

15-374-cv

Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, et al.

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2015

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9 SUBMITTED: OCTOBER 23, 2015

10 DECIDED: FEBRUARY 24, 2016

11
12 No. 15-0374-cv

13
14 BRUCE BERNSTEIN,
15 *Plaintiff,*

16
17 *v.*

18
19 BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, MAX BERGER,
20 STEVEN SINGER, SALVATORE GRAZIANO, EDWARD GROSSMANN AND
21 GERALD SILK,
22 *Defendants-Appellants.**
23

24
25 Appeal from the United States District Court
26 for the Southern District of New York.
27 No. 14 Civ. 6867 (VEC) – Valerie E. Caproni, *Judge.*
28

29
30 Before: KEARSE, WALKER, and CABRANES, *Circuit Judges.*
31

* The Clerk of Court is respectfully directed to amend the caption to conform to the above.

1 Attorney Bruce Bernstein sued his former law firm, Bernstein
2 Litowitz Berger & Grossmann LLP (“BLB&G”), and five of its
3 partners, alleging that he had been forced to resign after blowing the
4 whistle on what he considered to be the firm’s unethical litigation
5 conduct. The firm argued that the relevant facts were “confidential
6 client information” that could not be disclosed by Bernstein in a
7 complaint raising claims of, *inter alia*, retaliatory breach of contract.
8 Bernstein sought and obtained permission from the United States
9 District Court for the Southern District of New York (Kevin P.
10 Castel, *Judge*) to file a complaint under seal, with the sealing to
11 automatically expire fourteen days after service of process on
12 defendants, unless extended by the court. Thirteen days after the
13 complaint was filed, the parties settled the suit on confidential
14 terms. The parties then sought an order directing the clerk of court
15 to close the file while leaving it permanently sealed.

16 The United States District Court for the Southern District of
17 New York (Valerie E. Caproni, *Judge*) denied the parties’ request.
18 The district court concluded that the complaint is a judicial
19 document subject to a presumption of public access under the First
20 Amendment and the common law. The district court also held that
21 keeping the complaint secret was not necessary to protect
22 “confidential client communications.” Finally, applying the
23 balancing test for the common-law right of access, the court found

1 that the weak private interests at stake did not rebut the
2 presumption of access, which is supported by substantial public
3 interests. We agree with the district court and AFFIRM.

4 _____
5
6 Gregory P. Joseph, Pamela Jarvis, and Courtney
7 A. Solomon, *on the brief*, Joseph Hage Aaronson
8 LLC, New York, NY, *for Defendants-Appellants*.

9 _____
10
11 JOHN M. WALKER, JR., *Circuit Judge*:

12 Attorney Bruce Bernstein sued his former law firm, Bernstein
13 Litowitz Berger & Grossmann LLP (“BLB&G”), and five of its
14 partners, alleging that he had been forced to resign after blowing the
15 whistle on what he considered to be the firm’s unethical litigation
16 conduct. The firm argued that the relevant facts were “confidential
17 client information” that could not be disclosed by Bernstein in a
18 complaint raising claims of, *inter alia*, retaliatory breach of contract.
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20 District Court for the Southern District of New York (Kevin P.
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23 defendants, unless extended by the court. Thirteen days after the
24 complaint was filed, the parties settled the suit on confidential

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6 subject to a presumption of public access under the First
7 Amendment and the common law. The district court also held that
8 keeping the complaint secret was not necessary to protect
9 "confidential client communications." Finally, applying the
10 balancing test for the common-law right of access, the court found
11 that the weak private interests at stake did not rebut the
12 presumption of access, which is supported by substantial public
13 interests. We agree with the district court and AFFIRM.

14 BACKGROUND

15 We recite the facts alleged in the complaint that are necessary
16 to understand the substantial public interest in the complaint's
17 disclosure, as the complaint in a case discloses the nature of the
18 proceeding. We emphasize, however, that at this point in the
19 proceeding the facts alleged are exactly that—simply allegations, the
20 truth of which has not been proven.

21 Bernstein became of counsel with BLB&G in 2008. At the firm,
22 he worked on *In re Satyam Computer Services, Ltd., Securities*
23 *Litigation*, a class action which arose from a "massive financial

1 scandal involving . . . Satyam Computer Services, Ltd. (Satyam), one
2 of India's largest information technology and outsourcing
3 companies." 609 F. Supp.2d 1375, 1375 (J.P.M.L. 2009). Suits
4 brought by various investors against Satyam and others were
5 consolidated in the Southern District of New York by the Judicial
6 Panel on Multidistrict Litigation. *Id.* In May 2009, the Mississippi
7 Public Employees' Retirement System ("MPERS") was appointed as
8 one of four lead plaintiffs in the case. *In re Satyam Comput. Servs.,*
9 *Ltd., Sec. Litig.*, 1:09-md-02027-BSJ [Doc. No. 8] (May 12, 2009). The
10 Office of the Mississippi Attorney General ("AG's Office") was
11 inside counsel for MPERS. BLB&G was outside counsel.

12 In September 2010, BLB&G partner Steven Singer informed
13 Bernstein that a solo practitioner based in Jackson, Mississippi,
14 Vatterria Martin, would act as "local counsel" and "occasionally
15 check on the status of the case for MPERS, even though BLB&G was
16 already providing this information directly" to the AG's Office. In
17 December 2010, the lead plaintiffs in the Satyam class action reached
18 an agreement in principle to settle with Satyam for \$125 million. On
19 February 16, 2011, Satyam and the lead plaintiffs executed a
20 stipulation setting forth the terms of the agreement.¹

¹ On March 8, 2011, the lead plaintiffs reached an agreement in principle to settle with Satyam's codefendants—various PricewaterhouseCoopers entities that were Satyam's auditors—for \$25.5

1 On March 1, 2011—after the agreement in principle with
2 Satyam had been reached and the stipulation had been executed—
3 another BLB&G partner, Max Berger, “assigned two unnecessary
4 legal research projects” to Martin. Bernstein protested the
5 assignment, but his concerns were dismissed, with Singer saying,
6 “Do you ever want us to work with Mississippi again?” Martin
7 ultimately produced an eighteen-page memorandum on April 26,
8 2011, several weeks after the case was settled in principle. Singer
9 and Berger agreed with Bernstein that the memorandum “addressed
10 the wrong pleading,” “contained no meaningful analysis,” and was
11 “ridiculous.” Martin reported a total of 207 hours’ work on the case,
12 primarily spent producing the useless memorandum.

13 After the settlement became final, Bernstein learned from
14 BLB&G’s comptroller that the firm had paid Martin \$112,500 from
15 the proceeds of the Satyam class settlement. BLB&G did not disclose
16 the payment to the court in its August 1, 2011 fee petition.²

million. The district court entered amended preliminary settlement-approval orders on March 21, 2011 and May 12, 2011. *In re Satyam Comput. Servs., Ltd., Sec. Litig.*, 1:09-md-02027-BSJ [Docs. No. 259 & 319]. The final judgment and order as to Satyam issued on September 13, 2011. *Id.* [Doc. No. 363].

² Formerly, the local civil rules of the Southern District of New York required that all fee applicants in derivative and class actions disclose to the court “any fee sharing agreements with anyone.” By a rule amendment effective July 11, 2011—three weeks before BLB&G submitted its fee petition—the automatic-disclosure provision was repealed as to

1 Concerned with the ethical and legal implications of the
2 arrangement, Bernstein inquired further. He learned that Martin
3 had been admitted to the bar only five years before *Satyam* was filed,
4 and was married to Deshun T. Martin, a special assistant attorney
5 general in the AG's Office.

6 Bernstein allegedly raised his ethical concerns again in several
7 contentious meetings with partners. The firm's leadership—Berger,
8 Salvatore Graziano, and Edward Grossmann—dismissed Bernstein's
9 misgivings. Graziano and Berger informed Bernstein that there was
10 "local pressure on the Mississippi AG" to use "local firms," told him
11 "you need to drop this," and made a veiled threat to "blackball"
12 Bernstein if he became "a whistleblower."

13 In December 2011, Bernstein reported his concerns to the U.S.
14 Attorney's Office for the Southern District of New York. Soon
15 afterward, Bernstein became concerned about BLB&G's conduct in
16 another class action, in which the firm allocated work to Mississippi
17 firms that lacked relevant experience.

class actions. See S.D.N.Y. Local Civil Rule 23.1 (repealed effective July 11, 2011); S.D.N.Y. Local Civil Rule 23.1.1. According to the Joint Committee on Local Rules note, the committee recommended that the automatic-disclosure rule as applied to class actions be deleted "because it is redundant [with] . . . Fed. R. Civ. P. 23(h)." Federal Rule 23(h), in turn, does not mandate automatic disclosure of all fee-sharing arrangements in class actions.

1 Bernstein claims that the issue took its toll on his relationship
2 with the firm's leadership. In October 2012, after realizing that his
3 termination was inevitable, he resigned from the firm. Bernstein
4 alleges that after his departure, BLB&G interfered with his
5 relationship with a lead plaintiff in one case, and BLB&G partners
6 made various threats toward him before attempting to "buy [his]
7 silence" by offering him compensation from a future settlement in
8 an unrelated case on the condition that he keep the Mississippi-
9 counsel arrangement secret. Bernstein declined.

10 At two mediation sessions held before Bernstein filed suit,
11 BLB&G expressed its belief that Bernstein's claims were based on
12 facts learned in the course of representation of a client and thus
13 could not be disclosed under the New York Rules of Professional
14 Conduct. Bernstein, by contrast, maintained that the facts
15 underlying his claims were "neither privileged nor confidential" and
16 that he was free to disclose them in court filings.

17 Notwithstanding Bernstein's position that he was free to
18 disclose the facts at issue, Bernstein filed a motion with the district
19 court prior to filing the complaint requesting—"out of an abundance
20 of caution"—the entry of "an order sealing all materials filed in this
21 case until the Court resolves these issues of confidentiality."

22 Judge Kevin Castel, sitting in Part I, granted the motion on
23 July 24, 2014, before the suit was filed. Noting that "it is doubtful

1 that sealing is appropriate,” the district court nevertheless out of an
2 “abundance of caution” ordered that “[t]he action may be filed
3 under seal and the sealing shall *expire* within 14 days of service of
4 process on defendants unless extended by order of the judge to
5 whom the case is assigned.”

6 On August 22, 2014, Bernstein filed the complaint under seal
7 against BLB&G and five individual BLB&G partners: Berger, Singer,
8 Graziano, Grossmann, and Gerald Silk. He alleged, in substance,
9 that defendants (1) engaged in a kickback scheme in violation of the
10 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.
11 §§ 1962(c), 1964(c), and (2) breached their contract with Bernstein in
12 retaliation for reporting an ethical breach.

13 After filing the sealed complaint, the parties returned to the
14 negotiating table. As Judge Caproni, to whom the case had been
15 assigned, wrote: “Armed now with the ticking time bomb provided
16 by the Court’s order, Bernstein was able to accomplish what he
17 could not without the assistance of a filing in this Court: he
18 negotiated a mutually acceptable settlement.” The settlement
19 agreement “includes a provision that voids the settlement if [the]
20 action is unsealed or otherwise becomes public.”

21 On September 4, 2014—one day short of the automatic
22 unsealing provided for by the court’s July 24 order—Bernstein filed
23 a notice of dismissal pursuant to the settlement. The following day,

1 the parties jointly moved for an order directing the clerk of court “to
2 close the file without ordering the file unsealed.” The parties
3 apparently believed that obtaining a stipulated dismissal before the
4 expiration of the sealing order would “ensure that the [c]omplaint
5 would never see the light of day.”

6 On January 12, 2015, following a hearing and multiple rounds
7 of briefing, the district court issued its opinion and order. After
8 determining that it had jurisdiction, the district court held that the
9 complaint is a judicial document subject to a presumption of public
10 access under both the First Amendment and the common law. Next,
11 the district court held that the complaint does not contain
12 confidential client communications or information and therefore
13 public access to the complaint would not plausibly implicate values
14 “higher” than First Amendment values. Finally, the district court
15 held that even if the First Amendment presumption did not apply,
16 the common-law presumption of access to judicial documents
17 would require the complaint to be public because the “considerable”
18 public interest in disclosure outweighs the “weak” private interests
19 favoring secrecy. accordingly, the district court denied the parties’
20 request to continue the sealing order and directed the clerk of court
21 to unseal the case thirty days from the issuance of its order, with the
22 thirty-day period to be tolled during the pendency of any appeal.

1 Defendants timely appealed. Bernstein has not filed a brief.
2 Although he continues to contest defendants' claim that the
3 complaint contains "confidential client information," he supports
4 BLB&G's position that the case should remain sealed so as not to
5 risk unwinding the settlement.

6 DISCUSSION

7 The sole issue is whether the district court correctly denied the
8 parties' request to continue the sealing order. In reviewing a district
9 court's order to seal or unseal, we examine the court's factual
10 findings for clear error, its legal determinations de novo, and its
11 ultimate decision to seal or unseal for abuse of discretion. *See United*
12 *States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995); *United States v. Amodeo*,
13 44 F.3d 141, 146 (2d Cir. 1995) (*Amodeo I*).

14 I. Pleadings as judicial records.

15 We first consider whether a complaint is a judicial document
16 subject to a presumption of access and easily conclude that a
17 complaint is such a document. A "judicial document" or "judicial
18 record" is a filed item that is "relevant to the performance of the
19 judicial function and useful in the judicial process." *Lugosch v.*
20 *Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (internal
21 quotation marks omitted). Such documents are presumptively
22 public so that the federal courts "have a measure of accountability"
23 and so that the public may "have confidence in the administration of

1 justice.” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)
2 (*Amodeo II*). In determining whether a document is a judicial record,
3 we evaluate the “relevance of the document’s specific contents to the
4 nature of the proceeding” and the degree to which “access to the
5 [document] would materially assist the public in understanding the
6 issues before the . . . court, and in evaluating the fairness and
7 integrity of the court’s proceedings.” *Newsday LLC v. Cty. of Nassau*,
8 730 F.3d 156, 166-67 (2d Cir. 2013).³

9 Pleadings plainly meet the *Newsday* test for reasons that are
10 readily apparent. “A complaint, which initiates judicial
11 proceedings, is the cornerstone of every case, the very architecture of
12 the lawsuit, and access to the complaint is almost always necessary
13 if the public is to understand a court’s decision.” *Fed. Trade Comm’n*
14 *v. AbbVie Prods. LLC*, 713 F.3d 54, 62 (11th Cir. 2013). Moreover, in
15 commencing an action and thus invoking the court’s jurisdiction, the
16 parties’ substantive legal rights and duties may be affected. For
17 example, “a large number of lawsuits . . . are disposed of at the
18 motion-to-dismiss stage, where a court determines solely on the

³ While “the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access,” *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted), a document is judicial not only if the judge actually relied upon it, but also if “the judge *should* have considered or relied upon [it], but did not.” *Id.* at 123 (internal quotation marks omitted). Such documents “are just as deserving of disclosure as those that actually entered into the judge’s decision.” *Id.* (internal quotation marks omitted).

1 basis of the complaint whether the plaintiff has made sufficient
2 factual allegations to state a claim.” *Id.* The filing of a complaint
3 triggers other legal consequences as well. *E.g., Kronisch v. United*
4 *States*, 150 F.3d 112, 126 (2d Cir. 1998) (obligation to preserve
5 evidence); *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 (2d Cir.
6 1965) (when duplicative actions are commenced, the first-filed
7 complaint normally determines the district of adjudication). For
8 these reasons, the “modern trend in federal cases” is to classify
9 “pleadings in civil litigation (other than discovery motions and
10 accompanying exhibits)” as judicial records. *IDT Corp. v. eBay*, 709
11 F.3d 1220, 1223 (8th Cir. 2013); *accord AbbVie*, 713 F.3d at 62–63
12 (collecting cases); *United States v. Martin*, 746 F.2d 964, 968 (3d Cir.
13 1984).

14 The fact that a suit is ultimately settled without a judgment on
15 the merits does not impair the “judicial record” status of pleadings.
16 It is true that settlement of a case precludes the judicial
17 determination of the pleadings’ veracity and legal sufficiency. But
18 attorneys and others submitting pleadings are under an obligation
19 to ensure, when submitting pleadings, that “the factual contentions
20 [made] have evidentiary support or, if specifically so identified, will
21 likely have evidentiary support after a reasonable opportunity for
22 further investigation or discovery.” Fed. R. Civ. P. 11(b)(3).
23 In any event, the fact of filing a complaint, whatever its veracity, is a

1 significant matter of record. Even in the settlement context, the
2 inspection of pleadings allows “the public [to] discern the
3 prevalence of certain types of cases, the nature of the parties to
4 particular kinds of actions, information about the settlement rates in
5 different areas of law, and the types of materials that are likely to be
6 sealed.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir.
7 2004). Thus, pleadings are considered judicial records “even when
8 the case is pending before judgment or resolved by settlement.” *IDT*
9 *Corp.*, 709 F.3d at 1223 (citations omitted); accord *Stone v. Univ. of Md.*
10 *Med. Sys. Corp.*, 855 F.2d 178, 180 n.* (4th Cir. 1988); Laurie Doré,
11 *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit*
12 *of Settlement*, 74 NOTRE DAME L. REV. 283, 378 (1999).

13 We therefore hold that pleadings—even in settled cases—are
14 judicial records subject to a presumption of public access.

15 II. Presumptive right of access to the complaint.

16 A “[f]inding that a document is a ‘judicial document’ triggers
17 a presumption of public access, and requires a court to make
18 specific, rigorous findings before sealing the document or otherwise
19 denying public access.” *Newsday*, 730 F.3d at 167 n.15. The
20 “presumption of access” to judicial records is secured by two
21 independent sources: the First Amendment and the common law.
22 *Lugosch*, 435 F.3d at 121. The analysis with respect to each is
23 somewhat different.

1 **A. The First Amendment presumptive right of access.**

2 Defendants argue that the First Amendment presumption
3 does not apply here. We disagree.

4 “We have articulated two different approaches for
5 determining whether ‘the public and the press should receive First
6 Amendment protection in their attempts to access certain judicial
7 documents.’” *Id.* at 120 (internal quotation marks omitted). The first
8 approach considers “experience and logic”: that is, “whether the
9 documents have historically been open to the press and general
10 public and whether public access plays a significant positive role in
11 the functioning of the particular process in question.” *Id.* (internal
12 quotation marks omitted). “The second approach considers the
13 extent to which the judicial documents are derived from or are a
14 necessary corollary of the capacity to attend the relevant
15 proceedings.” *Id.* (alterations and internal quotation marks omitted).

16 A complaint—especially in a case that is ultimately settled—
17 is best evaluated under the “experience and logic” approach,
18 because the alternative approach is relevant only after court
19 proceedings have commenced. Experience and logic both support
20 access here. Complaints have historically been publicly accessible
21 by default, even when they contain arguably sensitive information.
22 *Cf. Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189-90 (2d Cir.
23 2008). Defendants acknowledge that since the adoption of the

1 Federal Rules of Civil Procedure in 1938, federal lawsuits have been
2 commenced by the filing of the complaint. Fed. R. Civ. P. 3. But
3 they argue that since “many federal courts did not require
4 complaints to be filed unless and until judicial intervention was
5 sought” before 1938, there is no strong historical tradition of public
6 access to complaints. This argument is unpersuasive. It ignores the
7 history of the last eight decades under the Federal Rules. Moreover,
8 the fact that pre-1938 law may have allowed actions to commence
9 without the filing of a complaint says nothing about whether the
10 public at that time had access to documents that *were* permitted or
11 required to be filed.

12 Logical considerations also support a presumption of public
13 access. Public access to complaints allows the public to understand
14 the activity of the federal courts, enhances the court system’s
15 accountability and legitimacy, and informs the public of matters of
16 public concern. Conversely, a sealed complaint leaves the public
17 unaware that a claim has been leveled and that state power has been
18 invoked—and public resources spent—in an effort to resolve the
19 dispute. These considerations indicate that public access to the
20 complaint and other pleadings has a “significant positive role,”
21 *Lugosch*, 435 F.3d at 120 (internal quotation marks omitted), in the
22 functioning of the judicial process.

1 **B. The common-law presumption of access.**

2 The district court concluded that in addition to the First
3 Amendment presumption of access, the common-law presumption
4 of access attached. Defendants contend that the common-law
5 presumption “lacks weight here” and that unsealing the complaint
6 constituted an abuse of discretion.

7 The courts have long recognized the “general right to inspect
8 and copy public records and documents, including judicial records
9 and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597
10 (1978) (footnote omitted). This right “is said to predate the
11 Constitution.” *Amodeo I*, 44 F.3d at 145.

12 The “right to inspect and copy judicial records is not
13 absolute,” however, and a court may exercise its “supervisory
14 power over its own records and files” to deny access “where court
15 files might have become a vehicle for improper purposes.” *Nixon*,
16 435 U.S. at 598 (internal quotation marks omitted). “Once the court
17 has determined that the documents are judicial documents and that
18 therefore a common law presumption of access attaches, it must
19 determine the weight of that presumption.” *Lugosch*, 435 F.3d at 119.

20 The weight of the presumption is a function of (1) “the role of
21 the material at issue in the exercise of Article III judicial power” and
22 (2) “the resultant value of such information to those monitoring the
23 federal courts,” balanced against “competing considerations” such

1 as “the privacy interests of those resisting disclosure.” *Lugosch*, 435
2 F.3d at 119-20 (internal quotation marks omitted); *see also Amodeo II*,
3 71 F.3d at 1049-51. We take each factor in turn.

4 Where a document’s “role in the performance of Article III
5 duties” is “negligible . . . , the weight of the presumption is low.”
6 *Amodeo II*, 71 F.3d at 1050. Conversely, where documents “directly
7 affect an adjudication,” *id.* at 1049, or are used to determine litigants’
8 substantive legal rights, the presumption of access is at its zenith,
9 *Lugosch*, 435 F.3d at 121, and thus can be overcome only by
10 “extraordinary circumstances,” *Amodeo II*, 71 F.3d at 1048 (internal
11 quotation marks omitted). The locus of the inquiry is, in essence,
12 whether the document “is presented to the court to invoke its
13 powers or affect its decisions.” *Id.* at 1050.

14 Applying this standard, we have determined that a report
15 submitted to a court in connection with a summary-judgment
16 motion is entitled to a strong presumption of access. *Joy v. North*,
17 692 F.2d 880, 894 (2d Cir. 1982). Since such a document “is the basis
18 for the adjudication, only the most compelling reasons can justify”
19 sealing. *Id.* By contrast, documents “such as those passed between
20 the parties in discovery” often play “no role in the performance of

1 Article III functions” and so the presumption of access to these
2 records is low. *Amodeo II*, 71 F.3d at 1050.⁴

3 Under the two-factor *Lugosch* approach, we easily determine
4 that the weight of the presumption here is strong. Pleadings, such
5 as the complaint here, are highly relevant to the exercise of Article
6 III judicial power. Of all the records that may come before a judge, a
7 complaint is among the most likely to affect judicial proceedings. It
8 is the complaint that invokes the powers of the court, states the
9 causes of action, and prays for relief. We have already discussed the
10 second basis supporting the weight of the presumption: the utility of
11 the complaint to those who monitor the work of the federal courts.

12 We now move to the crux of the weight-of-the-presumption
13 analysis: balancing the value of public disclosure and
14 “countervailing factors” such as “(i) the danger of impairing law
15 enforcement or judicial efficiency and (ii) the privacy interests of
16 those resisting disclosure.” *Id.*; see also *Amodeo I*, 44 F.3d at 146–47.
17 In striking this balance, we agree with the district court’s careful
18 opinion that the value of public disclosure is substantial and the
19 privacy interests at stake are minimal.

⁴ Cf. *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 857 (2d Cir. 1998) (settlement negotiations and draft agreements “do not carry a presumption of public access” because “[t]he judge cannot act upon these discussions or documents until they are final, and the judge may not be privy to all of them”).

1 As the district court noted, the complaint alleges that
2 defendants, as counsel for a state employees' pension fund that was
3 a lead plaintiff in a major securities class action, "regularly engage in
4 a kickback scheme with the Mississippi Attorney General's Office, a
5 public entity whose constituents might otherwise be in the dark
6 about the arrangement." Whether true or not, this allegation would
7 naturally be of legitimate interest to the public (especially those who
8 contribute to and receive payments from MPERS) and to federal
9 courts in the future (e.g., those considering whether to name BLB&G
10 as lead class counsel or find MPERS to be an adequate class
11 representative in future class actions). Moreover, the complaint also
12 did not come "within [the] court's purview solely to [e]nsure [its]
13 irrelevance." *Lugosch*, 435 F.3d at 119 (internal quotation marks
14 omitted). Although the speedy settlement of the claim meant that
15 the court did not adjudicate the merits of the case, the district courts
16 routinely engage in adjudicatory duties even in connection with
17 complaints that are dismissed or settled.

18 In the circumstances here presented, the interests favoring
19 secrecy, meanwhile, are weak. This is not a case in which disclosure
20 would reveal details of an ongoing investigation, pose a risk to
21 witnesses, endanger national security, or reveal trade secrets. *See*
22 *Amodeo I*, 44 F.3d at 147. Moreover, as we will show, the case does
23 not implicate the duty to protect either privileged attorney-client

1 material or confidential client information. Once these rationales fall
2 away, only insubstantial arguments remain.

3 On appeal, defendants spend much of their brief arguing that
4 the complaint is unreliable and contesting the truth of the allegations
5 in the complaint. They argue that unsealing the complaint “assumes
6 the truth” of the allegations within it. But unsealing does no such
7 thing. As the district court noted:

8 Complaints can—and frequently do—
9 contain allegations that range from
10 exaggerated to wholly fabricated. That is
11 the nature of judicial proceedings—not
12 everything alleged by one party can or
13 should be taken as ground truth. Still, the
14 pleadings can and do properly frame the
15 proceeding and provide outer boundaries
16 on the claims advanced . . . and the redress
17 sought.

18
19 (Internal citation omitted). Following defendants’ logic to its
20 conclusion, moreover, would create an untenable result—the sealing
21 of all complaints in actions in which the plaintiff does not prevail,
22 and all indictments in a criminal prosecution in which the defendant
23 is acquitted.

24 In sum, the district court engaged in a thoughtful and
25 extended analysis of the competing interests at stake. The district
26 court concluded that (1) the weight of the presumption of public

1 access accorded to the complaint was high because (a) the document
2 was highly relevant to the exercise of Article III judicial power and
3 (b) the public interest in disclosure was substantial, while the private
4 interests in secrecy are weak; and (2) BLB&G did not come forth
5 with a sufficient rationale to rebut this strong presumption of access.
6 These conclusions were amply supported, and there is no basis to
7 disturb them.

8 **III. Sealing of the complaint is not justified in order to**
9 **protect “confidential client information.”**

10 On appeal, BLB&G renews its argument that a need to protect
11 “confidential client information” justifies or requires continued
12 sealing of the complaint. We reject this claim.

13 After Bernstein left BLB&G, George W. Neville—a special
14 assistant attorney general in the civil litigation division of the AG’s
15 Office—exchanged several letters with Bernstein’s attorney. In these
16 letters, Neville ordered Bernstein to keep the existence of the alleged
17 kickback scheme private, writing: “As counsel for the State of
18 Mississippi . . . and on behalf of the State of Mississippi and its
19 agency MPERS, I am directing [Bernstein] not to disclose any
20 confidential information he learned as counsel to Mississippi and its
21 agency MPERS.”

22 Relying in part on these letters, defendants argued to the
23 district court that all or virtually all of the facts alleged in the

1 complaint are “confidential” under the New York Rules of
2 Professional Conduct and thus permanent sealing is required.⁵ The
3 district court rejected this claim. On appeal, defendants renew this
4 confidentiality argument. We reach the same conclusion as did the
5 district court.

6 As a threshold matter, we note that defendants rely in large
7 part on the conclusions of their legal-ethics expert made in a
8 declaration filed in the district court. We do not consider arguments
9 based on this declaration because of our longstanding rule that
10 expert testimony on issues of domestic law is not to be considered.
11 *See Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 128 n.12 (2d Cir. 2011)
12 (holding that the court was “not compelled to accept” a legal-ethics
13 expert’s declaration regarding whether an ethical duty had been
14 triggered, because the question was for the court to decide), *rev’d on*
15 *other grounds*, 133 S. Ct. 1138 (2013); *see also Hygh v. Jacobs*, 961 F.2d

⁵ Rule 1.6 provides: “A lawyer shall not knowingly reveal confidential information, . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person” unless an exception applies. N.Y. R. Prof’l Conduct 1.6(a)(3). One such exception is “when permitted or required under these Rules or to comply with other law or court order.” *Id.* at 1.6(b)(6). “Confidential information” is “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” *Id.* at 1.6. Rule 1.9(c) provides that a lawyer shall not “use” or “reveal” a former client’s confidential information, except as the Rules “permit or require.”

1 359, 363 (2d Cir. 1992); *Marx & Co. v. The Diners' Club, Inc.*, 550 F.2d
2 505, 509-11 (2d Cir. 1977).⁶

3 We now turn to the merits. To overcome the First
4 Amendment right of access, the proponent of sealing must
5 “demonstrat[e] that closure is essential to preserve higher values
6 and is narrowly tailored to serve that interest.” *In re N.Y. Times Co.*,
7 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks omitted).
8 “Broad and general findings” and “conclusory assertion[s]” are
9 insufficient to justify deprivation of public access to the record, *id.*
10 (internal quotation marks omitted); “specific, on-the-record
11 findings” are required. *United States v. Erie Cnty.*, 763 F.3d 235, 243
12 (2d Cir. 2014) (internal quotation marks omitted).

13 Here, defendants argue that “protection of confidential client
14 communication” is a higher value. This assertion raises the question
15 of whether any confidential client information is actually implicated
16 in this case. Putting that aside for a moment, however, the assertion
17 itself is questionable. We have implied—but never expressly held—
18 that protection of the attorney-client privilege is a “higher value”
19 under the First Amendment that may rebut the presumption of
20 access. *E.g., id.; Lugosch*, 435 F.3d at 125. Defendants go further,

⁶ To the extent that expert interpretations of the ethical rules are useful, they are better presented in an amicus brief or the parties’ citations to treatises, rather than a declaration or affidavit.

1 however, arguing that the protection of “confidential client
2 information” is a “higher value” superseding the First Amendment
3 right of access and should have “equal status” to the attorney-client
4 privilege.

5 The attorney-client privilege and the duty to preserve client
6 confidences and secrets are “not co-extensive,” however. *Doe v. A*
7 *Corp.*, 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971), *adopted sub nom. Hall v.*
8 *A. Corp.*, 453 F.2d 1375, 1376 (2d Cir. 1972) (per curiam). The
9 broader “ethical duty to preserve a client’s confidences . . .[.] unlike
10 the evidentiary privilege, exists without regard to the nature or
11 source of information or the fact that others share the knowledge.”
12 *Brennan’s, Inc. v. Brennan’s Restaurants, Inc.*, 590 F.2d 168, 172 (5th
13 Cir. 1979) (internal quotation marks omitted). We share the district
14 court’s skepticism of BLB&G’s claim that “this broader ethical duty
15 should be treated identically to . . . the narrower and more venerable
16 attorney-client privilege.”

17 In any event, even if we were to accept defendants’ “higher
18 value” argument, the complaint here does not contain “confidential”
19 client information.

20 First, the complaint does not include information that is
21 “likely to be embarrassing or detrimental to the client if disclosed.”
22 N.Y. R. Prof’l Conduct 1.6. Of course, the information may be
23 seriously embarrassing to *counsel* (BLB&G and the AG’s Office), but

1 not to the *client*, MPERS. Indeed, it is counterintuitive to suggest
2 that MPERS was somehow complicit in an alleged kickback scheme
3 that caused it to pay legal fees for unnecessary work. If anything,
4 MPERS would appear to benefit from disclosure; the worst that can
5 be said about it is that it was unlucky in its choice of counsel. In
6 sum, BLB&G's claim about possible harm to MPERS is a mere
7 "naked conclusory statement that publication . . . will injure" it. *Joy*,
8 692 F.2d at 894. Such a statement "falls woefully short of the kind of
9 showing which raises even an arguable issue as to whether it may be
10 kept under seal." *Id.*

11 Moreover, the fact of representation is generally neither
12 privileged nor confidential. See *In re Grand Jury Subpoenas*, 803 F.2d
13 493, 496 (9th Cir. 1986). The complaint's allegation that BLB&G
14 routinely assigns work to unqualified local counsel at the AG's
15 Office's direction relates to a business practice, not to a "client
16 confidence."

17 Finally, as the district court noted, "[t]he request to keep the
18 alleged kickback scheme confidential was made by the member of
19 the Attorney General's Office whose conduct is discussed in the
20 Complaint. Insofar as this request (and perhaps even the underlying
21 scheme) was adverse to the interests of MPERS, for the purpose of
22 applying the ethical rule, the Court does not presume that the

1 attorney's request for confidentiality signifies the *client's* desire"
2 (citation omitted).

3 **CONCLUSION**

4 For the reasons stated above, we AFFIRM the judgment of the
5 district court.