV. P. 26(f), and not until 1983 that the scope and nature of the pretrial conference provided for in Rule 16 was expanded and clarified. However, despite the limited language of the original Rule 16, many courts had been using the pretrial conference as a means of managing and limiting discovery. *See* 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1528, at 293 n.1 (2d ed. 1990); *see also* Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966) (calling an inquiry into the complexity of the issues and the time reasonably required to complete discovery "appropriate in a pretrial hearing"); Goldberg v. Ann-Vien, Inc., 29 F.R.D. 6, 7 (N.D. Ga. 1961) ("Some Federal Courts, for many years, have made it a practice of using the pretrial conference as a method for shortening the process of discovery."); New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp., 20 F.R.D. 36, 37 (S.D.N.Y. 1955) ("A proper use of pretrial procedure should make it possible to restrict and limit interrogatories and depositions to matters which are directly relevant to the amended complaint and the answers.").

n130 *See Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice,* 70 F.R.D. 79 (1976). The Pound Conference was held in St. Paul, Minnesota on April 7-9, 1976, and was sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association. Its popular name derives from an address on the same topic given by Roscoe Pound in 1906. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 29 A.B.A. REP. 395 (1906), *reprinted in* 35 F.R.D. 241, 273 (1964).

n131 Warren E. Burger, *Agenda for 2000 A.D. -- A Need for Systematic Anticipation,* 70 F.R.D. 83, 95-96 (1976).

n132 Simon H. Rifkind, *Are We Asking Too Much of Our Courts?,* 70 F.R.D. 96, 107 (1976).

n133 *Id.; see also* Francis R. Kirkham, *Complex Civil Litigation -- Have Good Intentions Gone Awry?,* 70 F.R.D. 199, 202-04 (1976) (arguing that "discovery knows no bounds" in complex litigation and that one result is "a massive unequalled invasion of privacy and business records").

n134 Burger, *supra* note 131, at 93.

n135 Griffin B. Bell, *The Pound Conference Follow-Up: A Response from the United States Department of Justice,* 76 F.R.D. 320, 328 (1978). Attorney General Bell also wrote, in a letter to Judge Roszel C. Thomsen, who was chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States: "It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad. . . ." Letter from Attorney General Griffin Bell to Judge Roszel C. Thomsen (June 27, 1978), *quoted in* ACF Indus. v. EEOC, 439 U.S. 1081, 1087 (1979) (Powell, J., dissenting from denial of certiorari).

n136 *See, e.g.,* CONNOLLY, HOLLEMAN & KUHLMAN, *supra* note 99, at 77 ("The benefits that can flow from judicial control of discovery time can be fully realized only through a comprehensive case management system governing every stage of the litigation process."); STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS, 25-29, 35-37 (1977); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 VAND. L. REV. 1295, 1348-61 (1978); NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979), *reprinted in* 80 F.R.D. 509, 525 (1979) ("Virtually all our recommendations for expediting potentially protracted cases require strong judicial control.").

n137 William J. Manning, *Report to the Bench and Bar, Preface* to AMERICAN BAR ASS'N, REPORT OF THE SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE (1977), *reprinted in* 92 F.R.D. 149, 151 (1981).

n138 *See id;* AMERICAN BAR ASS'N, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE (1976), *reprinted in* 74 F.R.D. 159 (1976).

n139 AMERICAN BAR ASS'N, *supra* note 138, *reprinted in* 74 F.R.D. at 192.

n140 *Id.*

n141 AMERICAN BAR ASS'N, *supra* note 137, *reprinted in* 92 F.R.D. at 157.

n142 *See id., reprinted in* 92 F.R.D. at 159-62. This proposed amendment to Rule 26 included a provision for the imposition of sanctions for failure to cooperate in the framing of a discovery plan. *See id., reprinted in* 92 F.R.D. at 159.

n143 *Id., reprinted in* 92 F.R.D. at 179. For general discussions of the Committee Report, see William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century,* 76 F.R.D. 277, 288-94 (1978); and Bell, *supra* note 135, at 328-29.

n144 *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure,* 77 F.R.D. 613 (1978); *id.* at 626 (advisory committee note); 8 WRIGHT & MILLER, *supra* note 14, § 2002, at 21-22.

n145 *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure,* 80 F.R.D. 323 (1979); *see also infra* pp. 456-57 (discussing the 1980 amendments). For criticisms of the ABA report and the Advisory Committee proposals, see

William H. Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition,* 78 F.R.D. 267, 267 (1978); and Charles Alan Wright, *DICTA: New Civil Discovery Rules -- "No" Vote,* VA. LAW WEEKLY, Oct. 13, 1978, at 1, 3-4. For a favorable view, see Weyman I. Lundquist & H. Stephen Schechter, *The New Relevancy: An End to Trial by Ordeal,* 64 A.B.A.J. 59 (1978).

n146 427 U.S. 639 (1976) (per curiam).

n147 *Id.* at 643.

n148 *See, e.g.*, Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 HARV. L. REV. 1033, 1055 (1978).

n149 Others also had recognized an unwillingness on the part of judges to control discovery. For example, one survey conducted in Chicago found that lawyers had the perception that many judges believed discovery disputes did not belong in the courtroom. *See* Wayne D. Brazil, *Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery,* 1980 AM. B. FOUND. RES. J. 219, 250-51.

n150 FED. R. CIV. P. 26(f) advisory committee's note (1980), *reprinted in Amendments to the Federal Rules of Civil Procedure,* 85 F.R.D. 521, 526 (1980) [hereinafter *1980 Amendments*].

n151 *See id.*

n152 *See* 8 WRIGHT & MILLER, *supra* note 14, § 2051, at 179 (Supp. 1991).

n153 FED. R. CIV. P. 26(f) advisory committee's note (1980), *reprinted in 1980 Amendments, supra* note 150, at 526.

n154 *Id., reprinted in 1980 Amendments, supra* note 150, at 527. The practice under Rule 26(f) indicates that this prediction was correct. A court surveying the reported cases in 1987 found that "less than fifty cases have resorted to [Rule 26(f)]." Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 134 (5th Cir. 1987). The court noted, however, that an accurate count is impossible because, "[t]hankfully, most of the mountainous volume of the District Courts' pretrial activity never reaches the pages of a reporter or the files of a computer." *Id.* at 134 n.10. Although the Rule states that the court "shall" hold a discovery conference, the district court has some discretion to deny a motion for a discovery conference. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2051, at 179 (Supp. 1991).

n155 *Union City Barge Line,* 823 F.2d at 134 (holding the district court in error for failure to conduct a discovery conference in an action for illegal commercial bribery, interference with a contractual relationship, and wrongful termination of a contract).

n156 *See, e.g., In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1011-12 (1st Cir. 1988) ("With [the discovery procedure] at hand, the trial judge was considerably better equipped to set a course plotted to meet the idiosyncratic needs of any pending piece of litigation."); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 870 n.5 (3d Cir. 1984) ("We note the commendable procedure followed by [the district judge] . . . under Rule 26(f) [that] has substantially reduced the need for discovery."); Jaquette v. Blackhawk County, 710 F.2d 455, 463 (8th Cir. 1983) ("[C]onferences at the pleading stage . . . have proven successful.").

n157 *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence,* 137 F.R.D. 53, 97-98, 105 (1990) [hereinafter *1991 Amendments*] (proposed Rule 26(f) and advisory committee's note).

n158 Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 999-1000 (1980) (Powell, J., dissenting) (footnote omitted).

n159 Warren Burger, Address on the State of the Judiciary to the American Bar Association Mid-Year Meeting: (Feb. 3, 1980), *quoted in* Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. at 999 n.4 (Powell, J., dissenting).

n160 *See supra* pp. 436-41.

n161 American Bar Ass'n, *Second Report of the Special Committee for the Study of Discovery Abuse,* 92 F.R.D. 137, 137 (1980).

n162 GORDON BERMANT, JOE S. CECIL, ALAN J. CHASET, E. ALLAN LIND & PATRICIA A. LOMBARD, PROTRACTED CIVIL TRIALS: VIEWS FROM THE BENCH AND THE BAR 56 (1981).

n163 *See, e.g.,* C. RONALD ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE (1979); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses (part 2),* 1980 AM. B. FOUND. RES. J. 789, 789-902.

n164 Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough,* 1981 B.Y.U.L. REV. 579, 588.

n165 *See, e.g.,* Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions,* 1981 AM. B. FOUND. RES. J. 873; Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform,* 3 REV LITIG. 1, 48 (1982); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix,* 69 MINN. L. REV. 1, 19-22 (1984) ("Even attorneys, usually seen as jealous guardians of control over their cases, are not averse to a stronger judicial hand."). *Compare* Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 445 (1982) ("[M]anagerial judges are changing the nature of their work. . . . [J]udges [should] balance the scales, not abandon them altogether in the press to dispose of cases quickly.") *with* Steven Flanders, *Blind Umpires -- A Response to Professor Resnik,* 35 HASTINGS L.J. 505, 507 (1984) ("Resnik exagerates the extent of any judicial activity that is inconsistent with due process.").

n166 *1983 Amendments, Federal Rules of Civil Procedure,* 97 F.R.D. 165, 214 (1983) [hereinafter *1983 Amendments*]. For an overview of the 1983 amendments, see ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32-33 (1984). I was the Reporter to the Advisory Committee on Civil Rules throughout the period during which the 1983 amendments were formulated and moved through the approval process.

n167 FED. R. CIV. P. 26(b))(1), *reprinted in 1983 Amendments, supra* note 166, at 214-15. Note that the Committee chose to proscribe discovery activity that generally was regarded as indefensible, rather than narrow the scope of the discovery standard generally.

n168 *Id.*

n169 FED. R. CIV. P. 26(b) advisory committee note (1983), *reprinted in 1983*

Amendments, supra note 166, at 218. *See generally* MILLER, *supra* note 166, at 32-36 (explaining the power granted judges to limit discovery on their own initiative).

n170 FED. R. CIV. P. 26(b) advisory committee note (1983), *reprinted in 1983 Amendments, supra* note 166, at 217; *see also* 8 WRIGHT & MILLER, *supra* note 14, §§ 2036-2040, at 267-95 (Supp. 1991) (describing the discretion allowed judges in issuing protective orders under the old Rule 26(c)).

n171 FED. R. CIV. P. 26(g) advisory committee note (1983), *reprinted in 1983 Amendments, supra* note 166, at 220. The advisory committee note cites ACF Indus. v. EEOC, 439 U.S. 1081 (1979), which is cited above in note 135.

n172 *See* FED. R. CIV. P. 26(g) advisory committee note (1983), *reprinted in 1983 Amendments, supra* note 166, at 219; *see also* FED. R. CIV. P. 11 advisory committee note (1983), *reprinted in 1983 Amendments, supra* note 166, at 198-20,; 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1333-1335, at 44-92 (2d ed. 1990) (describing the scope of application of Rule 11); Arthur R. Miller, *The New Certification Standard Under Rule 11,* 130 F.R.D. 479 (1990) (discussing the 1983 amendment to Rule 11).

n173 Indeed, the Committee stressed that Rule 26(g) should serve as a deterrent. *See* FED. R. CIV. P. 26(g) advisory committee note (1983), *reprinted in 1983 Amendments, supra* note 166, at 220 (citing NHL v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)). The *NHL* case is discussed above at p. 455.

n174 FED. R. CIV. P. 16(a) advisory committee note (1983), *reprinted in 1983 Amendments, supra* note 166, at 207; *see also* MILLER, *supra* note 166, at 19-22 (describing the amended Rule 16 as a response to the recognized need for increased judicial management).

n175 *See* MILLER, *supra* note 166, at 19-22.

n176 *See* MANUAL FOR COMPLEX LITIGATION § 21.2, at 29 (2d ed. 1985); *see also* 6A WRIGHT & MILLER, *supra* note 129, § 1530, at 302-06 (describing judicial management of the "big case" through the use of pretrial conferences).

n177 *See* 5A WRIGHT & MILLER, *supra* note 172, §§ 1333-1335, at 55-57.

n178 Rule 11 has provoked an enormous amount of controversy and a burgeoning literature. *See, e.g.,* 5A WRIGHT & MILLER *supra* note 172, § 1332, at 22-44. In response, the Advisory Committee on Civil Rules has conducted public hearings, commissioned a study by the Federal Judicial Center, and is now proposing a series of amendments to the Rules. *See infra* pp. 462-63.

n179 *See, e.g.,* Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and A Proposal for More Effective Discovery Through Local Rules,* 30 VILL. L. REV. 767, 778-99 (1985); George K. Walker, *The Other 1983 Amendments to the Federal Rules of Civil Procedure -- Pleadings and Motions; Pretrial and Discovery; U.S. Magistrate Cases,* 20 WAKE FOREST L. REV. 819, 849-51 (1984); Margaret L. Weissbrod, Comment, *Sanctions Under Amended Rule 26 -- Scalpel or Meat-ax?: The 1983 Amendments to the Federal Rules of Civil Procedure,* 46 OHIO ST. L.J. 183, 201 (1985).

n180 *In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1012 (1st Cir. 1988).

n181 *Id.* at 1011.

n182 482 U.S. 522 (1987).

n183 *Id.* at 565 n.23 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun agreed with the majority's holding that the non-mandatory language of the Hague Convention should not deprive a federal court of its discretion to apply the Federal Rules to foreign discovery requests. He disagreed with the majority that the Convention is "optional," however, and he argued that a district court should be required to look first to the Convention, then have discretion to apply the Federal Rules if employing the Convention would be futile. *See id.* at 548-49; *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-35 (1984) (arguing that the liberality of discovery requires active control from trial judges to limit abuse).

n184 *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure,* 127 F.R.D. 237, 348 (1990) [hereinafter *1990 Amendments*] (proposed Rule 45(c)(3)(B)(iii)); *id.* at 354 (proposed Rule 45(c)(3)(B)(iii) advisory committee's note) (explaining that the new clause "protects non-party witnesses who may be subjected to considerable burden in performing their duty to supply pertinent information").

n185 *See id.* at 348 (proposed Rule 45(c)(3)(B)(ii)).

n186 *Id.* at 353 (proposed Rule 45(c)(3)(B)(ii) advisory committee's note); *see* Gregory Gelfand, *Discovery Reform for Informational Property: "Just Compensation" for Data and Intelligence,* LEGAL TIMES, Mar. 5, 1990, at 26.

n187 *See* H.R. Doc. No. 77, 102d Cong., 1st Sess. 1 (1991) (communication from the Chief Justice of the United States to Congress of the proposed amendments to the Federal Rules of Civil Procedure).

n188 *See, e.g.,* Brazil, *supra* note 136, at 1349; William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform,* 50 U. PITT. L. REV. 703, 721 (1989).

n189 The obligations would include disclosure at the outset of the litigation of certain information that would be helpful to the opposing party's discovery efforts, disclosure at least 90 days before the trial date of expert testimony to be offered at trial, and disclosure at least 30 days before trial of information concerning witnesses and exhibits to be offered at trial. *See 1991 Amendments, supra* note 157, at 87-106 (proposed Rule 26(a) and advisory committee's note).

The concept of automatic disclosure is also appearing in some Expense and Delay Reduction Plans being prepared under Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (to be codified at 28 U.S.C. §§ 471-482). *See, e.g.,* Civil Justice Reform Committee, Expense and Delay Reduction Plan for the United States District Court for the District of Massachusetts §§ 2.01-2.05, at 48-64 (preliminary draft, Oct. 21, 1991).

n190 *See 1991 Amendments, supra* note 57, at 87-106 (proposed Rule 26(a) and advisory committee's note).

n191 The proposed revision of the discovery rules has already engendered significant controversy. Despite the recognized need for change, some segments of the bar perceive the proposals as unduly favorable to other segments. The President's Council on Competitiveness recommends mandatory disclosure of "core-information" followed by presumptive quantitative limits on discovery with a "market-based framework." *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 16-17 (1991).

n192 Pub. L. No. 101-650, 104 Stat. 5089 (to be codified at 28 U.S.C. §§ 471-482).

n193 Of course, protective orders will have some utility as long as dissemination is desired or opposed by some of the litigants, because awareness of the availability of these orders may modify attorney behavior and encourage cooperation. Protective orders will be unique and well-suited to pretrial management, however, only to the degree that dissemination is in itself undesirable.

n194 *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

n195 *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) (observing that litigants have the opportunity to obtain information that, if publicized, could damage reputations and violate privacy interests).

n196 Whalen v. Roe, 429 U.S. 589, 599 (1977); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-16, at 1389-1400 (2d ed. 1988); Gary R. Clouse, Note, *The Constitutional Right to Withhold Private Information,* 77 Nw. U. L. REV. 536, 537 (1982).

n197 *See, e.g., In re* American Tobacco Co., 880 F.2d 1520, 1530 (2d Cir. 1989) (holding that a protective order was necessary to protect the anonymity of patients who participated in medical research); Cantor v. Toyota Motor Sales, USA, Inc., 546 So. 2d 766, 767-68 (Fla. Dist. Ct. App. 1989) (holding that conversations with a psychologist are protected by the doctor-patient privilege when the patient's mental condition is not an issue in the case).

n198 *See* Leonard W. Schroeter, *Privacy Rights Can Limit Discovery,* TRIAL, NOV. 1990, at 49, 52-53. The privacy implications of the new Florida statute, *see supra* p. 443, are enormous, because the statute provides for the disclosure of information regarding a "public hazard" and then defines the term to include a "person," thereby making anyone a potential "public hazard." As Professor Richard Marcus has pointed out, the statute's definition embraces anyone with AIDS. *See* Marcus, *supra* note 9, at 482-83; *see also infra* pp. 484-87 (discussing the confidentiality of settlement terms).

n199 *See Seattle Times,* 467 U.S. at 34-35. The Court stated that the protection of privacy is "implicit in the broad purpose and language of [Rule 26(c)]." *Id.* at 35 n.21; *see also In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987) ("[P]rivate litigants have protectable privacy interests in confidential information disclosed through discovery."). Some courts have excluded nonparties and even parties from a deposition on privacy grounds. *See, e.g.,* Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 973); Times Newspapers Ltd. v. McDonnell Douglas Corp., 387 F. Supp. 189, 197 (C.D. Cal. 1974).

There are intimations in Whalen v. Roe, 429 U.S. 589 (1977), and Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977), that a constitutional basis may exist for a litigant's right to avoid public disclosure of private information. *See Whalen,* 429 U.S. at 605-06; *Nixon,* 433 U.S. at 457 (conceding the availability of constitutional protections for public officials "in matters of personal life unrelated to any acts done by them in their public capacity").

Several courts of appeal have relied on these Supreme Court cases to recognize a constitutional right of informational privacy. *See, e.g.,* Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) (recognizing the existence of constitutional privacy rights, but holding that such rights do not require confidentiality of information regarding possession of illegal drugs); Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 438 (7th Cir.) (recognizing a constitutional right to privacy, but holding that a prison inmate had no reasonable expectation of privacy regarding withdrawals made from his prison bank accounts), *cert. denied,* 478 U.S. 1009 (1986); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 580-81 (3d Cir. 1980) (holding that medical information subpoenaed in a trial falls within a constitutionally protected zone of privacy). *See generally* Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy.* 71 B.U. L. REV. 133, 145-501 (1991) (outlining the treatment of informational privacy rights since *Whalen v. Roe).* For an extensive discussion of the subject, including the recognition of a corporation's constitutional interest in the nondisclosure of confidential discovery data, *see* Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1019-23 (D.C. Cir. 1984).

n200 *See, e.g.,* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-67 (1989) (protecting the privacy interest in a decade-old criminal record); Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (finding a privacy right in state records regarding prescription narcotic use, but holding that the right was insufficient to prohibit disclosure of patient identity to state authorities); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (holding that due process limits the government's authority to disseminate information regarding an individual's excessive drinking).

n201 *See generally* Arthur R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (1971) (discussing the threat to individual privacy posed by ever more efficient data collection and storage systems); CRAIG T. NORBACK, THE COMPUTER INVASION (1980) (same), ALAN F. WESTIN, PRIVACY AND FREEDOM (1967) (same).

n202 *Cf.* FED. R. CIV. P. 1 (" The rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.").

n203 *See* Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) ("During the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants."); Marcus, *supra* note 9, at 477-78. *But see* FED. R. CIV. P. 5(d) advisory committee's note (1938). Congress is more than capable of identifying those situations in which the interest in public disclosure outweighs the interest in confidentiality. For example, the antitrust statutes make pretrial antitrust proceedings presumptively public. *See* 15 U.S.C. §§ 1311-1314 (1988).

n204 Examples include the litigation over the San Juan Dupont Plaza Hotel fire and the collapse of the Washington Public Power Supply System.

n205 *See* Carpenter v. United States, 484 U.S. 19, 25 -- 26 (1987); Ruckelshaus v. Monsanto, 467 U.S. 986, 1000 - 94 (1984); 8 Wright & Miller, *supra* note 14, § 2043, at 300 -- 08; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 94-95 (1890). In fact, some have even argued that a failure to protect the confidentiality of information during the pretrial process may constitute a taking of property under the Takings Clause of the Constitution. *See* Gregory Gelfand, *"Taking" Informational Property Through Discovery,* 66 WASH. U. L.Q. 703, 718 -- 19 (1988); Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection,* 104 HARV. L. REV. 1330, 1342-44 (1991).

n206 JOHN LOCKE, *The Second Treatise of Government, in* Two TREATISES OF GOVERNMENT §§ 27-28, at 305-07 (Peter Laslett ed., 2d ed.(1967).

n207 467 U.S. 986 (1984).

n208 484 U.S. 19 (1987).

n209 *See* *Carpenter,* 484 U.S. at 25 (holding that the Wall Street Journal has a property interest in confidential business information generated by its employee); *Ruckleshaws,* 467 U.S. at 1003 - 04 1010 - 13 (holding that a Fifth Amendment taking resulted from the EPA's disclosure of trade secrets obtained under a promise of confidentiality); Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?,* 38 CATH. U. L. REV. 65, 395-96 (1989): John C. Janka, Note, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets,* 54 U. CHI. I. REV. 334, 367-68 (1987).

n210 *Carpenter,* 484 U.S. at 26 (quoting 3 WILIIAM M. FLETCHER, CYCLOPEDIA OF THE LAW IF PRIVATE CORPORATIONS § 857.I, at 26) (rev. ed. 986)).

n211 *See* Note, *supra* note 205, at 1336 - 37.

n212 *See* Gelfand, *supra* note 205, at 718 - 19; Note, *Computer Intellectual Property and Conceptual Severance,* 103 HARV. L. REV. 046, 046 (1990); Note, *supra* note 205, at 1340 - 42.

n213 Samuelson, *supra* note 209, at 398 (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 40-41 (1986)).

n214 The ability to avoid disclosure of a trade secret is critical to the secret's value, and the ability to control the timing and circumstances of publication lies at the heart of certain copyright values -- as the Supreme Court has recognized. *See* Harper & Row, Publishers, Inc. v. Nation Enters, 471 U.S. 539, 549 (985) (affirming an author's right to first publication); *cf.* Kenneth E. Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy,* 9 J. LEGAL STUD. 801, 817 (980) ("[Rule 10b-5] helps protect investment to obtain socially productive information, the value of which would be impaired by its release before certain steps can be taken to implement the discovery.").

Consider, for example, product safety information. This material -- design specifications, performance standards, and the like -- is often among the most sensitive information a product manufacturer possesses. Especially in today's marketplace, the safer the product, the more likely that it has a significant competitive edge over its rivals. That advantage can be maintained only if the information used to improve the product's safety is kept confidential. Under a presumption of public access, the more safety tests that a manufacturer conducts and the more research that it undertakes to improve safety, the greater the risk that information will be disclosed to plaintiffs' attorneys. The greater the disclosure, the more likely that the information will fall into the hands of a competitor, who can then replicate the design or process without making the initial investment incurred by the original manufacturer. The obvious result is a chilling effect on the willingness of manufacturers to engage in extensive initial safety testing programs.

n215 *See* Coca-Cola Bottling Co. v. Coca-Cola., 107 F.R.D. 288, 289 (D. Del. 1985).

n216 *See id.* at 297-99.

n217 *See id.* at 294.

n220 *See id.*

n221 *Cf.* National Polymer Prods., Inc. v. Borg-Warner Corp., 641 F.2d 418, 424 (6th Cir. 1981) (stating that courts should consider "whether disclosure will actually impair legitimate business interests of the defendants"); Tripp Baltz, *Shhhh -- Confidentiality in the Courts,* CHI. LAW., Jan., 1991, at 53 (discussing the debate concerning the propriety of issuing protective orders to protect industrial secrets).

n222 *See* Quinter v. Volkswagen of Am., 676 F.2d 969, 974 (3d Cir. 1982) (sanctioning an expert for revealing information obtained under a protective order to unrelated counsel in another suit against the same defendant).

n223 Litton Indus. v. Chesapeake & Ohio Ry., 129 F.R.D. 528, 531 (E.D. Wis. 1990).

n224 *See id.*

n225 *See, e.g.,* Parker v. M & T Chemicals, Inc., 566 A.2d 215, 217 (N.J. Super. Ct. App. Div. 1989).

n226 *See FBI Stings Parts Counterfeiters,* AUTOMOTIVE NEWS, Jan. 22, 1990, at 48; Michael Hoenig, *Protective Confidentiality Orders,* N.Y.L.J., Mar. 5, 1990, at 7.

n227 *See* Hoenig, *supra* note 226, at 7.

n228 416 U.S. 470 (1974).

n229 *See id.* at 481-82.

n230 *See id.* at 485-86.

n231 *See, e.g.,* Salsbury Lab., Inc. v. Merieux Lab., Inc., 908 F.2d 706, 710 (11th Cir. 1990); CVD, Inc. v. Raytheon Co., 769 F.2d 842, 850 (1st Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); Jet Spray Cooler, Inc. v. Crampton, 385 N.E.2d 1349, 1355 (Mass. 1979); Gordon L. Doerfer, *The Limits on Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy,* 80 HARV. L. REV. 1432, 1451, 1454 (1967); David W. Slaby, James C. Chapman & Gregory P. O'Hara, *Trade Secret Protection: An Analysis of the Concept "Efforts Reasonable Under the Circumstances to Maintain* ***Secrecy,*** *"* 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 321 (1989).

n232 *See* 18 U.S.C. § 1905 (1988) (prohibiting government officials from disclosing confidential information obtained in the course of their government duties); 1979 Uniform Trade Secrets Act, *reprinted in* 2 MELVIN F. JAGER, TRADE SECRETS LAW, at A1 (App. 1985) (adopted in 28 states); 1 JAGER, *supra,* at §§ 3.01-.04 (1991); 3 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS App. B (1977).

n233 *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); *Kewanee Oil,* 416 U.S. at 482, 485.

n234 *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 161 (1989). This is the critical issue in Hartman v. Remington Arms, currently *sub judice* before the Eighth Circuit.

n235 *Cf. In re* Richardson-Merrell, Inc., Bendectin Prods. Liab. Litig., 97 F.R.D. 481, 484 (S.D. Ohio 1983) ("Discovery is not to be used for annoying or embarrassing the opposing party.").

n236 *See, e.g.*, Butkowski v. General Motors Corp., 497 F.2d 1158, 1159 (2d Cir. 1974) (irrelevant design information); *In re Richardson-Merrell*, 97 F.R.D. at 484 (request calculated to portray defendant in a damaging light); Uitts v. General Motors Corp., 62 F.R.D. 560, 562 (E.D. Pa. 1974) (design documents for type of vehicle not at issue).

Although discovery has been conducted under the Federal Rules for more than 50 years, there is still little agreement on where the boundary lies between legitimate discovery and the illicit territory known as the "fishing expedition." The dispute reflects deep philosophical disagreement over questions such as how high the access barrier to the courts should be, at what point in a lawsuit issues and legal theories should be formulated, and whether the "notice" pleading and liberal discovery regime of modern procedure authorizes an invocation of the system or the interposition of a defense based only on the prospect that it will prove viable at some subsequent point in the litigation. Much of the debate over the current Rule 11 involves these issues. *See, e.g.*, FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 3.11, at 154-55 (3d ed. 1985); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions,* 100 HARV. L. REV. 630, 634, 647 (1987); *see also* AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1988) (reporting the level of Rule 11 activity based on empirical studies, a comprehensive literature review, and a review of nationwide case law); GEORGINE VAIRO, REPORT TO THE ADVISORY COMMITTEE ON AMENDED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1987) (providing an empirical study of how Rule 11 has actually been used by the courts); 5A WRIGHT & MILLER, *supra* note 172, § 1332, at 22-44 (discussing criticisms of the 1983 amendment of Rule 11).

n237 As is true of many aspects of contemporary discovery, no empirical data exists documenting how frequently discovery mechanisms are used in this way.

n238 *See Product Liability Reform Act: Hearings on S.1400 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science & Transportation,* 101st Cong., 2d Sess. 235-402 (1990) (statements of witnesses and Senators); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 155-61 (1988); Hoenig, *supra* note 226, at 3.

n239 *See* Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980) (refusing to admit evidence of later remedial measures because its admittance would discourage such improvements), *cert. denied,* 449 U.S. 1080 (1981); HUBER, *supra* note 238, at 161 (noting that liability insurance costs have virtually halted investments in small-airplane development); Hazard, *supra* note 97, at 2242-43 (observing the growing resentment against broad discovery in managerial circles).

n240 *See generally* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 71 (3d ed. 1984) (discussing the most familiar rules of privilege as well as their justifications).

n241 *See id.*

n242 *See* United States v. Reynolds, 345 U.S. 1, 11 (1953).

n243 *See, e.g., In re* Folding Cartons Antitrust Litig., 609 F.2d 867, 871 (7th Cir. 1979); Campbell v. Gerrans, 592 F.2d 1054, 1056 - 57 (9th Cir. 1979); *see also* WRIGHT & MILLER, *supra* note 14, §§ 2016-2018, at 122-53 (explaining the various privileges).

n244 *See* 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 300.

n245 The common law right to inspect and copy judicial records is not absolute, particularly if these records are a source of business information that, if released, might harm a litigant's competitive standing. The determination of whether access to such records is appropriate is best left to the trial court, which exercises its sound discretion in light of the relevant facts and circumstances of each particular case. *See* Crain Communications, Inc. v. Hughes, 521 N.Y.S.2d 244, 244-45 (N.Y. App. Div. 1987), *aff'd,* 539 N.E.2d 1099 (N.Y. 1989).

n246 Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984).

n247 *Id.* at 34-35 (citation ommitted); *see also* Gregory Gelfand, *Discovery Reform for Informational Property: "Just Compensation" for Data and Intelligence,* LEGAL TIMES, Mar. 5, 1990, at 26 (illustrating potential for abuse of discovery by parties primarily concerned with "taking" a company's information property for private purposes without just compensation). The threat to confidentiality from discovery abuse has also been recognized by the recently proposed amendments to the Federal Rules that enhance the trial judge's power to protect intellectual property. *See supra* p. 462; *see also* Note, *supra* note 205, at 344-45 (discussing the proposed amendments).

n248 *See* Hoenig, *supra* note 226, at 6-7.

n249 *See Crain Communications,* 521 N.Y.S.2d at 245.

n250 *See* United States v. Reynolds, 345 U.S. 1, 11 (1953) (forbidding discovery of top secret information); *see also In re* Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) (suggesting that, in some circumstances, "the only plausible alternative to a protective order may be the denial of discovery altogether").

n251 For example, the recent amendments to the Texas Rules of Civil Procedure create a presumption of openness, allow nonparties to intervene in the sealing proceedings, and allow immediate appeals "by any party or intervenor who participated in the hearing preceding issuance of such order." TEX. R. CIV. P. ANN. rr. 76a, 166(b)(5)(C) (West Supp. 1991).

n252 *See* Philip H. Corboy, *Masked and Muzzled, Litigants Tell No Evil: Is This Blind Justice?,* LEGAL TIMES, Jan. 8, 1990, at 27, 28 ("The evil of **secrecy** is that those who are jeopardized are not the parties before the court, but the general public and other specific victims.").

n253 In Alan B. Morrison, *Protective Orders, Plaintiffs', Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?,* 24 U. RICH. L REV. 109 (1989), one of the nation's finest public interest lawyers describes (largely from the plaintiff's perspective) the process that often leads to a protective or scaling order. *See id.* at 109-13.

n254 Corboy, *supra* note 252, at 28; *see also* Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982) (noting that preventing the disclosure of discovery materials to other litigants promotes redundant discovery and therefore inflicts inefficiencies on all parties); Tom Riley & Mary K. Hoefer, *Protective Orders: Machiavelli Would Be Pleased,* 20 TRIAL 30, 32 (1984).

n255 *See* Anne-Therese Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?,* 66 NOTRE DAME L. REV. 117, 154-57 (1990).

n256 A good example is Del Monte v. Xerox Corp., No. 1412/86 (N.Y. Sup. Ct. Aug. 5, 1989), in which the court modified a confidentiality seal that had been put in place pursuant to a voluntary request made by both parties as part of a settlement agreement. *See id.,* slip op. at 3. With the support of the defendant corporation, *see id.,* slip op. at 2-3, the court modified the order to permit a local public health agency access to epidemiological data and other health-related studies contained in the court records, *see id.,* slip op. at 11-12. Del Monte is not atypical of New York practice, because court proceedings are presumptively open. *See, e.g.,* Flynn v. Doe, 553 N.Y.S.2d 288, 289 (Sup. Ct. 1990).

Federal practice also allows the court to refer discovery material to the proper authorities when a case raises issues of public health and safety. *See* Anderson v. Cryovac, Inc., 805 F.2d 1, 8 (1st Cir. 1986) (holding that the release of otherwise sealed information regarding public health to a government agency does not destroy a protective order).

n257 The 1980 amendment of Federal Rule 5(d), which authorized local rules eliminating the filing requirement, was not intended to alter that power. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 104 F.R.D. 559, 567-68 (E.D.N.Y. 1985), *aff'd,* 82 F. 2d 39 (2d Cir.), *cert. denied,* 484 U.S. 953 (1987). One court, however, has held that its power to order filing ends with the final judgment. *See* Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 781 (1st Cir. 1988), *cert. denied,* 488 U.S. 1030 (1989). *See generally* Morrison, *supra* note 253, at 120-21 (discussing different strategies available to federal judges to make unfiled documents accessible to the public).

n258 *See* cases discussed *supra* note 256.

n259 The importance of privacy and property rights is discussed in Part V, *see supra* pp. 463-74, and the damage to the litigation system is discussed in section B of this Part, *see infra* pp. 483-89.

n260 *See, e.g., Drug Maker Liable in $ 77.8 Million Verdict,* 18 Prod. Safety & Liab. Rep. (BNA) 1309, 1309 (Nov. 30 1990) (reporting that the plaintiffs' bar issued a public alert regarding an allegedly unsafe product).

n261 In a related vein, the government may not prevent anyone from disclosing information that was acquired independently merely because that individual took part in a judicial proceeding. *See* Butterworth v. Smith, 110 S. Ct. 1376, 1381 (1990).

n262 In some jurisdictions, such as New York, the filing requirement is not automatically triggered by commencement of the action. *See* N.Y. Civ. Prac., L. & R. 304 (McKinney 1990) (Method of Commencing Action or Special Proceeding); *id.* 3012 (Service of Pleading and Demand for Complaint).

n263 *See* Robert Abrams, *Hidden Dangers: Xerox Case Shows Public Has Right to Know,* ROCHESTER DEMOCRAT & CHRON., July 27, 1990, at 7A (column by the New York state

attorney general); Letter from Chief Judge Sol Wachler to John Bauman (Nov. 2, 1989) (on file at the Harvard Law School Library).

n264 *See* Robert L. Beck, *Xerox Case Was No Secret,* ROCHESTER DEMOCRAT & CHRON., Aug. 9, 1990, at A11; Roy L. Reardon, *Court Confidentiality Debate's Rhetoric,* N.Y.L.J., Oct. 16, 1990, at 2.

n265 Beck, *supra* note 264, at A11.

n266 *See* Ed Vogel, *Lawyer Says Fatal Hazard Exists in LV,* LAS VEGAS REVIEW-JOURNAL, Apr. 4, 1991, at A1, B3.

n267 *See FDA's Regulation of Zomax: Hearings Before a Subcomm. of the House Comm. on Gov't Operations,* 98th Cong., 1st Sess. 3-5 (1983) (testimony of Dr. Devra Davis); KEEPING SECRETS: JUSTICE ON TRIAL 13-15 (1990) (report of a conference sponsored by the Society of Professional Journalists and the Association of Trial Lawyers of America). As legal editor for *Good Morning America,* I had the opportunity to interview Dr. Davis about her experience with this drug, which appeared in a segment regarding court seals and confidentiality in litigation. *See Good Morning America* (ABC television broadcast, Sept. 4, 1990).

n268 *See Court* ***Secrecy:*** *Hearings Before the Subcomm. on Courts & Administrative Practice of the Senate Comm. on the Judiciary,* 101st Cong., 2d Sess. I7-24 (1990) [hereinafter *Senate Hearings*] (statement and testimony of Dr. Devra Davis).

n269 *See* DIVISION OF DRUG EXPERIENCE, FOOD & DRUG ADMIN., ADVERSE DRUG HIGH LIGHTS, NO. 8116 (1981).

n270 *See* PHYSICIANS' DESK REFERENCE 1165-66 (36th ed. 1982).

n271 *See* Letter from McNeil Pharmaceutical to "Prescribing Physicians" (Apr. 9, 1982) (on file at the Harvard Law School Library).

n272 *See, e.g.,* sources cited *supra* note 267.

n273 *See Senate Hearings, supra* note 268, at 5 (statement and testimony of Frederick R. Barbee).

n274 *See id.*

n275 805 F.2d 1 (1st Cir. 1986).

n276 *See id.* at 8.

n277 *See id.*

n278 *See* Anderson v. Cryovac, Inc., 862 F.2d 914 (1st Cir. 1988).

n279 Once these anecdotes reach the press, they seem to permeate even the "academic" literature without further critical examination. *See, e.g.,* John J. Watkins, Expanding the Public's Right to Know: Access to Settlement Records Under the First Amendment 2-3 (Harvard Univ. School of Gov't, Discussion Paper D-7, Dec. 1990) (on file at the Harvard Law School library).

n280 *See, e.g.*, Anderson, 805 F.2d at 12 (finding public access to the discovery process detrimental because it can be expected to make discovery "more complicated and burdensome than it already is").

n281 *See* Marcus, *supra* note 9, at 485 ("[G]eneral public access would tend to disrupt the cooperative exchange of information between the parties."). A similar effect would be felt in a regime that permitted protective orders but made their subsequent modification or elimination relatively easy. *See infra* pp. 499-501.

n282 *See supra* pp. 462-63.

n283 *See, e.g.*, International Union v. Garner, 102 F.R.D. 108, 109-10 (M.D. Tenn. 1984) (extending suspension of discovery based on a finding that discovery processes were used primarily to develop information for a National Labor Relations Board proceeding).

n284 *Compare In re* Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) ("The only plausible alternative to a protective order may be the denial of discovery altogether.") *with* Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Haw. 1975) (allowing discovery because other methods for protecting the defendant's legitimate interest in confidentiality were available).

n285 Although settlement agreements and judicial determinations both resolve a controversy, this does not mean that both should be publicly available. In fact, because settlements are agreements undertaken between and among *private* parties and do not involve the state, settlements should not be considered part of the public record. Settlements are more properly viewed as part of the class of private information -- along with pretrial discovery materials -- in which the litigation system has a *limited* interest.

n286 *Cf.* Dawson v. White & Case, N.Y.L.J., Apr. 25, 1991, at 26 (N.Y. Sup. Ct. Apr. 24, 1991) (allowing the sealing of an accounting of a partnership interest in a law firm because the public's legitimate interest in the material was limited and the law firm's privacy interest was great). Those contemplating or involved in similar litigation obviously would have a great interest in the terms of settlement. But that does not justify denying confidentiality.

n287 *See, e.g.*, John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 634-35 (3d Cir. 1977) (finding that the admission into evidence of the small size of a settlement agreement led the jury to discount the testimony of the expert witnesses who worked for the settling defendant as biased in favor of the plaintiff); *see also* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 971-72 (1988) (arguing that information about a small-sum settlement with one of the codefendants may lead the jury to conclude that the plaintiff does not believe in his claim against the remaining defendants).

n288 *See, e.g.*, Wilson v. Wilson, No. 89-C9620, 1991 U.S. Dist. LEXIS 10992, at *4 (N.D. Ill, Aug. 2, 1991).

n289 *See, e.g.*, *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 471-72 (E.D.N.Y. 1981) (allowing intervention by the Public Interest Research Group to challenge a protective order sealing the settlement terms between Ernst & Ernst and the FDIC, but refusing to modify the protective order); Katie Eccles, Note, *The* Agent Orange *Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 STAN. L. REV. 1577, 1616-17 (1990) (suggesting that public access to settlement agreements may be warranted in class action cases).

n290 A number of courts have recognized a common law right of access when there has been judicial participation in the settlement process, but they have given it extremely different applications. *Compare* Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 206 (Minn. 1986) (emphasizing the traditional privacy of settlements and the policy favoring settlements) *with* Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d Cir. 1986) (stating that court approval of a settlement is something the public has a right to know about and evaluate) *and* Shenandoah Publishing House, Inc. v. Fanning, 368 S.E.2d 253, 256 (Va. 1988) ("The public has a societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them.").

n291 *See, e.g.,* Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969); *Minneapolis Star,* 392 N.W.2d at 205. *But see* Owen M. Fiss, *Against Settlement,* 93 YALE L.J. 1073, 1075 (1984)("[S]ettlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

n292 *See* Brazil, *supra* note 287, at 959 ("[I]f a large percentage of our cases did not settle, the backlog in our courts would become totally intolerable."); *cf.* Edward Felsenthal & Wade Lambert, *Workloads of State Courts in U.S. Surged by 98 Million Cases in 1988,* WALL ST. J., May 3, 1990, at B 11 (calling the workload of state courts "astonishing").

n293 For example, a party's reluctance to settle without the sealing order would be strong evidence of reliance.

n294 *See, e.g.,* Palmieri v. New York, 779 F.2d 861, 862 (2d Cir. 1985) ("[A]bsent an express finding by the district court of improvidence in the magistrate's initial grant of the protective order or of extraordinary circumstances or compelling need by the State for the information protected thereunder, it was error for the district court to modify the magistrate's orders."); Martindell v. ITT Corp., 594 F.2d 291, 294-95 (2d Cir. 1979); Ropfogel v. Wise, No. 83 Civ. 2837(mp), 1991 U.S. Dist. LEXIS 11738, at *5-6 (S.D.N.Y. Aug. 22, 1991); *see also* City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *10-12 (2d Cir. Aug. 14, 1991)(extending the scope of a protection order to all documents relating to the settlement).

n295 *See generally* JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 91 (discussing the judicial crisis and suggesting reforms to reduce the burdens imposed on the federal court system); CONFERENCE OF STATE COURT ADM'RS, STATE JUSTICE INST. & NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1988 (1990)(presenting empirical information concerning the current workloads of state courts).

n296 CONFERENCE OF STATE COURT ADM'RS, STATE JUSTICE INST. & NAT'L CTR. FOR STATE COURTS, *supra* note 295, at 17.

n297 *See, e.g.,* Felsenthal & Lambert, *supra* note 292, at B11.

n298 As the First Circuit said in Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986):

The public's interest is in seeing that the [discovery] process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary

findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals. . . .
Id. at 12.

n299 *But cf.* Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (1990). The Florida Statute, signed into law on June 1, 1990, voids all contracts and agreements that have the effect of concealing a "public hazard," *id.* § 69.081(4), and allows any "substantially affected person," including members of the media, *id.* § 69.081(6), to request the court to conduct an in camera review of all documents for which a confidentiality designation has been requested, *see id.* § 69.081(7). This statute may cause a significant increase in the workload of the Florida courts.

n300 *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989); *see also* Wyeth Labs. v. United States Dist. Court, 851 F.2d 321, 324 (10th Cir. 1988)(holding that the district court had no authority to establish a courthouse DTP vaccine litigation library).

n301 *See* E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence,* 69 B.U.L. REV. 487 (1989) (discussing options for improving use of scientific and other highly technical information in the litigation process).

n302 21 U.S.C. §§ 301-393 (1988).

n303 15 U.S.C. §§ 2051-2083 (1988).

n304 15 U.S.C. §§ 1381-1431 (1988).

n305 *See, e.g.,* 15 U.S.C. § 1411 (1988); 49 C.F.R. § 573.5 (1990) (requiring reports of defective vehicles to be made to the Secretary of Transportation); 21 C.F.R. § 803.24 (1991) (requiring reports of malfunctioning medical devices to be made to the Food and Drug Administration); 16 C.F.R. § 1115.10 (1991) (requiring reports of products that fail to meet safety standards or that contain a defect that could create a hazard or risk of injury or death to the Consumer Product Safety Commission); *see also* 15 U.S.C. §§ 1395, 1401 (1988) (giving the Secretary of Transportation power to conduct research and testing and to investigate accidents); 15 U.S.C. § 2054(a)-(b) (1988) (giving the Consumer Product Safety Commission responsibility to research and investigate consumer product safety).

n306 *See* 21 U.S.C.A. § 360i(a)(6) (West Supp. 1991) (as amended by Pub. L. No. 101-629, 104 Stat. 4511, 4514 (1990)).

n307 *See* 21 U.S.C.A. § 360i(b)(1)(A)-(B) (West Supp. 1991) (as amended by Pub. L. No. 101-629, 104 Stat. 4511, 4511 (1990)).

n308 *See* Act of Nov. 16, 1990, Pub. L. 101-608, Title I, § 112(b), 104 Stat. 3115 (codified at 15 U.S.C.A. § 2084 (West Supp. 1991)).

n309 *See, e.g.,* Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1418(a)(2)(A)-(B) (1988) (trade secrets); Consumer Product Safety Act, 15 U.S.C. § 2055(a)(2) (1988) (trade secrets); Food, Drug, and Cosmetic Act, 21 U.S.C. § 360j(c) (1988) (trade secrets); 21 C.F.R. § 803.9 (1991) (trade secrets and privacy); 16 CFR § 1115.15 (1991) (product identification).

n310 *See, e.g.,* 15 U.S.C. § 1395(c) (1988) (granting public access to highway safety

research); 15 U.S.C. § 1414(c) (1988) (requiring the disclosure of product defect and planned remedy); 15 U.S.C. § 2054(d) (1988) (requiring that consumer product safety information be made available to the public); 21 U.S.C. § 360h(a) (1988) (requiring notice by Secretary of Health and Human Services of an unreasonable risk of substantial harm); 21 C.F.R. § 803.9 (1991) (granting public access to reports under the Food, Drug, and Cosmetic Act).

n311 5 U.S.C. §§ 552-559 (1988).

n312 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1986) ("A Lawyer Should Preserve the Confidences and Secrets of a Client."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. [4] (1983) ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

n313 *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities,* 1986 AM. B. FOUND. RES. J. 613, 617 (arguing that to find in lawyers "a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity. Such a screening submits each to the prior restraint of the judge/facilitator and to rule by an oligarchy of lawyers.").

n314 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983) (advising that a lawyer should not make extrajudicial statements that may be disseminated to the public if it will materially prejudice the adjudicative process).

n315 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1986).

n316 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) (instructing that a lawyer should not represent a client if representation will be limited by the lawyer's own or another client's interests).

n317 Because, in reality, disclosure will often weaken the plaintiff's bargaining position for securing the defendant's acquiescence in discovery of certain materials and also damage the plaintiff's ability to maximize the settlement value, the client's informed consent is critical.

n318 Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).

n319 *See* Marcus, *supra* note 9, at 472.

n320 A court has broad discretion under Federal Rule 26(c), for example, to shape a protective order to the needs of a specific case. *See* Tahoe Ins. Co. v. Morrison-Knudsen Co., 84 F.R.D. 362, 364 (D. Idaho 1979); 8 WRIGHT & MILLER, *supra* note 14, § 2036, at 269; *see also* Lewis R. Pyle Memorial Hosp. v. Superior Court, 717 P.2d 872, 876 (Ariz. 1986) ("The good cause standard gives courts very broad discretion to tailor protective provisions to fit the needs of the case.").

n321 For example, the Texas rule requires public notice of every request to seal court records. *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991). Requests have been made to seal a wide variety of information. In a wrongful death case, the defendant sought confidentiality for an employee handbook that contained a pizza recipe. *See* DePriest v. Pizza Management Inc., No. 483, 464 (Travis County Dist. Ct., 53rd Jud. Dist., Tx. Sept. 17,

1990). In a malpractice action, the plaintiff sought confidentiality for personal bank account statements, personal income tax returns, real estate deeds, certificates of stock ownership, and certificates of title to motor vehicles. *See* McGowen v. Jones, No. 141-126533-90 (Tarrant County Dist. Ct., 141st Jud. Dist., Tx. Sept. 21, 1990). In a personal injury action, defendant sought confidentiality for design and sales information about a popular athletic shoe. *See* White v. Reebok Int'l, Ltd., No. 88-45391 (Harris County Dist. Ct., 125th Jud. Dist., Tx. Nov. 26, 1990). In another case involving a counterclaim for breach of contract and deceptive trade practices, the counter-plaintiff sought a court seal for records concerning the price and intended use of property involved in the contract dispute. *See* Lindsay v. Jacobs, No. 90-06657 (Harris County Dist. Ct., 165th Jud. Dist., Tx. Oct. 24, 1990).

n322 When all the parties support the protective order or seal, as often is the case when the defendant seeks confidentiality and the plaintiff wants to facilitate its own access to discovery materials, the court is faced with an essentially non-adversarial situation and must assume the duty of making an independent inquiry. A useful analogue is the "fiduciary" burden assumed by federal judges in evaluating a proposed class action settlement under Federal Rule 23(e). *See generally* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 378-416 (2d ed. 1986) (detailing the issues a judge should consider). This seems to have been the approach taken in City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995 (2d Cir. Aug. 14, 1991), which spoke of the court's "larger role" in this context. *See id.* at *15-16.

n323 *See supra* pp. 487-88.

n324 *See generally* G.I. Fodier, Annotation, *In Camera Trial or Hearing and Other Procedures to Safeguard Trade Secrets or the Like Against Undue Disclosure in Course of Civil Action Involving Such Secret,* 62 A.L.R.2d 509, 516-33 (1958) (discussing a procedure that could be used to protect trade secrets from public or other disclosure). Even the disclosures that occur in the process of adjudicating the protective-order question pose risks that must be guarded against. *See generally* Michael A. Pope, William R. Quinlan & Thomas L. Duston, *Protecting a Client's Secret Data,* NAT'L L.J., July 8, 1991, at 15 (emphasizing the importance of developing sophisticated judicial approaches to discovery that can protect confidential business secrets).

n325 It would be more difficult for third parties to satisfy the first two requirements than it would be for parties to the action. This outcome is both sensible and consonant with current law.

n326 One of the least desirable aspects of some of the public access proposals is that they are heavily weighted with procedural requirements such as public notice, waiting periods, intervention proceedings, and rights to appeal. *See, e.g.,* TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991).

n327 *See, e.g.,* City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *4-5 (2d Cir. Aug. 14, 1991).

n328 *See, e.g.,* Anderson v. Cryovac, Inc., 805 F.2d 1, 8 (1st Cir. 986) ("In a case involving allegations that a city's water supply had been poisoned by toxic chemicals, the public interest required that information bearing on this problem be made available to those charged with protecting the public's health.").

n329 *See supra* pp. 488-90.

n330 *Cf.* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 4.5(b), at 236-37 (1985) (stating that the government must minimize the scope of intrusion during authorized electronic surveillance). Some information privacy statutes limit access to personal information on a need-to-know basis. *See, e.g.,* Federal Fair Information Practices Act, 5 U.S.C. § 552a (1988); Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1988).

n331 *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 400 (1981).

n332 *Cf.* Note, *supra* note 205, at 1348-49 (proposing that, although failure to provide a protective order for trade secrets generally would work a taking under the Fifth Amendment, a narrow "nuisance" exception should apply to "allow public disclosure . . . only if limiting access would significantly endanger the public").

n333 Courts have great flexibility to shape protective orders in order to meet the needs of a particular case. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 305-08. A good example of this flexibility is Maritime Cinema Serv. Corp. v. Movies en Route, Inc., 60 F.R.D. 587 (S.D.N.Y. 1973), which allowed the plaintiff to compel the defendant to answer certain interrogatories only on condition that the answers be seen by plaintiff's counsel but not by the plaintiff itself. *See id.* at 589-90.

n334 A number of courts have limited disclosure to parties' counsel and sometimes their expert witnesses. *See, e.g.,* Covey Oil Co. v. Continental Oil Co., 340 F.2d 993,999 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965); General Elec. Co. v. Allinger, No. 91-316-FR, 1991 U.S. Dist. LEXIS 10878 at *4 (D. Or. Aug. 1, 1991); Ohm Resource Recovery Corp. v. Industrial Fuels & Resources, Inc., No. S90-511, 1991 U.S. Dist. LEXIS 10297, at *14 (N.D. Ind. July 24, 1991); Coca-Cola Bottling Co. v. Coca-Cola Co., 107 >o7 F.R.D. 288, 300 (D. Del. 1985). Courts have also prevented a governmental agency from using discovery material for purposes outside the litigation, *see* Harris v. Amoco Prod. Co., 768 F.2d 669, 686 (5th Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986), and have prevented a state from divulging information to the public and to government employees other than designated workers who signed confidentiality affidavits, *see* New York v. United States Metal Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985).

n335 *See supra* p. 471.

n336 *See, e.g., Allinger,* 1991 U.S. Dist. LEXIS 10878, at *4.

n337 *See* Upjohn v. United States, 449 U.S. 383, 400 (1981).

n338 *See* City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *16 (2d Cir. Aug. 14, 1991) (concluding that a confidentiality order should only be issued after a careful, particularized review); *cf.* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 761 (1989) (arguing that, if federal agencies were required to disseminate information to the public about private individuals merely because the information was contained in public records, the government would be "transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requestor, for any purpose").

n339 The cases allowing sharing include Wilk v. AMA, 635 F.2d 1295 (7th Cir. 1980); Wauchop v. Domino's Pizza, Inc., NO. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694 (N.D.

Ind. Aug. 6, 1991); Nestle Foods Corp. v. Aetna Casualty & Sur. Co., No. 89-1701(CSF), 1990 U.S. Dist. LEXIS 12137 (D.N.J. Jan. 25, 1990); United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989); and Deford v. Schmid Prods. Co., 120 F.R.D. 648 (D. Md. 1987). Cases denying sharing include Scott v. Monsanto Co., 868 F.2d 786 (5th Cir. 1989); Palmieri v. New York, 779 F.2d 861 (2d Cir. 1985); and Mampe v. Ayerst Labs., 548 A.2d 798 (D.C. 1988). *See generally* Gary L. Wilson, Note, Seattle Times: *What Effect on Discovery Sharing?,* 1985 WIS. L. REV. 1055 (arguing that the use of *Seattle Times* as a legal support against discovery sharing is improper); Thomas M. Fleming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation,* 83 A.L.R. 4TH 987 (1991) (analyzing cases that have considered protective orders for the disclosure of discovered material to similarly situated litigants and observing that state courts generally disapprove of categorical prohibitions on disclosure but are willing to impose restrictions to protect trade secrets). The new Virginia statute expressly authorizes the sharing of discovery materials that are under a protective order. *See* VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1991).

n340 *See, e.g.,* Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694, at *13 (N.D. Ind. Aug. 6, 1991); Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Patterson v. Ford Motor Co., 85 F.R.D. 152, 153-54 (W.D. Tex. 1980); *see also* Baker v. Liggett Group, Inc., 132 F.R.D. 123, 126 (D. Mass. 1990) (issuing a protective order authorizing disclosure of confidential materials to other tobacco tort litigants, under appropriate restraints).

n341 Wilk v. AMA, 635 F.2d 1295, 1301 (7th Cir. 1980).

n342 In Campbell, *supra* note 11, the author suggests that there are financial rewards in vending discovery materials. *See id.* at 774; *see also* Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order,* 60 N.Y.U. L. REV. 1137, 1155-58 (1985) (discussing the ethical implications of compensation raised by information markets in discovered material). Although the commercialization of discovery material cannot be condoned, particularly when it contains proprietary data, it may be appropriate to allow a plaintiff to recoup the costs incurred in developing the information. *See* Marcus, *supra* note 9, at 498-99; *cf.* Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's -- Making the Rules Work,* 95 F.R.D. 245, 289 (1982) (proposing the imposition of a duty on the plaintiff to make discovery available to others without "undue" profit). Unfortunately, only the court is in a position to make a neutral judgment as to what is reasonable, and requiring courts to make those judgments would divert scarce judicial resources.

n343 *See generally Wilk,* 635 F.2d at 1300-01 (implying that a party bringing suit solely to obtain discovery material would not be entitled to a "day in court"); *Wauchop,* 1991 U.S. Dist. LEXIS 11694, at *15 (recognizing that a different result would be appropriate "if litigation was commenced solely for purposes of engaging in discovery"); *Patterson,* 85 F.R.D. at 154 (allowing the full use of information in other forums absent a showing that the "discovering party is exploiting the instant litigation solely to assist litigation in a foreign forum").

n344 *See, e.g., In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482,484 (E.D. Mich. 1979) (vacating a protective order and thereby allowing state court plaintiffs to share discovery information with consolidated federal multidistrict litigation plaintiffs), *aff'd,* 664 F.2d 114 (6th Cir. 1981).

Numerous proposals in recent years suggest that a substantial increase in the aggregation of related lawsuits is likely in the future. *See, e.g.,* 136 CONG. REC. H3116-19 (daily ed. June 5, 1990) (voting to pass the Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong.,, 2d Sess.); AMERICAN BAR ASS'N, REPORT OF THE COMMISSION ON MASS TORTS (1989); JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 91, at 44-45 (proposing an amendment to a multidistrict litigation statute to permit consolidated trials as well as pretrial proceedings); American Law Inst., Complex Litigation Project (Tentative Draft No. 4) §§ 4.01-.02, at 25-92 (Sept. 19, 1991) (providing for the transfer of related cases from federal to state court as well as from state to state); American Law Inst., Complex Litigation Project (Tentative Draft No. 2) §§ 3.01-.10, at 1-26 (Apr. 6, 1990) (proposing federal intrasystem consolidation and transfer, including trial); *id.* §§ 5.01-.05, at 33-129 (discussing a proposed complex litigation statute for federal-state intersystem consolidation); National Conference of Comm'rs of Uniform State Laws, Transfer of Litigation Act (July 1991).

n345 *See, e.g.,* United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990) (allowing discovery sharing but imposing on the third party "the restrictions on use and disclosure contained in the original protective order"), *cert. denied,* 111 S. Ct. 799 (1991).

n346 Requests for modification of protective orders are relatively common and are subject to varying treatment by courts. *See, e.g.,* Westchester Radiological Ass'n P.C. v. Blue Cross/Blue Shield of Greater New York, Inc., No. 85-CV-2733(KMW), 1991 U.S. Dist. LEXIS 9216 (S.D.N.Y. July 3, 1991); *see also* HARE, GILBERT & REMINE, *supra* note 11, § 6.11, at 144 (discussing cases on order modification); 8 WRIGHT & MILLER, *supra* note 14, § 2042, at 299 n.13 (1970 & Supp. 1991) (same); Robin C. Larner, Annotation, *Modification of Protective Order Entered Pursuant to Rule 26(c), Federal Rules of Civil Procedure,* 85 A.L.R. FED. 538 (1987 & Supp. 1990) (same).

n347 *See* Bechamps, *supra* note 255, at 130 (1990); *see also* Grundberg v. Upjohn Co., No. C-89-2746, 1991 U.S. Dist. LEXIS 14991 (D. Utah Oct. 4, 1991) (considering all relevant factors to determine whether changed circumstances warranted the modification of a protective order); All-Tone Communications, Inc. v. American Info. Technologies, No. 87-C-2186, 1991 U.S. Dist. LEXIS 10096, at *6 (N.D. Ill. July 18, 1991) (adopting the view that a court should consider the circumstances leading up to production prior to releasing judicial records).

n348 *See, e.g.,* H.L. Hayden Co. v. Siemens Medical Sys., 130 F.R.D. 281, 282 (S.D.N.Y. 1989); Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658-59 (D.D.C. 1986); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 55 (E.D. Mich. 1985).

n349 *See, e.g.,* Martindell v. ITT Corp., 594 F.2d 291, 295-96 (2d Cir. 1979); *see also Westchester,* 1991 U.S. Dist. LEXIS 9216, at *17 (modifying a confidentiality order to permit the disclosure of documents and testimony given before an order was in place). One court has suggested that "some element of a breach of faith" is involved. *In re* Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 Fed. R. Serv. 2d (Callaghan) 1251, 1252 (N.D. Cal. 1974).

n350 The unfair consequences are not limited to the parties. Indeed, a nonparty witness who testifies under the aegis of a protective order only to have his guarantee of confidentiality eliminated by a modification of the order quite properly can feel aggrieved.

n351 For example, in United States Dep't of Justice v. Reporters Comm. for Freedom of

the Press, 489 U.S. 749 (1989), the Court refused to require that the press be given access to ten-year-old criminal records; it found that any public interest in the criminal activity had been vitiated by the passage of time and that the subject of the record now had a protectable privacy interest that did not exist at the time the criminal act originally took place. *See id.* at 762-71.

n352 *See* Palmieri v. New York, 779 F.2d 861, 862 (2d Cir. 1985) ("[A]bsent an express finding by the district court of improvidence in the magistrate's initial grant of the protective orders or of extraordinary circumstances or compelling need by the State for the information protected thereunder, it was error for the district court to modify the magistrate's orders."); New York v. United States Metals Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985) (concluding that the district court did not abuse its discretion by including a report under a protective order on the basis of irreparable harm to defendant and the absence of public welfare concerns).

n353 *See generally* Richard L. Marcus, *Myth and Reality in Protective Order Litigation,* 69 CORNELL L. REV. 1, 18 (1983) (questioning whether litigants can still rely on protective orders).

n354 *See, e.g.,* John F. Rooney, *Issue of Sealed Files, Secrecy in the Courts Won't Be Swept Under the Rug,* CHI. DAILY L. BULL., Apr. 20, 1991, at 1 (chronicling the increase in judicial sensitivity toward sealing orders).

TESTIMONY FOR HEARING ON
"COURT SECRECY AND PUBLIC HEALTH AND SAFETY"

BY
STEPHEN G. MORRISON

Senate Judiciary Committee
Subcommittee on Anti-Trust, Competition Policy and Consumer Rights
December 11, 2007

My name is Steve Morrison. I am a trial lawyer who usually defends people who get sued. I have tried over 240 cases to jury verdict and argued over 60 appeals in the highest courts of the federal and state systems of this nation. It has been my privilege to be lead counsel in 27 states. I have represented large multi-nationals, Fortune 500 companies, and Main Street businesses. I have represented individuals and families. I am a past President of the Defense Research Institute representing over 21,000 defense lawyers nationwide. I am a past President of Lawyers for Civil Justice, a coalition of corporate and defense trial lawyers, major American corporations and defense bar associations. I am a past Chairman of the House of Delegates of the South Carolina Bar.

I have been involved on a first hand basis with hundreds of cases which were successfully litigated or settled precisely because the parties involved in the litigation knew that the private information which they shared in discovery would remain confidential. The parties understood that if their private information was to be shared with the public, it would be shared in the context of judicial supervision and due process, with each party being allowed to comment and to set the context on the data that was placed before the public. The current legislation contemplated, euphemistically designated the "Sunshine and Litigation Act,"

threatens the fundamental right of litigants to privacy and property. This legislation would increase the cost and burdens on the parties and decrease the efficiency of the court system. Certain parties would receive unfair tactical advantages at the expense of others. As importantly, the need for such legislation has not been demonstrated in the nearly two decades since it was first introduced. In my experience, legislation such as this would cripple the ability of the parties to reach a just determination of their disputes without offering any offsetting benefits. The legislation currently contemplated also directly contravenes the views expressed by the Judicial Conference Committee on Rules of Practice and Procedure which address this issue in the context of then pending Senate legislative initiatives. Any attempt to restrict or eliminate the power of the courts to issue protective orders to maintain the confidentiality and privacy of personal or sensitive information would have clear negative consequences for our nation's legal system.

I would like to make it clear that I am not speaking on behalf of any client or on behalf of any organization that I have led or am a member of currently. I speak from personal experience with deep conviction and I speak for myself.

The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by the United States Constitution. In my experience, both of these rights are lost when private information becomes public or a trade secret is revealed in a competitive arena. Most of the time when an individual is seeking to release private information into the public domain in the context of litigation, they are motivated not by a desire to protect human health and public safety but rather by a desire to leverage information out of context to increase the value of a particular piece of civil litigation. In other words, the

motive for disclosing private information in the context of civil litigation is frequently simply a matter of economics.

Moreover, litigants have a right to privacy in pretrial matters just as they have a right to due process. In America we have open access to courts. This means that anyone with the ability to pay the filing fees, usually $100 or so, and file a complaint stating that someone has wronged them can begin a lawsuit. The lawsuit then takes on a life of its own. The publicly filed papers are public, available to the newspapers, the internet, etc. However, litigants can then avail themselves of the police power of the state to demand and get private confidential information from each other. The fact that this private confidential information is exchanged in our civil justice system does not mean that that information is of interest to, or necessary to be disclosed to, the public on a unilateral basis without court supervision. Moreover, the exchange of this private information frequently does not lead to evidence that is admitted in any court of law.

In my experience hundreds of thousands and even millions of documents are released by parties to each other in individual cases throughout the country. Only a small fraction of these documents are relevant to any legal issue that is actually put before the court or placed in front of a jury in a trial. This means that massive amounts of private and confidential information are exchanged in the context of our civil justice system in order to resolve disputes peacefully and amicably.

If this information were to be released immediately to the broadcast media or the internet without context, without judicial supervision, without due process, massive mischief could and would take place. Portions of documents would be released without a witness to explain the document or to place it in context. Documents would be released solely to attempt

to embarrass one of the parties. Documents would be released so as to create an "in terrorem" effect as to the parties. The massive amount of information generated in litigation in this electronic age often forces litigants to place their privacy and proprietary information at risk to vindicate their legal rights. Protective orders protect those rights while allowing the legal disputes to be resolved fairly and efficiently through a balance process of protecting privacy rights and allowing the dispute resolution.

If confidentiality cannot be protected in the context of our civil justice system, in my experience, litigants will be more inclined to oppose every document request or attempt to narrow the request for information by the opposing party in each and every case. This will cause an increased burden on our court system in the form of increased hearings, increased legal costs to both parties and increased costs to the public. The legislation contemplated with impose new burdens on the courts by requiring them, at the earliest stages of litigation, to make preliminary determinations on an incomplete record regarding important questions such as whether protecting the confidentiality of any among thousands of documents requested would endanger the public health and safety. Overburdened courts are ill-equipped to assume such a role in modern trial practice and lawyers are generally able to agree on a procedure that both protects the confidentiality of sensitive documents and gives the opposing parties access to them and provides for the disclosure of those documents in an orderly process in open court when appropriate. Once a preliminary protective order is entered and the key documents have been identified, under the current system, the parties can then litigate whether they should be disclosed to the public. That litigation takes place with total respect to the fundamental rights of the party who owns the private documents as well as the party who wishes to disclose them to the broader public for whatever purpose.

Protective orders and settlement agreements are currently used to balance the broad and invasive nature of modern discovery. Historically, protective orders have worked well to balance competing interests in private discovery disputes. In my experience, generally, when a party wishes to have disclosure of past settlements in litigation, they are wishing to create an atmosphere where the settlement of the civil lawsuit is cast as an "admission" of wrong doing by the settling party. The effort is not simply to disclose that a case has been settled but to cast the party who has settled in the role of the "evil-doer". Does anyone really believe that such a use of past settlements will promote future settlements? If one of the goals of our justice system is the peaceful resolution of disputes among parties, then settlement should be promoted and not discouraged. There are many reasons to settle a case which have nothing to do with an admission of wrong doing. Any fundamental change in American Law restricting judicial authority to issue protective orders and sealing orders would create a tactical advantage for contingency fee lawyers hoping to file more lawsuits against corporate deep-pocket defendants.

Information about public hazards is available to the public under existing law and there is no compelling need to consider legislation that would restrict judge's discretion nationwide. Professor Arthur Miller, the nation's foremost expert on privacy and procedure set forth his view that to impose any further restrictions on a judge's discretion to protect privacy and property rights or to "favor" or "disfavor" either privacy or openness in the exercise of that discretion by legislation or court rule, is not warranted by empirical evidence. The courts already have law discretion to balance the competing goals of promoting openness and protecting legitimate interest in privacy and confidentiality when information is sealed upon settlement as well as when the production of confidential information is compelled in the

course of litigation. Recent research on this issue concludes that the current system is working effectively and needs no change.

Moreover, regulatory agencies already have the power to obtain information from companies about matters effecting "public health and safety." These agencies do not need courts to serve as freedom of information clearing houses. In fact, federal statutes already require regulated industries to provide a massive amount of information to government agencies about the products they produce before they go to market, as well as after they are on the market. The findings of empirical research conducted by the federal judicial center, the research arm of the federal courts, as well as extensive public comments submitted to the judicial conference committee on rules of practice and procedure, failed to detect anything wrong with the current protective order practice of the use of confidentiality agreements.

Professor Miller was correct in concluding, "the appropriate concern is not that there is too much 'secrecy'. Rather, it is that there is too little attention to privacy, the loss of confidentiality and to interference with the proper functioning of the judicial process."

Confidentiality serves several values in the civil justice system. The benefit of public access to certain litigation materials simply does not rise to, much less, transcend the essential rights of privacy. The present practice should be retained. We should continue to rely on our courts to use their discretion to issue confidentiality orders to protect the legitimate interest of the parties. We should continue to allow the parties to retain their rights to negotiate confidentiality agreements voluntarily. Our current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is simply no reason to believe that existing court rules of practice create any risks to public health and safety. I strongly recommend against enactment of restrictive legislation. The truth is, the

courts rarely use their authority to seal information, especially in today's environment. When they do, there is compelling evidence that preserving confidentiality is of primary importance. Even if the courts have the resources to assume a public information function, they are not the appropriate institutions to do so. As we all know, a multitude of executive, administrative and law enforcement agencies exist for the purpose of protecting the public health and safety. This is not the role of the civil justice system or the role of individual private litigants no matter how much they aspire to that role. Courts are in the best position to make judgments in the context of the full adversarial process, with the rules of evidence and cross examination procedures and full due process placing all information in context to determine whether or not information should remain confidential or whether it should be disclosed to the public and in what context.

Thank you for the opportunity to present this information to the committee. I hope it has been helpful.

Statement of The Reporters Committee for Freedom of the Press

for the hearing

"The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety?"

United States Senate Committee on the Judiciary,
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Dec. 11, 2007

Chairman Kohl, Ranking Member Hatch and Members of the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights:

The Reporters Committee for Freedom of the Press is honored to be given the opportunity to provide comments regarding the Sunshine in Litigation Act emphasizing the media perspective. The press often serves as a conduit between the public and information in the public interest and the U.S. Supreme Court has called the press a "surrogate for the public." The Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and access interests of the news media. The Reporters Committee has provided legal representation, guidance and research on these issues since 1970. Access to court proceedings and documents is a major component of the litigation, research and advocacy the Reporters Committee engages in and we have long studied the subject.

In researching court access issues, we have found the pervasiveness of unnecessary secrecy to be absolutely staggering. Not only are courts issuing protective orders or sealing orders with regard to national security, personal privacy and confidential business information — often rightly so — but courts are going much too far in readily approving blanket sealing orders that close access to entire case files and trying entire cases outside the public's view with secret

docketing systems.[1] Opening access to documents in cases where public health and safety are at issue, while only a small fraction of closed court matters in the public interest, is an important step at providing the public with information it has the right to know about.

Examples abound of cases in which protective orders sealed access to information in court cases of great interest to the public and the press. In some instances where protective orders are issued, a third party (often the media) will intervene to argue for access to the documents under seal. At times, the result is a modified order allowing more access, or even a withdrawal of the order; but this is not without great effort and expense on the part of the intervenor. Despite sometimes achieving access in the end, it cannot be ignored that access was initially withheld and only achieved after a third party assumed the duty — and financial burden — of seeking access. Some examples of federal cases containing information sealed by protective orders:

- A protective order intended to apply to business, financial and trade secrets information has been allegedly improperly applied to nearly all of the pretrial documents filed in the civil case involving the victims of the Sept. 11, 2001 terrorist attacks against the airlines and security agencies involved that day. The victims are arguing that the defendants in the case are over-applying the order to documents that should not be sealed for the reasons allowed under the order; their motion is pending in the U.S. District Court for the Southern District of New York. *In re September 11 Litigation*, No. 21 MC 97.

- Materials provided by the prosecution to the defense in the grand jury investigation against I. Lewis "Scooter" Libby were subject to a blanket protective order issued Nov. 17, 2005; after protests from the media, prosecutor Patrick Fitzgerald later tailored the order more narrowly to allow greater access to the pretrial and trial proceedings. *United States v. Libby*, No. 05-458 (D.D.C. 2007).

- Documents in lawsuit filed by former member of the Honolulu Police Department's elite Criminal Intelligence Unit alleging corruption and misconduct were all sealed under a protective order. *Kamakana v. Honolulu*, 2002 WL 32255355 (D. Haw. Nov. 25, 2002). The *Honolulu Advertiser* intervened and won access to the records from the District Court, which was affirmed by the 9th Circuit in 2006.

[1] A Reporters Committee study found that from 2001 to 2006, the U.S. District Court for the District of Columbia alone had at least 469 sealed cases missing from the public docket and tried in complete secrecy. *See Disappearing Dockets*, THE NEWS MEDIA AND THE LAW, *available at*: http://www.rcfp.org/news/mag/30-1/cov-disappea.html.

- A blanket protective order sealed documents in a RICO trial in New York, causing the Hearst Corp. to move to intervene for access in June 2004; the U.S. District Court for the Northern District of New York refused to decide whether to allow the media to intervene and on appeal, the 2nd Circuit found in January 2006 that the First Amendment provides a right of access to such documents. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006).

- In a high-profile antitrust case involving an alleged monopoly on computer microprocessors between two multi-million dollar technology corporations, the court considered a blanket protective order sealing access to discovery materials. *AMD v. Intel.*

- The 8th Circuit essentially denied a challenge to a protective order in refusing to allow intervention by a non-profit group seeking to challenge the order to obtain access to information it intended to use to educate the public in the underlying case regarding the meatpacking industry. The court denied intervention and the protective order stood. *Organization for Competitive Markets, Inc. v. Seaboard Farms, Inc.*, 2001 WL 842029 (8th Cir. Feb. 8, 2001).

- A protective order in a Pennsylvania police officer's civil lawsuit for alleged retaliation sealed all information in the case; the judge refused to lift the order after The *Philadelphia Daily News* asked it to, but on appeal, the 3rd Circuit found the order to be too broad to achieve the court's intended goal of an impartial jury pool and lifted the order. *Shingara v. Skiles.*

Secrecy levels increased dramatically after the terrorist attacks of Sept. 11, 2001, leading some institutions to overreact and seal access to even innocuous materials for fear that disclosure of information at any level may lead to further disasters. Infrastructure information, such as evacuation plans and records relating to mines, dams and pipelines that had long been in the public domain, was suddenly removed from publicly accessible facilities and Web sites and shrouded in secrecy. The government became far more reluctant to provide citizens with access to government records,[2] including even records of those individuals whose paychecks come directly from the public's taxpayer dollars.[3]

[2] In response to requests for information under the Freedom of Information Act, the government has made "creative use" of the nine exemptions to the Act, according to the Coalition of Journalists for Open Government. A CJOG study showed that following 2001-2002 memos from then-Attorney General John Ashcroft and then-White House Chief of Staff Andrew Card, use of some exemptions was up as much as 500 percent from 1998 to 2006.

Despite some government institutions' more recent reluctance to recognize a public right of access to government information, appellate court precedent across the country has repeatedly given the public a presumptive right of access to judicial proceedings and records.[4] Although a court may limit access to proceedings or documents in unusual cases, courts have understood that they must consider First Amendment issues and meet rigorous constitutional standards before access is restricted.

Our concern is that in far too many cases, both the presumption of openness and the strict scrutiny required to allow closure are overlooked as judges disregard constitutional and common law rights in favor of privacy interests. The U.S. Supreme Court has ruled that if closure could possibly be warranted, it would be only after a court has undertaken a rigorous First Amendment analysis, subjecting closure to strict scrutiny. In the 1984 case *Press Enterprise Co. v. Superior Court*, the Supreme Court wrote, "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Additionally, full grants of requests for information sought under the Act was down 42 percent for that same time period. The study is available at: http://www.cjog.net/documents/Still_Waiting_Narrative_and_Charts.pdf.

[3] More than 900,000 government employees' names, positions and salaries are being withheld by the federal government, according to the Transactional Research Access Clearinghouse at Syracuse University. These employees do not have classified positions within such administrative branches as the FBI, CIA or Drug Enforcement Agency, as one might suspect, but are Peace Corps volunteers or employees of agencies such as the Environmental Protection Agency, the Federal Emergency Management Agency or the Occupational Health and Safety Administration. TRAC has filed a lawsuit against the Office of Personnel Management to compel the release of this previously public information.

[4] Several U.S. Supreme Court opinions enumerate this presumptive right of access to proceedings and/or records, including *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984).

Unless court records are evaluated under strict scrutiny and properly allowed to be closed, court records of all types, in all cases, should be available to the public so the public may monitor how court officials — public employees — perform their duties, and to further public trust in our legal system. Closed proceedings and records, the U.S. Supreme Court wrote in *Richmond Newspapers, Inc. v. Virginia*, inhibit the "crucial prophylactic aspects of the administration of justice" and lead to distrust of the judicial system if, for example, the outcome is unexpected and the reasons for it are hidden from public view. To allow court records to be sealed from public access not only undermines the longstanding pillars of public policy that keep our nation functioning, but disregards the great public interest in many matters of civil litigation as well.

The public has an interest in all litigation, including civil cases between two private parties, especially when matters of public health and safety are at issue. Courts have agreed that this should be the case. [5] When private litigants bring their disputes for resolution in public courts before a state-appointed or publicly elected judge, they should anticipate the government institution would adjudicate their matter in public and that any filings or documents accompanying the case would be publicly available as well.

Courts have consistently found that access to courts and judicial records is important for public education, public trust and the integrity of the court system. When public health and safety are at issue, public interest is further heightened. Legislation that would mandate openness

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[5] As the U.S. Supreme Court has noted, "in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979). Other courts have uniformly applied those principles to grant the public a presumptive right of access to civil proceedings in many cases, including *Publicker Industries, Inc. v. Cohen*, 733 F.2d1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984) and *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

for court records in such cases would provide the public with access to important records that would not only give members of the public information they may need, but also protect their rights of access to that information.

Thank you.

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**"The Sunshine in Litigation Act:
Does Court Secrecy Undermine Public Health and Safety?"**

Testimony Submitted for the Hearing
Before the Subcommittee on
Antitrust, Competition Policy and Consumer Rights

ON THE SUNSHINE IN LITIGATION ACT OF 2007

JUDITH RESNIK[1]

Thank you for requesting that I submit testimony for the record. On the day of the hearing, I will be speaking in London at a symposium devoted to this very subject: the contributions courts make to the public sphere.[2]

While "bargaining in the shadow of the law" is a phrase often invoked,[3] bargaining is increasingly a requirement *of the law* of conflict resolution. That bargaining—pressed upon litigants by public processes—is in need of public oversight. The *Sunshine in Litigation Act of 2007* is a significant step forward in protecting the public dimensions of adjudication. My hope is that this proposed legislation can serve as a springboard for discussions among members of all three branches of the federal government about how to shape rules, practices, and legislation to be responsive to the problem of the privatization of adjudication.

Courts may not be the best nor are they the only resource for understanding the nature of injuries, the kinds of conflicts around us, the development of legal norms, and the roles and obligations of governments. But courts, well-practiced in contributing to social ordering through public enactment of the state's power, are one source for information and as such, well worth preserving.

In the comments that follow, I address five points:

(1) How changes in the way cases are handled in the federal courts undermine the public dimensions of courts;

(2) That public processes are central to courts' identity, utility, and legitimacy, as can be seen from our constitutional structure and traditions;

(3) That these public dimensions are at risk and that, absent intervention, the privatization of public processes will continue to the detriment of public knowledge;

(4) Why bargaining over adjudication is in need of regulation and how requirements proposed by the *Sunshine in Litigation Act of 2007* that federal judges make factual findings and legal conclusions before permitting confidentiality and secrecy will inform us all about what materials parties seek to keep outside the public purview and when the legal justifications for closure is appropriate;

(5) Finally, and with respect, that this proposal could be enhanced were it to include requirements that judges publish the decisions made and further, that this provision be coupled with other reforms to make good on the promise of open and public courts.

I. SECRECY AND SUNSHINE IN CONTEXT

When earlier versions of this legislation were pending,[4] researchers at the Federal Judicial Center inquired into the practice of sealing court-based settlements.[5] From their review of a sample of docket sheets from different federal districts, the researchers reported that few litigants in their data set requested that settlements filed in court be sealed.[6] One might infer from the relative rarity of docket sheets noting sealing that information about how cases are processed and about their outcomes is generally accessible.

My view, in contrast, is that privatization of court-based decisionmaking is underway, but that sealing court files is not the predominant mode used to accomplish what some describe as "confidentiality" and "privacy" and others call "secrecy." Despite the information explosion enabled by new technologies, knowledge about conflicts and their resolutions is being limited. While courts were once information producers and information outlets, that function is diminishing through (a) the devolution of court authority to agencies, (b) the outsourcing of decisions to private dispute resolution providers, and (c) the internalization by courts of rules and practices that promote conflict management and settlement (alternative dispute resolution or ADR) in lieu of adjudication.

These changes represent a movement away from a due process litigation model exemplified by the 1938 Federal Rules of Civil Procedure to what should be called "Contract Procedure," in which judges strive to produce settlements.[7] This privatization makes it more difficult to grasp the nature, content, and consequences of conflicts in which public norms are invoked. Both the Due Process Model of the 1930s Federal Rules and the Contract Procedure Model of the twenty-first century crafted new forms of process—ranging from the 1930s

invention of discovery to the 1990 promotion of judicial settlement conferences and other forms of alternative dispute resolution. These new procedures require new regulations to address what aspects of these processes should be presumptively public.

My hope is that the attention paid to problems of privatization will not be focused on courts alone. For hundreds of thousands of claimants, administrative agencies are, functionally, courts. Moreover, contractual obligations to participate in mandatory arbitration proceedings are now enforced. In addition to considering what information related to court-based processes ought to be before the public, Congress should also focus on what can be done to improve the dissemination of knowledge produced by the alternatives to courts.

II. The Importance of the Public Dimensions of Adjudication

Before detailing how opportunities for public engagement are being closed off, a word about the development of public access to adjudication is in order. The United States has had a leadership role in recognizing the importance of access to courts and an independent judiciary as requisite to the functioning of successful, market-based economies. One often hears about tensions between the branches of the federal government. But our history is rich with examples of how Congress has worked to support the federal courts. During the twentieth century, Congress turned to the federal courts repeatedly to ensure the rights of the people of this country. Indeed, between 1974 and 1998, Congress created more than 450 new causes of action.[8]

Through much of that expansion, the traditions of public processes of adjudication (forged before the Renaissance as fledgling city-states attempted to generate their own authority by openly displaying their power to enforce the law and keep the peace[9]) carried forward. The proposition that judicial power entails an open process was enshrined early on, in the Sixth Amendment of the U.S. Constitution, establishing that the accused has a right to a "public trial."[10]

But what about civil cases? Access to civil processes, inferentially available when the Seventh Amendment protected jury trial rights, is founded more generally on a mixture of common law traditions and due process inferences.[11] Many state constitutions go further by making explicit rights of access through "open courts" provisions.[12]

Today, commitments to open and public processes are found worldwide, as is exemplified by Article 6 of the European Convention on Human Rights[13] which, like many such provisions, also recognizes the need to balance public access rights with appropriate recognition of privacy and security concerns.

In practice, in the past, the public was able to learn about civil and criminal proceedings via the open doors and windows of courtrooms, through the episodic publication and

dissemination of opinions, and by the personal inspection of papers filed with courts. With the rise of the newspaper business, the press provided another route, as did the development of "reporters" of court opinions[14] and commercial publishers of those judgments.[15]

Public access to proceedings *in* courts has become a signature feature *of* courts, resulting in practices so familiar as to be taken for granted. Justifications are provided only when challenges—many brought by the media—were made to closures. Presumptions of openness typically rest on historical tradition, coupled with insistent opposition to certain forms of secretive state processes. Further, some argue that through access the public is educated, the judges and litigants and lawyers are supervised, and knowledge of legal requirements is disseminated.[16] All of this openness now nests in the language of rights.

III. The Public Dimensions of Courts Are at Risk

However, during the past thirty years, public processes have been constrained—in part through requiring alternatives and in part by devolving much of the work of courts to administrative agencies and private providers. The result is privatization—coming from three directions.

A. The "New" Civil Procedure: "Trial as Error"

In the 1990s, when participating in a conference of judges and lawyers, a federal district judge commented that going to trial was a "failure" of the system. That attitude reflects a dramatic reconfiguration in the work of judges who, over the last thirty years, have focused on promoting settlements.[17]

1. New Rules

The emphasis has shifted away from the tasks associated with formal adjudication: public processes, reasoned deliberation, and the dissemination of information about processes and outcome. Instead, techniques such as mediation, arbitration, and settlement conferences, once termed "extrajudicial,"[18] have become regular features of civil processes. Through these rule changes, coupled with educational programs, the definition of the "good judge" became one who focused on and achieved dispositions with the lowest possible investment of time.

This reconfiguration of the judicial role is not limited to the trial level. More than half the circuits have "civil appeals management plans" requiring disputants to meet and attempt to settle cases while they are pending on appeal.[19] Further, many appellate courts rely on staff to screen cases and send appeals to various tracks. Although as a formal matter, aggrieved parties unhappy with final judgments have a statutory appeal "as of right," in practice what constitutes such an appeal varies considerably. Discretionary and low-visibility judgments by judges and staff determine which appeals receive more consideration than others.[20] Moreover, in many circuits, oral arguments are no longer presumptive but depend upon courts' permission and, when

litigants are permitted to argue cases, presentations may be limited to ten minutes for each side. Furthermore, not all judgments rendered are given precedential effect. Although new rulemaking (implemented in 2007) by the federal judiciary requires that litigants be permitted to cite to any appellate decisions, some circuits have responded with local rules that such decisions are not to be used as "precedent."[21]

Judges have become now multi-taskers, sometimes managers of lawyers and cases, sometimes mediators, sometimes referral sources, sending people outside the courts to other fora. These new roles, coupled with other changes detailed below, have had an impact.

2. Vanishing Trials

In the late 1930s, about twenty percent of civil cases were tried. In contrast, by 2002, a trial started in fewer than two of one hundred civil cases filed in federal courts.[22] Moreover, both the proportion and the absolute number of trials have declined.[23] As of 2002, "the average federal district judge presided over only about nine trials"; in 1962, the average was thirty-nine.[24] The phenomenon of the low rate of trials has come to be known within the legal profession as the problem of "the vanishing trial."[25]

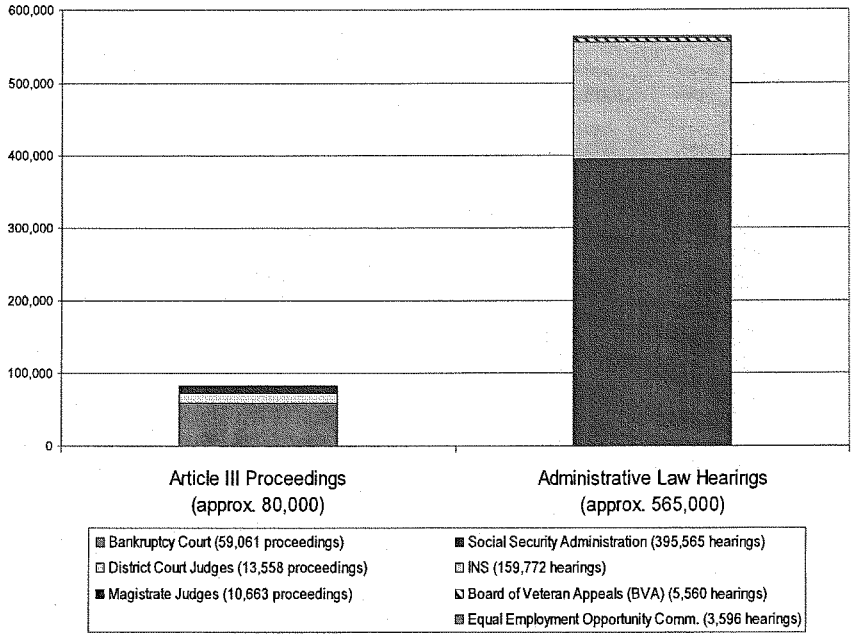
The sources for such changes at both trial and appellate levels are multiple, ranging from adjudication's successes (attracting large numbers of claimants placing demands that exceed capacity) to concerns about adjudication's failures (as too expensive, too cumbersome, too aggressive).[26] Further, Congress has played a role in endorsing forms of ADR for courts and for agencies.[27] Further, as I discuss below, Congress has not crafted mechanisms that would make the new processes and their outcomes easily accessible to the public.

B. Devolution to Administrative Adjudication

I have just detailed the decline of public trials in federal courts. But it would be an error to assume that because relatively few trials are occurring in the federal courthouses across the United States, evidentiary hearings have vanished. Rather, many such exchanges have migrated from courts into agencies, which are another form of alternative dispute resolution. Yet, most of this federal adjudication is not readily subject to public scrutiny.

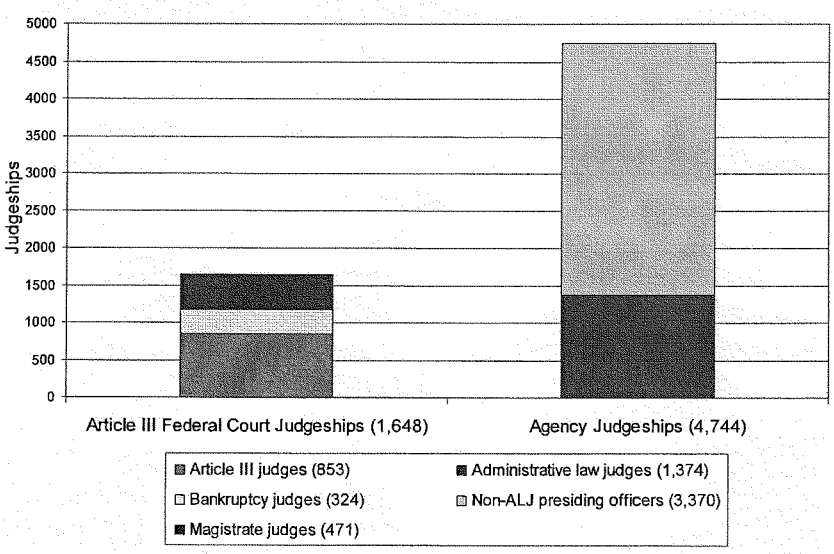
To summarize a good deal of information, consider two charts below. The first, figure 1, Authorized Judgeships in Article III Federal Courts and in Federal Agencies, provides a comparative picture of the number of all the judges working inside Article III courts and those who sit outside—in federal agencies.

Figure 2: Estimate of Evidentiary Proceedings in Article III Courts and in Four Federal Agencies (2001)



Explanation of the category "evidentiary hearings" is in order. The Administrative Office of the United States Courts, which provides statistics on the federal system, defines as "trials" all proceedings, civil or criminal, before Article III judges that are "contested hearings at which evidence is presented."[29] Separate tables are kept to tally such proceedings before magistrate and bankruptcy judges. Included in the definition would be testimony taken on motions, trials begun but ended through settlement, and those trials that result in the disposition of a case. Further, in this accounting, I have included proceedings at which either constitutional (district court) or statutory (magistrate and bankruptcy) judges preside in courthouse-based hearings. This generous estimate found about 100,000 evidentiary proceedings a year.

Figure 1: Numbers of Authorized Judgeships in Article III Federal Courts and in Federal Agencies (as of 2002)



From this chart, one can see the total number of judgeships—life-tenured or otherwise—at the trial level in federal courthouses around the United States, as well as the judgeships in federal agencies around the country. This count includes both the Article III district court judgeships and the statutory magistrate and bankruptcy judgeships. More than 1650 authorized positions exist, as contrasted with some 4700 administrative law judges or presiding officers who work in federal agencies.[28]

The next chart, Evidentiary Proceedings in Article III Courts and in Four Federal Agencies, is aimed at depicting all forms of "evidentiary proceedings" (not only "trials") that took place in federal courthouses as well as in four federal agencies with large caseloads.

On the other side of this chart is a bar representing the more than half-a-million evidentiary proceedings that occur in four federal agencies—the Social Security Administration, the Equal Employment Opportunity Commission (EEOC), the Immigration and Naturalization Service, and the Department of Veterans' Affairs.[30] These charts let one see that, while the taking of evidence in federal courts may be waning (if not vanishing), evidentiary proceedings have also migrated into agencies functionally serving as courts. Congress has authorized the devolution of a significant portion of adjudication to agencies but not shaped mechanisms by which the public can routinely learn about the processes or the outcomes of such proceedings.

In terms of public access, no ready way exists to be able to watch these exchanges in which government officials—hearing officers, administrative law judges, and other agency employees—decide the rights and obligations of tens of thousands of persons. For example, under the governing rules, EEOC hearings (related to claims about discrimination in federal employment) may be attended by outsiders only if specific permission is given.[31] Hearings on veterans' claims are generally closed.[32] Immigration hearings other than exclusion proceedings are presumptively open; however, immigration judges may respond to space constraints by limiting attendees—with priority in seats going to the press.[33] Further, immigration judges may also close hearings in order to protect witnesses, or when family abuse is at issue, when certain kinds of protective orders are sought, and under some case law, due to national security concerns.[34] Social Security hearings are open, unless otherwise ordered closed.[35]

As a practical matter, however, even if one has the "right" to attend these various proceedings, it is difficult to find them. Unlike courtrooms with designated spaces for public observances, the offices used by agencies do not invite "street traffic." Equally important, one cannot easily read—in lieu of seeing—the decisions of federal administrative adjudication. No "federal reporter" collects the judgments of all federal agencies and puts them together in published volumes or online. (Some agencies provide various forms of information about their adjudication.[36])

Moreover, unlike the federal courts, served by an Administrative Office that routinely collects and collates national data, federal administrative agencies have no shared research division that spans the dozens of entities and that supplies the public with annual booklets detailing their work. In the 1970s, Congress did create the Administrative Conference of the United States (ACUS), designed to provide some interagency analysis.[37] But Congress has never funded ACUS at a level that would have permitted it to survey and report regularly on all of the adjudicatory practices of agencies.[38]

C. Outsourcing: Enforcing Pre-Disputes Contracts to Arbitrate

Yet, what occurs within agencies is relatively visible when compared with another form of ADR, exemplified by an excerpt below from a 2002 Cellular Service Agreement. As the

agreement reproduced here indicates, by unwrapping the telephone and activating the service, consumers waive rights to go to court and become obligated to "arbitrate disputes arising out of or related to" this or "prior agreements." Further, both the provider and consumer agree to waive rights to pursue any "class action or class arbitration"—creating an appearance of symmetry. (I am not aware of many instances in which telephone providers bring class actions against their own consumers.) The telephone provider requires participation in a stipulated dispute resolution service. Not detailed are what the costs might be.[39]

Figure 3: Example of Cellular Telephone Contract, 2002

Example of Cellular Phone Contract, 2002

Your Cellular Service Agreement

Please read carefully
before filing in a safe place.

YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT .... IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). .... YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE

9

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission) **YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW.**

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) **EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .**

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claim arising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS. In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an issue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators

(4) **IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;**

(5) **NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.**

What makes waivers such as this effective? The responsibility lies with both Congress and the courts. In 1925, Congress enacted the United States Arbitration Act, recognizing arbitration contracts as enforceable obligations.[40] But federal courts did not automatically enforce agreements that were entered *ex ante* and that waived access to courts. Judges saw arbitration as too flexible, too lawless, or too informal. They contrasted it with adjudication, praised for its regulatory role in monitoring adherence to national norms.[41]

However, in the 1980s the Supreme Court reversed earlier rulings and enforced arbitration contracts, even when federal statutory rights were at stake,[42] and even when state law might permit adjudication.[43] Instead of objecting to the informality of arbitration, judges praised its flexibility. Importantly, judges also argued that arbitration was similar to adjudication, now reconfigured as just one of several techniques appropriate for the resolution of disputes. If the alternatives permit an adequate means to vindicate federal statutory rights, courts enforce contracts entered into before a dispute arises.[44]

Consider the question of "sunshine" in this context. Contracting parties such as employees and consumers are sent to mandatory arbitration programs created by employers, manufacturers, and providers of goods and services. Under the rules of major providers, attendance of "observers" is either presumptively prohibited[45] or is at the option of parties and the arbitrator. Moreover, if members of the media are permitted to attend, they generally may not record the proceedings.[46]

All of these innovations put dispute resolution *outside* courthouses, but their enforcement relies on doctrine generated *within* courts interpreting such consumer and employee contracts. Concepts of "rights to sue" in public fora have given way to enforcement of obligations to use alternatives, many of which do not allow for aggregate processing nor require public disclosure of decisions rendered.[47]

IV. Regulating the Bargains Made in Court

About thirty years ago, as a consumer of goods and services and as an employee, the form contracts that I signed imposed fewer bars to courts than they do now. Further, had I filed a federal lawsuit, I would not have been greeted by a judge insistent that I explore alternatives to adjudication,[48] and fewer claims of injuries would have been sent to the administrative judiciary.

Litigation opportunities have been replaced by decisonmaking mechanisms that do not permit the public to understand the claims, the defenses, the processes for decisionmaking, or the outcomes.

Some, however, defend these new systems as appropriate adaptations. Hence, it is incumbent on those of us committed to vibrant public adjudicatory practices to explain some of what can be lost when litigation opportunities diminish.

A. Public Utilities

Adjudication offers democratic governance occasions to observe the exercise of state authority and to participate in norm generation—occurring, admittedly, through a haphazard process in which vivid sets of alleged harms make their way into the public purview.

Adjudication is not necessarily an ideal mechanism for understanding social policymaking, but it does serve to disseminate information about the imposition of state power and to legitimate that power. Adjudication's public dimensions also enable a diverse audience to see the effects of the application of law in many specific situations. As various sectors of the public gain insight into law's obligations and remedies, reaffirmation of those precepts may occur, or pressures might emerge for judges and legislators to expand or to constrict extant rules.

Further, adjudication makes good on democratic ideals that individuals are to be treated equally and with dignity. Open courts make concrete democracy's promise to impose constraints on state power. In open courts, judges (government employees) have to account for their own authority by letting others know how and why power is used. Jeremy Bentham's oft-quoted phrase captures this principle: "Publicity is the very soul of justice [...]. It keeps the judge himself, while trying, under trial."[49] And, when government officials are disputants, they too are subjected to scrutiny and forced, when either plaintiffs or defendants, to comply with court rules. In this respect, courts can be a great leveler, enabling participatory parity.

Moreover, when adjudication fails in public, courts can be called to account. For example, during the 1970s and 1980s, as women and men of color brought claims of discrimination to courts in the United States, they found that some judges responded as if differential treatment was natural. Furthermore, these litigants sometimes found themselves subjected in court to some of the very behaviors to which they were objecting. In response to such concerns, the chief justices of many state courts and of several of the federal circuits convened special projects, denominated 'fairness' or 'gender bias' and 'racial bias' task forces. These projects identified areas of law (such as violence against women or sentencing decisions) in which doctrines and practices did not accord equal treatment,[50] as well as bringing to light interactions that undercut the credibility of lawyers, witnesses, and litigants. Statutes, rulemaking, and case law resulted because public scrutiny found behaviors at odds with the provision of "equal justice under law."[51]

B. Insisting on Access to Information in Court-Based Adjudicatory Procedure

But if one cannot see what happens, one cannot evaluate its quality. Given that so much dispositional work occurs outside of courtrooms, the proposed federal statute, *The Sunshine in Litigation Act of 2007*, is needed to ensure that the materials that are developed in the course of litigation have the potential to become a part of the public record. I know that other witnesses are addressing specific issues about the proposed legislation's effects on discovery. Moreover, a good deal has been written about the challenges of crafting procedures responsive to rights of public access while sensitive to privacy concerns and, further, that models exist in some of the states on which one can draw.[52]

I will, therefore, address my comments to other issues, about how the proposed legislation can itself serve as a research tool, illuminating what forms of closure are currently requested and how routine that practice has become. Below, I also address the propriety of congressional intervention and what more needs to be done.

1. Information-Forcing

The very fact that legislation such as this has been proposed has brought light to examples of nondisclosure. In response to an earlier proposed Sunshine provision, the Federal Judicial Center (FJC) looked into the practices of sealed settlements.[53] From a sample of fifty-two of the ninety-four federal district courts, the researchers culled more than 280,000 docket filings and found court-sealed settlement agreements in a small number—1270 cases, or one out of every 227 cases, constituting under one-half of one percent of the filings reviewed.[54]

What the researchers learned was that, while sealing was infrequent, it occurred in a range of cases, including personal injury, employment, civil rights, and contract cases. Higher rates of confidentiality came in certain kinds of cases, such as those filed under the Fair Labor Standards Act (FLSA), in which settlements are generally to be approved by courts. Those cases had a rate of sealing almost six times the overall average.[55] Given that questions of fair labor are especially ones that affect other similarly situated workers, sealing in this context raises special concerns. Indeed, the FJC researchers concluded that in at least two-fifths of the cases identified, sealing occurred when cases had features making them of special public interest.[56]

Unfortunately, no comparable data set exists on how often and in what cases discovery is sealed, either during the course of litigation or as a condition of settlement. Exactly how much occurs is hard to ascertain because parties may conclude agreements by dismissals and when doing so, file only notices of dismissal. In separate contracts, the parties specify the relevant terms. An unknown number of those non-filed contracts include "confidentiality clauses" that prohibit disclosure of the terms to others. Increasingly, it appears that confidentiality clauses are also becoming routine in discovery and proffered as a predicate to the initial disclosures, making nondisclosure the *baseline* from which special negotiations are required to enable the information to be revealed to others.

Some of these practices have made it into case law and commentary.[57] For example, in 2003, the Ninth Circuit reviewed a blanket protective order making secret a good deal of discovery related to alleged fraud by an insurance company. The court held that a presumption of access attached to discovery materials submitted in conjunction with dispositive motions, and remanded the case to the trial court to revisit its ban on access.[58]

That settlements are made to hinge on agreements to make data inaccessible can be gleaned from press reports and occasional decisions disputing settlement terms. For example, in a sex-

discrimination case against a major Wall Street firm[59] that had been accompanied by a good deal of advance media coverage, pre-trial news coverage was extensive. One story ran under the banner: "Women of Wall Street Get Their Day in Court."[60] Instead, the case was settled with promises of nondisclosure not only by the individual plaintiff but also by the Equal Employment Opportunity Commission (EEOC), the federal agency that had filed the lawsuit. The *Wall Street Journal*'s reporters explained that the EEOC "had planned to introduce statistics about women's pay and promotion at trial," but per the settlement, "details on the alleged disparities between the firm's male and female employees were never made public."[61]

Thus, we know that the pressures for settlement are acute and that premiums are paid for the nondisclosure of information. Yet, many courts have been reluctant to limit negotiations around the sale of secrecy. As one Circuit panel put it: "honoring the parties' express wish for confidentiality may facilitate settlement."[62] Yet, by permitting parties to a litigation to buy and sell access of third parties to the information generated in discovery, courts help that market affect the prices of settlements.

2. Bargaining Under Law

Should these practices be regulated, and if so, by what institution—courts or Congress? Since the enactment of the Rules Enabling Act in 1934, Congress has generally left most of the rulemaking to the judiciary, which has developed a many-layered and deliberate process to consider the shape and scope of federal rules. Since the 1988 amendments to that Act, the process is both open to the public and receptive to public input. Yet Congress has also been active in the years since the 1988 reforms and, on various occasions, has inserted imposed procedural requirements, either in the context of substantive legislation or as an enactment affecting a particular rule.

Decisions about how to regulate the bargains struck under the aegis of courts is the kind of public policy question appropriate for congressional oversight. Moreover, the mechanism chosen by the proposed *Sunshine in Litigation Act of 2007* properly places authority on judges to decide, on a case-by-case basis, when closure and confidentiality are permissible. The legislation sets forth criteria for decision and asks that courts explain when and why protective orders are necessary and how they can be narrowly tailored so as to respect the presumption of what Jeremy Bentham called "publicity" that surrounds the proceedings of courts.

Moreover, if enacted, the proposed *Sunshine in Litigation Act of 2007* would join other provisions—a few in statutes, others in Federal Rules, and some through case law—that constrain the bargaining power of litigants. For example, some settlements can only be entered if the terms are revealed to and the fact of agreement approved by the court. Examples include class actions,[63] cases filed under the Tunney Act,[64] under the Fair Labor Standards Act,[65] and criminal prosecutions.[66]

Turning to case law, courts have occasionally rejected certain kinds of bargains. For example, judges have sometimes refused to enforce agreements to vacate otherwise valid lower court decisions[67] or required that proponents of class action settlements disclose side-settlements.[68] Some jurists have also objected to specific provisions, such as "most favored nation clauses" promising to reopen settlements if other agreements are made on more favorable terms,[69] or have refused to enforce confidentiality agreements in various circumstances.[70] Judges have also declined to interpret parties' agreements to preclude other litigants from access to expert information,[71] have selectively reviewed court materials and exhibits to determine whether portions involving children's emotional and medical conditions might be sealed while leaving access open to other parts of a record,[72] and have endeavored to require honesty in negotiations through post-settlement enforcement of only those agreements predicated on good faith disclosure of relevant facts.[73]

As this proposed statute makes plain, law could do more[74] by putting possibility of confidentiality "off the table" and by increasing its price by requiring judicial oversight before secrecy can be bought and sold.

3. Coupling Disclosure in Court with Publication

Were the *Sunshine in Litigation* measure in place, parties would have to seek court approval for closure. But the proposed legislation does not include a requirement that judges put their decisions into the public realm nor create a mechanism by which the kind and nature of those decisions could be quantified and analyzed. Hence, I suggest that the drafters consider adding provisions to oblige judges to make their rulings available through online internet services, as well as in reporters, and that the Administrative Office of the United States Courts be asked to put the bases of the rulings into its databanks so that researchers can readily evaluate the kind and nature of the claims for privacy as well as their outcomes.

Were decisions published about when and why closure was requested and when it was permitted, and if aggregate data were available, we would all have better means by which to assess claims—on both sides—of the impact of these rules. One possibility is to craft this statute to include provisions for research (akin to that in the Civil Justice Reform Act of 1990[75]) so as to build in disclosure about this disclosure provision.

V. Shining More Sun on More Procedures: Sunshine in Arbitration and in Administrative Agencies

This hearing is focused on one corrective measure, the *Sunshine in Litigation Act of 2007*, responsive to a problem of privatization that is court-based. A related piece of litigation—bearing a similar name—is also before Congress; the *Sunshine in the Courtroom Act of 2007* seeks to permit federal courts to televise proceedings under certain circumstances.[76] Both of

these acts respond to the concern that just because an event takes place in court, one cannot assume that public access is protected.

On Wednesday, December 12th, 2007, another subcommittee of Congress will address the *Arbitration Fairness Act of 2007* (S. 1782). I hope that Congress will see the relationship between its work on courts and its work on arbitration and will address how arbitration and agency-based adjudication also create problems of secrecy in need of redress through "sunshine." Congress should craft a series of mechanisms to protect public access in all three fora. For, just as one needs to write rules and statutes to ensure public processes in courts, one can also write rules and statutes to mandate some measure of access to and public disclosure in alternatives to courts. One ought not assume that secrecy is an inevitable feature of ADR.

Rather, while appreciating the utility of some forms of alternative dispute resolution, one can condition devolution and outsourcing of adjudication on access to information about what transpires in those alternative fora. This already lengthy testimony is not the place to detail how to tailor dissemination of information and public access in various venues but rather to underscore that legislation akin to the *Sunshine Act of 2007* is appropriate for these other settings.

One model comes from state oversight of some professionals and of insurance companies. Examples include cases involving medical malpractice and health care professionals, with regulations keyed to disclosure of agreements for more than a stated amount.[77] In 1999, Florida required that its Department of Public Health publish on the Internet payment of malpractice claims in excess of a specified amount.[78] At least twenty other states have statutes or court rules constraining in various ways the ability to seal court documents and outcomes.[79]

Another precedent is provided by the *Automobile Dealers Fairness Act of 2002*. There, Congress exempted one set of cases—franchise disputes involving automobile dealers and manufacturers—from having to comply with form contracts requiring arbitration of disputes.[80] As the legislative history explained, other legislation had already recognized the "disparity of bargaining power between motor vehicle dealers and manufacturers." Given a dealership's dependency on marketing a particular brand and the small number of manufacturers, those who produce automobiles may have the clout to insist on amendments to contracts, once a dealership has been established.[81] Therefore, Congress provided that form contracts requiring arbitration between manufacturers and dealerships would not be enforceable unless both parties agreed to waive access to courts and administrative remedies *after* disputes arose.[82] Moreover, the legislation requires that if arbitrations are had, arbitrators must provide written explanations of the facts and law supporting the decision.[83]

Congress could generalize on that model by requiring all arbitration awards to be accompanied by some explanation and put onto a database generally available to the public. In a similar vein, Congress could require agencies to post decisions of Administrative Law Judges on websites. Furthermore, Congress should review the various provisions within statutes and regulations that mandate open or closed administrative hearings so as to assess whether those provisions are appropriately tailored to the circumstances.

In sum, adjudication's public dimensions are at risk. As court-based processes focus on facilitating settlements, and as courts outsource their evidentiary work to administrative agencies and private dispute resolution providers, the power and effects of decisionmaking become less readily accessible. Given the proliferation of the sites of adjudication and the pressures to seek alternative forms of resolution, I am not confident that adjudication will be as available one hundred years hence as it is today. Its substitutes do not permit easy public observation nor do they facilitate knowledge of the deployment of power, both public and private. Hence, I commend measures such as this, the *Sunshine in Litigation Act of 2007*, that enables all of us to know more about how the power of adjudication is being marshalled and exercised.

Thank you for your consideration of these comments. I would be happy to supplement the record with responses to any questions that you would like to pose.

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[1] Arthur Liman Professor of Law, Yale Law School. My thanks to Yale Law School students Stella Burch, Joseph Frueh, and Natalie Ram for research and their thoughtful help. This testimony is submitted before the hearings; the bill, not yet numbered, is therefore referred to as the *Sunshine in Litigation Act of 2007*, to be put before the 110th Cong., 1st Sess. to create a new provision (section 1660) in Title 28.

[2] *Adjudicatory Practices in Transition: Courts and the Public Sphere*, Birkbeck College, University of (London, Dec. 11, 2007).

[3] *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

[4] *See* Sunshine in Litigation Act of 2005, S. 1348, 109th Cong. (2005).

[5] *See* Robert Timothy Reagan, Shannon R. Wheatman, Marie Leary, Natacha Blain, Steven S. Gensler, George Cort, & Dean Miletich, Sealed Settlement Agreements in Federal District Court (Fed. Judicial Ctr., 2004) [hereinafter FJC Sealed Settlement Study].

[6] *Id.* at 3.

[7] Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

[8] Admin. Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998).

[9] *See* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 178-79 (1960) (detailing the "'public' character" of local courts, meeting in "a castle or manor house," or possibly "forest or field," with attendance a duty contingent on land ownership); *See also* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 526-37 (2006).

[10] U.S. CONST. amend. VI; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980). Convictions of treason also require confessions to be made in "open [c]ourt." U.S. CONST. art. III, § 3.

[11] *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986); *see also* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 96 (2d Cir. 2004) (holding that "docket sheets enjoy a presumption of openness" and that "the public and the media possess a qualified First Amendment right to inspect them," and explaining the utility of such an approach).

[12] *See, e.g.*, CONN. CONST. art. I, § 10 ("All courts shall be open . . . ."). Seventeen state constitutions incorporate the precise phrase "All courts shall be open." *See, e.g.*, DEL. CONST. art. I, § 9; KY. CONST. § XIV; MISS. CONST. art. III, § 24; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TEX. CONST. art. I, § 13. Other states' constitutions contain similar provisions worded somewhat differently. *See, e.g.*, MO. CONST. art. I, § 14 ("[T]he courts of justice shall be open to every person . . . ."); S.C. CONST. art. I, § 9 ("All courts shall be public . . . ."); W. VA. CONST. art. III, § 17 ("The courts of this State shall be open . . . ."). In addition, some state constitutions mandate openness for particular events, such as treason trials. Specifically, the constitutions of thirty-five states, plus those of American Samoa and Guam, contain a provision requiring either the testimony of two co-conspirators or "confession in open court" to convict a person of treason. *See, e.g.*, ALA. CONST. art. I, § 18; COLO. CONST. art. II, § 9; IND. CONST. art. I, § 29; ME. CONST. art. I, § 12; NEB. CONST. art. I, § 14; WASH. CONST. art I, § 27. Several other states' constitutions refer to proceedings "in open court" for other events. *See, e.g.*, OR. CONST. art. I, § 42(1)(a) (declaring the right of crime victims "to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition"); VT. CONST. art. X (providing that a criminal defendant "may in open court or by a writing signed by the accused and filed with the court, waive [his] right to a jury trial and submit the issue of [his] guilt to the determination and judgment of the court without a jury"); VA. CONST. art. 6, § 10 ("[T]he Supreme Court shall conduct a hearing in open court [regarding] disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties . . . .").

[13] *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(I), Nov. 4, 1950, 213 U.N.T.S. 221, 228 ("Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."). *See also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14, U.N. Doc. 1/6316 (Dec. 16, 1966) ("[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded [for limited reasons].").

[14] *See* MORRIS L. COHEN, ROBERT C. BERRING & KENT C. OLSON, HOW TO FIND THE LAW 16-20 (9th ed. 1989) (providing a brief history of the use of court reporters in colonial America).

[15] *See generally* Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531 (1993).

[16] *See* Jeremy Bentham, *Of Publicity and Privacy, as Applied to Judicature in General and to the Collection of Evidence in Particular*, *in* WORKS OF JEREMY BENTHAM, vol. 6, ch. X, 351 (1843). *See generally* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 405-26 (1987).

[17] *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

[18] The word "extrajudicial" was used in 1983, in the Federal Rules of Civil Procedure, to refer to such processes, explaining that at pretrial conferences consideration could be given to "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." *See* FED. R. CIV. P. 16(c)(7) & advisory committee's note (1983) (amended 1993).

[19] *See* FED. R. APP. P. 33.

[20] *See generally* Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV 661, 674-80 (2006); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290 (1996).

[21] *See* FED. R. APP. P. 32.1 (imposing requirements on opinions issued on or after January 1, 2007); 2d Cir. R. 32.1. Dispositions by Summary Order (permitting judgment by summary order, without precedential effect, in cases in which the decision is unanimous and each judge on a panel concurs that no jurisprudential purpose would be served by the issuance of an opinion). Further, beginning in 2001, in a special published reporter of "unpublished" decisions called the Federal Appendix, was begun. *See* Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 259 (2002). *See generally* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1465 (2004); Lauren Robel, *The Practice of Precedent:* Anastasoff, *Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 402 (2002).

[22] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459-60 (2004); *see also* Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of a Solution?*, 79 CONN. B.J. 1, 4-5 (2005); Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1.

[23] *Galanter*, *supra* note 22, at 459-60.

[24] Kravitz, *supra* note 22, at 5. Judge Kravitz also noted that, while the number of trials per judge has decreased, the length of trials has increased.

[25] The American Bar Association Section of Litigation sought out a group of researchers (myself included) to understand and evaluate the change in the rate of trial. The results were published in the *Journal of Empirical Legal Studies*. *See* Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

[26] *See* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 246-53 (1995).

[27] *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified as amended at 28 U.S.C. §§ 651-58 (2000)); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified as amended at 5 U.S.C. §§ 571-584 (2000)).

[28] *See* RAYMOND LIMON, OFFICE OF ADMIN. LAW JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY: THEN AND NOW: A DECADE OF CHANGE 1992-2002 app. C at 7 (2002); *see also* Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1008 (2004).

[29] *See* ADMIN. OFFICE OF THE U.S. COURTS, 2001 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 24-25 (2002), *available at* http://www.uscourts.gov/judbus2001/front/2001artext.pdf.

[30] For the sources for this calculation, see Judith Resnik, *Migrating, Morphing,* and *Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004).

[31] 29 C.F.R. § 1614.109(e) (2005) ("Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public.").

[32] *See, e.g.*, 38 C.F.R. § 20.701 (2005) ("Only the appellant and/or his or her authorized representative may appear and present argument in support of an appeal.").

[33] 8 C.F.R. § 1003.27(a) (2005) ("[T]he Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public . . . .").

[34] *Id.* § 1003.27(c) (providing that hearings involving spousal abuse may be closed); *see also* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 220 (3d Cir. 2002) (upholding a blanket closing, based on national security concerns, of deportation hearings), *cert. denied*, 538 U.S. 1056 (2003). *But see* Detroit Free Press v. Ashcroft, 303 F.3d 681, 705 (6th Cir. 2002) (finding a general closing of such proceedings to violate the First Amendment).

[35] 20 C.F.R. § 498.215(d) (2005) ("The hearing will be open to the public unless otherwise ordered by the ALJ for good cause.").

[36] For example, the National Labor Relations Board posts on the web the judgments rendered by its Administrative Law Judges; *See* NLRB, Administrative Law Judge (ALJ) Decisions, http://www.nlrb.gov/research/decisions/alj_decisions.aspx. The opinions of the Board itself are collected in an agency reporter. *See* NLRB, Board Decisions, http://www.nlrb.gov/Research/Decisions/Board%5Fdecisions (last visited Dec. 1, 2006); NLRB, Regional Directors, http://www.nlrb.gov/Research/Decisions/regional_directors.aspx. The Executive Office of Immigration Review also posts statistics about asylum outcomes, with details about the nationalities of petitioners and dispositions of cases, but the materials are presented in the aggregate. *See* Executive Office for Immigration Review, Index of Frequently Requested FOIA-Processed Records, http://www.usdoj.gov/eoir/efoia/foiafreq.htm (last visited Dec. 1, 2006); *see also* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS: FY 2005

ASYLUM STATISTICS (2006), *available at* http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf.

[37] *See* Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964).

[38] *See* Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 90 (1998).

[39] Although some have argued that a failure to specify costs ought to be grounds for the unenforceability of mandatory arbitration clauses entered into prior to the occurrence of disputes, the Supreme Court has concluded that the burden rests on the party challenging a particular procedure to establish that the costs imposed prevent that person from effectively vindicating federal statutory rights. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000).

[40] *See* United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2000)). The current version is commonly referred to as the Federal Arbitration Act (FAA).

[41] *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 438 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[42] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985).

[43] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 10-14 (1983). This approach has prevailed. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (holding that the FAA applies to all employment contracts except those of transportation workers). On remand, the Ninth Circuit concluded that, under California law, the contract was unenforceable because it was a contract of adhesion. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002).

[44] Moreover, interpretations of such contractual provisions are now generally sent, for a first consideration, to arbitrators. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). Although the Florida Supreme Court had held an arbitration provision unenforceable because the underlying contract had a provision which, under Florida law, was invalid and non-severable (Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 862-64 (2005)), the U.S. Supreme Court held that the issue of the contract's enforcement was one that had to be first presented, under federal law, to the arbitrator. *Buckeye Check Cashing*, 546 U.S. at 446; *see also* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003) (finding that the question of whether an arbitration contract precluded a class arbitration was an issue to be determined initially in arbitration rather than in court).

[45] *See, e.g.*, Am. Arbitration Ass'n, Wireless Industry Arbitration Rules (July 1, 2003), http://www.adr.org/sp.asp?id=22010 (providing in rule twenty-four that "[t]he arbitrator shall ensure the privacy of the hearings"). The Better Business Bureau's arbitration rule fourteen permits outside observers to attend as long as there is "room and no objection" from either the parties or the arbitrator. Better Bus. Bureau Dispute Resolution, Binding Arbitration 2006, http://www.dr.bbb.org/ComSenseAlt/bindArb.asp (last visited Dec. 1, 2006).

[46] *See* Better Bus. Bureau Dispute Resolution, Binding Arbitration 2006, *supra* note 45 (stating in rule fifteen that "[u]nless there is approval of all parties and the arbitrator, neither media representatives nor any other observer may be permitted to bring cameras, lights, recording devices or any other equipment into the hearing"). Further, the

media's attendance is contingent upon the consent of the arbitrator and the parties. *Id.* (stating in rule fifteen that "[m]edia shall be permitted access to arbitration hearings on the same basis as other observers").

[47] The parameters of what kinds of procedures, in terms of the kinds of information in contracts mandating arbitration and in terms of the kinds of costs and the procedural opportunities that suffice to preclude litigation, remain a source of litigation. *See, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (placing the burden of proof on opponents of arbitration to show that its costs make it an inadequate substitute for statutory rights). That ruling has resulted in some lower courts permitting discovery into the costs to be imposed in a particular program.

[48] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 384-86 (1982).

[49] *See* Jeremy Bentham, *Principles of Judicial Procedure*, *in* WORKS OF JEREMY BENTHAM, *supra* note 16, vol. 4, ch. XX, 316.

[50] *See, e.g.*, Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts*, 67 S. CAL. L. REV. 745 (1994).

[51] These are the words inscribed on the front of the façade of the Supreme Court of the United States.

[52] *See* Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375 (2006).

[53] *See* FJC Sealed Settlement Study, *supra* note 5.

[54] *Id.* at 3; *see also id.* at app. c (providing summaries of the cases).

[55] *Id.* at 3.

[56] *Id.* at 7.

[57] *See, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206 (9th Cir. 2002) (discussing access to confidential settlement materials); Hasbrouck v. BankAmerica Hous. Servs., 187 F.R.D. 453 (N.D.N.Y. 1999) (finding good cause to protect disclosure of a settlement that the plaintiff had reached in a prior lawsuit with a different defendant). *See generally* Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991).

[58] *See* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1136 (9th Cir. 2003); *see also* Stalnaker v. Novar Corp., 293 F. Supp. 2d 1260 (M.D. Ala. 2003) (approving a settlement in a Fair Labor Standards Act lawsuit but ordering that it be unsealed).

[59] *See* EEOC & Allison Schieffelin v. Morgan Stanley & Co., No. 01 Civ. 8421, 2004 U.S. Dist. LEXIS 12724 (S.D.N.Y. July 8, 2004), *aff'g in part* 324 F. Supp. 451 (S.D.N.Y. July 2, 2004).

[60] *See* Patrick McGeehan, *The Women of Wall Street Get Their Day in Court*, N.Y. TIMES, July 11, 2004, § 3, at 5. *See also* Susan E. Reed, *When a Workplace Dispute Goes Very Public*, N.Y. TIMES, Nov. 25, 2001, § 3, at 4 (discussing the

sex discrimination litigation against Merrill Lynch, its settlement with hearings, and efforts by unhappy litigants to bring the issues back to public attention, including through hiring an airplane to pull a banner, "Merrill Lynch Discriminates Against Women" through the air).

[61] *See* Kate Kelly & Colleen DeBaise, *Morgan Stanley Settles Bias Suit for $54 Million*, WALL ST. J., July 13, 2004, at A1; *see also* Susan Antilla, Op-Ed, *Money Talks, Women Don't*, N.Y. TIMES, July 21, 2004, at A19 (arguing that "Morgan Stanley, and all of Wall Street, scored" by keeping the statistics private).

[62] Gambale v. Deutsche Bank AG, 377 F.3d 133, 143-44 (2d Cir. 2004) (concluding that when settlements were conditioned on confidentiality and did not include information on amounts paid, no disclosure was required). *Gambale* also concluded that despite the dismissal of the action, federal courts retained jurisdiction to deal with materials in their files. *Id.* at 141; *see also* Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994) (remanding for the district court to consider the utility of confidentiality).

[63] *See* FED. R. CIV. P. 23(e), (g)-(h).

[64] 15 U.S.C. § 16(b)-(h) (2000).

[65] *See, e.g.*, Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1355 (11th Cir. 1982) (describing the court's obligation to ensure that litigation under 28 U.S.C. § 201 *et seq.* be settled in a manner that is "fair and reasonable"); Boone v. City of Suffolk, 79 F. Supp. 2d 603, 605 (E.D. Va. 1999) (discussing this common law requirement). In *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260 (M.D. Ala. 2003), Judge Myron Thompson both explained the rationale for judicial oversight and ordered the unsealing of a settlement between an employee and an employer.

[66] *See* FED. R. CRIM. P. 11 (requiring that plea proceedings be conducted in "open court" and detailing the questions that must be addressed); *see also* 18 U.S.C. § 3553(c) (Supp. III 2005) (requiring that judges state "in open court" their reasons for imposing sentences); United States v. Alcantara, 396 F. 3d 189, 191-92 (2d Cir. 2004) (describing the right of access to plea and sentencing hearings, admonishing judges not to conduct sentencing hearings in their robing rooms absent adherence to procedures, including advanced notice and opportunities for a hearing, and commenting that the "power to close a courtroom" in a criminal proceeding ought to be exercised only under "urgent circumstances" and with "very clear and apparent reasons" (citations omitted)); United States v. Smith, 426 F.3d 567, 575-76 (2d Cir. 2005) (upholding, in light of security concerns, the imposition of photo identification requirements as a predicate to courtroom access but discussing the importance of judicial—rather than Executive Branch—control over courtroom access).

[67] *See, e.g.*, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994). *See generally* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471 (1994).

[68] The authority to request such information is suggested in the Advisory Committee's notes to the 2003 revisions of the class action rule. *See* FED. R. CIV. P. 23(e)(2) & Advisory Committee's Notes (requiring that parties seeking approval of class action settlements inform the court of "any agreement made in connection with the proposed settlement").

[69] *See* Kathryn E. Spier, *"Tied to the Mast": Most-Favored-Nation Clauses in Settlement Contracts*, 32 J. LEGAL STUD. 91 (2003). Those clauses require that, if a settlement is made with other parties on terms more favorable than that entered by the contracting parties, the earlier settlement would be enhanced to equalize it to the later settlement.

[70] *See, e.g.*, Llerena v. J.B. Hanauer & Co., 845 A.2d 732 (N.J. Super. Ct. Law Div. 2002) (permitting one employee, alleging sexual harassment by an employer, access to a settlement agreement between that employer and another employee that those parties had deemed confidential). The court provided limited access, accompanied by a protective order, authorizing only the plaintiff, her lawyers, and her experts access to information about the prior settlement. *Id.* at 739.

[71] *See* Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222 (1998).

[72] Jaufre ex rel. Jaufre v. Taylor, 351 F. Supp. 2d 514 (E.D. La. 2005).

[73] Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 866 (1994) (quoting Petition for Writ of Certiorari at 13a, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (No. 93-205)). According to the brief submitted by Desktop Direct, Digital's chief executive officer had led Desktop's chief executive officer to believe that the alleged infringement was an "innocent mistake" but that subsequently information surfaced that the case for "willful infringement" was strong. *See* Brief of Respondent at *3, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (No. 93-205), 1994 WL 249425.

[74] One example comes from a Supreme Court decision—*Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994)—addressing the availability of federal jurisdiction to enforce settlements. The Court suggested that in diversity cases, one method to make federal courts available for post-settlement litigation aimed at enforcing settlements would be to incorporate settlement terms into notices of dismissal or into consent judgments. For those litigants in search of continuing federal jurisdiction, the *Kokkonen* decision creates incentives to file agreements with courts which would (under current law) make those documents accessible to others. But the Court's opinion used tentative phrases, perhaps suggesting that the Justices hoped for guidance from other sources or did not agree on a broader ruling. The legal question of using settlements to confer jurisdiction on the federal courts is significant, as are the issues of whether judges have the inherent power to impose disclosure or other conditions on settlements in all cases, and/or whether the Federal Rules that address settlement give judges license to do so.

[75] Civil Justice Reform Act of 1990, Pub.L. 101-650, 104 Stat. 5089 (1990).

[76] *See e.g.* Sunshine in the Courtroom Act of 2007, S. 352, 110th Cong. (2007); Sunshine in the Courtroom Act of 2007, H.R. 2128, 110th Cong. (2007).

[77] *See, e.g.*, CONN. GEN. STAT. § 19a-17a (2003) (requiring that, "[u]pon entry of any medical malpractice award or upon entering a settlement of a malpractice claim" against those licensed under other provisions, the entity making payment or the party are to notify the Department of Public Health of "the terms of the award or settlement" as well as to provide a copy along with the complaint and answer); New Jersey Health Care Consumer Information Act, N.J. STAT. ANN. §§ 45:9-22.21-:9-22.25 (West 2004) (enacted in June of 2003 and requiring that all "medical malpractice court judgments and all medical malpractice arbitration awards" in which a complaining party had received an award within the five most recent years be made available to the public in profiles of physicians and podiatrists licensed to practice in the state of New Jersey). In May of 2004, a few weeks before the Act was to become effective, the Medical Society of New Jersey sued the state's Consumer Division to enjoin implementation of the Act, argued to be in conflict with federal rights of expectations of privacy under 42 U.S.C. § 11137 and the Constitution. *See Malpractice Data Blocked*, N.Y. Times, May 10, 2004, at B4. Those efforts were refused in *Medical Society of New Jersey v. Mottola*, 320 F. Supp. 2d 254 (D.N.J. 2004).

[78] *See* FLA. STAT. ANN. § 456.041(4) (West Supp. 2006) (requiring reporting of payments of claims that exceed $100,000).

[79] Included on that list are Arkansas, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Oregon, South Carolina, Texas, Virginia and Washington. Coverage and exceptions vary widely. *See, e.g.*, ARK. CODE. ANN. §§ 16-55-122, 25-18-401 (West 2004) (prohibiting the sealing of government documents and voiding private contracts that limit disclosure of environmental hazards); N.C. GEN. STAT. ANN. §132-1.3 (West 2000) (prohibiting sealing of settlements of "any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions" arising out of government actions except those related to medical care, unless the policy of openness is overridden and no other less restrictive means is available); WASH. REV. CODE ANN. § 18.71.350 (West. 1999) (requiring professional liability insurers of physicians to report settlements in excess of $20,000 or the payment of three or more claims within a five-year period); *id.* § 4.24.611 (West 2005) (limiting confidentiality provisions when claims involve product liability or hazardous substances); *see also* Goldstein, *supra* note 52.

[80] *See* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1758, 1835-36 (2002) (codified at 15 U.S.C. § 1226 (Supp. IV 2004)); The Motor Vehicle Franchise Contract Arbitration Fairness Act, S. REP. NO. 107-266, at 2 (2002). The U.S. Chamber of Commerce opposed this measure. *See Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 24 (2000); Letter from R. Bruce Josten, Executive Vice President, U.S. Chamber of Commerce, to Sen. Jeff Sessions (Feb. 28, 2000) (on file with author). While this congressional intervention relieves automobile dealers of enforcement of their own ex ante mandatory arbitration provisions with manufacturers, dealers may invoke such clauses in contracts with consumers. *See, e.g.*, Donna Harris, *Arbitration Defuses Lawsuits: We Can Work It Out—Or Not*, AUTOMOTIVE NEWS, Feb. 6, 2006, at 56 (discussing the contested effectiveness of mandatory arbitration clauses).

[81] *See* The Motor Vehicle Franchise Contract Arbitration Fairness Act, S. REP. NO. 107-266, at 2-3 (describing dealers as "virtual economic captives of automobile manufacturers," who proffer contracts on a "'take it or leave it'" basis).

[82] *See id.* at 5 (asserting that most states have administrative boards that enforce motor vehicle franchise law and provide "efficient and cost-effective alternative dispute resolution systems," in addition to court-based remedies).

[83] 15 U.S.C. § 1226(a)(3). Under Federal Trade Commission rules for franchisors, settlements of "significant" claims by franchisees must be disclosed on documents promoting a franchise, thereby making information about outcomes available—providing another model of how one might regulate to enhance access by the public.

STATEMENT OF ROBERT N. WEINER
BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS OF THE SENATE JUDICIARY COMMITTEE

December 11, 2007

I want to thank the Subcommittee for inviting me to present my views on confidentiality in litigation, an issue I have thought about, written on and litigated extensively. I am a partner at the law firm of Arnold & Porter LLP. We have served as national counsel in product liability cases involving drugs, medical devices, and other products, where issues regarding protective orders frequently arise. We also have been extensively involved in recent years with electronic discovery. In addition, I was a member of the Sedona Conference Working Group on Protective Orders, which included plaintiffs' lawyers, defense lawyers, lawyers for newspapers, judges, and academics. Though I did not agree with all the conclusions of the Group, they do provide a counterpoint to the some of the attacks on confidentiality in litigation. As was true when I participated in the Sedona Working Group, the views I offer today are not on behalf of my firm or any client.

I testified before Senator Kohl's subcommittee in 1990 on this very same subject in a hearing "examining the use of secrecy and confidentiality of documents by courts in civil litigation." Hearing on Court Secrecy before the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary, 101st Cong., 2nd Sess. (May 17, 1990). It is striking how many of the arguments on this issue have remained constant, even while the world around us has changed. The changes, in my view, make it more important than ever that courts have adequate discretion to protect the confidentiality of information produced in discovery.

The most relevant difference between 1990 and today is the accelerating erosion of privacy. The internet results in instantaneous publication of any new fact, or factoid, about an individual or business. Public disclosure now is far more public than it was in 1990.

The potential for rapid, widespread, and irretrievable dissemination of private information makes compelled disclosure in litigation more problematic. Few of us stop to think about how far litigation departs from the ordinary manner in which we deal with one another in personal or business affairs. Suppose the father of a child who broke her leg in a soccer game believed the coach should have trained the players better to avoid injury. No one, I believe, would contend that the father had a right to show up at the coach's home or office and rifle through his files. Or, to take another example, if a customer suspected the butcher had held her thumb on the scale, we would not argue that the customer had a right to go behind the counter, inspect the meat, and review the butcher's invoices. But once the father or the customer filed suit, then through the good offices of counsel, he or she would gain license to inquire at least as intrusively.

Whether meritorious or not, the filing of a lawsuit generally entitles the plaintiff to delve into the defendant's files and ask the defendant in deposition about anything conceivably relevant to the plaintiff's allegations. And "relevant" is broadly defined to include not only documents or information that may cast light on the plaintiff's claims, but also anything that could lead to evidence casting light on them. For an individual defendant, discovery could encompass almost any aspect of his or her private life, depending on the plaintiff's claims. Perhaps the potential invasion of privacy is more worrisome with regard to individuals, but corporate defendants have a significant interest in confidentiality as well, and so do the people who work for them. For a corporate defendant, document requests in litigation can include its personnel files, marketing

strategies, pricing policies, and manufacturing processes, even in a case between competitors. A plaintiff who sues a manufacturer alleging a defect in its product, for example, may be able to ask an employee his or her salary and bonus, on the ground that it is relevant to the employee's credibility or that the sales of the product affect the employee's income. The plaintiff also might be able to ask about the employee's health, on the ground that the employee's medical condition contributed to the product defect.

Electronic discovery has heightened the prospect that sensitive commercial or personal information will be produced in discovery. The volume of materials sought in discovery is in some cases so huge and the cost of producing it so great that companies increasingly turn over raw electronic files and tell their opponents to search electronically for what they need. Defendants in such cases often do not have the time or the budget to screen out information that could cause competitive harm to the company or personal harm to its employees.

Those who think this problem only affects multi-billion dollar manufacturing companies should think again. The rules apply to a newspaper sued in a libel action, where a plaintiff may seek to review reporters' notes and research materials. They apply to a health insurer sued for insurance fraud, where medical records could be part of discovery. And they apply to a university in an employment discrimination case, where a plaintiff may seek scholars' private reviews of each other's work.

Protective orders generally do not affect the parties' ability to review this information, but rather their ability to disclose it. The premise underlying the argument against such protective orders is that a plaintiff has a right not only to question the defendant in a deposition and to review the defendant's files, but to make public whatever these efforts uncover. It is not clear whether the right claimed is constitutional, statutory, or natural. The advocates argue that it

derives from the public's legitimate right to know. But spreading the supposed right over more people does not clarify its genealogy. The public does indeed have a constitutional right to know what goes on in a courtroom. And generally, the public has a qualified right of access to what is filed with a court. The taxpayers, after all, fund the courts and have an interest in knowing what they are getting for their money. But that is not what we are talking about with respect to protective orders. The materials yielded by the far-ranging romp through the opponent's files that the Federal Rules of Civil Procedure authorize are exchanged between the parties. They generally are not filed with the court, and they far exceed the scope of what is introduced in evidence in any subsequent trial. The taxpayers do not pay for these materials, and a defendant would not be required to disclose them absent a lawsuit -- and being involved in a lawsuit is generally not voluntary. As the Sedona Guidelines observe, "Pretrial discovery that is simply exchanged between the parties is not a public component of a civil trial."

Richard Zitrin's writing in particular reflects a fundamental misconception in this regard. He refers to protective orders as "secretizing information." If there were such a word as "secretize," it would connote making public information secret. But the information produced in discovery is usually not public. Take a small scale example. Few of us make our personal medical records public or want them made public. That does not mean that we "secretize" them. They are private to begin with. If we had to produce them in litigation -- as might be required in some states -- they would still be private records. A protective order would merely keep them private, not somehow change their status. The same is true of private records produced on a larger scale.

The Supreme Court in Seattle Times v. Rhinehart, 467 U.S. 20 (1984), made short work of the notion that there is a public right of access to discovery materials. Recognizing the

distinction between documents filed in court and materials exchanged between the parties in pretrial discovery, the Court rejected the contention that the First Amendment prohibited entry of a protective order:

> As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. . . . A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . . Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

467 U.S. at 32-33 (citations omitted).

The Court also acknowledged the concerns regarding privacy -- more than a decade before the internet heightened the intrusion:

> It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense: discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. . . . There is an opportunity, therefore, for litigants to obtain -- incidentally or purposefully -- information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.

U. at 34-35 (citations omitted).

In short, the Court found that confidentiality has a place in litigation, that a defendant does not lose the right to prevent publication of his or her private papers merely by suffering the misfortune of being named in a lawsuit.

Federal courts have authority under Rule 26(c) of the Federal Rules of Civil Procedure to balance the competing interests of the parties affected by discovery, and, for good cause, to enter orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Among the things a Court can do is order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." The Federal Rules, and the many state analogues, contemplate that the court will make a determination in each case of the appropriate type and degree of protection discovery materials should receive.

Why should we depart from this system? The primary argument is that protective orders conceal information related to product safety. A number of articles cite a safety problem with a product, and then note that there were protective orders in litigation. What is generally lacking is a link between the two, an indication that protective orders in litigation somehow papered over the safety problem. The assertion of such concealment strains plausibility, because, as noted above, protective orders generally cover only materials exchanged between the parties. The complaint alleging the plaintiffs' injuries and the defendants' misdeeds is a public document. It is also privileged under the law of libel and slander. The plaintiff can send it to anyone, can issue press releases when filing it and can cultivate all the publicity he or she wishes. Increasingly, it is available electronically to lawyers, journalists, and business competitors across the globe. Westlaw provides the ability to search for new complaints filed in many federal courts. Pacer provides electronic access to federal dockets. Electronic clipping services can

provide notice of any new suit against a particular company or individual. Protective orders affect none of that. Nor do they prevent a plaintiff, when bringing a lawsuit, from also notifying regulatory agencies. In addition to all these mother lodes of information, a judge weighing the facts and circumstances of the individual case can take into account whether discovery has turned up information that for some reason should be public, and can make it public. But those arguing for compelled disclosure of information that "concerns" or "relates to" public safety would impose impossible burdens on courts and would give litigants leverage to extract settlements based on the risk that their opponents' trade secrets will be disclosed. In a case alleging a product defect causing injury, almost all the information produced may somehow "concern" or "relate to" safety. Whether that information shows a real risk, whether the risks of the product outweigh the benefits or exceed what an ordinary consumer would expect, is the ultimate issue in the case, frequently decided by a jury after full discovery and a trial. Asking a court to prejudge it at the outset of the case without the benefit of a developed record invites an ill-informed, overbroad, and potentially unfair determination.

A second attack on protective orders focuses on how they are obtained. The parties generally agree on them, it is lamented, and the courts routinely sign off without exercising serious review. Indeed, there is a germ of truth to this argument. Courts are, and should be, loath to foment litigation regarding issues on which the parties agree. Absent a public right of access to discovery materials and absent a demonstrable impact on public safety, there is normally no good reason to clog the courts with additional procedural wrangling. Nonetheless, the courts do retain authority to check any excesses. No one forces a plaintiff to agree to a protective order. The plaintiff can, if he or she believes it is justified, litigate the issue just like any other of the innumerable issues raised in a litigation. Even after an agreed protective order is entered,

virtually every such order gives opposing counsel the right to challenge the confidentiality of particular documents.

Indeed, with electronic discovery, a broad initial order with a right to challenge particular designations is becoming an essential tool in litigation, a tool that serves the interests of the court and the parties. When a party produces hundreds of gigabytes of data, to require review of every document for confidentiality before production would delay litigation interminably and raise the cost prohibitively. Therefore, parties frequently agree that the defendant can produce information subject to a protective order and allow the plaintiff subsequently to challenge certain confidentiality designations or categories of designations. Without this safety valve, large litigations would grind to a halt. Suits would be settled because of discovery costs, not because of the validity of the claims.

In any event, even if a plaintiff agrees to a protective order, third parties, including the press and public interest groups, can often enter the case to challenge it, and they have done so repeatedly. In short, that parties often stipulate to protective orders stands as no indictment of the case-by-case approach to the issue embodied in the Federal Rules of Civil Procedure.

I am a defense lawyer. My ethical obligation is to represent my client zealously. The plaintiff's lawyer has the same obligation to his or her client. Each of our clients -- indeed, in many cases, each of us personally -- may gain or lose depending on how issues regarding protective orders are resolved. Congress should be skeptical of efforts by any of the combatants to paint this picture in black and white. Neither side of this question has a monopoly on truth and virtue. There are legitimate issues regarding the appropriate degree of public access to information on the one hand, and legitimate concerns about privacy, abuse of discovery, and protection of valuable trade secrets on the other. The balance of competing values can only be

struck case by case, where the court can weigh the particular facts before it and enter an appropriate order. That is how the system works now in federal court. There is no evidence that this system has broken down, that it has endangered the public health, or that it has denied any litigant his or her day in court.

The effort to change the law regarding protective orders is thus a solution in search of a problem. On any measure of the problems facing courts in this country, protective orders are not even a blip on the screen. No major overhauls are necessary. No rigid rules that strip the courts of discretion to decide each case on its merits are warranted.

In sum, when considering sunshine in litigation, Congress should remember that too much sun is harmful.

The Need for Sunshine in Litigation

Written Testimony for the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights

Tuesday, December 11, 2007

Richard Zitrin*

INTRODUCTION

On October 10, 2000, *60 Minutes II*, the CBS investigative news program, aired a segment about victims of defective Firestone tires with "belt separation" that caused the tires to shred without warning.[1] The segment focused on Kim Van Etten, whose son Danny was killed when a Firestone tire separated. Ms. Van Etten accepted a settlement that required that she and her lawyer keep secret not only the amount of the settlement, but all the documents they had obtained during discovery. Van Etten accepted secrecy because her lawyer told her it would take years to resolve her case publicly, and "it's so very hard when you're dealing with the death of your son."

Van Etten's lawyer defended secretizing the settlement, while acknowledging others may have died later as a consequence. "You can spend maybe two years litigating over obtaining vital documents, but are you doing what's best for your client? ... I'm saying your job as a lawyer is to prosecute and win that case, and that's where your mind better be and your focus ought to be," he told Dan Rather.

But Kim Van Etten, in the final analysis, focused on something else – those deaths that came after. She clearly had only a limited understanding of the nature of the documents "secretized" by her agreement. But she knew they went to the heart of the case. "I felt like I killed those people, and in all honesty I do have a hand in it and I'll have to answer to it at sometime in my life or after my life," she told Rather. Rather demurred, telling her that "people watching" would almost certainly tell her "'you don't have anything to answer for.'" But Van Etten was resolute: "Yes I do. Because even though I didn't know [the details of the documents], a lot of people died. And if I said 'no,' and went those six years [to trial], and got strong instead of crying..." those people might be alive.

One might understand why Firestone and its lawyers would insist on secrecy. Plaintiffs' lawyers who are more interested in making money and moving on to the next case are not likely to focus on the harm done to other mothers and their sons in the future.

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* See endnote for biographical information about Professor Zitrin.

1. "Hush Money?," *60 Minutes II*, reported by Dan Rather, CBS Television, October 10, 2000. The recitation that follows is taken from a videotape of that segment.

But what about our government? Shouldn't our society – embodied as a nation of laws in the highest sense – protect our citizens from unnecessary danger? There seems to be no more unnecessary danger than one that could be avoided by simply shining the light of public scrutiny on information exchanged in litigation. This information is *already* presumptively public. It remains so unless the parties to a lawsuit engage in a back-room deal to exchange large sums of money for a code of silence – at the expense of the lives of future victims.

Simply put, a strong "sunshine in litigation" law will save lives – hundreds, indeed thousands, of lives. It will prevent car accidents, food poisoning, "adverse incidents" from drugs and prostheses, children maimed by unsafe toys, more. And it will do this at no cost to our government.

Sunshine in litigation means that that information exchanged in the litigation discovery process may not be "secretized" where that action would endanger the public health and safety. It's simple: no settlement agreement, and no stipulation to a protective order, where the goal of the litigants is to allow their own private economic advantage to triumph over public harm.

I. A Personal Perspective

I should begin with a personal perspective. First, I believe in "sunshine in litigation" and openness of both court records and discovery. I believe that courts are public forums, and that arguments about the privacy of disputes should generally be outweighed by the public's right to know. Some have strongly argued that civil courts exist to serve "private parties bringing a private dispute."[2] I believe, however, that even if the dispute began as a private one, once the courts are involved it is at most a private dispute *in a public forum*. Once the disputants go to court, the public nature of the forum trumps the formerly private nature of the dispute.[3]

Second, although I have been a trial lawyer since my bar admission, I come to my position not primarily as a litigator with either a plaintiffs' or defense perspective, but rather from my involvement in the field of legal ethics. Having evaluated what is and what I believe *should be* the ethical behavior of lawyers, and after seeing my views evolve substantially over 30 years in the field, I have come to believe that the traditional model of the "zealous" advocate, who does everything within the bounds of the law for his or her client almost without regard to consequences, is both inappropriate and unnecessary to being an excellent lawyer.[4]

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2. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 433–36 and 467 (1991).

3. Trumping doesn't include disclosing names of innocent victims, such as children who have been harmed. This would prevent necessary privacy for those innocents who need protection against harm.

4. I am hardly alone in moving in this direction. The last twenty years has seen the American Bar Association substantially broaden ABA Model Rule 1.6, from narrow permission to disclose a client's "criminal act" likely to lead to "imminent" death or substantial bodily harm (1983) to broad permission to

Yet, those lawyers—whether for plaintiffs or the defense—who might otherwise agree with this perspective too often feel they have no choice but to accept and even argue for secrecy. The rules of ethics generally (with narrow exceptions) require lawyers to put the interests of the client ahead of those of society, and neither local nor jurisdictional rules of court[5] (including those addressing discovery and protective orders) generally proscribe entering into settlements that permit a society-first perspective. Thus, lawyers feel bound to settle cases in ways that serve the needs of specific clients even if they potentially harm substantially the interests of society as a whole. Unless counsel are operating in a jurisdiction with a strong "sunshine in litigation" law, they may feel that there is little that can be done when the defendant demands, and the plaintiff accepts, secrecy as a condition of obtaining information or resolving a case.

accomplish such a goal, by (1) modifying the existing court rules governing discovery and case settlement; (2) narrowing the acceptable grounds for protective orders, especially *stipulated* protective orders; (3) modifying the jurisdiction's ethical rules of professional conduct to prohibit lawyer collaboration in "secretizing" such information; and (4) educating and requiring the trial bench to follow these modifications and rules.

II. "Secret Settlements" Jeopardize the Public Health and Safety

So the terminology I use here is clear, by "secret settlements" I mean those agreements between plaintiffs' and defense lawyers to keep information about a known harm—whether it is a defective product, toxic waste, or a dangerous drug—from the public. The plaintiff gets a large (sealed) settlement; the defendant gets silence; the public gets shortchanged. I am not talking about keeping secret the *amount* of the settlement; there are valid reasons for doing this. I am not talking about keeping secret the names of innocent parties, such as children; there are important reasons for doing this. Rather, my concern is with those settlements in which the very information about the claimed harm, usually obtained through the process of open discovery, is "secretized" by private agreement of the parties.

In the last ten years, secrecy in settlements has become an increasingly common subject of articles in the popular legal press and more scholarly forums.[6] The general

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disclose any occurrence, not limited to the client's act nor to its being criminal, likely to result in such harm, whether or not imminent (2002), to further disclosing relating to non-injury-related matters – not related to the issues raised in this paper – approved by the ABA House of Delegates just last month, in August 2003. *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Rule 1.6.

5. With the notable exception of South Carolina. See *infra*.

6. My 2003 compilation of some of the work that appeared between 1998 and 2003 includes the following: Laurie Kratky Doré's article, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999), was a survey of the issue of secrecy from an ethics perspective. Her article appeared about the same time as Richard Zitrin & Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER (Ballantine, 1999), in which Chapter 9 (pages 183 – 208)

media has increasingly addressed the issue: in 2000, a front page article and editorial in the Los Angeles *Times*, an editorial and feature article in *USA Today*, the piece on *60 Minutes* cited in the introduction to this article, in 2001, and numerous other articles. [7]

Why this increased scrutiny? Unfortunately, it has been mostly a matter of dead and wounded bodies. The Fall 2000 *Times* articles, *USA Today* editorial and *60 Minutes* piece all flowed from the allegations in the fall of 2000 about Firestone's shredding tires. More recent articles most often were inspired, so to speak, by events of harm: the policy of some Catholic church archdioceses of allowing priests who were known pedophiles to be relocated and continue serving in parishes;[8] or the dangers of diabetes and

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was devoted to discussing secret settlements. Also of similar vintage is Richard A. pages Zitrin and Carol M. Langford, *It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements*, 7 VOIR DIRE No. 1, at 12 (ABOTA, Spring 2000); Frances Komoroske, *Should You Keep Settlements Secret?* 35 TRIAL (June 1999). 6; Richard A. Zitrin , *The Case Against Secret Settllements (Or, What You Don't Know Can Hurt You)*, 2 Inst. For Study Legal Ethics 115 (1999); Diana Digges, *Confidential Settlements Under Fire in 13 States*, Lawyer's Weekly USA (April 30, 2001) at B1; Richard A. Zitrin, *Why Lawyers Keep Secrets About Public Harm*, THE PROFESSIONAL LAWYER, American Bar Ass'n, (Summer 2000); and Kevin Livingston, *Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists Who Want to Ban Secret Settlements*, THE RECORDER 1 (May 8, 2001). More recently there have been articles in the legal press such as Rebecca Womeldorf and William S.D. Cravens, *More Sunshine Laws Proposed*, Nat'l L.J. (Nov. 12, 2001) at B14; Jill Hertz Blaustein, *Sealed But Not Secret*, LITIGATION NEWS (July 2002) at 1; Martha Neil, *Confidential Settlements Scrutinized*, A.B.A. J. (July 2002) at 20, and James E. Rooks, Jr., *Let the Sun Shine In*, TRIAL (June 2003); and additional survey treatments such as Christine Hughes, *Confidential Settlements: A White Paper*, New England Legal Foundation, April 2003. Since that time, while I have not done a formal compilation for this testimony, scrutiny of secret settlements has, if anything, increased.

7. My 2003 compilation of some of the work that appeared between 2000 and 2003 includes the following: *Lethal Secrets* [editorial], LOS ANGELES TIMES; Sep 12, 2000; Davan Mahraraj, *Goodyear Tire Fatalities Echo Firestone's Troubles*, LOS ANGELES TIMES, Oct 25, 2000, pg. A.1; *Sealed court records kept tire problems hidden* [editorial], USA TODAY; Sep 19, 2000; Thomas A. Fogarty; *Can courts' cloak of secrecy be deadly? Judicial orders protecting companies kept tire case quiet*; USA TODAY; Oct 16, 2000; "Hush Money?," *60 Minutes II*, supra, note 2; *see e.g.*, James Frimaldi and Carrie Johnson, *Factory Linked to Bad Tires*, THE WASHINGTON POST, Sept. 28, 2000 at E01. Richmond Eustis, *Judge Orders Unsealing of Secret Firestone Documents From Fatal 1997 Crash*, FULTON COUNTY DAILY REPORT, Sept. 29, 2000; Ray Shaw, *Sunshine in Litigation*, Fla. B.J., January, 2000 at 63; Roy Simon, *Some Secrets Lawyers Shouldn't Keep*, NEWSDAY (Aug. 16 2001) at A39; Richard A. Zitrin, *Time to End the Secrecy*, SAN FRANCISCO CHRONICLE, August 21, 2001. Eileen McNamara, *Courts Must End Secrecy*, BOSTON GLOBE B1 (Feb. 27, 2002); Ben Kelly, *Secret Court Settlements Prevent Needed Warnings*, THE BOSTON HERALD, (Sept. 16, 2002) at 18; Stephen Gillers, *Court Sanctioned Secrets Can Kill*, LOS ANGELES TIMES (May 14, 2003). I have not done a formal compilation for this testimony, but scrutiny of secret settlements has, if anything, increased. In December 2006 and January 2007, front page articles in THE NEW YORK TIMES highlighted the thousands of cases involving the drug Zyprexa settled secretly between plaintiffs and Eli Lilly Corp. in multi-district litigation in the Eastern District of New York federal court. For my early perspective on this, see Richard Zitrin, *Secrecy's Dangerous Side Effects*, LOS ANGELES TIMES (February 8, 2007).

8. *See, e.g.*, Thomas G. Plante, *Bless Me Father for I Have Sinned : Perspectives on Sexual Abuse Committed by Roman Catholic Priests* (Praeger Publishers, 1999), Michael Paulson, *Lessons Unlearned*, BOSTON GLOBE, June 12, 2002, available at http://www.boston.com/globe/spotlight/abuse/stories2/061202_louisiana.htm (last visited Nov. 9, 2003); Broken *Vows*, Christopher Sciavone, BOSTON GLOBE, December 8, 2002 (commenting on the Boston

misprescribing that came to light in the Zyprexa disclosures of a year ago.[9] Change comes, but often its cost is high.

In the Firestone matter, by October 2001, the National Highway Traffic Safety Administration (NHTSA) had determined that Firestone shredding tires had caused at least 271 fatalities, most of which involved cases settled secretly.[10] Zyprexa has been estimated to cause severe, endangering weight gain in 30 percent of its patient-users.[11] This news has become just the latest in a series of horror stories involving secrecy, though these stories may have had better timing than others in bringing the issue to the front pages, and thus to a broader American audience.

Before Firestone there were the prescription drugs Zomax and Halcion, the Shiley heart valve, and the Dalkon Shield intrauterine device, all taken off the market as too dangerous, but not until years—and hundreds of secret settlements—had come and

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Archdiocese's practices: "John Geoghan was repeatedly reassigned; Paul Shanley was recommended for alternative ministries elsewhere; and Joseph Birmingham and others were moved about the diocese as 'squirrels' -- clerical jargon for priests hidden away in rectories"), available at: http://www.boston.com/globe/spotlight/abuse/stories3/120802_schiavone_entire.htm (last visited November 9, 2003), Associated Press, *Abusive Priests Were Protected, Grand Jury Reports*, ORLANDO SENTINEL, Feb. 11, 2003 available at: http://www.orlandosentinel.com/news/nationworld/balet.abuse11feb11,0,5039586.story (last vistited Nov. 8, 2003); Associated Press *Chronology of Church Abuse Crisis*, posted Dec. 12, 2002 *reprinted and available at*: http://www. sexcriminals.com/news/13949/ (last visited Nov. 8, 2003); Jonathan Bandler, *Priest Got Church Recommendations Despite Sex Allegations*, THE JOURNAL NEWS, Feb. 28, 2003 *available at*: http://www.thejournalnews.com/newsroom/022803/b0128wilson.html (last visited Nov. 8, 2003).

9. See, e.g., New York Times coverage since December 2006, including Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use,* THE NEW YORK TIMES, December 18, 2006; *Editorial: Playing Down the Risks of a Drug,* THE NEW YORK TIMES, December 19, 2006; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug,* THE NEW YORK TIMES, December 21, 2006; *Mother Wonders If Psychosis Drug Killed Her Son*, THE NEW YORK TIMES, January 4, 2007.

10. NHTSA October 4, 2001 report, at http://www.nhtsa.gov/hot/Firestone/Update.html (last visited November 9, 2003). NHTSA's first estimate was under 100 fatalities; the agency periodically raised its estimate during late 2000 to late 2001 from 88 to 119 to 148, and 174. *See* DriveUSA.net, *Recall Chronology,* http://www.driveusa.net/ford_firestone_chronolgy.htm (last visited November 9, 2003). The accuracy of this information is borne out by news reports and reports on NHTSA's own site. *See, e.g.*, Earle Eldridge, *Firestone Attorney Says Tiremaker Not at Fault,* USATODAY, Aug. 14, 2001 (stating that tread separation of Firestone tires had led to 206 deaths and over 700 injuries and noting that Bridgestone/Firestone has settled more than 200 of these lawsuits before trial) *available at*: http://www.usatoday.com/money/autos/2001-08-12-firestone-trial-full.htm) (last visited November 8, 2003). NHTSA itself recognized that the "additional reported fatalities were not the subject of new complaints; rather, they were added after ODI obtained additional information about pre-existing complaints." October 4, 2001 report.

11. Alex Berenson, *Eli Lilly Said to Play Down Risks of Top Pill,* THE NEW YORK TIMES, December 17, 2006.

gone.[12] The public was left in the dark long after the products' defects were well known to those involved in litigation.

An English investigation provided the proof against Halcion. Disclosures about Zomax came only after a scientist experienced a potentially fatal allergic reaction and decided to investigate. By the time Zomax was taken off the market, it was reportedly responsible for a dozen deaths and over 400 severe allergic reactions, almost all of which were kept quiet through secret settlements worked out by McNeil, the drug's manufacturer. Attorneys for A. H. Robins, the Dalkon Shield's manufacturer, even tried to condition their secret settlements on plaintiffs' lawyers' promises never to take another Dalkon case—a clear ethics violation.[13]

In the case of General Motors pickup trucks with side-mounted gas tanks, GM took the offensive when in 1993, GM's lawyers sued Ralph Nader and the Center for Auto Safety for defamation. But other GM lawyers had been quietly settling exploding side-mounted gas tank cases with startling frequency for years. In 1996, lawyers for the Nader defendants obtained GM's own records of those cases in discovery. They showed approximately 245 individual gas tank pickup cases, almost all settled, and almost all requiring the plaintiffs to keep the information they discovered secret. The earliest cases marked "closed" were filed in 1973, the latest 23 years later, just before the records were turned over.[14]

III. Our Courts Should Be Instruments of Public Trust and Protection

One can hardly question that there are countless judicial opinions at all levels of our justice system that turn on public policy issues or are decided based on the public interest in the administration of justice. Judicial protection of the interests of non-parties to litigation is required in many situations, from seeking court approval of settlement agreements of class action and shareholder derivative suits, to giving rights to third party beneficiaries to contracts[15], wills and trusts[16], and investment prospectuses[17].

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12. *See*, among other sources, Lloyd Doggett and Michael Mucchetti, *Public Access to Public Courts*, 69 TEX. L. REV. 643, (1991); Bob Gibbins, *Secrecy Versus Safety: Restoring the Balance*, 77 ABA JOURNAL 74 (December 1991); Steven D. Lydenberg, et. al., RATING AMERICA'S CORPORATE CONSCIENCE 234 ffl (Addison-Wesley, 1986), *Davis v. McNeilab, Inc.*, U.S. Dist. Ct., D.C., No. 85-CV-3972; Morton Mintz, AT ANY COST 197–98 (Pantheon, 1985); [Mass.] LAWYER'S WEEKLY, February 20, 1995.

13. *See*, principally, ABA Model Rule 5.6(b).

14. *See* transcript of American Judicature Society, *Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?* 78 JUDICATURE 304 (1995); Catherine Yang, *A Disturbing Trend Toward Secrecy*, BUSINESS WEEK (October 2,1995); Stephen Gillers, *Court Sanctioned Secrets Can Kill*, LOS ANGELES TIMES (May 14, 2003). Documentation of cases alleging GM truck fires was provided to the author by Clarence Ditlow, director of the Center for Auto Safety. *See* Phillips v. GMC, 126 F. Supp. 1326, 1332 (D. Mont. 2001), *vacated and remanded by* Phillips v. GMC 289 F.3d 1117, 1124 (9th Cir. 2002), discussing the total amounts of recovery in the GM cases.

15. *See e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 309 cmts. b & c (1981) (stating that third party beneficiaries have equal rights of enforcement to a contract as original party). *See also*, Lucas v.

A judiciary responsible to protect the interests of the public is central to the concept of our system of justice. While the fundamental aspect of the role of the courts is to administer justice—usually justice between the parties—the ABA Model Code of Judicial Conduct asserts that among the most basic roles of the judiciary is to maintain the integrity of and public confidence in our legal system. The Preamble to the ABA Model Code of Judicial Conduct reads:

> The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.[18]

Our most populous states have closely modeled their own codes of judicial conduct to reflect this basic judicial duty.[19] Seeing the court system as a "public trust" means defining a relationship of trust between judges and the public. Such a relationship

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Hamm, 56 Cal. 2d 583, 589–591 (1961) (stating that an attorney can be held liable for malpractice by a third party intended beneficiary).

16. *See e.g.*, Bucquet v. Livingston, 56 Cal. App. 3d 914, 921–22 (1976) (holding that a lack of privity will not necessarily prevent a third party beneficiary under a will to bring a cause of action); *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner,* 612 So. 2d 1378 (Fla. 1993); *Kinney v. Shinholser,* 663 So. 2d 643 (Fla. 5th DCA 1995); *DeMaris v. Asti,* 426 So. 2d 1153 (Fla. 3d DCA 1983) (same).

17. *See e.g.*, Security and Exchange Act of 1934, 15 U.S.C. § 78j, Rule 10b-5 (protecting the rights of third parties from misrepresentation involving securities).

18. ABA MODEL CODE OF JUDICIAL CONDUCT, Preamble (1990).

19. *See, e.g.*, CAL. CODE OF JUDICIAL CONDUCT, Preamble (1996) (*available at*: http://www.lectlaw.com/files/jud32.htm (last visited August 12, 2003)) ("The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.") (emphasis added); FLORIDA CODE OF JUDICIAL CONDUCT, Preamble (*available at*: http://www.flabar.org (last visited August 12, 2003)) ("Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to maintain confidence in our legal system.") (emphasis added); TEXAS CODE OF JUDICIAL CONDUCT, Preamble (*available at*: http://www.courts.state.tx.us/Judethics/canons.asp (last visited August 12, 2003)) ("Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to maintain confidence in our legal system.") (emphasis added); NEW YORK CODE OF JUDICIAL CONDUCT, Preface (1996) ("Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.") (emphasis added); ILLINOIS CODE OF JUDICIAL CONDUCT, Preamble (1993) "(The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.") (emphasis added).

implies that the judiciary should operate in the best interests of the beneficiaries of that trust.

Other ABA rules and state codes of judicial conduct support the policy that courts should act in the best interests of the public. Among the most affirmative of these rules is memorialized by the ABA in Canon 2A of its Model Code of Judicial Conduct: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[20] Since the ABA Model Code was revised in 1990, almost all states have either adopted this tenet or have enacted similar rules either requiring[21] or strongly urging[22] judges to act in a manner that promotes public confidence in the judiciary. It is fair to say that these rules pose an affirmative duty on the judiciary to instill and maintain public confidence in the court system.

Such confidence is necessarily upset by a judiciary that permits secret settlements to go unchecked even if those settlements are likely to conceal significant harm from the public. In these cases, the public is likely to believe—rightly so—that the court system is allowing the private resolution of supposedly private disputes in a manner that amounts to a breach of the public trust.

This is easily avoided. Courts can and should act to prevent litigants from entering into settlement agreements, stipulations for protective orders, or agreements to destroy or return discovery *wherever* they arise under a court's jurisdiction, *whether or not* the agreement is ever presented to the court.

IV. Responses to Objections to Sunshine Laws

A. No Evidence?

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20. ABA Model Code of Judicial Conduct, Canon 2A (1990).

21. *See, e.g.*, New York Code of Judicial Conduct, Canon 2A ("A judge *shall* respect and comply with the law and *shall* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") (emphasis added); Cal. Code of Judicial Conduct, Canon 2A ("A judge *shall* respect and comply with the law and *shall* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") (emphasis added); Florida Code of Judicial Conduct, Canon 2A ("A judge *shall* respect and comply with the law and *shall* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") (emphasis added).

22. *See, e.g.*, Illinois Code of Judicial Conduct, Rule 62, Canon 2A ("A judge *should* respect and comply with the law and *should* conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") (emphasis added); Texas Code of Judicial Conduct, Canon 2A, "A judge shall comply with the law and *should* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") (emphasis added).

Four principal arguments have been advanced in opposition to those court limitations on secrecy. The first relates to the claim of Professor Arthur R. Miller[23] and others that there exists only "anecdotal evidence," or what Miller calls "stories," that secrecy has indeed prevented the public from learning vital information on issues of health and safety. It is true, of course, that allegations in a lawsuit—even an occasional jury verdict—don't prove anything. But there is no evidence that openness actually encourages frivolous lawsuits. More significantly, an examination of specific cases, among them those discussed above, shows that far more than mere "anecdotes" are involved, including several products that were eventually removed from the market.[24] Moreover, even if legal and scientific experts argue whether something is truly dangerous, this argument begs the more fundamental question: Does the public have a right to know what the risks are—and what the evidence is?

B. NO SETTLEMENTS?

Second, opponents of openness claim that cases wouldn't settle without secrecy, and thus would increase the caseload of an already overburdened judiciary. There is no evidence for this proposition. Indeed, these claims do not appear to have even strong "anecdotal" support. There have been no studies demonstrating this supposition to be true, nor any such claims from the states with the strongest anti-secrecy laws.

In fact, at three judicial seminars that I have privileged to speak on this subject,[25] I spoke informally and in workshops with many judges; *none* could recall a case he or she believed would not have settled had secrecy been forbidden. I did not find a single judge who believed cases would *not* settle in the absence of secrecy.

James E. Rooks, Jr., who has compiled a wealth of data on secrecy in litigation, recently wrote that in his substantial experience talking with judges at such conferences, he too has never heard a judge cite such a case.[26] Chief Judge Joseph Anderson of the federal district court for the District of South Carolina agrees with this conclusion, and notes that since his court approved the first significant district court openness rule in November 2002, filings in his court have gone up, but trials have gone down.[27] Not only

23. See Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, *supra*, note 3, at 482.

24. Among the examples of products removed from the market are the drugs Halcion and Zomax, the Shiley heart valve, the Dalkon Shield intrauterine device, and General Motors side-mounted gas tanks.

25. The Roscoe Pound Institute Annual Forum for State Court Judges, Chicago, July 2000; the American Bar Association annual continuing education conference for state appellate judges, Vancouver, B.C., July 2001; the Louisiana Judicial College, December 2001.

26. James E. Rooks, Jr., *Is the Sunshine Chilly*, working paper representing an expanded version of Rooks' article in Trial magazine, *Let the Sun Shine In*, Trial, June 2003, at pages 11-13.

27. Judge Anderson made these remarks at a conference entitled "Court-Enforced Secrecy: Formation, Debate and Application of South Carolina's New Secrecy Rules," October 24, 2003, co-sponsored by the South Carolina Bar Ass'n and the University of South Carolina Law Review (hereinafter "the South Carolina conference."). The rule in question is discussed *infra*.

did Judge Anderson challenge the assertion that cases would not settle, he was joined in that view by Professor (and former federal court of appeals judge) Abner Mikva and *both* of the defense counsel who spoke. [28]

Rooks affirms Judge Anderson's sense of things, noting that "Florida's Sunshine in Litigation law has now been in effect for nearly 13 years, and there is no reason not to believe that trial lawyers for both sides have simply accepted it and moved on with business." [29] Rooks concludes that *speculation* about openness' chilling effect on settlements was merely a "prediction" before state regulation that never came to pass and for which there is no evidence. [30]

A 2003 study by the Federal Judicial Center also confirms this view. The FLJ examined 39,496 civil cases that were filed in eleven federal districts and were terminated in 2001 or early 2002.[31] The study indicated that there were only 140 cases with sealed settlement agreements—only one-third of one percent.[32] While many more cases may have been settled secretly through *unfiled* documents, [33] there is little if any anecdotal or empirical evidence that these cases would have gone to trial. Indeed, there is a marked dearth of cases that have actually gone to verdict. The reason is obvious: Those few cases often make front-page headlines when they do go to verdict, such as the one General Motors side-impact gas tank case that *was* tried, in Atlanta, in 1994 .[34]

As Chief Judge Anderson put it at the South Carolina conference, parties wishing secrecy are most unlikely to "opt to go forward with the most public of resolutions – a trial.... It's usually the cases that *matter* where secrecy is asked for – in cases where it shouldn't be permitted."[35]

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28. Remarks of attorneys Stephen E. Darling and Steve Morrison, at the South Carolina conference, October 24, 2003, *Id.*

29. Rooks, *supra*, note 33. at 11.

30. *Id.* at 13.

31. *See See* Federal Judicial Center, *Sealed Settlement Agreements in Federal District Court – May 2003 Progress Report*, 2 (2003) [hereinafter Progress Report]. at 6. Note, however, that because this portion of the study only monitors *filed* settlement agreements, it is impossible to know how many agreements to "secretize" information were made but not filed. See discussion below and especially in PartIV (A), *infra*.

32. *See id.* at 7 and Table 2. Note, however, that because this portion of the study only monitors *filed* settlement agreements, it is impossible to know how many agreements to "secretize" information were made but not filed.

33. This is a serious, sometimes overlooked, aspect of the secrecy problem.

34. *See* General Motors Corp. v. Moseley, Fulton Co. State Ct. case Nos. A94A0826 and A94A0827, appealed at 213 Ga. App. 875 (1994).

35. Remarks at South Carolina conference, October 24, 2003, *supra*, note 34.

What is more plausible than the claim that cases won't settle is that the *amount* of settlement ultimately might be lower, but only because no premium is paid for the plaintiff's silence.[36] Indeed, this seemed to be the position of one of the defense lawyers at the South Carolina conference, Stephen E. Darling.[37] In his remarks, Darling asserted that under anti-secrecy rules defendants would no longer be "*willing to pay extra money*"[38] to settle secretly. Without secrecy, "defendants will not pay more" and plaintiffs would have to settle "for a lesser amount." This remarkable statement is tantamount to an admission that defendants pay, and plaintiffs accept, more money than a case is worth simply to ensure secrecy – or, put more bluntly, that secrecy is indeed bought and sold.

As one court aptly put it:

> [S]ettlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial matters.[39]

C. NO PRIVACY?

Third, some opponents of secrecy argue the rather anachronistic view that "courts exist to resolve disputes that are brought to them by litigants"[40]; or that "litigants do not give up their privacy rights, voluntarily or involuntarily, when they walk through the courtroom door."[41] It is not surprising that those who favor continuing secrecy in discovery and settlement agreements believe the court's primary function—if not its exclusive function—"is to decide cases according to substantive law . . . [and that] collateral effects of litigation should not be allowed to supplant this primary purpose."[42]

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36. *See* Adam Liptak, *South Carolina Judges Seek to Ban Secret Settlements*, N.Y. TIMES, Sept. 2, 2002, *available at* http://www.nytimes.com/2002/09/02/national/02JUDG.html (visited March 31, 2003).

37. South Carolina conference, October 24, 2003, *supra*, note 34.

38. Emphasis is mine.

39. United States v. Kentucky Utils. Co., 124 F.R.D. 146, 153 (E.D. Ky. 1989) *rev'd* 927 F.2d 252 (6th Cir. 1991).

40. Richard L Marcus, *Symposium in Honor of Edward W. Cleary: Evidence and Procedure for the Future: The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457, 468 (1991).

41. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, *supra*, note 3, at 466.

42. *See* Marcus, *supra* note 46, at 470.

One of these "collateral effects," however, is the disclosure of information to the public that would not have been available in the absence of the litigation—information concerning a public danger.[43] At the least, when such information reveals the danger of a public hazard or threat, the courts have an obligation to the public they serve to disclose this information, and the danger must trump any claim of privacy.

A court, after all, is a publicly-funded institution; its main function should be to serve the broader interests of the public.[44] "Our courts are part of the pubic domain," said Professor Abner Mikva, discussing new the South Carolina rules.[45] There is no presumption of privacy; rather "all presumptions should go in the other direction."[46] As for the claim of embarrassment, Mikva submitted that "mere embarrassment" is something most adults must learn to handle.[47] Indeed, no one has documented any recent sightings of corporations, like zebras,[48] blushing red with embarrassment.

D. NO RESOURCES?

Fourth and finally, opponents claim that openness will cause court workloads to seriously increase, as judges are required to scrutinize hitherto uncontested motions and stipulations or unpresented discovery. The more likely reality is that this will *not* be the case, as I discuss below.

I have become persuaded that one of the natural consequences of permitting secrecy is to foster the art of lying to or misleading the court. Perhaps the best example of this is the *Fentress* case, in which the Kentucky Supreme Court found that lawyers who engaged in an ongoing trial after a secret settlement had already been reached showed "a serious lack of candor with the trial court, and there may have been deception, bad faith conduct, abuse of the judicial process or perhaps even fraud."[49] This not only results in private secrecy at the costs of public harm, but undermines the very authority of the courts themselves.

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43. *See id.* at 469–70.

44. *See* Laurie Kratky Doré, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement *supra*, note 21.

45. Remarks at the South Carolina conference, October 24, 2003, *supra*, note 34.

46. *Id.*

47. *Id.* Chief Justice Jean Hoefer Toal of the South Carolina Supreme Court chimed in in support at the afternoon question and answer session to the effect that if she had been deterred by embarrassment, her career would long ago have been over.

48. I refer to one version of the famous child's riddle, "What's black and white and red all over?" and its answer, "An embarrassed zebra."

49. Potter v. Eli Lilly & Co., 926 S.W.2d 449 (Ky. 1996). This case is described more fully in section the last section of this paper, *infra*.

V. To What Extent Are Courts Equipped to Take Judicial Action to Protect the Public?

A. Practical Limitations on What Courts Are Able to Do

It would be foolish to comment on courts abilities to act on this issue without recognizing the limitations some—perhaps most—judges face in dealing with anything beyond the everyday business on their dockets. Resources available to courts in general and trial courts in particular vary widely from state to state, even from venue to venue within states. Among these variations (there are undoubtedly many others) are:

* the availability of research attorneys and/or law students and the extent to which research can be done on line;
* the extent to which the court can utilize magistrates, commissioners, special masters, or "private judges";
* the extent of both system-wide and individual case and calendar management problems, including the extent of overall court backlog and length of each court's docket; and
* whether courts are segregated into issue-specific departments or at least have separate criminal and civil departments.

These limits on resources present a particular problem to courts concerned with openness and secrecy. Since much of what affects openness happens outside the court's ordinary purview, and since many matters *within* the purview of the court system are not directly presented because they are resolved prior to contested hearing, the courts are often marginally or not at all involved in the substantive issue being disputed among the parties and counsel. Taking the time to examine such cases almost certainly means extra time and work for both the judge and his or her staff beyond the ordinary functions of the court. Given the press of ordinary court business, this can be a daunting, even impossible obstacle. Moreover, most judges are ordinarily loath to interfere with agreements made by counsel, particularly those that occur beyond their sight.

B. The Limitations Facing Individual Trial Courts

At the trial court level, one can divide issues of openness and secrecy in two broad, general categories: those that involve lawyers interacting with the bench, and those that do not. This is undoubtedly an oversimplification, but one that is useful to look at this issue from the point of view of the judge. There will be a considerable difference in the allocation of judicial resources depending on whether or not the judge is already involved in the substantive issue.

Jurisdictions vary in the extent to which they require, or even permit, lawyers to make the court aware of their progress in litigation, both procedurally and substantively. In the last generation, the interests of judicial economy, the allocation of precious court resources, the effect of technology, and the institution of "meet and confer" requirements have all materially diminished a courts' record-keeping capacity about cases—and issues

within cases—resolved outside the courthouse corridors. To the extent that document production requests, for example, are no longer even filed with a court unless there is a dispute, a court's ability to acquaint itself with a particular case, even if it wanted to, is considerably less than it was a generation ago.

Nevertheless, many matters beyond the court's purview or knowledge may have an important impact on the question of openness vs. secrecy. Most of these relate to how discovery—interrogatories, deposition testimony, and perhaps most significantly, document production—is handled by the parties. In exchange for discovery, there may be private agreements to return documents or not disseminate deposition transcripts. In exchange for *settlement*, there may be these and other requirements to maintain a veil of silence. If these agreements do not require judicial intervention or even ratification, courts will ordinarily never learn of them.

Among others, the following matters that commonly require court involvement may raise the issue of openness vs. secrecy:

* motions to compel discovery and for sanctions for discovery failures;
* protective orders;
* rulings about privilege, including attorney-client and work product;
* requests or motions to seal documents or testimony;
* motions in limine and other motions affecting trial evidence;
* motions to compromise claims where the court's approval is necessary (e.g., minors, bankruptcy, probate, class actions, etc.)
* stipulations regarding any of the above;
* stipulations regarding post-trial settlement (including waivers of motions for new trial or appeal, stipulated reversals of judgment, etc.)

When these matters actually come before a trial court for hearing, the judge has a relatively easy opportunity to make an informed, substantive decision about how to deal with the issue of openness. But when these matters result in stipulations or unfiled agreements, one can hardly expect courts to be able to take affirmative case-by-case action to ensure the public's right to know.

Hon. Marilyn Hall Patel of the Northern District of California has long refused to allow the vast majority of secret settlements presented to her. "The court, which is a public forum," she told a reporter 15 years ago, "should not be a party to closing off from public scrutiny these agreements."[50] Patel noted then that "[s]ecrecy is costly to the system, because it means that somebody else is going to have to start all over from scratch. It just smacks of anti-competitive activity."[51] Given the ever-increasing complexity of litigation in the new millennium, there is every reason to agree with Judge Patel's view. South Carolina federal judge Anderson agrees, opining that openness

50. B.J. Palermo, *Secrecy in the Courts*, California Lawyer (July 1989).

51. *Id.*

actually fosters judicial economy by not requiring every new piece of litigation over a circumstance dangerous to the public to be started over again. Indeed, at the South Carolina conference, October 24, 2003, Judge Anderson made this point several times. The draft of his paper distributed at the conference states that "duplicative discovery," as he terms it:

> means that in any future litigation involving the same issue ... the litigants will bear the cost of duplicative discovery. Nowhere is this more true than in cases where litigants (principally defendants) have established 'document repositories,' entire buildings where documents produced over the years are stored. The litigant in the first case seeks production of documents and is handed the key to the document repository. When the case is over, the documents go back, and the 'need in the haystack' process is repeated....
> "The burden on the judiciary is repeated as well. I know of nothing more time consuming than pouring through boxes of documents in an effort to be fair....[52]

Discovery, once disclosed in one case, remains available for future cases. And if the issue is dealt with on a systemic, jurisdiction-wide level rather than by individual courts, it becomes "policy," and much of the difficulty involved in a case-by-case review is obviated.

Among federal courts, only Carolina Local Rule 5.03[53] approved in November 2002, addresses requires openness of all documents relating to a settlement agreement filed with the court. I address that rule more fully below.

VI. A Clear Benefit and a Clear Need for Legislation

A. The Openness Presumption

This lack of regulation, particularly in our federal courts, shows the clear and the clear need for a strong, mandated presumption of openness – absent a specific, particularized showing of the necessity for secrecy. In addition to skepticism about the reasons for secrecy, this presumption would generally be based in part on a public policy

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52. *Supra*, note 34. In his oral remarks, Judge Anderson likened this duplicative discovery to the Indiana Jones movie "Raiders of the Lost Ark." The audience watches Indiana Jones who, after great time and effort (not to mention close encounters with death) recovers the Ark of the Covenant, only to learn in the movie's last scene that the ark is buried in a crate in a gigantic storage facility containing thousands of seemingly identical crates. Anderson made it clear that courts should only have to find the "ark" once, and that courts should not be parties to burying it again.

53. *See* Local Civil Rule 5.03, which states (new language in italics):
5.03: Filing Documents under Seal. Absent a requirement to seal in the governing rule, statute or order, any party seeking to file documents under seal shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request or attempt to seal filed documents. Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents that are not filed with the Court. *See* Local Civil Rule 26.08....
(C) *No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule.*

perspective that information likely to materially affect the public welfare should be available to the general public. If this "openness presumption" were uniformly applied, it would operate for all matters involving the courts, whether the parties were in dispute or evinced agreement.

Thus, this presumption of openness would apply broadly to all those matters involving the court, including all settlement agreements and stipulations for protective orders. It is important for courts to address the issue of secrecy and to prevent not merely the "secretization" of the settlement, but of the *discovery of information* that led to that settlement.

By preventing automatic secrecy *stipulations*, the requisite justification for protective orders, sealing documents, and the like would be re-examined and narrowed. These issues should be addressed *regardless* of whether the parties agree to the secrecy in question.

Courts clearly have the power to enforce this openness. Orders, even if broad, would almost certainly be enforceable; almost all courts have recourse to a variety of sanctions, including monetary and issue sanctions and contempt powers, to enforce their orders.

B. THE NEED FOR LEGISLATION

Approximately fifteen to twenty states have made significant strides in attempting to require that discovery information remain public.[54] Nevertheless, their effectiveness is far from uniform. Federal rule changes regarding the filing of discovery have also been less than helpful in creating more openness in discovery. Under the former version of FRCP Rule 5(d), circuits previously required that "all discovery materials must be filed with the district court, unless the court orders otherwise."[55] However the current version of the rule, amended in 2000, states:

> All papers . . . must be filed with the court . . . but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses *must not be filed* until they are used in the proceeding or the court orders filing: (i)

54. Some states have made their significant strides through legislation or by court rules. *See e.g.*, A.C.A § 16-55-122 (Arkansas); Fla. Stat. § 69.081 (Florida); La. C.C.P. Art 1426(D) (Louisiana); MI R Admin MCR 8.119(f) (Michigan); La. C.C.P. Art 1426 (Louisiana); Tex. R. Civ. P. 76a (Texas); and Wash. Rev. Code § 4.24.611 (Washington). However, other states have only made significant strides in their "attempts" to implement legislation or court rules. For a current overview of the many states that have addressed this issue see Christine Hughes, *Confidential Settlements: A White Paper*, New England Legal Foundation, April 2003 at 21–42 (discussing the attempts made by Arizona, California, Connecticut, Illinois, Massachusetts and Rhode Island) and James E. Rooks, Jr., *Let the Sun Shine In*, TRIAL (June 2003) at 18 (listing 21 states that "have provisions that appear to directed toward the secrecy phenomenon").

55. In re Agent Orange Liability Litigation, 821 F.2d 139.

> depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.[56]

Accordingly, outside of the possibility of standing orders, which only a few daring judges like Judge Patel in California have even approached, in the vast majority of jurisdictions there is little judges can do on a case-by-case basis.

In November 2002, the federal district court in South Carolina amended its Local Rule 5.03 to preclude settlement agreements filed with the court from being put under seal.[57] However, this rule does *not* pertain to settlement agreements *not* filed with the court – or, for that matter, to protective orders or other parts of the discovery process.[58] The intent of this laudable rule is materially undermined by the change to Rule 26(a) on filing discovery.

Upon approval of this rule, its sponsor, Judge Anderson stated in a letter to his colleagues on the federal bench: "Here is a rare opportunity for our court to do the right thing, and take the lead nationally in a time when the Arthur Anderson/Enron/Catholic priest controversies are undermining the public confidence in our institutions and causing a growing suspicion of things kept secret by public bodies.[59] But the court's local rule only applies where the court's *direct* imprimatur is sought. Under the rule, private secretization agreements continue with the court's tacit acceptance. Judge Anderson's vision will not be fulfilled to any significant extent until it can address the specific means that foment that "growing suspicion." Because it does not apply to either protective orders or unfiled matters, the rule will necessarily fall well short of its stated goal.[60]

C. The Benefits: Protective Orders and Presumptions of Openness

One of the most common court-sanctioned procedures used to hide potential dangers to the public is the protective order. Defendants in cases dealing with alleged physical harm to plaintiffs will commonly seek protective orders as being necessary to protect a "trade secret" or "commercial advantage." But protective orders may also be

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56. Fed. Rule Civ. P. Rule 5(d) (emphasis added). *See also,* New York v. Microsoft, Corp., 206 F.R.D. 19, 24 (2002). Emphasis added.

57. *See* D.C.S.C. Local Civil Rule 5.03, *supra*, note 62.

58. The South Carolina Supreme Court adopted So. Carol. Rule Civ. Proc. 41.1 on May 5, 2003. For a far more extensive analysis of these rules, *see* Richard A. Zitrin, *Why the Laudable South Carolina Court Rules Must be Broadened*, to be published this winter in the So. Carolina Law Review. Other papers given in connection with the South Carolina conference of October 24, 2003, note 34, including those from Chief Judge Anderson and South Carolina Chief Justice Jean Hoefer Toal, will also be published in that volume.

60. *See* Adam Liptak, *South Carolina Judges Seek to Ban Secret Settlements*, N.Y. Times, Sept. 2, 2002, *available at* http://www.nytimes.com/2002/09/02/national/02JUDG.html (visited March 31, 2003) (citing Judge Anderson in a letter to his colleagues).

used as a means of concealing "smoking guns" and other inflammatory discovery and not merely to protect trade secrets. Opponents of "sunshine" rules posit that these rules will operate to vitiate the presumption that trade secrets should be protected.[61] This is simply not the case. Proprietary information *will* be protected unless it kills or maims someone. However, there is no legitimate need to protect a product or service that hurts people. If it is a defective product, there is no trade secret to protect—*no one* is going to copy that design. [62]

Some states and local court jurisdictions have begun tightening the standards required for protective orders to promote openness in litigation where the public interest is in issue. While there are strong public policies to protect information such as trade secrets, commercial processes, or the identities of minors, there are at least as strong public policies to protect the health and safety interests of the public from known harms. Only a presumption of openness in the issuance of protective orders will balance these interests.

However, there is still much to be done. Most states, concerned with constitutional standards and Supreme Court precedent, "have protective order rules patterned on the good cause standard of the federal rules."[63] Federal courts are generally recognized to have three levels of standards for protective orders, depending on the purpose for which the order is sought and the reasons for the general presumption in favor of access. [64] Only the highest of these standards goes significantly beyond a generalized notion of "good cause."

This highest standard, by far the most stringent, should be the one used in considering all protective orders within the scope of this article. When the proponent claims that the protective order is necessary to protect a trade secret or confidential commercial information pursuant to Fed. R. Civ. P 26(c)(7), this standard requires a

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61. *See* Kevin Livingston, *Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists Who Want to Ban Secret Settlements*, THE RECORDER 1 (May 8, 2001).

62. The *60 Minutes II* piece, *supra*, note 2, included a video clip of Firestone executive vice president Gary Kreiger stating at a Congressional hearing that "confidentiality orders applied only to trade secrets and formulations, ... and of course the judge had to agree that those were trade secrets...." Kreiger thus makes *two* unsupportable claims: first that anyone would claim that tires with separation defects had a technology that someone else would want to adopt, and second, that the existence of a *stipulated* protective order rubber-stamped by the judge constitutes the judge's agreement that there were legitimate trade secrets. As to the first issue, the segment presented in counterpoint a video clip of former NHTSA head and Public Citizen spokesperson Joan Claybrook calling such protective orders "unethical."

63. Laurie Kratky Doré, *supra* 21, at 11 and n.26.

64. For a more thorough discussion of federal standards for protective orders and supporting case law, *see* Richard Zitrin, Why the Laudable South Carolina Court Rules Must Be Broadened, pre-publication paper for October 2003 symposium on the South Carolina court rule, Colunbia, SC, October 2003, to be published in the South Carolina Law Review. Also see Laurie Kratky Doré, *supra* note 21.

three-part test that combines the general, threshold showing of "good cause"[65] with requirements that the proponent to show also that the information actually is a trade secret or commercial information *and* that disclosure would cause cognizable harm.[66]

To be effective, courts evaluating the showing made in support of protective orders in any case where substantial danger to the public health or safety is in issue must create rules that (1) set a presumption of openness *and* a high standard for proof of *legitimate* trade secret issues; and also, significantly, (2) require a decision on the merits; and (3) deny *pro forma* acceptance of such orders – *even when stipulated* – as the path of least resistance to resolving contested issues. Such courts should also be more inclined to consider remedies for inappropriate efforts at secrecy, including discovery sanctions.

This means more work for trial courts at least temporarily, since instead of merely accepting stipulations of the parties, these courts would *require an actual showing* that the limitations on access or dissemination of information are objectively warranted under the circumstances. However, through a strong presumption in a well-drafted rule, a court will not only mitigate the harm posed by secrecy in litigation and thereby maintain the public's confidence in its judicial system, but in short order will see workloads return to normal as litigants learn of the futility of seeking improper protective orders – and the possibility of sanctions for requesting such orders in bad faith.

Although stipulations for protective orders may be the most common form of proposed agreement, there are many others, including stipulations regarding privilege or a privilege log, post-judgment stipulations including stipulated reversals or vacatur, and various agreements relating to case settlement, from filings under seal where court approval is necessary to stipulations to change the name of the parties so that they would be unrecognizable to anyone going to the court file to examine the case.[67] Courts proscribing limitations on agreements that harm the public must do so sufficiently inclusively so that such agreements themselves may also be barred.

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65. FED R. CIV. P. 26(c); In re Agent Orange Prod. Liability Litigation, 821 F.2d 139, 145 (2d Cir. 1987), *cert denied*, 484 U.S. 953 (1987).

66. *See e.g.*, Hasbrouch v. Bankamerica Housing Servs., 187 F.R.D. 453, 455 (N.D.N.Y. 1999); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 (E.D. Pa 1981).

67. I know of no reported cases directly addressing the propriety of such name change stipulations, but during the South Carolina conference, *supra*, note 34, Judge Anderson referred to a dozen cases in the District of Columbia that had been changed to "Sealed v. Sealed" so that no one would know the identities of the actual parties. While researching Chapter 9 of *The Moral Compass of the American Lawyer* I learned anecdotally of several such circumstances involving professionals who did not want their names sullied by being found in the court record and conditioned settlement on such "sanitization." Two of these instances are personally known to me, though the attendant umbrella of confidentiality makes it impossible to cite to them. Indeed, the very nature of the attendant confidentiality makes such name-change situations extremely difficult to uncover, as anyone connected with the matter who disclosed information would be breaching a confidentiality order or agreement.

Although it is legislation and not a court rule, California's newly passed AB 634 provides at least a large portion of a valuable template for dealing with protective orders.[68] Elder abuse legislation, AB 634 *inter alia* prevents secretizing information in elder abuse cases that relate to harm to elders. Section 2 states, in pertinent part:

> 2031.2. (a) In any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code), *any information that is acquired through discovery and is protected from disclosure by a stipulated protective order shall remain subject to the protective order, except for information that is evidence of abuse of an elder or dependent adult* as described in Sections 15610.30, 15610.57, and 15610.63 of the Welfare and Institutions Code. (Emphasis added.)

VII. A Case Study: A Courageous Judge and a Conspiracy of Lawyers

Faced with limited resources and time, no judge can take on the job of "secrecy cop" alone. Nevertheless, in order for jurisdiction-wide court action to be effective, it will need support from individual judges – mostly at the trial level – who are willing to ensure these rules are enforced. Fortunately, the bench will be up to the task. Indeed, it seems there have been an increasing number of instances in which a single jurist took the initiative in a way that helped maintain openness in our courts – even where there was no clear guidance from a set of "sunshine in litigation" court rules.

In early 1995, Kentucky judge John Potter, suspicious of the actions of the lawyers in the aforementioned *Fentress* case, changed his minute order on his own motion from recording a dismissal after verdict to "dismissed as settled." This act set off a controversy that resulted in the discovery that the 28-plaintiff case had indeed been settled, though the judge was never told.[69]

It started in September 1989, when Joseph Wesbecker armed himself with an AK-47, walked into the Louisville printing plant where he had worked, and started shooting. He killed eight people, wounded twelve more, and finished matters by blowing his own brains out. One month before, Wesbecker had begun taking Prozac. The lawyers for the shooting victims soon focused on the drug as the cause for Wesbecker's extraordinary violence, and they targeted Eli Lilly, Prozac's manufacturer.

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68. AB 634 (Steinberg and Simitian), signed into law by Gov. Gray Davis, effective January 1, 2004. *See* note 84, *supra.* The portions of the bill relevant to this discussion will be found in Calif. Civil Code sections 2031.1 and 2031.2.

69. Potter v. Eli Lilly & Co., 926 S.W.2d 449 (Ky. 1996).) The description set forth here is closely adopted Richard Zitrin & Carol Langford, *Hide and Secrets II*, "The Moral Compass" column for LAW NEWS NETWORK on line magazine and AMERICAN LAWYER MEDIA, April 1999. *See also* Richard Zitrin & Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER, *supra*, note 21, Chapter 9, for a more complete recounting of this case.

The *Fentress* case, named for one of Wesbecker's victims, was the first of 160 cases pending against Prozac to go to trial. The circumstances made *Fentress* a tough plaintiffs' case: the lawyers would have to prove that the drug had affected not *their own clients'* behavior, but Wesbecker's. Still, Lilly and its lawyers were determined to defend Prozac with everything they had.

By the time *Fentress* went to trial in the Fall of 1994, Prozac had become the aspirin of anti-depressants -- the wonder drug everyone was talking about and millions were using. Prozac represented almost one-third of all Lilly sales in 1994 -- $1.7 billion. A great deal was at stake: If Lilly lost, other plaintiffs waiting in the wings would gain strength and resolve. But a defense verdict might make those plaintiffs reconsider.

Throughout the case, plaintiffs' attorneys pushed Judge Potter to allow evidence about another Lilly product, the anti-inflammatory drug Oraflex, which had been taken off the market in 1982 as too dangerous. In 1985, Lilly had pled guilty to 25 criminal counts of failing to report adverse reactions to Oraflex, including four deaths, to the Food & Drug Administration. Central to the plaintiffs's claims was that Lilly had done the same thing with Prozac. Potter refused to allow the evidence, saying its prejudice outweighed any probative value.

But when Lilly executives testified that the company had an excellent reputation for reporting problem incidents -- what they euphemistically called "adverse events" – plaintiffs' counsel immediately renewed their request to bring in the Oraflex evidence. Potter agreed, noting that "Lilly has injected the issue into the trial"

Potter's ruling set off a flurry of activity around his courtroom. The lawyers jointly asked for a recess, and then asked to adjourn for a day. By mid-afternoon, a strong scent of settlement was in the air. But when court reconvened the next day, chief plaintiffs' counsel Paul Smith announced that the plaintiffs would rest without presenting the Oraflex evidence unless the trial went to its second phase, on damages. That, of course, would occur *only* if the jury first decided Lilly was liable. The strategy puzzled Judge Potter enough for him to ask the lawyers whether they had reached a settlement. He was told unequivocally that they had not.

While the jury was deliberating, a juror came forward and told Judge Potter that she had overheard settlement negotiations going on in the hallway. She repeated this in chambers with the lawyers present and was then excused. Potter turned to the lawyers and said, "Does anybody have anything they want to say?" A moment later, he asked again, "Does anybody have the slightest clue?"

"No," said Smith.

"I can't imagine," said one of the defense lawyers.

In other chambers meetings, lawyers from both sides emphasized their plans for Phase Two of the trial, on damages, including engaging in settlement discussions if the plaintiffs won Phase One.

On December 12, only three court days after Potter's ruling allowing the Oraflex evidence, the jury returned a defense verdict. In January 1995, Judge Potter formally entered his order in *Fentress v. Eli Lilly*, dismissing the case after verdict by jury. As soon as the verdict was in, Lilly and its lawyers trumpeted their victory across the country. "We were able, finally," said one of Lilly's lead attorneys, "to get people head to head in a courtroom and say 'Put up or shut up.' ... [T]his is a complete vindication of the medicine."

Had John Potter not been the judge, the *Fentress* case might have ended there. Despite the lawyers' denials and their references to a damages phase, Potter suspected that a deal had been made before closing argument. When the plaintiffs didn't file a notice of appeal, Potter called in the lawyers from both sides. They continued to deny that a settlement had been reached.

Although Potter was more suspicious than ever, he had no jurisdiction, except as to his own order of dismissal. So in April 1995, stating "it is more likely than not that the case was settled," Potter filed an unusual document: On his own motion, he changed his post-trial order from a dismissal after verdict to "dismissed as settled." He set a hearing for May.

Quickly, the lawyers on both sides joined forces to file an objection with Kentucky's appeals court to prevent Judge Potter's hearing anything about what they considered a closed case. Paul Smith stated flatly that "there was no secret settlement.... This was a hard fought case." Potter, meanwhile, found himself in need of counsel.

After Potter's changed order had become public, Richard Hay, then President of the Kentucky Academy of Trial Attorneys, told reporters that if money had been traded for evidence, the trial was "a sham," like "taking a dive in a boxing match." Potter read Hay's comments, called him, and asked how outraged Hay was about the case. "Enough to represent you," Hay replied. Together, Hay and Potter filed a brief that emphasized a "public silence [that] has been bought and paid for," robbing millions who "want the truth."

In June 1995, the appeals court ruled against Potter, saying he no longer had jurisdiction over the case. Potter appealed to the Kentucky Supreme Court. Before the fall Supreme Court hearing, lawyers for both sides finally acknowledged that they had indeed settled all money issues and had agreed to go through only the liability phase of the trial no matter what the result. Still, they refused to disclose specifics. Meanwhile, in Indianapolis, Lilly's hometown, Paul Smith suddenly withdrew as lead counsel in a series of consolidated Prozac cases in federal court. He wouldn't say whether he had settled his Indianapolis cases as part of the *Fentress* settlement, and the judge refused to ask.

In their appeal to the Supreme Court, Potter and Hay de-emphasized the importance of public disclosure, and focused instead on the lawyers' failure to be candid with the judge. On May 23, 1996, the Kentucky Supreme Court decided the case of *Hon. John W. Potter v. Eli Lilly* unanimously in Judge Potter's favor, citing the lawyers' "serious lack of candor" and evidence of bad faith, abuse of process, even fraud. Although the court said that "the only result" of exposing the secret *Fentress* agreement "is that the truth will be revealed," the decision was less a victory for open settlements, and more a demand that the judge be included in the secret.

Judge Potter, though, still saw the larger issue. Armed with Supreme Court authority to conduct an investigation and hold a hearing, Potter asked Deputy State Attorney General Ann Sheadel to investigate, giving her the power to subpoena documents and question witnesses under oath. Sheadel's March 1997 report uncovered new twists to the story. A complex agreement did exist between Lilly and the plaintiffs, one so secret that it was never fully reduced to writing. All Sheadel could find was a written *summary* of the verbal agreement. No lawyer would admit preparing it, and no plaintiff was allowed to have it.

In exchange for the plaintiffs agreeing not to present the evidence of Lilly's criminal conduct with Oraflex, Lilly had agreed to pay all plaintiffs, win or lose. Part of the agreement was that *all* of chief plaintiffs' counsel Smith's Prozac cases, including those in Indianapolis, were settled, and half his overall expenses paid by Lilly.

Judge Potter set a hearing to take sworn testimony on March 27, 1997. The hearing never happened. On March 24, in a surprise move, attorneys for Lilly and the plaintiffs presented Judge Potter with a new stipulation and order in *Fentress* showing that the case was dismissed as "settled," exactly what Potter had insisted on two years before. The judge signed the order. Three days later, Lilly's attorney went before the appeals court to argue that any further proceedings would be moot. He also claimed that Potter had violated judicial ethics and was on a "vendetta" against Lilly. Potter recused himself, saying "the spotlight should be on what ... is under the log, not the person trying to roll it over."

The judge had succeeded in uncovering the collusive settlement. But of the approximately 160 active Prozac cases in December 1994, less than half remained. Inexplicably, *Fentress* had received almost no attention in the national media, and the Kentucky court of appeal closed any further hearings to the public. Plaintiffs' attorney Paul Smith was still practicing law in Dallas. And the only thing that anyone ever learned about the amount of the settlement was the comment of a Louisville lawyer who represented one of the *Fentress* plaintiffs in a divorce. The amount, he said, was "tremendous."

In December 1997, California appeals court justice J. Anthony Kline filed a dissent in which he said that "as a matter of conscience," he would refuse to follow the California Supreme Court's decision allowing stipulated reversals of court judgments as a

condition of case settlement.[70] Although Kline wrote that he would obey a direct order to implement a stipulated reversal, he nevertheless was accused by the state's Commission on Judicial Performance of "willful misconduct in office [and] conduct prejudicial to the administration of justice." The case created a political firestorm as well as front page news and lead editorials. A year and a half later, the charges against Kline were dismissed, but stipulated reversals remain.

In April 1998, the tobacco industry's wall of secrecy crumbled when the House Commerce Committee opened its files and unsealed 39,000 documents after the Supreme Court refused to overturn judge Kenneth J. Fitzpatrick's broad December 1997 disclosure order in Minnesota's suit against the industry. But much of the most explosive and shocking documents, including evidence of the Council for Tobacco Research's so-called "special projects" unit, supervised and run by lawyers in order to use the attorney-client privilege, had already been disclosed in 1992 in a published opinion written by federal judge H. Lee Sarokin.[71] Sarokin's opinion, overruling many of the tobacco companies' privilege claims, was reversed and he himself was removed from the case. But the opinion remained, providing the outlines of a road map for those, including many states' attorneys general, to use in the years that followed.

The architect of Texas Rule 76a, Texas Supreme Court Justice Lloyd Doggett, now a congressman, is another judge who made a difference. As he put it, "To close a court to public scrutiny of the proceedings is to shut off the light of the law."[72]

Conclusion

Until the law is changed to prevent the practice, attorneys believing it to be in their client's best interest to enter into a secrecy agreement that conditions the return of the "smoking gun" to the defendant will simply do so. The attorney's perceived duty of "zealous advocacy" will trump any possibility of disclosure. So long as such agreements are within bounds of the rules, they will be entered into regardless of any danger to the public, on the theory that the client's best interest (read *financial* interest) must come first.

It is therefore incumbent upon our government to lead the way: to show how the public interest can be protected and the public's confidence in the judiciary system upheld.

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70. *Morrow v. Hood Communications, Inc.*, 59 Cal.App.4th 924 (1997). Kline was commenting on the *Neary* case, *supra*, note 62. His interesting defense of his dissent can be found in *California Lawyer*, September 1998, at 25.

71. *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992), *rev'd* 975 F.2d 81 (3d Cir. 1992).

72. Lloyd Doggett and Michael Mucchetti, *Public Access to Public Courts*, 69 TEXAS L. REV. 643, (February 1991).

One commentator recently noted that "[l]awyers, no less than clerics, and judges, no less than cardinals, must choose openness over concealment if the courts are to avoid the loss of confidence now plaguing the church."[73] Indeed, secrecy needs to be purged from our halls of justice in order that the confidence in the court system to which both the public and our courts are entitled to remains firm and strong. I believe that our trust in our judiciary is well placed. Our courts are the best institutions to refuse to lawyers or litigants to use (or abuse) the court processes to conceal known dangers from an innocent public The United States Senate has the opportunity to help our justice system to begin to walk down this the "high road," acting consistently with judicial responsibility, protecting the public interest, and safeguarding the public health and safety by letting the light of public scrutiny shine brightly.

BIOGRAPHICAL NOTE ABOUT RICHARD ZITRIN

Richard Zitrin is an Adjunct Professor of Law, University of California, Hastings College of the Law, teaching Legal Ethics, and was the Founding Director of the Center for Applied Legal Ethics at the University of San Francisco School of Law from 2000 to 2004, where he also served as Adjunct Professor of Law, teaching Legal Ethics, from 1977 to 2005. He is also in private practice in San Francisco. He has co-authored, as lead author, three books on Legal Ethics, a general-audience book on lawyers and the American legal system, *The Moral Compass of the American Lawyer* (Ballantine, 1999), a textbook that emphasizes a practical approach to teaching ethics, *Legal Ethics in the Practice of Law* (3rd edition, LEXISNEXIS, 2007), and an annually-updated book comparing the rules of ethics, *Legal Ethics Rules, Statutes and Comparisons* (LEXISNEXIS, 2008).

Mr. Zitrin has written approximately 75 articles on legal ethics, including an on-line column "The Moral Compass," for *American Lawyer Media,* and articles for national periodicals such as the *ABA Professional Lawyer*, *The National Law Journal, Voir Dire*, *Trial*, and *Legal Times*, and op-ed pieces for publications such as *The Los Angeles Times* and *The San Francisco Chronicle*.

Mr. Zitrin has written and spoken often on the issue of "sunshine in litigation," and acknowledges "freely borrowing" for this testimony from academic articles and research he has previously conducted, and from his book *The Moral Compass of the American Lawyer.* He has also written legislation on the subject, most recently California AB 1700 (2005) for Assemblymember Fran Pavley.

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73. Eileen McNamara, *Courts Must End Secrecy*, BOSTON GLOBE B1 (Feb. 27, 2002).

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1ST SESSION

S. _____

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2007".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that—

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

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

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

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

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

"(4) This section shall apply even if an order under paragraph (1) is requested—

"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

"(B) by application pursuant to the stipulation of the parties.

"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

"(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

"(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to sub-

section (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement between or among parties that prohibits 1 or more parties from—

"(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

"(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

"(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United

States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.