COUNCIL ON COURT PROCEDURES

Minutes of Meeting of November 9, 1991

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Present:	Richard C. Bemis	Henry Kantor
	Susan G. Bischoff	Richard T. Kropp
	Bruce C. Hamlin	Winfrid K.F. Liepe
	Lafayette G. Harter	Robert B. McConville
	Maury Holland	Michael V. Phillips
	Bernard Jolles	Elizabeth Welch
Excused:	Susan P. Graber	John V. Kelly
	John E. Hart	Ronald L. Marceau
	Lee Johnson	William C. Snouffer
	Janice M. Stewart	
Absent:	Richard L. Barron	Paul J. DeMuniz
	William D. Cramer	Jack L. Mattison

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne Executive Assistant. In addition, the following were present: Hon. Robert P. Jones; Attorneys Larry Wobbrock, Mike Williams, Elden Rosenthal, Bill Gaylord, Phil Chadsey, and Frank Lagesen; Ron Smith, Bob Keyser, and Jan Inman (the latter three with Oregon Association of Process Servers); Attorney Keith Burns and Terri Mundt (with Court Reporters Association); Sue Grabe, with Oregon State Bar.)

The meeting was called to order by Chair Henry Kantor at 9:35 a.m.

Agenda Item No. 1: Approval of minutes of meeting held October 12, 1991. Approval of the minutes was deferred until the next meeting.

Agenda Item No. 2: Schedule of meetings through May 1992 (schedule attached). There were no objections to the dates scheduled for the meetings. Chair Henry Kantor stated that the meetings will be held on the dates shown on the schedule but that the meeting scheduled for March 14, 1992 will not be a public meeting; instead another public meeting will be scheduled somewhere east of the river in the Third Congressional District.

The Chair reminded the Council that the next meeting will be held December 14, 1991 at the Oregon State Bar Center. He said that he was waiting to hear from the Bar to see whether or not a public meeting could be scheduled in September 1992 at the time of the Bar Convention before scheduling the meetings for the rest of the year.

Agenda Item No. 3: Status report regarding six-person jury. The Chair stated Ron Marceau contacted him to say that he had been in contact with members of OTLA and OADC. He had also spoken with Judges Panner and Rossman, who indicated a significant interest in the issue and wanted an opportunity to speak to the Council. Ron Marceau indicated that he would try to have the judges appear at our Council meeting in December or January.

The Chair stated that there would be an additional agenda item heard today, that being the issue of court reporters' oaths. Due to miscommunication, Attorney Keith Burns had understood that discussion was to take place today. Regarding Agenda Item No. 4, presentation relating to secrecy in personal injury actions, the Chair also stated John Hart, who could not be present at today's meeting, indicated that OADC wanted an opportunity to respond further at another meeting.

Agenda Item No. 5: Presentation relating to service of summons at employer's office and insurance for process servers (Oregon Association of Process Servers). Ron Smith, with Capitol Investigation Co., Bob Keyser, with the Legislative Performance Group (representing the Oregon Association of Process Servers (OAPS)), and Jan Inman, President of OAPS, all spoke on this issue. They requested amendment of ORCP 7 D(2)(c) to allow service of individuals at place of employment by other than personal service. They were also seeking legislation that would require professional process servers to have $100,000 errors and omissions coverage. Mr. Smith distributed copies of the bills which they had submitted to the 1991 legislature to accomplish this. He also furnished handouts which included examples of statutes and rules from several states allowing workplace service, as well as a listing from the Secretary of State's Office of process servers indicating the amount of errors and omissions coverage carried by each (attached).

A motion was made and carried that consideration of these requests be set for discussion at another meeting. The Executive Director was asked to furnish a memorandum analyzing the requests.

Agenda Item No. 4: Presentation relating to secrecy in personal injury actions (OTLA and OADC). Larry Wobbrock had furnished a packet of materials for the perusal of Council members (the materials are attached to only the original of these

minutes) which had been mailed previously to Council members. Included in the packet are Senate Bill 579; a Texas Law Review article included in the appendix of which is Rule 76a, Sealing Court records, adopted by the Texas Supreme Court; various newspapers articles regarding court secrecy; legislation enacted and pending legislation in various states, as well as court rules adopted. Mr. Wobbrock pointed out later that he wanted to make a correction in the materials: in the legislation enacted, the list showed Oregon had enacted legislation. He said there was an Oregon statute covering public entities, but there is no general anti-secrecy provision in Oregon.

The Chair distributed a copy of an excerpt of an Order in a Multnomah County Circuit Court case, James v. General Motors of Canada (attached).

Larry Wobbrock, speaking in behalf of OTLA, asked the Council to consider as a rule Senate Bill 579, which provides a mechanism for sharing of documents with plaintiffs' attorneys who handle similar cases, and stated OTLA seeks a prohibition against sealing court records and discovery of documents. He asked that the Council consider Court Rule 76a adopted by the Texas Supreme Court. He said that Senate Bill 579, which is similar to the Texas court rule, is also identical to the Virginia statute. Those provisions prohibit sealing of court records unless the court considers the public interest in not sealing such records. Mr. Wobbrock then presented a 20-minute video for the Council dealing with protective orders and secrecy in court settlements.

Hon. R. P. Jones stated he had been asked to appear by representatives of OTLA. He said that he favored the development of some type of court rule which requires judges to consider the public interest and set up guidelines for decision relating to restricting release of information on discovery or settlement. He noted that judges had inherent authority to control excessive secrecy, but that it was difficult to do this without a controlling rule when the parties agreed upon a secrecy provision.

The following attorneys then testified:

Bill Gaylord, Attorney, Portland, spoke of his experiences in the several products liability cases. He referred to a case where the Honda Company was a defendant. He stated that Honda maintained all of the documents pertinent to the product involved in the case in a large repository. He discussed the problems plaintiffs' lawyers experience in attempting to find documents in the Honda repository of documents if they cannot share information.

Elden Rosenthal, Attorney, Portland, said that secrecy problems arise in products liability cases, large corporate

employment misconduct cases, large age discrimination cases, and drug litigation. He said that plaintiffs frequently agree to secrecy provisions to achieve a favorable settlement and this may not further the public good. In dealing with secrecy in discovery, the expenses involved became a problem. The producing party will make a decision as to whether something is confidential and if the receiving party objects to the documents, an expensive hearing is required. He said that the current system of compensation based upon finding of liability is a statement of the public perception of justice as compensating people who are injured. Given this concept of justice, it seems incredibly unjust to make it difficult for those people seeking compensation to get true facts in an economical, efficient way.

Mike Williams, Attorney, Portland, spoke and stated that restricting information that is discovered in the course of litigation did not serve the public good.

Phil Chadsey, Attorney, Portland, spoke on behalf of the OADC. He distributed to the Council members an article which appeared in the Legal Times (attached). He said that OTLA was not protecting the public interest in seeking to restrict confidentiality but protecting their own interests. He stated that there are good reasons for maintaining confidentiality in discovery or settlement in many cases. These reasons apply not only to defendants but to plaintiffs as well. Many times plaintiffs do not want the amount of a settlement disclosed or want to protect confidential personal information relating to their mental and emotional condition. He also said a rule requiring an elaborate hearing for every confidentiality order would create more work for judges.

Frank Lagesen, Attorney, Portland, testified on behalf of OADC. He said that they had not had an opportunity to examine the material submitted by OTLA or to assemble information on the issue. He asked that OADC be given an opportunity to address the matter at a future council meeting.

Larry Wobbrock spoke again. He said that resisting defendants' requests for confidentiality orders was extremely expensive and many times maintaining public access to information discovered was not particularly to the plaintiff's advantage. What was needed was some way of protecting the public interest.

Bill Gaylord spoke again. He stated that he frequently stipulates to protective orders to save his client the expense of litigating the matter but adds a condition that such order be subject to modification without a showing of changed conditions. He said OTLA is not asking that there be no confidentiality orders in discovery or secrecy in settlements. There are situations where secrecy is appropriate. What they are seeking to do is reverse the presumption in favor of such secrecy and to

require the person requesting confidentiality to make a real showing of a compelling need for secrecy.

The Chair stated again that representatives from OTLA and OADC would have further opportunity to speak at another meeting.

Additional Agenda Item: Oaths for depositions by telephone. Keith Burns, representing the Oregon Court Reporters Association, wrote the Council on October 24, 1990. In his letter he stated a problem had arisen over the years with the authority of court reporters to administer the oath when taking depositions by telephone, particularly when the deponent is not in Oregon. This was usually taken care of by stipulation or the fact that the court reporter was a notary and had the authority to give oaths under ORS 44.320. In the 1989 session of the legislature that statute was amended to include certified shorthand reporters as those who could take testimony and administer oaths. When a deposition is being taken in Oregon with one of the parties being represented by an out-of-state attorney, a question sometimes still arises. He said there is no place in the certified court reporters statute that discusses oaths because they rely upon ORS 44.320. Mr. Burns believed that a very simple way to resolve any problem in the minds of attorneys who are participating in a deposition in this state, while they are practicing in another state, would be an amendment to ORCP 39 C(7) by adding: "The deposition shall be preceded by an oath or affirmation as provided in Rule 38 A."

The Council discussed the problem. Bruce Hamlin suggested that the problem had several aspects because the oath (1) makes the witness realize this is an important occasion and they must tell the truth, (2) defines whether the deposition is usable in the case, and (3) makes the witness liable if they lie. Judge Liepe said that the language suggested was not specific enough to address the problem. Mr. Burns was asked to work with the Executive Director and present a more specific proposal for the next meeting.

Agenda Item No. 6: Exclusion of witnesses at depositions. This agenda item was deferred until another meeting. Janice Stewart submitted a four-page memorandum regarding exclusion of witnesses at depositions (attached). Council members were asked to read this and Ms. Stewart will address the matter at the next meeting.

Agenda Item No. 7: Council expense allowances. The Chair reminded the Council members that the Council operates under a relatively limited budget and that the next largest item of expense after salaries is travel. He said some questions arose for those Council members who have to travel long distances, for example, in some instances whether or not to request reimbursement for a second night's lodging. The Chair suggested

that it be limited to one night's lodging. The Executive Director pointed out that the correct rate (according to statute) for mileage reimbursement is 22 cents per mile and that necessary and actual meal expenses are allowed if receipts are provided (the same applies for lodging). He said the other method for reimbursement is a per diem amount of $59 for a 24-hour period but was not sure whether that would be an answer to a limited budget. The Chair stated the remaining budget would be examined in four or five months and requested that, in the meantime, voluntary restraint be exercised in the matter of requests for reimbursement.

NEW BUSINESS. A packet of materials had been distributed at the meeting consisting of:

An October 29, 1991 letter from Thomas Christ proposing the addition of a section to Rule 17 on late filings (attached);

An October 17, 1991 letter from Attorney Connie Elkins supporting an amendment to ORCP 39 C(4) which would require a proponent of a videotaped deposition to establish the reasons necessary for having a deposition videotaped (attached);

An October 30, 1991 letter from Attorney Phil Goldsmith (attached) regarding proposed revisions to ORCP 32. Mr. Goldsmith also forwarded a Willamette Law Review article by Phillip Emerson, "Oregon Class Actions: The Need for Reform" (attached). Mr. Goldsmith indicated that a group of lawyers were working on a revision for Rule 32 and had learned that the Federal Advisory Committee on Federal Rules has been considering revisions to FRCP 23 which they wanted to review before submitting proposals for the Council's consideration.

The Chair stated that these matters would be on the agenda for future meetings.

The meeting was adjourned at 12:04 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

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COUNCIL ON COURT PROCEDURES

Tentative Schedule of Meetings

January through May 1992

January 11, 1992	Oregon State Bar Center
February 8, 1992	Salem (PUBLIC MEETING)
March 14, 1992	Oregon State Bar Center (PUBLIC MEETING)
April 11, 1992	Eugene (PUBLIC MEETING)
May 9, 1992	Oregon State Bar Center

OREGON ASSOCIATION OF PROCESS SERVERS, INC.

O.A.P.S.

November 9, 1991

Mr. Fredric R. Merrill,
Executive Director,
Council on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403-1221

RE: Service of Summons at Employer's
Office & Insurance for Process Servers

Dear Mr. Merrill:

We would like to amend the ORCP 7 D(2) (c) to allow service of individuals at place of employment by other than personal service. Attached is the original legislative draft, together with excerpts from several states allowing similar procedures.

Your consideration in this matter is greatly appreciated.

Sincerely,

OREGON ASSOCIATION OF PROCESS SERVERS

Jan Inman
President

Attachment

true copy of the summons and a true copy of the complaint to the person to be served.

D.(2)(b) Substituted service. Substituted service may be made by delivering a true copy of the summons and complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules, substituted service shall be complete upon such mailing.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, **or if the person is an employee of an employer that maintains an office for the conduct of business,** office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed

CALIFORNIA

Who May Serve: Any person over the age of 18 years and not a party to the action.

Any person who makes more than 10 services of process within the state during one calendar year must be registered.

Methods of Service: Personal, substituted service, notice and acknowledgment.

Special Requirements on Substituted Service: After reasonable diligence a summons and complaint may be served by leaving a copy at the person's dwelling house, usual place of abode, or usual place of business in the presence of a competent member of the household, or a person apparently in charge of the office or place of business who is at least 18 years of age who shall be informed of the contents. **Note:** reasonable diligence is not defined. The most accepted procedure is three attempts on three different days when the person is most likely at the address.

If a substituted service is made a copy of the summons and complaint must be mailed by first class mail, postage prepaid to the person served (defendant), at the address of service.

Personal service only on subpoenas, orders, etc., in which failure to appear results in a bench warrant being issued.

At time of service on a summons the date upon which personal delivery is made shall be entered on the face of the copy of the summons. The service shall not be rendered invalid or ineffective if the copy was not dated.

There are no days or times when service cannot be completed.

Special Requirements on the Proof: The affidavit of service must show all documents served, the date, time, place and manner of service. If substituted service the name of the person whom a copy was delivered to, his title or relationship, and date and place of mailing. If a company is served, the name and title of the person served. A Declaration of Diligence must be made setting forth the dates, times and places where personal service was attempted. When service is on a summons the proof must indicate how the capacity was marked.

Affidavit of service is not required to be notarized if signed under penalty of perjury under the laws of the state of California.

Process service rates are established by statute for the sheriff, constable or marshall; that rate is $16.00 per defendant.

Process service rates are recoverable costs. The court shall allow such sums as are reasonably incurred in effecting service when service is made by a registered process server.

NEW YORK

Who May Serve: Anyone over the age of 18 and not a party to the action.

Process servers are required to be licensed only in the city of New York.

Method of Service: Personal, substituted, door of residence (nailing and mailing).

Special Requirements on Substituted Service: Service is permitted by delivering the summons within the state to a person of suitable age (over 14 years) and discretion, at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person served at his last known residence. Proof must be filed within 30 days thereafter with the clerk. Service shall be deemed complete ten days after such filing.

Special Requirements on door service include three attempts at residence, before 8 a.m. or after 6 p.m., before tacking, and mailing a copy to the person served. An affidavit must be completed showing attempts.

Service of process cannot be completed on Sundays. **Note:** Saturday service is generally avoided if the person to be served is orthodox Jewish.

Requirements on Tendering Fees: Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.

Special Requirements on the Proof: Descriptions are needed on all affidavits. It the case is matrimonial, you must also indicate how you knew the person you served was the defendant (i.e., by photograph, etc.). The affidavit must include date and time of service.

Affidavit of service must be notarized complete with signature and stamp. **Note:** Signature and stamp must be black.

Process service rates are established by statute.

Process service rates are recoverable only as established by statute.

Personal service may be made by serving a person designated as an agent with the consent of the agent endorsed thereon.

When serving a managing agent for a corporation, obtain the name and title.

PENNSYLVANIA

Who May Serve: Sheriff, coroner, competent adult over the age of 18.

Process servers are not required to be registered.

Method of Service: Personal, substituted.

Writ or complaint in civil actions must be served by sheriff or coroner.

Special Requirements on Substituted Service: Service is permitted by handing a true and attested copy to an adult member of the family where defendent resides, or to a clerk or manager of a hotel, inn, apartment house, boarding house, or other place of lodging where he resides, or to his agent or person for the time being who is in charge of his office or usual place of business.

Personal service only on subpoenas.

Service of process cannot be completed on Sundays or national holidays.

Requirements on Tendering Fees: Witness fees and mileage should be tendered with subpoenas to a witness who is not a party to the action or the service is not valid.

Requirements Affecting Expiration Dates: Summons and complaints must be served within 90 days from filing date or the matter must be reinstated prior to continuing service. This applies to Pennsylvania service made out of state. In state, services must be made within 30 days from date of filing.

Special Requirements on the Proof: When substituted service is made, full name and relationship to defendant must be stated. If name of individual served is not obtained, then full descriptions are required.

Affidavit of service must be notarized.

Process service rates are established by statute.

Process service rates are not recoverable.

Out of state service may be made by those permitted to serve under state law or law of place where served.

IOWA

Who May Serve: Any person who is not a party to the action nor the attorney for the party to the action.

Process servers are not required to be registered.

Method of Service: Personal, substituted.

Special Requirements on Substituted Service: Service is permitted at the person's dwelling house or usual place of abode by delivering a copy to a member of the family, manager clerk, or proprietor who is at least 18 years of age.

Service of process is not permitted on Sunday, unless a statement under oath by the plaintiff, his agent or attorney is made that states personal service is impossible unless made on Sunday.

Affidavit of service must be notarized.

Process service rates are not recoverable.

WYOMING

Who May Serve: Sheriff, undersheriff, deputy, at request of a party any other person over the age of 21 years, not a party to the action appointed by the clerk.

Process servers are not required to be registered.

Method of Service: Personal, substituted, registered mail.

Special Requirements on Substituted Service: Service may be completed by leaving a copy of summons and complaint at defendant's dwelling house or usual place of abode with some member of his family or other person employed over the age of 14 years, or at defendant's usual place of business with any employee then in charge of such place of business.

Service by registered mail can only be made outside the state and is completed by the clerk of the court.

Personal service may be completed by delivery to an agent authorized by appointment or by law to receive service of process.

Special Requirements on the Proof: Person serving process must make proof of service to court promptly and in any event within time during which person served must respond to process. Affidavit must include date, place, and manner of service.

There are no days or times when service cannot be completed.

MICHIGAN

Who May Serve: Person of suitable age and discretion who is not a party nor an officer of a corporate party unless process is to be personally served upon a person in a governmental institution, hospital or home. In which case process shall be served by a person in charge of such institution or by a member of his staff, bailiff, sheriff or deputy.

Process servers are not required to be registered.

Method of Service: Personal, substituted, mail—registered or certified.

Special Requirements on Substituted Service: Service is permitted by serving a copy of summons and complaint upon defendant's authorized agent (by written appointment), employee, representative, salesman or servant of defendant as is found. A copy of the summons and complaint must be sent to defendant at his last known address by registered mail.

Service of process cannot be completed on a Sunday, election day (upon elector) unless order by a judge, legislator while legislation is in session and fifteen days before and after session.

Requirements on Tendering Fees: One day's witness fees and mileage should be tendered with subpoenas.

Special Requirements on the Proof: Name of person served, place of service, date and time are required on the affidavit.

Affidavit of service must be notarized.

Process service rates are established by statute.

Process service rates are recoverable only if a judgment is obtained.

Summons and court orders expire 182 days after complaint filed unless judge orders second summons within the 182 days.

Note: The rules affecting service of process are going through a major change.

SOUTH CAROLINA

Who May Serve: Sheriff, person not a party to the action.

Method of Service: Personal, substituted.

Special Requirements on Substituted Service: Service can be made by delivering copy to any person of discretion residing at residence or employed at place of business of defendant.

Proof of service on out of state services must be notarized.

Category: PROCESS SERVER
Name:
Entity: NORTHWEST CLAIMS SERVICE
Amount: $1,000,000 EA. OCCURRENCE, $1,000,000 AGGREGATE
Surety: HARBOR INS. CO., INS. SERV. PROF. PROGRAM, EXP. 09/07/91
Filed: 11/06/90
File Number: PS 1990-0010
Remarks:
PO BOX 8900-299, KEIZER, OR 97303.

Category: PROCESS SERVER
Name:
Entity: CAPITOL INVESTIGATION CO. LTD.
Amount: $300,000 EA. OCCURRENCE, $600,000 AGGREGATE
Surety: HARBOR INS. CO., INS. SERV. PROF. PROGRAM, EXP. 10/24/91
Filed: 11/15/90
File Number: PS 1990-0011
Remarks:
PO BOX 3225, PORTLAND, OR 97208.

Category: PROCESS SERVER
Name:
Entity: PRUDENCIO, GORDON W., INVESTIGATIONS
Amount: $300,000 EA. OCCURRENCE & $300,000 AGGREGATE
Surety: SCOTTSDALE INS. CO., JIM & BOB CLARK'S INS., EXP. 01/02/92
Filed: 01/09/91
File Number: PS 1991-0001
Remarks:
PO BOX 5151, GRANTS PASS 97527.

Category: PROCESS SERVER
Name:
Entity: ORE. PROCESS SERVICE INC.
Amount: $100,000 EA. OCCURRENCE, $300,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO. OF NY, INS. SERV. PROF. 01/01/92
Filed: 02/01/91
File Number: PS 1991-0002
Remarks:

PO BOX 768, SPRINGFIELD 97477.

Category: PROCESS SERVER
Name:
Entity: ACP INVESTIGATIONS, INC.
Amount: $100,000 EA. OCCURRENCE, $300,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO OF NY, INS. SERV. PROF., EXP 02/02/92
Filed: 03/04/91
File Number: PS 1991-0003
Remarks:
125 SOUTH CENTRAL #218, MEDFORD 97525.

Category: PROCESS SERVER
Name:
Entity: PRUDENCIO, GORDON W., INVESTIGATIONS
Amount: $300,000 EA. OCCURRENCE & $300,000 AGGREGATE
Surety: SCOTTSDALE INS. CO., JIM & BOB CLARK'S INS., EXP. 01/02/92
Filed: 03/08/91
File Number: PS 1991-0006
Remarks:
122 SWARTHOUT DR., GRANTS PASS, 97527.

Category: PROCESS SERVER
Name: BROWNING, ROBERT A.
Entity:
Amount: $300,000 EA. OCCURRENCE & $300,000 AGGREGATE
Surety: ORE. STATE BAR PROF. LIABILITY FUND, EXP. 12/31/91
Filed: 03/06/91
File Number: PS 1991-0004
Remarks:
3012-B PACIFIC AVE., PO BOX 430, FOREST GROVE, 97116.

Category: PROCESS SERVER
Name: HEIL, DENNIS J.
Entity:
Amount: $300,000 EA. OCCURRENCE, $300,000 AGGREGATE
Surety: ORE. STATE BAR PROF. LIABILITY FUND, EXP. 12/31/91
Filed: 03/06/91
File Number: PS 1991-0005
Remarks:

3012-B PACIFIC AVE., PO BOX 430, FOREST GROVE, 97116.

Category: PROCESS SERVER
Name:
Entity: WILLAMETTE VALLEY MESSENGER SERVICE, INC
Amount: $500,000 EA. OCCURRENCE, $1,000,000 AGGREGATE
Surety: HARBOR INS. CO., INS. SERV. PROF. PROGRAM, EXP. 03/20/92
Filed: 03/20/91
File Number: PS 1991-0007
Remarks:
2659 COMMERCIAL ST. SE, SUITE 230, SALEM, 97302.

Category: PROCESS SERVER
Name:
Entity: ACE MESSENGER SERVICE INC.
Amount: $500,000 EA. OCCURRENCE, $1,000,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO OF NY, INS. SERV. PROF. EXP. 02/28/92
Filed: 03/22/91
File Number: PS 1991-0008
Remarks:
12750 SW PACIFIC HWY. #122, TIGARD, 97223.

Category: PROCESS SERVER
Name:
Entity: BARRISTER SUPPORT SERVICE
Amount: $100,000 EA. OCCURRENCE, $300,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO OF NY, INS. SERV. PROF. EXP.-03/03/92
Filed: 03/25/91
File Number: PS 1991-0009
Remarks:
8700 SW 26TH P-6, PORTLAND, 97219.

Category: PROCESS SERVER
Name:
Entity: CLEVELAND INVESTIGATION CO.
Amount: $1,000,000 EA. OCCURRENCE, $1,000,000 AGGREGATE
Surety: LEXINGTON INS. CO., EASTERN SPECIAL RISK INS., EXP. 02/19/92
Filed: 05/17/91
File Number: PS 1991-0010
Remarks:

6665 WALDEN LANE, TALENT 97540.

Category: PROCESS SERVER
Name: ADKINS, STEVEN
Entity: PACIFIC NORTHWEST INVESTIGATIONS
Amount: $1,000,000 EA. OCCURRENCE, $1,000,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO. OF NEW YORK, EXP. 04/21/92
Filed: 06/19/91
File Number: PS 1991-0011
Remarks:
JOHNSON & ADKINS, 312 SW JEFFERSON AVE., CORVALLIS, OR 97333.
PACIFIC NORTHWEST INVESTIGATIONS, PO BOX 863, ALBANY, OR 97321.

Category: PROCESS SERVER
Name: RENNINGER, KANDY
Entity: RENNIGER LEGAL SERVICES
Amount: $100,000 EA. OCCURRENCE, $300,000 AGGREGATE.
Surety: HARBOR INS. CO. - INS. SERV. PROF. PROGRAM, EXP. 10/20/91
Filed: 06/26/91
File Number: PS 1991-0012
Remarks:
P.O. BOX 482, ASTORIA, OR. 97103.

Category: PROCESS SERVER
Name: MALSTROM, ALMA I.
Entity: MALSTROM PROCESS SERVICE CO.
Amount: $100,000 EA. OCCURRENCE, $100,000 AGGREGATE.
Surety: MONTICELLO INS. CO./GILBERT, VERN AGENCY, EXP. 06/20/92.
Filed: 07/01/91
File Number: PS 1991-0013
Remarks:
130 HIGH ST. S.E., SALEM, OR. 97301.

Category: PROCESS SERVER
Name: DAUGHERTY, ROBERT A.
Entity: COLUMBIA GORGE INVESTIGATIONS
Amount: $100,0 EA. OCCURRENCE, $300,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO. OF NY, INS. SERV. PROF. 08/10/92
Filed: 09/20/91
File Number: PS 1991-0015
Remarks:

P.O. BOX 371, THE DALLES, OREGON 97058.

Category: PROCESS SERVER
Name: LANCASTER, DENNIS
Entity: TWO WHEEL MESSENGER SERVICE
Amount: $300,000 EA OCCURANCE, $300,000 AGGREGATE
Surety: INSURANCE MARKETPLACE, AMERICAN STATES INS., EXP. 07/15/92
Filed: 07/30/91
File Number: PS 1991-0014
Remarks:
305 LUNA VISTA, ASHLAND, OREGON 97520.

Category: PROCESS SERVER
Name: BROWNE, CHELSEA J.
Entity: BROWNE LEGAL INVESTIGATION
Amount: $100,000 PER CLAIM, $300,000 AGGREGATE
Surety: FIDELITY AND CASUALTY CO. OF NEW YORK, EXP. 11/03/91
Filed: 10/09/91
File Number: PS 1991-0016
Remarks:
1208 S.E. ANKENY ST., PORTLAND 97214.

Category: PROCESS SERVER
Name: INMAN, JAN
Entity: ACTION SERVICES
Amount: $100,000 PER CLAIM, $300,000 AGGREGATE
Surety: FIDELITY AND CASUALTY CO. OF NEW YORK, EXP. 05/23/92
Filed: 10/11/91
File Number: PS 1991-0017
Remarks:
P.O. BOX 69621, PORTLAND 97201.

Category: PROCESS SERVER
Name: BAHR, PAUL J.
Entity: BAHR & ASSOCIATES
Amount: $100,000 PER CLAIM, $300,000 AGGREGATE
Surety: FIDELITY AND CASUALTY CO. OF NEW YORK, EXP. 08/17/92
Filed: 10/11/91
File Number: PS 1991-0018
Remarks:

P.O. BOX 69392, PORTLAND 97201.

Category: PROCESS SERVER
Name:
Entity: CAPITOL INVESTIGATION CO. LTD.
Amount: $300,000 EA. OCCURRENCE, $600,000 AGGREGATE
Surety: FIDELITY & CASUALTY CO., NEW YORK, EXP. 10/24/92
Filed: 10/21/91
File Number: PS 1991-0019
Remarks:
PO BOX 3225, PORTLAND, OR 97208.

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SUITE 800
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October 30, 1991

VIA MESSENGER

Fredric R. Merrill - Executive Director
Council on Court Procedures
School of Law
University of Oregon
11th & Kincaid
Eugene, Oregon 97403-1221

RE: Protective Orders

Dear Professor Merrill:

Please find enclosed 25 copies of material which I ask that you distribute to the members of the Council on Court Procedures. I look forward to seeing you on Saturday, November 9th at the next Council meeting.

Sincerely,

Lawrence Wobbrock

LW/dm
Enclosure

cc: Jan Baisch, Esq.
Charlie Williamson, Esq.
Art Johnson, Esq.
Elden Rosenthal, Esq. (copies)
William Gaylord, Esq. (copies)

Senate Bill 579

Sponsored by Senator KERANS; Senator L. HILL

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Allows disclosure of materials or information produced during discovery related to personal injury action or action for wrongful death to another attorney representing client in similar or related matter despite issuance of protective order. Requires notice to parties protected by order and opportunity to be heard. Requires court to allow disclosure except for good cause shown. Applies only to protective orders issued on or after effective date of Act.

A BILL FOR AN ACT

Relating to discovery; creating new provisions; and amending ORCP 36 C.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 36 C. is amended to read:

C. Court order limiting extent of disclosure.

C.(1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

C.(2) A protective order issued under subsection (1) of this section to prevent disclosure of materials or other information related to a personal injury action or action for wrongful death shall not prevent an attorney from voluntarily sharing such materials or information with an attorney representing a client in a similar or related matter. Disclosure may only be made by order of the court, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

Senate Bill 580

Sponsored by Senator KERANS; Senators L. HILL, SPRINGER

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Provides that agreements between parties to civil action that terms of settlement or compromise agreement be confidential are not binding. Specifies that order may only be issued upon motion of a party and finding by court that confidentiality is needed to protect one of parties and that public interest will not be harmed. Applies only to agreements entered into on or after effective date of Act.

A BILL FOR AN ACT

Relating to confidential settlements.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) An agreement between parties to a civil action to keep the terms of any settlement or compromise of the action confidential shall not be binding on the parties unless the court so orders. An order to keep the terms of the settlement confidential shall be issued by a court only upon motion of a party and upon a finding by the court that:

(a) Confidentiality is necessary to protect one or more of the parties to the action; and

(b) The public interest will not be harmed by the issuance of the order.

(2) An order issued under subsection (1) of this section shall not bar an attorney or party to the cause in which the order is issued from voluntarily sharing with other persons any material and information gathered during discovery or otherwise during the preparation or investigation of the case, provided such information or material does not disclose the terms of the settlement or compromise agreed to by the parties.

SECTION 2. This Act shall apply only to settlement or compromise agreements entered into on or after the effective date of this Act.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

Public Access to Public Courts: Discouraging Secrecy in the Public Interest*

Lloyd Doggett**
Michael J. Mucchetti***

The adoption of Texas Rule of Civil Procedure 76a by the Texas Supreme Court represents a bold and precedent-setting attempt to bring greater openness to judicial proceedings. Responding to the widespread and perfunctory granting of sealing and protective orders in Texas courts, the Rule establishes a presumption that most civil court records should be open to the public and allows courts to issue such orders only after deciding that the interest at stake outweighs the broad public interest in access. Since its adoption in April 1990, the Rule has been the subject of controversy and concern in the Texas bar. In this Article, Justice Doggett and Mr. Mucchetti present a detailed examination of the new Rule's provisions and a theoretical defense of its approach. The Article is intended both as an explanation of the Rule and as an articulation of the benefits that may be realized by this leading step in a nationwide trend toward greater openness.

* Aware of the ethical guidelines for judges, the authors intend no statement in this Article as a comment on any pending or impending proceeding in any court.

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I. Introduction

The wisdom of Justice Brandeis rings true today: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[1] Courts also flourish when bathed in the cleansing, edifying illumination of public inspection. Concealing information when its release would enhance government accountability or avert danger to health and safety sacrifices the public interest and jeopardizes confidence in the judicial system. Unfortunately, sealing orders, protective orders, and confidentiality agreements are increasingly employed to stifle public scrutiny.[2]

Investigative reports exploring the proliferation of court secrecy

1. L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1st ed. 1914); *see also infra* notes 32-37 and accompanying text (discussing the role that access to court records serves in ensuring judicial integrity).

2. *See* Comment, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J. L. & POL. 381, 382 (1990) (noting that the "incidence of secrecy in the judicial process appears to be on the rise, particularly in the complex litigation area"); SOC'Y OF PROF. JOURNALISTS & ASS'N OF TRIAL LAWYERS OF AM., KEEPING SECRETS: JUSTICE ON TRIAL 6 (1990) [hereinafter KEEPING SECRETS] (observing that secrecy orders have become increasingly pervasive since the mid-1970s); *see also infra* notes 25-28 (describing how sealed records thwart the government's regulatory and law enforcement efforts).

have been published in *The Washington Post*,[3] *Newsday*,[4] *The Dallas Morning News*,[5] and the *San Francisco Daily Journal*.[6] Illustrative of the national trend is Dallas County, where over 200 sealing orders were entered in non-child-related cases between 1980 and 1987,[7] some of which involved allegations of fatally defective products, environmental contamination, or professional incompetence.[8] Despite the potentially adverse impact upon the public, court records were sealed without prior public notice, without a hearing, and without a showing that secrecy was proper.[9] Even the sealing orders themselves were often sealed. The orders were overbroad both in coverage and duration.[10] Many closed entire files rather than only those portions for which sealing was justified. Lacking any expiration date, many orders sealed files forever. The increase of sealing orders in recent years is at least in part a result of published recommendations by groups such as the Defense Research Institute. As blanket advice in products liability litigation, they recommend that "[e]ven where defense counsel can make no special claim of confidentiality, he or she should routinely seek a protective order limiting the dissemination of discovery information."[11]

3. *See* Weiser, *Public Courts, Private Justice: Forging a "Covenant of Silence,"* Wash. Post, Mar. 13, 1989, at A1, col. 1; Walsh & Weiser, *Public Courts, Private Justice: Secret Filing, Settlement Hide Surgeon's Record*, Wash. Post, Oct. 26, 1988, at A1, col. 1; Walsh & Weiser, *Public Courts, Private Justice: Drug Firm's Strategy: Avoid Trial, Ask Secrecy*, Wash. Post, Oct. 25, 1988, at A1, col. 1; Walsh & Weiser, *Public Courts, Private Justice: Hundreds of Cases Shrouded in Secrecy*, Wash. Post, Oct. 24, 1988, at A1, col. 1; Walsh & Weiser, *Public Courts, Private Justice: Court Secrecy Masks Safety Issues*, Wash. Post, Oct. 23, 1988, at A1, col. 3 [hereinafter *Safety Issues*].

4. *See* Meier, *Legal Merry-Go-Round*, Newsday (New York), June 5, 1988, at 21; Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, Newsday (New York), Apr. 24, 1988, at 24.

5. *See* McGonigle, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, Dallas Morning News, Nov. 23, 1987, at 1A, col. 1; McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, Dallas Morning News, Nov. 22, 1987, at 1A, col. 1 [hereinafter *Secret Lawsuits*]; McGonigle, *Jurist Believes Sealing Records Is Undemocratic*, Dallas Morning News, Nov. 22, 1987, at 25A, col. 1; McGonigle, *Judge Says Privacy Can Help Settle Suits*, Dallas Morning News, Nov. 22, 1987, at 24A, col. 1.

6. *See* Ziegler, *Judges Sit in the Eye of the Secrecy Storm*, S.F. Daily J., Oct. 30, 1990, at 1, col. 2 [hereinafter *Secrecy Storm*]; Ziegler, *Letting 'Sunshine' In: California Joins Trend to Strip Secrecy from Court Files*, S.F. Daily J., Oct. 29, 1990, at 1, col. 2 [hereinafter *Sunshine*]; Ziegler, *Trend in States Seems to Favor Allowing a Little 'Sunshine' In*, S.F. Daily J., Oct. 29, 1990, at 9, col. 1 [hereinafter *Trend in States*].

7. McGonigle, *Secret Lawsuits*, *supra* note 5, at 24A, col. 1. Because this study did not analyze protective orders restricting access to unfiled discovery in otherwise unsealed files, it represents only a small segment of secrecy directives.

8. *Id.* at 1A, col. 4.

9. *Id.* at 24A, cols. 2-3.

10. *See id.* at 24A, col. 6, 25A, col. 1 (noting that in Dallas County court records dating back to 1920 remain under seal, and many contain no record at all of their contents or reasons for closure).

11. Kearney & Benson, *Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer*, 1987 CURRENT ISSUES IN L. & MED. 36, 40. This "practice among some attorneys to automatically seek protective orders in every case where any potential for embarrassment or harm, no matter how slight, exists" was also noted in Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1985).

Closure directives are usually approved with no consideration of the broader public interest.[12] Several factors contribute to this trend. First, with secrecy becoming more common, counsel may fear losing a client or subjecting himself to a malpractice action if sealing is not demanded. Second, opposing counsel may believe that not acquiescing to secrecy requests will delay discovery or foil the settlement. Finally, the judge, faced with an ever-burgeoning docket, will likely sign any agreed order presented on such an issue.[13] As one critic of this system noted, confidentiality and sealing orders produce "a closed circle that can exclude other victims and potential victims, as well as the larger public, which has a critical interest in the proper functioning of public justice."[14]

The Texas Supreme Court sought to break this closed circle by adopting Rule 76a. Part II of this Article examines the historical and philosophical foundations of the Rule. Part III traces the Rule's provisions, addresses perceived problems concerning its application, and seeks to explain its purpose.

II. The Genesis and Foundation of Rule 76a

A. The Adoption of Rule 76a

Responding to legislation mandating that it adopt guidelines for the judiciary to use in determining whether civil records should be sealed,[15] the Texas Supreme Court submitted the issue to a specially created subcommittee of its standing Advisory Committee. Public hearings were held before the subcommittee, the Advisory Committee, and the supreme court. Participants included diverse representatives from the bar as well as public interest and citizen groups. After devoting more time to debat-

12. The societal interest in the free flow of information has been frequently noted. *See infra* notes 38-42 and accompanying text.

13. As candidly noted in United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989),

> When such an Order is signed, usually, as in this case, the busy trial judge is not in a position to balance the competing interests of privacy versus public access. All of the negotiations may have been done in private, and the trial judge may not even have a feel for the issues or the nature of the case or documents.

Id. at 151; *see also* AMERICAN BAR ASS'N, REPORT OF THE ACTION COMMISSION TO IMPROVE TORT LIABILITY SYSTEM 30 (1987) (noting the frequency of secrecy requests and the tendency of judges to assent to them without thorough consideration); 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, 7 (1978) (recognizing that courts "apply their pro forma imprimatur" to confidentiality stipulations); *infra* note 51.

14. *Transcript of Hearing on Court Secrecy Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 51 (May 17, 1990) [hereinafter *Court Secrecy Hearing*] (copy on file with the *Texas Law Review*) (statement of Paul K. McMasters, Society of Professional Journalists).

15. *See* TEX. GOV'T CODE ANN. § 22.010 (Vernon Supp. 1991).

ing this rule than to all of the other proposed rule changes combined, the Advisory Committee offered a recommendation that was then revised substantially by the supreme court.

As finally approved, Texas Rule of Civil Procedure 76a is, therefore, a product of considerable debate and compromise.[16] It was adopted by the narrowest possible margin of a 5-4 vote after the court was bombarded with suggestions that greater openness would produce dire economic consequences.[17] The Product Liability Advisory Council, the Texas Association of Defense Counsel, and the American Tort Reform Association appear to have taken a lead in this opposition. While comments from these groups were useful in perfecting the Rule, their apparent opposition to the basic concept of greater openness in judicial proceedings was fortunately rejected.

B. Justifying Greater Access to Judicial Documents

That judicial records should be open to public inspection is not a novel idea.[18] The United States Supreme Court has recognized a "presumption—however gauged—in favor of public access to judicial

16. This debate is reflected in Chamberlain, *Proposed Rule 76a: An Elaborate, Time-Consuming, Cumbersome Procedure*, 54 TEX. B.J. 348 (1990) (arguing that the Rule would discourage settlements, permit pretrial delay, and violate property and privacy rights); McElhaney & Leatherbury, *An Overview: Proposed Rule 76a*, 54 TEX. B.J. 340 (1990) (supporting the Rule on the basis of a need for a comprehensive and uniform standard governing the sealing of court records); and Peterson, *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*, 54 TEX. B.J. 344 (1990) (warning that the Rule would threaten trade secrets and sensitive commercial information).

17. For example, then president-elect of the Texas Association of Defense Counsel John Marks suggested that allowing the release of information exchanged during discovery " 'will be a great disaster for industry, and I think it will be another black eye for Texas' in trying to recruit new business." Herman, *Court Cuts Civil Suit Secrecy*, Houston Post, Apr. 17, 1990, at A11, col. 1 (quoting John Marks).

18. Federal and state courts for decades have responded to the need for openness. *See, e.g.*, Stone v. University of Md. Medical Sys. Corp., 855 F.2d 178, 182 (4th Cir. 1988) ("The public's right of access to judicial records and documents may be abrogated only in unusual circumstances."); Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) ("A presumption of access must be indulged to the fullest extent not incompatible with the reasons for closure."); *In re* Application of Nat'l Broadcasting Co., 635 F.2d 945, 949 (2d Cir. 1980) ("The existence of the common law right to inspect and copy judicial records is beyond dispute."); Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504, 506 (D. Colo. 1902) (rejecting an agreement between the parties to remove testimony and exhibits on file in the clerk's office and noting that "the matter of inspecting and taking copies of public records is as old in the law as the records are old"); Pantos v. City & County of San Francisco, 151 Cal. App. 3d 258, 263, 198 Cal. Rptr. 489, 492 (1984) ("Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons."); Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 316, 196 Cal. Rptr. 871, 876 (1983) ("The stipulated order of confidentiality is contrary to public policy, contrary to the ideal that full and impartial justice shall be secured in every matter . . . ."); *Ex parte* Drawbaugh, 2 App. D.C. 404, 407-08 (1894) ("[A]ny attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access . . . ."); C.L. v. Edson, 140 Wis. 2d 168, 182, 409 N.W.2d 417, 422 (Ct. App. 1987) (finding a compelling public interest in disclosing sealed documents although private individuals were involved, and

records."[19] Texas's approach, however, is innovative for two reasons. First, it forces compliance with existing guarantees of openness by adding procedural enforcement teeth, by allowing third parties to contest the orders, and by preventing attorneys from reaching agreements that vitiate its intent. Second, it includes some discovery within the definition of court records. This support of greater access to judicial records is consistent with the broader notion of affording access to courts generally.[20] As expressed by Justice Tom Clark, "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' "[21] This call for openness has traditionally applied to both criminal and civil trials.[22]

Several concerns motivated those who drafted and adopted Rule 76a. First, greater access to civil judicial records promotes public health and safety: "secrets buried in court records, literally, kill and maim."[23]

stressing that "public records, including court documents, are subject to a strong presumption favoring their disclosure").

19. Nixon v. Warner Communications, Inc., 435 U.S. 589, 602 (1979).

20. Some commentators find that the right to access judicial records is not only consistent with the right to open trials, it is "[i]n certain respects . . . more important than access to the actual court proceedings." Comment, *supra* note 2, at 397; *see also* Comment, *All Courts Shall Be Open*, 52 TEMP. L.Q. 311, 338 (1979) ("Access to records may, arguably, be a more important aspect of the right to observe judicial processes, as it allows examination of documents, pleadings, and transcripts which portray a more complete picture of the official development and resolution of a case.").

21. Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) (quoting *In re* Oliver, 333 U.S. 257, 268 (1948)); *see also* Craig v. Harney, 331 U.S. 367, 374 (1947) ("What transpires in the courtroom is public property."). This entitlement has gained some international acceptance: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him." *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948).

22. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) ("[W]hether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."); *see also id.* at 567 (noting that colonial law sought to assure open trials; for example, West New Jersey provided that "in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner") (quoting SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959)); Gannett Co. v. DePasquale, 443 U.S. 368, 420 (1979) (Blackmun, J., concurring and dissenting) ("[T]here is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history . . . ."); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) ("[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well."); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983) ("The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial."), *cert. denied*, 465 U.S. 1100 (1984).

23. Prepared Statement of Dianne Weaver Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 1 (May 17, 1990) (copy on file with the *Texas Law Review*). Secrecy exacts a perilous price:

> Workers were kept in the dark for 20 years about the hazards of asbestos because of court-sanctioned secrecy agreements. In the interim, thousands got lung disease and hundreds died.
>
> Hundreds of smokers had Bic cigarette lighters blow up in their hands. One Penn-

For example, some argue that General Motors' tactic of requiring confidentiality before releasing sensitive documents "helped avoid a public debate about whether the company placed financial considerations ahead of safety concerns in designing [its] fuel tanks."[24]

Court orders have also prevented law enforcement and regulatory agencies, as well as the public, from acquiring critical information.[25] One decree placed limitations upon an attorney regarding the disclosure to any governmental agency of information obtained from Pfizer Laboratories.[26] This abuse of the public trust is neither isolated nor trifling:

> Just put yourself in the place of one of those thousands of Americans who had a possible faulty heart valve implanted without knowing, because of protective orders, that the valve could be a killer. Or of the family members of a person who died because the physician was treating him for a heart attack rather than a reaction to a drug; that misdiagnosis might not have occurred if previous court settlements had not been sealed.
>
> Such secrecy agreements have been permitted in cases involving dangerous playground equipment while children elsewhere continued to play on it; explosive conditions in grain elevators while workers elsewhere went unwarned; exploding fuel tanks while other unsuspecting customers continued to buy. . . . We know of lawsuits over toxic spills that were settled in secret, even though the spills threatened entire neighborhoods.[27]

sylvania woman was burned over 70 percent of her body. Confidential settlements left scores of others unaware that the lighters were defective.

Ziegler, *Sunshine*, *supra* note 6, at 8, col. 4; *see also* Lock, *Secrecy Orders: What You Don't Know Will Hurt You*, MD. B.J., Sept. & Oct. 1990, at 25 (pointing out the dangers to the public from secrecy orders, especially in product liability cases); *supra* text accompanying note 8.

24. Walsh & Weiser, *Safety Issues*, *supra* note 3, at A1, col. 1.

25. As New York Attorney General Robert Abrams stated,

> "[S]ealed settlements make it very difficult for government officials to determine links between environmental exposure to toxic chemicals and health effects. . . . It is important that, in the future, when judges are asked to approve secret settlements, they not seal records and data that may have an impact on the public health and welfare."

Freeman & Jenner, *Just Say No: Resisting Protective Orders*, TRIAL, Mar. 1990, at 66, 70 (quoting Abrams, Press Release, *News from Attorney General Robert Abrams* (Aug. 17, 1989)). Abrams will propose legislation that allows government agencies access to otherwise sealed records. Marcus, *Firms' Secrets Are Increasingly Bared by Courts*, Wall St. J., Feb. 4, 1991, at B1, col. 3, B2 cols. 4-5. In urging adoption of Rule 76a, the Texas Attorney General wrote: "Keeping court records sealed in cases involving dangerous products or professional negligence threatens the public health and safety. The keeping of vital information regarding dangerous products or individuals sealed, forestalls the public's ability to protect itself from these dangers . . . ." Letter from Texas Attorney General Jim Mattox to Chief Justice of the Texas Supreme Court Thomas Phillips 2 (Mar. 21, 1990) [hereinafter Mattox Letter] (copy on file with the *Texas Law Review*).

The American Bar Association also favors releasing information obtained under secrecy agreements to government agencies if it "indicates [a] risk of hazards to other persons" or "reveals evidence relevant to claims based on such hazards . . . ." AMERICAN BAR ASS'N, *supra* note 13, at 32.

26. Walsh & Weiser, *Safety Issues*, *supra* note 3, at A22, col. 3.

27. Prepared Statement of Paul K. McMasters Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 3-4 (May 17, 1990) (copy on file with the *Texas Law Review*).

How many deaths could have been prevented? We will never know, because the documents are preserved forever beyond our reach. The effect of disclosure, however, is not purely speculative. When asked by an interviewer if there was "any evidence that dangerous products have come off the market as a result of disclosure," District Judge Jim Carrigan of the U.S. District Court of Colorado responded, "Why don't we have Dalkon Shields on the market anymore? Why did we get rid of those gas tanks that were burning up people? You can enumerate as many examples as you want to."[28] Fewer deaths and injuries should also translate into fewer lawsuits.

Second, access to judicial records encourages greater integrity from attorneys and their clients. If documents are made public in one case, a party is less likely to deny their existence in later litigation.[29] Even if the materials are lost, their former availability increases the likelihood of their discovery from other sources. An egregious example of a party's suppression of key documents is found in *Rozier v. Ford Motor Co.*[30] The defendant failed to produce crash test data and received a favorable verdict. In finding that the reports had been withheld and that the case should be reopened, the appellate court stated:

> Through its misconduct . . . Ford completely sabotaged the federal trial machinery, precluding the "fair contest" which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by Ford's selective disclosure of information.[31]

Had the reports already been publicly available, it is less likely these tactics would have been employed.

Third, access ensures greater integrity from the bench. An old adage tells us that "doctors bury their mistakes, but judges publish

28. *Court Secrecy Often Puts Public at Risk*, USA Today, Apr. 23, 1990, at 11A, *reprinted in* TRIAL, July 1990, at 65.

29. *See generally* Anderson v. Cryovac, Inc., 862 F.2d 910, 927-28 (1st Cir. 1988) (criticizing a defendant for "play[ing] possum" by knowingly "filing misleading or evasive responses" concerning its poisoning of local well water); Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1018 (3d Cir.) (finding that defendant's interrogatory answer was "grossly false" because it listed only one fire caused by its can openers when, in fact, twenty-six occurrences were listed in the files of the Consumer Product Safety Commission), *cert. denied*, 482 U.S. 915 (1987). In this respect, Rule 76a's benefit is similar to the advantage Professor Wigmore described when extolling open judicial proceedings. He observed that openness tends to improve the testimony "by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present." 6 J. WIGMORE, EVIDENCE § 1834 (Chadbourn rev. ed. 1976).

30. 573 F.2d 1332 (5th Cir. 1978).

31. *Id.* at 1346.

theirs."[32] Inspection of public records provides "a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service."[33] Guaranteeing greater access to court records, including discovery records, serves this function.[34] Rule 76a will make it harder to close files as part of the " 'good ol' boy system' between judges and some favored lawyers," as was allegedly done in Dallas County.[35] If it is true that " 'a lot of those records were sealed for other than judicial reasons,' " such as " 'political considerations' " or " 'favoritism with certain law firms,' " then the public should know.[36] At the least, inspection of judicial documents reassures the public that "justice is afforded equally" and forestalls "suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."[37]

32. Stephens v. Van Arsdale, 227 Kan. 676, 696, 608 P.2d 972, 987 (1980) (McFarland, J., concurring and dissenting).

33. State *ex rel.* Colescott v. King, 154 Ind. 621, 627, 57 N.E. 535, 538 (1900); *see also Stephens*, 227 Kan. at 695, 608 P.2d at 986 (McFarland, J., concurring and dissenting) ("Open court not only benefits particular parties to particular litigation, but it also helps to keep the administration of justice 'honest.' "); 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (Garland Publishing reprint 1978) (London 1827) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.").

A Houston attorney has noted:

> Openness is especially important for courts. Judges are relatively unknown public officials who have tremendous power. With the stroke of a pen, a judge can send you to jail, take away your children or give all of your property to someone else. That same judge can also run the state prisons or school system, decree what mental health care will be given to Texans or order children bused across town.

Moran, *Texans Should Be Worried When Judges Seek Secrecy*, Houston Chronicle, May 27, 1990, at 4F, cols. 2-3.

Sissela Bok has characterized secrecy's risks as follows:

> When linked, secrecy and political power are dangerous in the extreme. For all individuals, secrecy carries some risk of corruption and of irrationality; if they dispose of greater than ordinary power over others, and if this power is exercised in secret, with no accountability to those whom it affects, the initiation to abuse is great.

S. BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 106 (1982).

34. *See, e.g., In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1314 (7th Cir. 1984) ("While sealing of one document in one case may not have a measurable effect on confidence in judicial integrity or on the effective operation of the courts, the effect of a consistent practice of sealing documents could prove damaging."); Comment, *supra* note 2, at 398 (noting that "[b]eyond the harm to the public's understanding of the judicial system, total sealing orders negatively affect the public's perception of the judicial system's fairness").

35. McGonigle, *Secret Lawsuits*, *supra* note 5, at 24A, col. 3 (quoting Texas State District Judge John Marshall, Dallas County's chief administrative judge).

36. *Id.* (quoting Dallas County District Clerk Bill Long); *see also* Knight, *Court Business is Public Business*, Denver Post, Nov. 4, 1990, at 1H, col. 1 (claiming that selective use of sealing orders has created "two justice systems" in the Denver District Court, "one for the rich and famous and one for everyone else"). Regarding the adverse impact these actions have on the judiciary, the Texas Attorney General has written: "If there is a public perception that cases can be sealed on the whim of a judge or at the insistence of a prominent individual or powerful corporation, the public's confidence in the judicial decision making process is eroded." Mattox Letter, *supra* note 25, at 1.

37. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concur-

Finally and most importantly, greater access strengthens democracy.[38] Rule 76a embodies the conviction, often expressed by American courts, that any limitation on the right to inspect and copy public records is "repugnant to the spirit of our democratic institutions."[39] This right of access has been hailed as "fundamental to a democratic state."[40]

ring). While Justice Brennan is speaking of the importance of access to criminal trials, his argument is as forceful in the civil context.

38. *See generally* EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (" 'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.' ") (quoting Commager, *The Defeat of America*, N.Y. REV. BOOKS, Oct. 5, 1972, at 7 (reviewing R. BARNET, ROOTS OF WAR (1972))); Jones v. Jennings, 788 P.2d 732, 735 (Alaska 1990) (describing citizens' ability to monitor the government as a "cornerstone of democracy" and proclaiming free access to public records "a central building block of our constitutional framework"); Acker v. Texas Water Comm'n, 790 S.W.2d 299 (Tex. 1990) (recognizing the importance of openness to good government).

Several Presidents have espoused similar views. Thomas Jefferson, for example, proclaimed: "[I]t is proper that you should understand what I deem the essential principles of our government, and consequently those which ought to shape its administration. . . . [They include] the diffusion of information and the arraignment of all abuses at the bar of public reason." T. JEFFERSON, *First Inaugural Address*, Mar. 4, 1801, in THE PORTABLE THOMAS JEFFERSON 293-94 (1975). James Madison likewise observed: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . . . A people who must mean to be their own Governors, must arm themselves with the power knowledge gives." J. MADISON, *Letter to W.T. Barry, Aug. 4, 1822*, in 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) [hereinafter *Madison Letter*]. Woodrow Wilson commented: "Light is the only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments; . . . light that will open to view the innermost chambers of government . . . ." Wilson, *Committee or Cabinet Government?*, OVERLAND MONTHLY, Jan. 1884, *reprinted in* 2 THE PAPERS OF WOODROW WILSON 614, 629 (A. Link ed. 1967). Harry Truman addressed the issue with his customary directness: " 'I don't care what branch of the government is involved. . . . [If] you can't do any housecleaning because everything that goes on is a damn *secret*, why, then we're on our way to something the Founding Fathers didn't have in mind. Secrecy and a free, democratic government don't mix.' " M. MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 392 (1974) (quoting Harry Truman). A younger Richard Nixon observed in 1961 that secrecy had its limits: he argued that a return to secrecy in peacetime demonstrates a "profound misunderstanding of the role of a free press." N.Y. Times, May 10, 1961, at 3, col. 2, *quoted in* A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 343 (1973). Nixon felt that the desire for security could become a "cloak for errors, misjudgments and other failings of government." *Id.*

Rule 76a incorporates the Open Records Act's expression that it is "declared to be the public policy of the State of Texas" that the "people insist on remaining informed so that they may retain control over the instruments they have created." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Vernon Supp. 1991).

39. Nowack v. Fuller, 243 Mich. 200, 203, 219 N.W. 749, 750 (1928). *See generally* Jones v. Jennings, 788 P.2d 732, 735-36 (Alaska 1990) (" 'If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.' ") (quoting Letter from Thomas Jefferson to Colonel Charles Yancy (Jan. 6, 1816)); Brill, *Watching the Drama of Justice*, AM. LAW., July/Aug. 1990, at 32, col. 4 ("A government of the people and by the people will respect and agree to be governed by those government institutions that are working well and will force change on those that aren't—because the workings of its government are not hidden from them.").

40. United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir.), *rev'd sub nom.* Nixon v. Warner Communications, 435 U.S. 589 (1978); *see also* United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982) (noting that the "common law right [of public access] supports and furthers many of the same interests which underlie those freedoms protected by the Constitution"); *In re* Inslaw, Inc., 51 B.R. 298, 299 (W.D. Ohio 1985) (suggesting that the right of public access to judicial records "is analogous to the First Amendment right to freedom of speech and of the press"); *In re* "Agent

Nothing suggests that the judiciary should be immune from this simple and noble principle.[41] Public court records are rich with democracy's indispensable raw material: information. The breadth and import of civil cases have been summarized as follows:

> [T]here is the same need for public scrutiny of civil litigation as for criminal. . . . A real estate dispute may include issues of historical preservation, or of demolition of scarce low-income housing, or of significant zoning changes—all of considerable public import. Or a civil matter may reflect alleged fraud that could have criminal, not merely civil, implications. Indeed, civil cases of virtually every kind "frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy."[42]

Some courts and commentators have argued, usually by relying on a particular vision of the function of courts, that unfiled discovery should not be subject to the same demands of openness and access. One commentator, for instance, argued against broad access to pretrial discovery in the federal courts by saying: "The purpose of courts is to solve disputes, not educate the public about the state of the world."[43] Other commentators reflect this same assumption in arguing against Rule 76a on the grounds that it will remove a widely used option for settling disputes.[44]

Orange" Prod. Liab. Litig., 98 F.R.D. 539, 543 (E.D.N.Y. 1983) ("The right of inspection [of judicial records] is fundamental to a democratic form of government, serving as a check on possible abuses by the court system, and helping to produce an 'informed and enlightened public opinion.' ") (quoting *Mitchell*, 551 F.2d at 1258 (quoting Grossjean v. American Press Co., 297 U.S. 233, 247 (1936)).

41. "[A] basic tenet of the democratic system [is] that the people have the right to know about operations of their government, including the judicial branch, and that where public records are involved the denial of public examination is contrary to the public policy and the public interest." State *ex rel.* Bilder v. Township of Delavan, 112 Wis. 2d 539, 553, 334 N.W.2d 252, 260 (1983). As a Maryland court noted in reviewing a circuit court's order sealing case files and proceedings from the public,

> To close a court to public scrutiny of the proceedings is to shut off the light of the law. How else will the citizenry learn of the happenings in the courts—their government's third branch—except through access to the courts by the people themselves or through reports supplied them by the media?

State v. Cottman Transmission, 75 Md. App. 647, 659, 542 A.2d 859, 864 (1988). At its core, Rule 76a rejects the view espoused by some in the judiciary that " 'by and large, no news is good news.' " Mauro, *Activism for Babies and Other 1990 Oddities*, Legal Times, Dec. 31, 1990, at 6, col. 3 (quoting Justice Antonin Scalia). Justice Scalia said that in expressing his wish for less media coverage of court proceedings he was appealing to the principle that " 'the law is a specialized field, fully comprehensible only to the expert' " and that this proposition " 'has unique validity in the field of judging.' " *Id.*

42. Mokhiber v. Davis, 537 A.2d 1100, 1122 (D.C. 1988) (Ferren, J., concurring and dissenting) (quoting Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)).

43. 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, 1615 (1990).

44. *See, e.g.*, Chamberlain, *supra* note 16, at 349.

This argument is incomplete in several important respects. First, it sweeps too broadly if applied generally to unfiled discovery. Even courts such as the District of Columbia Court of Appeals that have embraced the broad view that "[g]eneral access to discovery materials . . . will not promote these ideals of public scrutiny"[45] have acknowledged that "[a] claim to access is bolstered when the materials sought will shed light on events of historical or contemporary interest to a wider audience; an issue of greater and wider public importance may create a stronger claim of access than a less important issue."[46] Rule 76a by its terms is intended to address those instances where the public need is greatest; it applies to unfiled discovery documents that "have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."[47]

Second, and more fundamentally, the argument against access to pretrial discovery ignores the larger role that courts, no less than the other branches of government, play in contributing to an informed populace. The legislature and executive are not confined to their core functions to the exclusion of broader societal obligations. No one, for example, argues that access to legislative records should be denied because "the purpose of Congress is to make laws, not to educate the public about the state of the world." Rather, it is recognized that openness of the legislative process helps to ensure its responsibility and fairness and that these benefits outweigh the possible loss in expediency created by public access.[48] Rule 76a and the revised Rule 166b(5)(c) represent a realization that similar interests are at stake in litigation. The competing interests in favor of privacy are stronger in adjudication than in legislation, and these rules do not stand for the proposition that secrecy is never warranted. However, they do support the proposition that secrecy, not openness, is the exception that requires justification. The court was also aware that too much sunlight withers the vine[49] and that some records

45. *Mokhiber*, 537 A.2d at 1110.

46. *Id.* at 1117.

47. TEX. R. CIV. P. 76a(2)(c); *see infra* text accompanying notes 76-85.

48. *See, e.g.*, Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 57 ("The decentralization and openness of legislative procedure provides numerous opportunities for public access . . . to the process of deliberation. . . . The slowness of the legislative process . . . gives groups and their representatives a chance to study the legislation, point out the dangers, assemble public opinion, and educate the members of Congress.").

49. Concealment's duality has been captured by one author: "Secrecy is as indispensable to human beings as fire, and as greatly feared. Both enhance and protect life, yet both can stifle, lay waste, spread out of all control. Both may be used to guard intimacy or to invade it, to nurture or to consume." S. BOK, *supra* note 33, at 18.

must be screened from inspection lest their exposure compromise legitimate privacy or other rights.

Knowledge is power.[50] Information's free flow allows citizens to govern their fate and fortune. When its passage is arrested or reduced to a trickle, control over our lives is wrested from our hands. If the public is to make intelligent decisions about our courts, our laws and the effectiveness of those officials that enforce them, a presumption of openness should govern.[51]

III. The Provisions of Rule 76a[52]

A. Presumption of Openness

Rule 76a begins with the clear presumption that all civil court records are open to the public.[53] In those rare instances when closure should be authorized, a court must first satisfy certain substantive and procedural requirements. No order or motion regarding sealing may be sealed.

B. Standard Governing Sealing Requests

Paragraph 1 defines the standard a trial court must apply when considering sealing requests. The movant always has the burden of proof to establish each of the following by a preponderance of the evidence:

50. "Nam & ipsa scientia potestas est" ("For knowledge itself is a power."). F. Bacon, *De Haeresibus*, in ESSAYES; RELIGIOUS MEDITATIONS; PLACES OF PERSWASION & DISSWASION 14 (1597 & reprint 1924); *see also* Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1186 (3d Cir. 1986) (Gibbons, J., dissenting) (criticizing a "big brother" approach to government that "places in the hands of those chosen for positions of authority the power to withhold from those to whom they should be accountable the very information upon which informed voting should be based"); S. BOK, *supra* note 33, at 19 ("Conflicts over secrecy . . . are conflicts over power: the power that comes through controlling the flow of information. . . . [P]ower requires not only knowledge but the capacity to put knowledge to use; but without the knowledge, there is no chance to exercise power."); A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19 (1960) (arguing that the "free mind" required by democracy requires the "unhindered flow of accurate information"); *Madison Letter*, *supra* note 38, at 103 ("[P]eople who must mean to be their own Governors, must arm themselves with the power which knowledge gives.").

51. Those seeking elected office, in particular, should not be able to hide their misdeeds in a clerk's locked vaults or lose them in the byzantine maze of their attorney's files. For example, a recent Texas gubernatorial candidate settled out of court and then sealed virtually every lawsuit "where charges of illegal or improper business practices were alleged . . . ." Sablatura, *Sealed Court Records Shroud Williams' Business Practices*, Houston Chronicle, Aug. 26, 1990, at 1A, col. 5.

52. In this Part, unless otherwise noted, quotations are from the text of Texas Rule of Civil Procedure 76a.

53. *See* TEX. R. CIV. P. 76a(1) ("[C]ourt records, as defined in this rule, are presumed to be open to the general public . . . ."). This presumption may not be waived by the court or counsel. *See* Missouri Pac. R.R. v. Cross, 501 S.W.2d 868, 872 (Tex. 1973) ("[The Texas Rules of Civil Procedure] are not to be ignored by agreements of courts and counsel to operate contrary thereto and in violation thereof.").

> (a) a specific, serious and substantial interest which clearly outweighs:
>
> (1) this presumption of openness;
>
> (2) any probable adverse effect that sealing will have upon the general public health or safety;
>
> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

The trial judge is thus called upon to balance the needs of the public against the asserted interest of the party seeking secrecy, a sharp departure from the view of those who perceive our courts solely as a setting for the resolution of private disputes between private parties concerning private matters for private purposes.[54]

An illustration of this more narrow jurisprudential view is *Cipollone v. Liggett Group Inc.*,[55] in which the valiant attempts by District Judge Sarokin to weigh the public interest were repeatedly stymied. In reviewing a magistrate's order prohibiting the dissemination of material concerning the tobacco industry, Judge Sarokin found that although the data might be embarrassing and incriminating, "that alone would not be sufficient to bar [the information] from the public and the press."[56] In fact, not only was the public interest a key factor, "[i]t would be difficult to envision a case involving a greater or more widespread interest."[57] The plaintiffs asserted:

> [D]iscovery in the matter reveals the knowledge of the tobacco industry regarding the effects of smoking, the steps taken to conceal and offset the knowledge, the efforts to enlist the aid of legislators and the medical profession to support the industry and mislead the public, and an alleged conspiracy of silence and chicanery within the industry itself.[58]

If tobacco companies had engaged in such conduct, the judge thought it unwise to aid in their "conceal[ment] or misrepresent[ation of] informa-

54. *See, e.g.*, KEEPING SECRETS, *supra* note 2, at 16 (statement of J. Morris) ("We've got a system that works. It's where private litigants try private matters and seek resolution for their own ends and purposes.").

55. 106 F.R.D. 573 (D.N.J. 1985), *rev'd on writ of mandamus*, 785 F.2d 1108 (3d Cir. 1986); *see also* M. Curtis, Confidentiality Orders: Cover-Ups and Consequences 29-34 (June 1989) (paper presented at the 25th Annual Convention of the North Carolina Academy of Trial Lawyers) (discussing the narrow reading of "good cause" by the *Cipollone* court).

56. *Id.* at 577. Judge Sarokin's position on granting confidentiality orders has evolved during his years on the bench:

> "I must confess that for a considerable period of time, as a routine matter I signed consent orders on the theory that since the parties agreed and the lawyers agreed, there was no reason for us to examine the agreement. But I slowly came to the realization that there were other interests involved."

Jaffe, *Public Good vs. Sealed Evidence*, Star-Ledger (New Jersey), Sept. 2, 1990, § 3, at 1, col. 2 (quoting Judge Sarokin).

57. *Cipollone*, 106 F.R.D. at 576.

58. *Id.* at 576-77.

tion regarding the risks of smoking."[59] Accordingly, he held that the protective order should be modified to apply only to confidential information, to allow a procedure for challenging the designation of information as confidential, and to allow plaintiffs' attorneys to use the information in other litigation in which they participated.[60]

The Third Circuit granted a writ of mandamus and reversed the district court's order.[61] It remanded the case for consideration of good cause because the district court's analysis had included first-amendment considerations rather than confining itself to an inquiry into good cause under Federal Rule of Civil Procedure 26(c).[62] After remand, Judge Sarokin again found that the tobacco companies failed to demonstrate good cause supporting the protective order:

> Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public. The public disclosure of that information will certainly embarrass that party and cause it financial loss. It is inconceivable to this court that under such circumstances the public interest is not a vital factor to be considered in determining whether to further conceal that information and whether a court should be a party to that concealment.
>
> However, even ignoring the public interest, defendants have failed to demonstrate any good cause for the concealment of otherwise non-confidential materials from the public in general.[63]

On appeal for the second time, the Third Circuit affirmed his decision because there was "no indication in the opinion that Judge Sarokin, in making 'good cause' determinations, considered the public interest."[64] The court of appeals affirmed his decision only because he purportedly had not weighed the public interest. This is not the only court to find the public interest irrelevant.[65]

Fortunately, Texas has taken a less parochial view by directing that courts, when considering a sealing request, are not limited to focusing solely on the private interests advanced by the litigants, but must also

59. *Id.* at 577.

60. *Id.* at 584-86.

61. *See* Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1120 (3d Cir. 1986).

62. *Id.*

63. Cipollone v. Liggett Group, Inc., 113 F.R.D. 86, 87 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

64. Cipollone v. Liggett Group, Inc., 822 F.2d 335, 341 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

65. *See, e.g., In re* Alexander Grant & Co. Litig., 820 F.2d 352, 357-59 (11th Cir. 1987) (Clark, J., dissenting) (criticizing the majority for treating the case as a purely private one and for failing to balance the public interest against the litigant's interest in secrecy). *But see In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 148 (2d Cir.) (finding that the lifting of a protective order was justified by the "enormous public interest in the Agent Orange litigation"), *cert. denied sub nom.* Dow Chem. Co. v. Ryan, 484 U.S. 953 (1987).

weigh the broader public interest. When a private dispute is taken before a city council, a state regulatory board, or into the halls of Congress, it is no longer purely private. The public finances these legislative and executive institutions and has a fundamental right to know how these matters are being resolved. This right is incorporated in open meetings, open records, and freedom of information acts. But the public's interest is often every bit as real when a private dispute is resolved in the third branch of government.[66] Like the other two branches, our judiciary is taxpayer funded, and its decisions often have far-reaching public policy implications.

C. *Records Covered by Rule 76a*

1. Definition of "Court Records."—Recognizing that many attorneys and litigants are accustomed to secrecy as a way of life, the drafters of the Rule attempted to anticipate and thwart methods that might be employed by creative attorneys to circumvent its effect. Initially, this was done by defining "court records" broadly; paragraph 2 includes within this definition "all documents of any nature" filed in any civil court. Exceptions are made for those documents filed (1) "in camera, solely for the purpose of obtaining a ruling" regarding discoverability;[67] (2) "to which access is otherwise restricted by law" such as in adoption,[68]

66. *See generally* Craig v. Harney, 331 U.S. 367, 374 (1947) ("There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."); State *ex rel.* Bilder v. Township of Delavan, 112 Wis. 2d 539, 553, 334 N.W.2d 252, 260 (1983) ("The courts, whose obligation it is to ensure that the executive and legislative branches of government remain open to public scrutiny, must abide by the same high standards they prescribe for others."); *see also supra* text accompanying notes 41-51.

67. This exception does not include affidavits. Attorneys who provide documents for in camera inspection should not be permitted to attach secret affidavits that often may be little more than an attempt to get the last word in rebuttal with the judge in support of nondiscoverability. In Barnes v. Whittington, 751 S.W.2d 493 (Tex. 1988), the court suggested that in "limited, extraordinary emergency situations" it may be proper to file ex parte affidavits with documents submitted for in camera inspection. *Id.* at 495 n.1; *see also* State v. Lowry, 34 Tex. Sup. Ct. J. 324, 325 n.2 (Feb. 6, 1991) (finding that affidavits supporting an exemption from discovery cannot be "tendered for ex parte consideration"). These situations are limited to those provided for by rule, such as in the issuance of ancillary writs (*e.g.*, TEX. R. CIV. P. 592). It must be kept in mind that ex parte communications are barred by rules governing the bar and the judiciary. *See* SUPREME COURT OF TEXAS, STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Prof. Conduct) Rule 3.05(b) (1989) [hereinafter TEX. DISCIPLINARY RULES OF PROF. CONDUCT] (located in the pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G app., following § 83.006 of the Government Code); TEXAS SUPREME COURT, CODE OF JUDICIAL CONDUCT, Canon 3, pt. A(5) (1987). Any such affidavits would be court records open to the general public under Rule 76a because they are not themselves "documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents." TEX. R. CIV. P. 76a(2)(a)(1). To seal affidavits, the showing under paragraph 1 of the Rule would have to be met. However, a court may inspect records in camera to determine disclosability. *See infra* text accompanying note 181.

68. *See* TEX. FAM. CODE ANN. § 11.17(f) (Vernon 1986) (allowing a court, on the motion of a

juvenile,[69] and mental health cases;[70] or (3) in cases arising under the Family Code. Under paragraph 9, access to documents described in these exceptions is governed by existing law.

The term "court records" includes, pursuant to paragraph 2(b), settlement agreements[71] not filed of record[72] that contain provisions restricting disclosure "concerning matters that have a probable adverse effect upon the general[73] public health or safety, or the administration of public office, or the operation of government."[74] Paragraph 2(b) was included to discourage parties from circumventing the Rule by conditioning settlement on the return or destruction of documents or the sealing of opposing counsel's lips.[75]

party or sua sponte, to order the sealing of the file or court minutes in a proceeding in which adoption or termination is sought).

69. *See id.* §§ 51.14-.16 (limiting inspection of juvenile court records to specified persons with legitimate interests in the proceedings and providing for the sealing of delinquency proceeding records under certain circumstances if the individual has shown evidence of having reformed).

70. *See* TEX. REV. CIV. STAT. ANN. art. 5547-12 (Vernon Supp. 1991) (allowing inspection of records in mentally ill dockets only upon a judge's finding that the inspection is justified and in the public interest and that the intended use falls within the statutory exemptions to confidentiality of mental health information).

71. Under Texas Rule of Civil Procedure 166b(2)(f)(2), "[t]he existence and contents of any settlement agreement" are already discoverable. The only reported case construing this provision read the Rule broadly to cover all settlement agreements. *See* Palo Duro Pipeline Co. v. Cochran, 785 S.W.2d 455, 456 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding).

72. Reference to any monetary consideration in these agreements is excluded from the definition of "court record." Chief Judge Sol Wachtler of the New York Court of Appeals, however, argues that settlement amounts should also be public information. He finds it unfair that parties can allow the publicly financed judicial process to move forward and still settle their case prior to a verdict on terms that are not known to the public. *See* Ziegler, *Trend in States*, *supra* note 6, at 9, col. 5.

73. The word "general" modifies "public health or safety" throughout Rule 76a, *see* paragraphs 1(a)(2), 2(b), and 2(c), but it neither adds nor subtracts from the phrase. By definition, a public issue is a general one.

74. This is consistent with the determination in Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985) (*per curiam*), that a settlement agreement closing court records does not justify sealing. *Id.* at 1571; *see also* Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d Cir. 1986) ("Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements.").

75. As one editorial observed, "Secrecy affecting public health and safety should not be a bargaining chip or a commodity to be sold in litigation." *Legislature Should Approve Bill That Requires Hazard Disclosures*, Fla. Sun-Sentinel, May 14, 1990, at 8A, col. 2.

Public inspection of documents otherwise accessible under the Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1991), has sometimes been prevented by settlement agreements involving governmental entities. Secrecy provisions in settlement agreements have been given effect under § 3(a)(7) of the Act, excepting from access matters "which by order of a court are prohibited from disclosure." *See* Tex. Att'y Gen. ORD-415 (1984) (denying access to settlement documents based on a settlement agreement leading to dismissal of a claim against the Public Utilities Commission). For contrary interpretations of similar statutes, see United States v. Kentucky Utils. Co., 124 F.R.D. 146, 151 (E.D. Ky. 1989) (holding that "confidentiality orders arrived at by the parties in the absence of the press and public, even though endorsed by the court, should not be given binding effect when a subsequent motion seeking access is filed"); and Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989) (holding that "a public agency may

2. Applicability to Discovery Materials.—The most controversial aspect of Rule 76a was the inclusion of some documents obtained during pretrial discovery within the term "court records."[76] Those opposing this decision cited the holding in *Seattle Times Co. v. Rhinehart* that protective orders restraining the dissemination of pretrial discovery do not require "exacting First Amendment scrutiny."[77] At the same time, however, the *Rhinehart* Court noted:

> [I]t is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved."[78]

The *Rhinehart* Court's potentially contradictory statements have led to some confusion among the lower federal courts as to whether first-amendment analysis plays a role in assessing the validity of protective orders, or whether orders that meet Federal Rule of Civil Procedure 26(c)'s standard of "good cause" are necessarily constitutional.[79]

Anderson v. Cryovac, Inc.[80] appropriately resolved this ambiguity by concluding:

not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential"). In North Carolina, a presumption of openness similar to that contained in Rule 76a has been mandated for all settlements involving governmental entities. *See* N.C. GEN. STAT. § 132-1.3(b)(2) (1990) (permitting sealing only where the court makes specific findings of an "overriding interest [that] cannot be protected . . . short of sealing the settlement").

76. In testimony before the Texas Supreme Court, Austin attorney David Donaldson, Jr. stated:

> Denying access to discovery information denies the public substantial information about the matters being heard by its courts. . . . The functioning of the discovery process is essential to the judicial process as a whole. If a trial court is allowed to force parties to engage in what probably is the most important aspect of litigation in secret without notice, an opportunity to be heard, and a showing of compelling need, the court is, in effect, turning the courts of this State into private institutions . . . . [That would] represent a fundamental shift from the tradition and practice of our state.

Written testimony of David H. Donaldson, Jr. before the Texas Supreme Court 14-15 (Nov. 30, 1989) (copy on file with the *Texas Law Review*).

77. 467 U.S. 20, 33 (1984); *see, e.g.*, Chamberlain, *supra* note 16, at 348 (citing *Rhinehart* as recognizing that "[h]istorically, courts have treated the results of discovery differently from the public parts of a civil trial"); *see also* Peterson, *supra* note 16, at 344 (arguing that our discovery laws were never "intended to serve a broader public purpose of forcing disclosure of otherwise private, privileged, or confidential information").

78. *Rhinehart*, 467 U.S. at 32 (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

79. *See* Cipollone v. Liggett Group Inc., 106 F.R.D. 573, 583 (D.N.J. 1985), *rev'd on writ of mandamus*, 785 F.2d 1108 (3d Cir. 1986). *Compare* Avirgan v. Hull, 118 F.R.D. 252, 253 (D.D.C. 1987) (stating that the good cause standard of Rule 26(c) "balances the governmental and first amendment interests at stake when a party seeks to disseminate information obtained through pretrial discovery") *with In re* "Agent Orange" Prod. Liab. Litig., 104 F.R.D. 559, 566 (E.D.N.Y. 1985) (asserting that the First Amendment "does not require open access to discovery materials" and "upon a showing of 'good cause' the public access to discovery materials may be limited").

80. 805 F.2d 1 (1st Cir. 1986).

> Although the "strict and heightened" scrutiny tests no longer apply, the first amendment is still a presence in the review process. Protective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause.[81]

Anderson represents the better view that the first-amendment right to access should be considered when determining whether good cause exists under the rules for a protective order. The Texas Constitution may provide even broader access guarantees in its "free speech"[82] and "open courts"[83] provisions. Whatever the extent of the constitutional right,

81. *Id.* at 7. *But see* Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119 (3d Cir. 1986) ("[T]he first amendment is simply irrelevant to protective orders in civil discovery . . . ."). A general presentation is given in Annotation, *Restriction on Dissemination of Information Obtained Through Pretrial Discovery Proceedings as Violating Federal Constitution's First Amendment—Federal Cases*, 81 A.L.R. FED. 471 (1987 & Supp. 1990). Still another view is that greater first-amendment scrutiny should be performed when public officials are involved or the confidentiality order is uncontested. *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 357, 358 (11th Cir. 1987) (Clark, J., dissenting).

82. "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press . . . ." TEX. CONST. art. I, § 8; *see also* LeCroy v. Hanlon, 713 S.W.2d 335, 338-39 (Tex. 1986) (recognizing that the Texas Constitution provides additional state-guaranteed rights). One commentator has noted that evidence indicates that the framers of Texas's free speech provision intended it to "go beyond the protection afforded by the federal charter," J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 117 (1987), and that "[a]lthough the Texas Supreme Court has yet to state *expressly* that section 8 of article I grants greater liberty, it has all but done so." Harrington, *Free Speech, Press, and Assembly Liberties Under the Texas Bill of Rights*, 68 TEXAS L. REV. 1435, 1444 (1990) (citing Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) and O'Quinn v. State Bar, 763 S.W.2d 397, 402-03 (Tex. 1988)). The supreme court has already found that article I, § 8 mandates that "Texas courts should be guided by a principle encouraging the free exchange of information and ideas." Garcia v. Peeples, 734 S.W.2d 343, 349 (Tex. 1987, orig. proceeding).

83. "All courts shall be open . . . ." TEX. CONST. art. I, § 13. Other states have construed identical provisions as providing greater access to the courtroom. *See, e.g.*, Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 260, 418 P.2d 594, 597 (1966) (finding that a state constitutional provision that "[j]ustice in all cases shall be administered openly" precludes a defendant from having a secret criminal trial); State v. Birdsong, 422 So. 2d 1135, 1137 (La. 1982) (citing a state constitutional provision that "All courts shall be open" as support for public trials); *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976) (citing a state constitutional provision that "All courts shall be open" as support for a rule that the "trial and disposition of criminal cases is the public's business and ought to be conducted in public"); KFGO Radio, Inc. v. Rothe, 298 N.W.2d 505, 511 (N.D. 1980) ("The uniform interpretation of the 'all courts shall be open' language is that the language confers an independent right of the public to attend court proceedings."); State ex. *rel.* National Broadcasting Co. v. Court of Common Pleas, 52 Ohio St. 3d 104, 107, 556 N.E.2d 1120, 1124 (1990) (finding a qualified right of access to criminal trials guaranteed by an "open court" provision); Commonwealth v. Fenstermaker, 515 Pa. 501, 506, 530 A.2d 414, 417 (1987) (finding a principle of openness based, in part, on a state constitutional provision providing that "All courts shall be open"); Cohen v. Everett City Council, 85 Wash. 2d 385, 388, 535 P.2d 801, 803 (1975) (holding that a state constitutional provision providing "Justice in all cases shall be administered openly" requires public trials in civil cases); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 548 (W. Va. 1980) ("The uniform interpretation of the mandate that the courts 'shall be open' by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding."). *But see* C. v. C., 320 A.2d 717, 728 (Del. 1974) (declining to read an "open courts" provision as providing greater guarantees of access to the court-

moreover, a state may certainly broaden access on other public policy grounds, as was done through Rule 76a.[84]

All discovery that is filed of record is, of course, accorded the same status as any other filed document. Since interrogatory answers must now be filed under newly amended Rule 168, they always constitute "court records" for purposes of the Rule. Unfiled discovery is considered a court record only if it concerns "matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." A specific exception applies to unfiled discovery obtained in cases originally initiated to protect trade secrets or other "intangible property rights."[85] Unfiled discovery includes any discovery exchanged or examined between counsel, but would usually not include correspondence such as settlement letters.

Because Rule 76a concerns disclosability and not discoverability, it applies only after it is determined that the matter in question is reasonably calculated to lead to the discovery of admissible evidence and is not privileged. The Rule does not alter existing discovery privileges. At the same time, however, a litigant's fear of being unable to justify restricting disclosure under Rule 76a may, as a practical matter, create more resistance to discovery. Trial courts must resolve discoverability and disclosability issues separately. A party's self-perceived inability to obtain nondisclosure under Rule 76a should never be permitted to justify nondiscoverability under Rule 166b.

3. Applicability to Protective Orders.[86]—Rule 166b(5)(c) continues to authorize the entry of protective orders to seal or otherwise limit disclosure of the results of discovery.[87] Under the new amendments, how-

room). Citing the finding in *LeCroy*, 713 S.W.2d at 341, that the right of access guaranteed by article I, § 13 "is a substantial state constitutional right," the Texas Attorney General argued that "[s]ealing important court records that give information to injured individuals which enable them to redress their grievances violates, the spirit, if not the letter, of section 13." Mattox Letter, *supra* note 25, at 3.

84. *See supra* text accompanying notes 23-51.

85. *See infra* text accompanying note 153.

86. Many procedural safeguards of the type incorporated in Rule 76a have been required by some federal courts with regard to protective orders entered under FED. R. CIV. P. 26(c). *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139, 147 (2d Cir.) (approving the district court's order that unsealed discovery materials and setting forth a procedure for defendants to seek continued protection of any particular materials), *cert. denied sub nom.* Dow Chem. Co. v. Ryan, 484 U.S. 953 (1987). For further references, see the cases collected at J. MOORE, J. LUCAS & G. GROTHEER, JR., 4 MOORE'S FEDERAL PRACTICE §§ 26.68, 26.73-.75 (2d ed. 1989 & Supp. 1990); C. WRIGHT & A. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE §§ 2035-2036, 2042-2043 (1970 & Supp. 1990); and Annotation, *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R. 3d 598 (1978).

87. Protective orders are comprehensively reviewed in F. HARE, JR., J. GILBERT & W. REMINE, CONFIDENTIALITY ORDERS (1988) [hereinafter CONFIDENTIALITY ORDERS].

ever, any such order applicable to "court records" as defined in Rule 76a[88] must be made in accordance with the procedures of that Rule.[89] Protective orders under Rule 166b(5)(a) and (b) for purposes other than concealing discovery, such as to resolve conflicts over scheduling or location, are not subject to Rule 76a.

The public sharing of information under Rule 76a differs in scope from the sharing of information among lawyers involved in similar litigation pursuant to *Garcia v. Peeples*.[90] The broader access of Rule 76a is designed to avoid harm by informing law enforcement agencies as well as the public before injury occurs rather than making information available only after litigation has been initiated. Circumstances may exist in which attorney sharing will be authorized under *Garcia* but sealing to others will be justified, such as when a competitor would gain unfair access to appropriately protected business information.[91] A general sealing order is not necessarily determinative of whether information may be shared by attorneys.

D. Retaining, Destroying, and Accessing Court Records

1. Traditional Retention of Unfiled Discovery.—At one time all discovery was filed at the courthouse. For the administrative convenience of the clerks and to minimize the storage problems involved with increasingly voluminous litigation files, the responsibility for maintaining discovery was imposed upon attorneys as officers of the court.[92] Prior to enactment of Rule 76a, remedies existed to deal with attorneys who breached this duty by failing to preserve documents.[93] While these remedies have not been altered, new questions now arise regarding responsibilities imposed to retain discovery once litigation is concluded. Because

88. Protection of discovery not defined as "court records" requires only the "good cause" showing of Rule 166b(5)(c).

89. This represents a change from the general attitude expressed in Houston Chronicle Publishing Co. v. Hardy, 678 S.W.2d 495 (Tex. App.—Corpus Christi, orig. proceeding [leave denied]), *cert. denied*, 470 U.S. 1052 (1984), that the trial court is accorded exceedingly broad discretion in denying third parties "*their claimed* right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings." *Id.* at 499.

90. 734 S.W.2d 343 (Tex. 1987, orig. proceeding). In *Garcia*, a products liability plaintiff who was granted discovery subject to a protective order challenged that order as an abuse of the trial judge's discretion, in part because the order prevented him from sharing discovery information with nonparties. *Id.* at 346. The Texas Supreme Court upheld his challenge, citing the gains in truthfulness and efficiency that sharing information can achieve. *Id.* at 347.

91. "[P]ublic policies favoring shared information [among attorneys] require that any protective order be carefully tailored to protect . . . proprietary interests while allowing an exchange of discovered documents." *Id.* at 348.

92. *See* Figari, Jr., Graves & Dwyer, *Texas Civil Procedure*, 42 Sw. L.J. 523, 540 (1988) ("Apparently in an effort to conserve file space and to reduce costs, the supreme court eliminated filing requirements for depositions and certain other discovery documents.").

93. *See infra* notes 102-06 and accompanying text.

a limited class of unfiled discovery is included within the definition of "court records," destruction of those documents constitutes spoliation of court records just as tearing up part of the clerk's file would.

2. Formulating a Retention Plan.—Rule 76a, like the prior rules requiring attorneys to maintain responses to discovery, provides no specific guidelines concerning the length of time these unfiled court records must be retained. The scope of that duty is a function of the type of information involved and whether a closure order has been granted. When records are sealed, the obligation to retain them is probably greater, because a court may later have good cause to unseal them and may exercise its continuing jurisdiction to do so.[94]

In the absence of an amendment to the Rule specifying the duration for which records must be maintained, courts may refer to the preexisting schedule for the retention of court records. Most civil district court records are maintained for twenty years.[95] For depositions, however, the Texas Supreme Court guidelines[96] generally allow disposal one year after final judgment has been rendered and all appellate remedies have been exhausted.[97] While this order is not directly applicable to records attorneys hold as custodians for the court, it would not be unreasonable to destroy unsealed documents one year after final judgment and all appellate remedies have been exhausted. The purpose of the Rule is served because during that time the public has been afforded an opportunity to inspect and opposing counsel has the ability to retain copies. Sealed documents are more problematic. Because the court has continuing jurisdiction to unseal them at any time, sealed documents require longer retention. Paragraph 6 requires that the order indicate the period that the records are to remain sealed. If the documents are sealed for only a short time, an attorney should preserve them for at least one year beyond the mandated sealing period. Lawyers concerned with prolonged storage may file the documents at the courthouse, turn them over to the custody

94. TEX. R. CIV. P. 76a(7).

95. 2 TEXAS STATE LIBRARY, TEXAS COUNTY RECORDS MANUAL 31 (rev. 1989).

96. Texas Rule of Civil Procedure 209 instructs the clerk of the court to follow the disposal guidelines promulgated by the Texas Supreme Court. The court's order, effective January 1, 1988, found immediately following Rule 209, generally applies to

> cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

Supreme Court Order Relating to Retention and Disposition of Deposition Transcripts and Depositions upon Written Questions (1988) [hereinafter Supreme Court Order].

97. Supreme Court Order, *supra* note 96.

of their clients with appropriate preservation instructions, or store the documents on microfilm or any other form that preserves their legibility.

Attorneys contemplating destruction of sealed records should weigh a number of factors in determining whether destruction is proper: the amount of time that has lapsed since a final judgment, whether a nonappealable judgment on the merits has been entered, the nature of the interest found to justify sealing, any changed circumstances, and the likelihood of similar litigation. The concern for public health and safety embodied in the Rule suggests that sealed documents related to this subject require longer retention periods.

3. Document Destruction.—"Spoliation," defined as the destruction or significant alteration of a document or instrument,[98] is an illegal[99] and unethical[100] means of evading discovery and adverse publicity.[101]

Texas courts have a number of tools available to discourage spoliation and to encourage parties to maintain discoverable evidence. Litigants confronted by opposing parties who refuse to produce documents in response to a proper discovery request may seek pretrial sanctions for abuse of discovery.[102] A court may stay the proceedings pending the

98. *See* BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

99. Texas addresses the problem of destruction of evidence with a statute providing that "a person commits an offense if, knowing that an . . . official proceeding is pending or in progress, he . . . alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the . . . official proceeding." TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1989).

Although the statute may be applied in civil proceedings, to date all reported cases deal with criminal investigations. *See* Spector v. State, 746 S.W.2d 945, 945 (Tex. App.—Austin 1988, no pet.); Russell v. State, 739 S.W.2d 923, 929 (Tex. App.—Dallas 1987), *pet. dism'd*, 772 S.W.2d 129 (Tex. Crim. App. 1989); Cuadra v. State, 715 S.W.2d 723, 724 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd); Dillard v. State, 640 S.W.2d 85, 86 (Tex. App.—Fort Worth 1986, no pet.); Comment, *Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 226 (1989).

100.

> [A lawyer shall not] unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

TEX. DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 67, Rule 3.04(a) (1989); *accord* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1980) ("[A lawyer should not] [c]onceal or knowingly fail to disclose that which he is required by law to reveal."); *id.* EC 7-27 (noting that a lawyer should not suppress evidence that a client has a legal obligation to reveal or produce); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1983) ("[A lawyer shall not] unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."). *See generally* Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

101. For a comprehensive treatment of this issue, see J. GORELICK, S. MARZEN & L. SOLUM, DESTRUCTION OF EVIDENCE (1989).

102. TEX. R. CIV. P. 215(2)(b).

production of evidence,[103] dismiss the action,[104] or even strike the pleadings of the offending party and enter a default judgment for the movant.[105] If a court learns that a party destroyed crucial evidence, it may instruct the jury to infer, as a matter of law, that the destroyed evidence is presumed to have favored the opposing party.[106]

In response to criticism that neither pretrial sanctions nor the adverse inference rule are sufficient to deter potential spoliation,[107] courts in other states have recognized the torts of intentional or negligent spoliation of evidence.[108] Cases recognizing the tort of negligent destruction of evidence require that the spoliator have violated an existing duty to preserve evidence foreseeably necessary in a trial.[109] The tort of inten-

103. *See* Harrell v. Fashing, 562 S.W.2d 544, 545 (Tex. Civ. App.—El Paso 1978, no writ); *see also* TEX. R. CIV. P. 215(2)(b)(1) (authorizing a court to issue an order disallowing further discovery by the disobedient party).

104. *See* Gonzales v. Conoco, Inc., 722 S.W.2d 247, 249 (Tex. App.—San Antonio 1986, no writ); Jarrett v. Warhola, 695 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd).

105. TEX. R. CIV. P. 215(2)(b)(5); *see* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985); First State Bank v. Chappell & Handy, P.C., 729 S.W.2d 917, 921 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); Woodruff v. Cook, 721 S.W.2d 865, 868-69 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); City of Houston v. Arney, 680 S.W.2d 867, 870-71 (Tex. App.—Houston [1st Dist.] 1984, no writ); Southern Pac. Transp. Co. v. Evans, 590 S.W.2d 515, 519 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), *cert. denied*, 449 U.S. 994 (1980).

106. CONFIDENTIALITY ORDERS, *supra* note 87, § 5.21, at 103. A presumption invoked against a spoliator was approved by H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340 (Tex. Civ. App.—Waco 1975, writ dism'd), in which the court held:

> Failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party. The force of evidence is greatly increased by the failure of the opposite party to rebut it, where it is obvious that the means are readily accessible to him.

Id. at 343; *see also* Fuller v. Preston State Bank, 667 S.W.2d 214, 220 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (holding that a party is entitled to show his opponent's destruction of documents because it "raises a presumption that the evidence would have been unfavorable to the spoliator"). A sample instruction concerning this presumption is found in 23 AM. JUR. PLEADINGS & PRACTICE FORMS ANNOTATED, Trial Form 155 (M. Harrington ed. 1973).

107. *See* CONFIDENTIALITY ORDERS, *supra* note 87, § 5.21, at 106 (stating that clever spoliators may avoid sanctions by destroying documents before a court order against the destruction is issued); Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEXAS L. REV. 1185, 1219-21 (1983) (noting that criminal sanctions are rarely imposed). *But see* Comment, *Spoliation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 563, 594 (1989) (arguing that the variety of sanctions and the broad discretion of the trial court afford a sufficient remedy against spoliators).

108. *See, e.g.*, Smith v. Superior Court, 151 Cal. App. 3d 491, 502, 198 Cal. Rptr. 829, 837 (1984) (intentional tort); Bondu v. Gurvich, 473 So. 2d 1307, 1312-13 (Fla. Dist. Ct. App. 1984) (negligent tort), *review denied sub nom.* Cedars of Lebanon Hosp. Care Center v. Bondu, 484 So. 2d 7 (Fla. 1986).

109. "This requirement [of a pre-existing duty to preserve evidence] has proven to be the most frequent stumbling block for negligent spoliation claims." Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1092 (1990). Some courts have found no pre-existing duty without evidence that the parties had previously agreed to preserve evidence. *See, e.g.*, Reid v. State Farm Mut. Auto. Ins. Co., 173 Cal. App. 3d 557, 579-80, 218 Cal. Rptr. 913, 926-27 (1985); Spano v. McAvoy, 589 F. Supp. 423, 427 n.2 (N.D.N.Y. 1984). However, the weight of authority is to the contrary:

> Most courts have ignored the agreement requirement and have indicated that duty depends

tional spoliation of evidence is analogous to the more widely recognized tort of intentional interference with a prospective business advantage.[110] With recognition of the latter tort firmly established in Texas courts,[111] one commentator has suggested that an intentional spoliation tort could easily be fashioned from the elements of the intentional interference tort.[112] Evasion of Rule 76a through the loss of critical documents would provide an additional justification for recognizing this cause of action.

The possibility of strict penalties for the destruction of evidence and an increase in judicial vigilance should also cause potential litigants to evaluate and revise their routine document destruction programs. Courts confronted by a litigant who destroyed documents are advised to ask two questions:

> First, is the program designed or is it maintained to target for destruction documents which are routinely relevant to ongoing or clearly foreseeable litigation, such as safety and testing reports; and second, was the program operated so as to destroy evidence relevant to the instant litigation while it was pending, imminent, or clearly foreseeable?[113]

Consistent with federal precedent,[114] attorneys or their clients who routinely destroy documents must institute procedures for saving documents that are relevant to any foreseeable or pending judicial proceeding.[115]

on other factors such as the foreseeability of the harm incurred, the existence of a statute or regulation on point, the existence of a "special relationship," the defendant's voluntary assumption of the duty, and the status of the spoliator as a party to the underlying suit. Kerkorian, *supra*, at 1094.

Because the trial court maintains continuing jurisdiction to unseal documents, litigants are on notice that documents currently sealed may become public records. Parties are thus on notice of a duty to preserve records.

110. This analogy was initially noted in *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 836; *see also* Comment, *supra* note 99, at 221-23 (suggesting that Texas lawmakers could model the tort of intentional spoliation of evidence after the tort of intentional interference with prospective economic advantage because of the similarity of the two actions). A tort of intentional spoliation of evidence closes some of the loopholes created by the criminal statutes against spoliation: "An individual would no longer be able to escape liability by destroying evidence before a legal proceeding was instituted . . . ." Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985).

111. *See, e.g.*, Sterner v. Marathon Oil Co., 767 S.W.2d 686, 689 (Tex. 1989); Martin v. Phillips Petroleum Co., 455 S.W.2d 429, 435 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

112. Comment, *supra* note 99, at 223.

113. Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1191 (1987).

114. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 750, 751 (E.D.N.Y. 1980) (noting that there is an obligation to preserve requested documents and urging good faith efforts to preserve other relevant documents).

115.

> Suspension procedures . . . deal with halting the destruction of documents when the company is served with a subpoena or a request for production. In concept, pre-prepared

4. Access to Unfiled Discovery.—A nonparty seeking access to an unfiled document need only approach an attorney of a party who has custody of it for an opportunity to inspect and copy the information.

Although reasonable access must be afforded, remedies are available to those subjected to unreasonable demands for access. By filing all previously unfiled discovery, an attorney can simply refer all inquiries to the clerk's office. If the specific discovery for which access is sought proves so extensive as to make filing infeasible, and in very unusual circumstances in which a proper showing concerning repeated requests can be made, a protective order may specify access procedures.[116]

A party may not condition release of the documents on the return or destruction of any copies made. Because public access is mandated by the Rule, access cannot be conditioned by agreements between counsel. When making unsealed documents available to the public, opposing counsel should not be restricted by a requirement that other parties be notified of those with whom information is shared.

E. Interests That May Support a Sealing Order

While the Rule does not enumerate the interests that justify a sealing order,[117] its reference to a "specific, serious and substantial interest" bars generalized claims,[118] such as promoting settlement,[119] avoiding in-

> memoranda are to be sent immediately to all employees having responsibility for records, directing them not to destroy any documents. After identifying the files that are responsive to the discovery, the record destruction program is reinstated for unrelated areas.

CONFIDENTIALITY ORDERS, *supra* note 87, § 5.20, at 103.

116. TEX. R. CIV. P. 166b(5)(b).

117. An earlier version of Rule 76a did specify four protected interests: privacy rights, constitutional rights, trade secrets, and a sexual assault victim's identity. *See* Transcript of Texas Supreme Court Advisory Comm. 74 (Feb. 9, 1990) [hereinafter Transcript] (copy on file with the *Texas Law Review*) (statement of Charles Herring). Fearing that courts would not apply the balancing test but would merely authorize secrecy for any documents that fell within the enumerated categories, the advisory committee rejected this approach. *See id.* at 82 (statement of Tom Leatherbury).

118. "Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater is the public's need to know." Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *see also* United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978) (observing that a movant seeking a protective order has the burden of showing necessity based on "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"); General Dynamics Corp. v. Selb Mfg. Corp., 481 F.2d 1204, 1212 (8th Cir. 1973) (denying defendants' motion for a protective order to stay discovery where they gave no particular demonstration of injury), *cert. denied*, 414 U.S. 1162 (1974); CONFIDENTIALITY ORDERS, *supra* note 87, § 6.9, at 135 ("Courts have generally denied relief because broad allegations of harm to a corporation's reputation do not satisfy the prerequisites for a protective order.").

119. Some courts have expressed skepticism of the commonly advanced rationale that secrecy is an important inducement to settlement. For example, in United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989), the court modified a dismissal order reached by agreement of the parties. The court concluded that the provision requiring destruction of documents obtained by the government during discovery should be altered to require the defendant to show continued good

jury to reputation,[120] expediting discovery,[121] and discouraging barratry.[122]

Certain types of privacy, economic, and governmental interests may merit protection under Rule 76a's stringent standard. The categories below are among the ones that existing case law provides precedent for protecting. Merely asserting that information falls within one of these categories will not sustain a sealing order, however, because a balancing test must still be applied.

cause for confidentiality. *Id.* at 151. In so deciding, the court reasoned: "[S]ettlements will be entered into 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." *Id.* at 153.

In adopting Rule 76a, the Texas Supreme Court determined that the benefits of open access outweigh any benefits that secrecy may offer toward achieving a settlement. Other courts have reached similar conclusions. *See, e.g.*, Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 346 (3d Cir. 1986) ("[T]he generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access.").

120. It is widely held that generalized allegations of embarrassment or harm to reputation will not support a sealing order. *See* Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982) ("[A] naked conclusory statement that publication . . . will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether [a bank document] may be kept under seal."), *cert. denied*, 460 U.S. 1051 (1983); Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 925 (1985) ("[M]erely asserting annoyance and embarrassment is wholly insufficient to demonstrate good cause."); Atlanta Journal v. Long, 258 Ga. 410, 414, 369 S.E.2d 755, 759 (1988) ("Embarrassment has always been a problem in civil suits, yet traditionally it has not prompted trial courts to routinely seal pre-judgment records.").

An earlier draft of the Rule contained the following provision: "Mere sensitivity, embarrassment or desire to conceal the detail of litigation is not in and of itself a compelling need [warranting protection]." *See* Transcript, *supra* note 117, at 94 (statement of Charles Herring). The passage was deleted from the final version in part because it was thought to be too obvious a point for inclusion. *See id.* Also, family law attorneys thought the provision was too broad, but their concern was addressed by exempting cases arising under the Family Code from the definition of court records. *See id.*; TEX. R. CIV. P. 76a(2)(a)(3).

121. The court in *In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139 (2d Cir.), *cert. denied sub nom.* Dow Chem. Co. v. Ryan, 484 U.S. 953 (1987), rejected this argument, finding that a document-by-document assessment would have to be made before trial anyway and the public interest in the litigation outweighed any inconvenience to the parties. *Id.* at 146, 148; *see also* Prepared Statement of Arthur H. Bryant Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 9 (May 17, 1990) (copy on file with the *Texas Law Review*) (noting that duplicated discovery created by court secrecy causes the judicial system and taxpayers to "pay an enormous cost" and that the resulting "inefficiency is massive").

It is an exaggeration to claim that Rule 76a will swamp attorneys and judges with additional work. Counsel already scrutinizes discovery requests, even thousand-page requests, to develop a feel for opposing counsel's legal theory. This same review can be used to categorize documents for which protection is sought under Rule 76a. A judge, however, will not be forced to wade through all these documents. Cautious lawyers should index the documents in a manner convenient to review. *See* TEX. R. CIV. P. 166b(4) (requiring a party who objects to a discovery request to segregate and produce the discovery if the trial court determines an in camera review is necessary). Otherwise, the judge may overrule their motion for a confidentiality order.

122. Texas has already established procedures to reduce barratry. *See* TEX. PENAL CODE ANN. § 38.12 (Vernon Supp. 1991); TEX. DISCIPLINARY RULES OF PROF. CONDUCT, *supra* note 67, Rule 8.04(a)(8) (1989); *see also* CONFIDENTIALITY ORDERS, *supra* note 87, § 7.10, at 204-11 (rejecting barratry as a ground supporting a confidentiality order).

1. The Right of Privacy.—Both the United States[123] and Texas Constitutions[124] protect an individual's right of privacy. Unlike individuals, corporations do not appear to possess an equivalent right.[125] The United States Supreme Court has noted that " 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of [some] particular guarantee[s] has been limited to the protection of individuals."[126]

The Texas Supreme Court has similarly recognized the right of privacy "as the right of an *individual* to be left alone, to live a life of seclusion, [and] to be free from unwarranted publicity."[127] Other jurisdictions,[128] the *Restatement (Second) of Torts*,[129] and commentators[130] agree that a corporation has no personal right of privacy.[131] This

123. Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *see also* Whalen v. Roe, 429 U.S. 589, 599 (1977) (recognizing an "*individual* interest in avoiding disclosure of personal matters") (emphasis added); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("That the *individual* shall have full protection in person and in property is a principle as old as the common law . . . .") (emphasis added).

124. *See infra* note 127.

125. *See* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."); California Bankers Ass'n v. Shultz, 416 U.S. 21, 65 (1974) (favorably quoting *Morton Salt's* language concerning a corporate right to privacy).

126. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 779 n.14 (1978). The Court continued: "Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as . . . equality with individuals in the enjoyment of a right to privacy . . . ." *Id.*

Other Supreme Court decisions support this conclusion. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of the law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . ." Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); *see also* Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2925 (1989) (O'Connor, J., concurring and dissenting) ("[A] corporation has no . . . right to privacy . . . ."); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 34 (1986) (Rehnquist, J., dissenting) ("[T]he constitutional right of privacy [has] been denied to corporations based on their corporate status."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 184 (1951) (Jackson, J., concurring) ("[T]he right of privacy does not extend to . . . corporations [, which are] dependent upon the state for their charters.").

127. Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973) (emphasis added); *see also* Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) ("[A] right of *individual* privacy is implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights." (emphasis added) (quoting the introduction to TEX. CONST. art. I)).

128. *See, e.g.*, Clinton Community Hosp. Corp. v. Southerland Md. Medical Center, 374 F. Supp. 450, 456 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975); Maysville Transit Co. v. Ort, 296 Ky. 524, 526, 177 S.W.2d 369, 370 (1944); Health Cent. v. Commissioner of Ins., 152 Mich. App. 336, 346, 393 N.W.2d 625, 630 (1986); Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc., 43 A.D.2d 178, 180, 349 N.Y.S.2d 736, 738 (1973).

129. § 652I comment c (1977) ("A corporation, partnership or unincorporated association has no personal right of privacy.").

130. *See* CONFIDENTIALITY ORDERS, *supra* note 87, § 7.9, at 199 ("[A]n overwhelming majority of the courts hold that a corporation has no legal right to privacy."); Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1663 (1980) ("Only private individuals are protected: a corporation has no legal right to privacy . . . .").

131. Advocates of a corporate right to privacy cling to a vacated circuit court opinion to support their argument. *See, e.g.*, Kearney & Benson, *supra* note 11, at 38 n.6.; Peterson, *supra* note 16, at

does not suggest that a corporation cannot protect a legitimate interest in confidentiality, but only that privacy analysis is not to be employed.

An individual may enjoy a privacy right in one of the following categories, but that right must still overcome the balancing test in paragraph 1—an inquiry that begins with a presumption of openness.[132] Of course, for one to have a claim to privacy, the information must in fact be private. Information that is already disseminated is no longer private.[133]

(a) Employment records.—Employees often surrender a great deal of personal autonomy by revealing information to employers that is otherwise not made public.[134] Recognizing the employee's interest in these records, both federal[135] and state[136] statutes have exempted certain personnel files from public inspection requirements. Likewise employees, especially those not party to the suit, may argue that their privacy interest in their employment records is sufficient to fulfill the criteria in paragraph 1.[137]

(b) Financial information.—A substantial interest in avoiding disclosure may exist for financial information[138] concerning bank ac-

347 n.14. The questionable authority upon which proponents rely is Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984). The D.C. Circuit granted rehearing en banc and vacated this opinion, but the new opinion did not reach the issue of a corporate right of privacy. *See* Tavoulareas v. Washington Post Co., 737 F.2d 1170 (D.C. Cir. 1984) (en banc) (per curiam).

132. *See supra* text accompanying notes 53-54.

133. Jordan v. Court of Appeals, 701 S.W.2d 644, 649 (Tex. 1985) (holding that protections afforded by a discovery privilege are waived by voluntary disclosure of the privileged documents).

134. *See* PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 356-57 (1977).

135. *See* Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1988) (exempting personnel and similar files from disclosure when it would constitute a clearly unwarranted invasion of personal privacy).

136. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(2) (Vernon Supp. 1991) (exempting information in personnel files from disclosure under the Open Records Act if disclosure would constitute a clearly unwarranted invasion of personal privacy).

137. *See* Comment, *The First Amendment and Pretrial Discovery Hearings: When Should the Public and Press Have Access?*, 36 UCLA L. REV. 609, 635 (1989) (arguing that discovery involving confidential employment records affects a protectable privacy interest).

138. *See* Plaquemines Parish Comm'n Council v. Delta Dev. Co., 472 So. 2d 560, 568 (La. 1985) (recognizing that "personal financial information [should] not be made public except to satisfy important rights of others or an overriding public interest in the disclosure").

counts,[139] credit reports, and income tax returns.[140]

(c) Lists of group members.—Identifying individual members of a group may infringe on their constitutional freedom of association.[141]

(d) Medical records.—Because of the value of confidentiality in healing and helping relationships,[142] both federal[143] and state[144] statutes exempt medical records from disclosure. Courts have denied disclosure of blood donors' identities to an AIDS victim because society's interest in maintaining a volunteer blood supply outweighs disclosure,[145] and granted a protective order that balanced a drug company's need for medical records against the non-party's interest in maintaining confidentiality.[146]

139. *See* TEX. REV. CIV. STAT. ANN. art. 342-705, §§ 1, 5 (Vernon Supp. 1991) (setting forth the limited circumstances under which financial institutions may be required to disclose or produce depositors' or borrowers' records); *see also In re* Southern Indus. Banking Corp., 49 Bankr. 760 (E.D. Tenn. 1985) (granting a protective order to preserve proprietary interest in an insolvent bank's financial records, including a bank examination report, and to protect the privacy of bank customers whose names were listed in the records); *cf.* Texas Nat'l Bank v. Lewis, 793 S.W.2d 83, 86 (Tex. App.—Corpus Christi 1990, orig. proceeding [leave denied]) (finding that the trial court did not abuse its discretion by ordering production of bank records without notice to affected customers, on the condition that the accounts be identified at trial by code, not customer name). In California, a bank must notify a customer when litigation to which the customer is not a party may require the disclosure of his bank records. Valley Bank v. Superior Court, 15 Cal. 3d 652, 658, 542 P.2d 977, 980, 125 Cal. Rptr. 553, 556 (1975). *But see* State v. Klatenhoff, 71 Haw. 598, 801 P.2d 548, 552 (1990) (following the majority of states by finding there is no reasonable expectation of privacy in personal bank records).

140. *See* Maresca v. Marks, 362 S.W.2d 299, 301 (Tex. 1962) (holding tax returns discoverable "only because the pursuit of justice between litigants outweighs protection of their privacy," but observing that "sacrifice of the latter should be kept to the minimum"); *see also* Sendi v. Prudential-Bache Sec., 100 F.R.D. 21, 23 (D.D.C. 1983) (entering a protective order after weighing the special privacy and confidentiality interests accorded tax returns against the need for discovery). As with other similar interests, justification for protection may be greatly reduced or completely eliminated by prior disclosure.

141. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984) (affirming the grant of a protective order sought by a religious group's leader to prevent members' identities from being disclosed in violation of their freedom of association).

142. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1987) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."); H. SCHUCHMAN, L. FOSTER & S. NYE, CONFIDENTIALITY OF HEALTH RECORDS 3 (1982).

143. Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1988) (exempting medical and similar files when the disclosure would constitute a clearly unwarranted invasion of personal privacy).

144. *See* TEX. REV. CIV. STAT. ANN. art. 5561h(2)(b) (Vernon Supp. 1991) (providing that records containing the identity, diagnosis, evaluation, or treatment of a patient or client that are created or maintained by a professional are confidential absent certain exceptions); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(15) (Vernon Supp. 1991) (exempting certain birth and death records from the Open Records Act); *see also id.* § 3(a)(18) (exempting information contained on or derived from certain triplicate prescription forms filed with the Department of Public Safety from disclosure).

145. Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 538 (Fla. 1987).

146. Deitchman v. E. R. Squibb & Sons, 740 F.2d 556, 566 (7th Cir. 1984).

(e) Sexual assault victims.—Similarly, sexual assault victims have been permitted to conceal their identities.[147]

2. Trade Secrets.—"Trade secret" is a much used and abused term in litigation. Far more is required to create a trade secret than simply showing that the information was generated in the course of trade or commerce.[148] Section 757 of the *Restatement (First) of Torts*, cited with approval by the Texas Supreme Court,[149] enumerates a number of factors that must be established to demonstrate both the true existence of a secret and its value to the owner.[150] A genuine trade secret is certainly the

147. *See* Doe v. Sarasota-Bradenton Fla. Television, 436 So. 2d 328, 330 (Fla. 1983) (denying appellant, on the facts of her specific case, the right to recover damages from a television station who identified her as the rape victim in an ongoing trial, but holding that state prosecutors should and could have legally sought a protective order to prevent that information from being made public). *See generally* W. FREEDMAN, THE RIGHT OF PRIVACY IN THE COMPUTER AGE § 2.4, at 70-71 (1987) (discussing several instances in which the disclosure of a rape victim's name was in controversy).

148. Establishing a trade secret also demands more than a corporate desire to prevent general public dissemination or a claim that some information not generally known may be prejudicial. This is consistent with the conclusion of Garcia v. Peeples, 734 S.W.2d 343 (Tex. 1987, orig. proceeding), in which the court stated: "[R]equirements of a particular, articulated and demonstrable injury, as opposed to conclusory allegations, apply to motions for protective orders under Rule 166b-4." *Id.* at 345; *see also In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 40, 44 (C.D. Cal. 1984) (asserting that "conclusory statements regarding commercial sensitivity" are insufficient because "accommodat[ing] the public relations interests of litigants" is not a judicial responsibility); United States v. Exxon Corp., 94 F.R.D. 250, 251-52 (D.D.C. 1981) (holding that "vague and conclusory generalizations" will not support a protective order); *supra* notes 118-20.

Parties seeking trade secret protection must show that they made reasonable efforts to maintain the secrecy of the information. Therefore, neither patented information nor a process discoverable through reverse engineering is a trade secret. *See* K. SCHEPPEL, LEGAL SECRETS 232, 233 (1988). Reverse engineering is "starting with the known product and working backward to divine the process which aided in its development or manufacture." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

149. The court first cited § 757 in Hyde Corp. v. Huffines, 158 Tex. 566, 575, 314 S.W.2d 763, 769 (applying § 757 to conclude that information obtained by a licensee was a protectable trade secret and that its disclosure or use would constitute a breach of confidence), *cert. denied*, 358 U.S. 898 (1958). *See also* K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv., 158 Tex. 594, 605, 314 S.W.2d 782, 789 (citing the section for the proposition that a device or process need not be patentable in order to be a trade secret), *cert. denied*, 358 U.S. 898 (1958).

150. Comment b of § 757 suggests relying on the following factors to determine if a trade secret exists:

1. The extent to which the information is known outside of the business;
2. The extent to which the information is known by employees and others involved in the business;
3. The extent of the measures taken by the company to guard the secrecy of the information;
4. The value of the information to the company and to its competitors;
5. The amount of effort or money expended in developing the information; and
6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT (FIRST) OF TORTS § 757 comment b (1939). Comment b has been employed to determine whether a trade secret exists. *See* Expo Chem. Co. v. Brooks, 572 S.W.2d 8, 11 (Tex. Civ. App.—Houston [1st Dist.] 1978) (suggesting that a court may find the existence of a trade secret

for notices of county governmental meetings.[179] This required notice must include a specific description of both the nature of the case and the records sought to be sealed. For example, a notice which indicates only that "confidential business information" is to be sealed is insufficient. A more particularized description is necessary to further the Rule's purposes; it must explain why sealing is sought and what type of records are involved without endangering the alleged secret. Where this requirement is satisfied by cross-referencing other filings that identify what is sought to be sealed, these matters must be attached to the notice so that the public can immediately determine the subject of the proceeding.

The notice must be posted at least fourteen days prior to the hearing on the motion to seal.[180] A verified copy of the posted notice must also be forwarded to the clerk of the supreme court so that both the capitol press and public interest groups based in Austin will be made aware of the proposed sealing. This procedure will also establish a data base concerning the extent of secrecy requests throughout the state.

The Rule makes clear that the hearing on sealing must be open to the public.[181] This unqualified requirement ensures that the public will have an opportunity to determine why the sealing occurred by either attending the hearing or obtaining a copy of the transcript. Attentive judges will have the hearing transcribed to provide a lasting public record that the public interest was considered and to afford those not present a chance to determine whether they possess an interest in unsealing the documents. To protect the interests asserted in support of sealing, the court may conduct an in camera inspection of records as necessary. Nonparties may intervene for the limited purpose of participating on the sealing issue. Pursuant to procedures utilized for jurisdictional special appearances under Rule 120a, the court may consider evidence at the hearing. The court may base its determination on the pleadings, any stipulations of the parties, affidavits and attachments filed by the parties, discovery results, and oral testimony.[182] Any affidavits must be served at least seven days in advance to enable an opponent to issue subpoenas or conduct discovery. Affidavits may be utilized by both those supporting

179. TEX. R. CIV. P. 76a(3).

180. TEX. R. CIV. P. 76a(4).

181. TEX. R. CIV. P. 76a(3) ("hearing will be held in open court"); TEX. R. CIV. P. 76a(4) ("hearing, open to the public").

182. TEX. R. CIV. P. 120a(3). The Rule supplements other guarantees that court proceedings will be open to the press and to the public. *See, e.g.*, TEX. CONST. art. I, § 8; TEX. CODE CRIM. PROC. ANN. art. 52.07 (Vernon 1979); *see also* Eagle Printing Co. v. Delaney, 671 S.W.2d 883 (Tex. Crim. App. 1984, orig. proceeding) (finding that a district judge lacked authority to close court proceedings to the press).

type of "specific, serious and substantial interest" that should be considered in the balancing process mandated by paragraph 1 of Rule 76a.

Paragraph 2(c) exempts from coverage of the Rule unfiled "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights." A party demonstrating that its action is a trade secret infringement action can, therefore, protect its discovery from disclosure without the necessity of satisfying the balancing test. The terminology of paragraph 2(c) raises two additional questions: what interests other than trade secrets are exempted and whether trade secrets are themselves a property interest.

Federal Rule of Civil Procedure 26(c), after which Rule 166b was patterned, authorizes protective orders for "a trade secret or other confidential research, development or commercial information." The Texas Supreme Court similarly sought through Rule 76a to protect a class of information that was broader than the traditional notion of a trade secret as purely technical knowledge,[151] but less expansive than the terminology of Rule 26(c). The court, however, overlooked the similarity between the judicial criteria for interpreting the terms "other confidential research, development or commercial information" in Rule 26 and those used to identify trade secrets, which render these additional categories little more than surplusage.[152] The same can probably also be said for the term "intangible property rights" as employed in paragraph 2(c) of Rule 76a.[153]

The language "*other* intangible property rights" was not chosen to create the implication that trade secrets are property rights for all purposes. The Texas Supreme Court most recently addressed this question in *Garcia v. Peeples*,[154] rejecting the argument that "allowing shared discovery amounts to an unconstitutional deprivation of property."[155] In

based on the six factors in comment b to § 757 rather than on the existence of an express agreement of confidentiality), *rev'd on other grounds*, 576 S.W.2d 369 (Tex. 1979).

151. *See* Annotation, *Discovery—Trade Secrets*, 17 A.L.R.2d 383, 385 (1951).

152. Federal courts generally have not differentiated between trade secrets and other confidential and commercial information. *See* Deford v. Schmid Prods. Co., 120 F.R.D. 648, 653 (D. Md. 1987); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889-90 (E.D. Pa. 1981). In CONFIDENTIALITY ORDERS, *supra* note 87, § 7.8, at 176-79, the authors argue that Rule 26(c)(7) contemplates only one category of information because (1) the language of the Rule embraces a single ground of relief, (2) both terms contemplate the same legal interest, (3) both terms are governed by identical criteria, and (4) the defendant's burden of proof is the same.

153. A "trade secret" should be read to include more than purely technical types of information. Peterson, *supra* note 16, at 347 n.1. It is for this reason that the phrase "intangible property rights" was included in the Rule.

154. 734 S.W.2d 343 (Tex. 1987, orig. proceeding).

155. *Id.* at 348 n.4; *see* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . property, without due process of law . . . .").

Ruckelshaus v. Monsanto Co.,[156] the United States Supreme Court considered the constitutionality of several provisions of the Federal Insecticide, Fungicide, and Rodenticide Act that allowed a governmental agency to publicly reveal registration data submitted to it.[157] Monsanto alleged that the required data disclosure constituted a taking of property without just compensation.[158] The Court noted that " 'property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' "[159] Because Missouri law recognized trade secrets as property, they were found to be protected by the Constitution.[160] While Texas law indicates that trade secrets are defined as property in some contexts, they have not been classified as property for purposes of the takings clause.[161]

Rule 76a does not frequently expose trade secrets to public inspection, as some contend.[162] First, the trade secrets themselves must be found discoverable—an endeavor not governed by Rule 76a's standards. Second, the sensitive documents may be inspected by the judge in camera as provided in paragraph 4.[163] Third, if information concerning a trade secret is divulged, it will usually be the harmful effect of a product or procedure that will be revealed, not the secret itself. This use does not run afoul of the Constitution because, as the *Monsanto* Court noted, "[if]

156. 467 U.S. 986 (1984).

157. *See* Act of Sept. 30, 1978, Pub. L. No. 95-396, § 2a, 92 Stat. 819, 820-24 (detailing the data that must be submitted by each applicant for registration of a pesticide) (amended 1988) (current version at 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1990)); Act of Sept. 30, 1978, Pub. L. No. 95-396, § 15, 92 Stat. 819, 829-32 (allowing disclosure to the public of information filed with the EPA, including information containing trade secrets, if the Administrator determines disclosure is necessary to protect the public) (amended 1984) (current version at 7 U.S.C.A. § 136h(d) (West Supp. 1990)); *see also Monsanto*, 467 U.S. at 1000.

158. *Monsanto*, 467 U.S. at 998-99. The holding in Carpenter v. United States, 484 U.S. 19 (1987), sometimes cited in support of this argument, was in fact limited to a finding that such data was "property" merely for purposes of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1988). *Carpenter*, 484 U.S. at 25.

159. *Monsanto*, 467 U.S. at 1001 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972))).

160. *Id.* at 1003-04.

161. *See* Garcia v. Peeples, 734 S.W.2d 343, 348 n.4 (Tex. 1987, orig. proceeding). In Ladner v. Reliance Corp., 156 Tex. 158, 293 S.W.2d 758 (1956), the court noted:

> An unpatented secret formula is not regarded as 'property' within the meaning of some provisions of our Constitution, but the owner or inventor . . . has a qualified property right in it to the extent that he is entitled to maintain the secrecy of his invention, and to prevent its disclosure or use by one who obtained a knowledge of it through fraud or breach of contract with him.

Id. at 167, 293 S.W.2d at 764; *see also* Atkins v. State, 667 S.W.2d 540, 542 (Tex. App.—Dallas 1983, no writ) (suggesting that the property right inherent in trade secrets is different from that implied by Penal Code provisions dealing with theft of property); TEX. PENAL CODE ANN. § 31.05 (Vernon 1989) (providing that theft of a trade secret is a third-degree felony).

162. *See, e.g.*, Peterson, *supra* note 16.

163. *See infra* text accompanying notes 181-82.

public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline . . . cannot constitute a taking of a trade secret."[164]

Finally, *Monsanto* is as important for what it refused to hold as for what it did hold. It did not hold that trade secrets were always property within the takings clause; on the contrary, the Court qualified its decision by citing a prior case for the proposition that " '[t]he right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.' "[165] Nor is the qualified protection of trade secrets found in Rule 76a unique.[166] An example is Rule 507, Texas Rules of Civil Evidence, which does not recognize an absolute property right in trade secrets, but instead affords the privilege only when it "will not tend to conceal fraud or otherwise work injustice."[167]

3. Other Interests.—

(a) Law enforcement and national security.—Where disclosure of information would impede law enforcement[168] or threaten national security,[169] it should be withheld.[170] Similarly, those assisting law enforcement by reporting activities that threaten public safety should generally

164. *Monsanto*, 467 U.S. at 1012 n.15.

165. *Id.* at 1007-08 (quoting Corn Prods. Ref. Co. v. Eddy, 249 U.S. 427, 431-32 (1919)).

166. *See* TEX. REV. CIV. STAT. ANN. art. 5920-11, § 14(b) (Vernon Supp. 1991) ("Information submitted to the [Railroad] [C]ommission concerning . . . trade secrets or commercial or financial information . . . *if not essential for public review as determined by the commission*, shall not be disclosed . . . .") (emphasis added); TEX. BUS. & COM. CODE ANN. § 15.10(i)(5) (Vernon 1987) (permitting release of trade secrets obtained through antitrust civil investigative demands if notice is given to the party who produced the material; such party may then petition the district court for a protective order); *see also* 1990 FLA. SESS. LAW SERV. 90-20 (West) (codified at § 69.081) (noting that the Florida statute governing sealed records only grants qualified protection to trade secrets).

167. TEX. R. CIV. EVID. 507; *accord* TEX. R. CRIM. EVID. 507 (containing an identical provision).

168. *See* Alliance to End Repression v. Rochford, 75 F.R.D. 431, 434-35 (N.D. Ill. 1976) (granting a protective order to safeguard police surveillance techniques); State v. Lowry, 34 Tex. Sup. Ct. J. 324, 327 n.8 (Feb. 6, 1991) (noting the importance of the informant and investigative privileges in assisting law enforcement officials by "protecting the anonymity of consumers who report illegal activity").

169. *See* Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 25 (1985); *see also* Freedom of Information Act, 5 U.S.C. § 552(b)(1) (1988) (exempting from disclosure matters authorized to be kept secret in the interest of national defense or foreign policy).

170. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.) (entering a preliminary injunction that prohibited the publication of a magazine article in view of the national security interests involved), *appeal dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

be provided reasonable protection from employer retaliation.[171]

(b) Personal safety.—Where disclosure could constitute a violation of the right to privacy and the right to liberty by exposing an individual to physical abuse,[172] confidentiality has been permitted.[173]

(c) Right to a fair trial.—In civil cases, publicity will rarely cause an unfair trial.[174] When fair trial rights are threatened, the proper remedy is not secrecy but a change of venue.[175]

4. Applying Rule 76a's Standard.—Showing that a record is within one of the above categories does not automatically require sealing. Conceivably, documents might fall within all of these classifications but the movant's interest might not overcome the presumption of openness and the probable adverse effects that sealing would have upon public health or safety. Likewise, neither does the assertion that the information falls within an exception to the Freedom of Information Act, the Open Records Act, or another statute provide protection from disclosure. While the courts may look to these statutes as an expression of public policy, these exceptions do not warrant automatic protection under the Rule.[176]

For example, assume that neighbors of a toxic waste disposal company sue the firm alleging they have been exposed to carcinogens because of inadequate procedures for containing waste and defective disposal

171. *See* Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring) (noting the need to protect whistle-blowers from retaliation). *But see* Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979) (denying relief to female lawyers who sought to be added as pseudonymous plaintiffs based upon claim that they would be "vulnerable to retaliation from their current employers, prospective future employers and an organized bar").

172. *See* Steinman, *supra* note 169, at 40 n.166.

173. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-66 (1958); Courier-Journal v. Marshall, 828 F.2d 361, 364 (6th Cir. 1987); Doe v. Stegall, 653 F.2d 180, 181 (5th Cir. 1981); Doe v. McConn, 489 F. Supp. 76, 77 (S.D. Tex. 1980).

174. *See* CONFIDENTIALITY ORDERS, *supra* note 87, § 7.9, at 197-99; *see also* United States v. Hooker Chem. & Plastics Corp., 90 F.R.D. 421, 426 (W.D.N.Y. 1981) (noting that a protective order should be granted reluctantly when a case gains notoriety); Thomson v. Cash, 117 N.H. 653, 654-55, 377 A.2d 135, 136 (1977) (rejecting the argument that access to a deposition would jeopardize the plaintiff's right to a fair trial).

175. *See* TEX. R. CIV. P. 257 (authorizing a change of venue upon the motion and affidavit of any party "and the affidavit of at least three credible persons, residents of the county in which the suit is pending . . . [if] so great a prejudice against him [exists] that he cannot obtain a fair and impartial trial").

176. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 14(f) (Vernon Supp. 1991) (providing that the Open Records Act "does not affect the scope of civil discovery under the Texas Rules of Civil Procedure"); Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (rejecting a reverse Freedom of Information action and holding that the exceptions to FOIA do not create a private right of action to enjoin an agency's disclosure of information).

containers. Discovery is obtained regarding disposal container designs, firm operating manuals, former and current employee medical records, employment records, and financial information. Even though individuals may be embarrassed by the release of information or a trade secret may be lost, the public interest in rectifying the existing damage and in preventing similar accidents from occurring elsewhere may outweigh the parties' interest in sealing the documents.

After establishing that a "specific, serious and substantial interest" clearly outweighs both the openness presumption and any probable adverse effect upon the health or safety, a movant must also show that "no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted." Using the above hypothetical, personal data could still be released after concealing the identity of individuals involved by redacting social security numbers, addresses, phone numbers, and similar identifying information. No sealing order should be granted before applying this "least restrictive means" test.

F. Notice and Hearing Provisions

The notice and hearing provisions contained in paragraphs 3 and 4 recognize that openness guarantees would be meaningless without proper procedural safeguards and a mechanism for the public to enforce its right of access.[177] Most importantly, the Rule guarantees to persons not a party to the litigation an absolute right to intervene to oppose sealing.[178]

A party seeking sealing must file a written motion in support of the request, schedule a hearing, and post notice thereof at the place provided

177. As of February 11, 1991, 36 Rule 76a hearing notices had been filed with the Texas Supreme Court Clerk's office. Amended filings and multiple filings by different parties to the same lawsuit are counted as a single filing. The cases involved claims of malpractice, wrongful death, misappropriation of trade secret, breach of contract, defamation, malicious prosecution, invasion of privacy, and others. The information sought to be sealed included trade secrets, financial information, school records, settlement agreements, and the identity of a sexual abuse victim. As of publication, no appellate courts had interpreted the Rule.

178. It is not necessary for an intervening third party under Rule 76a to satisfy a standing requirement by showing an actual or threatened injury as was required in Oklahoma Hosp. Ass'n v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985). *See also* McCarthy v. Barnett Bank, 876 F.2d 89, 92 (11th Cir. 1989) (denying a newspaper's attempted intervention to challenge a blanket protective order foreclosing access to pretrial discovery); Booth Newspapers, Inc. v. Midland Circuit Judge, 145 Mich. App. 396, 400, 377 N.W.2d 868, 870 (1985) (holding that the press lacks standing to challenge protective orders restricting dissemination of unfiled discovery), *appeal denied*, 425 Mich. 854 (1986), *cert. denied*, 479 U.S. 1031 (1987). Texas Rule of Civil Procedure 60 is inapplicable to Rule 76a. Rule 60 provides that "[a]ny party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party." TEX. R. CIV. P. 60; *see also* Transcript, *supra* note 117, at 204 (statement of J. Hadley Edgar) ("Under Rule 60, the court can only strike you if you don't have some justiciable interest, and it seems to me that what we have done under this rule is to create [a] justiciable interest.").

and opposing records closure.[183] Often it will be inappropriate to consider sealing based solely upon affidavits and, in some cases, prehearing discovery regarding the desired sealing will be required. When necessary to accomplish this, continuances should be freely allowed.

If a party fails to comply with the Rule's notice provisions, the nonmovant should bring the deficiency to the attention of both the trial court and the supreme court. Inadequate notice is a ground for abating the trial court's decision.

G. Standard for Issuance of Temporary Sealing Orders

Paragraph 5 of the Rule allows a party to obtain emergency, short-term relief when there is not time to comply with all of the Rule's provisions. Temporary sealing orders are obtainable when a specific interest of the party seeking sealing will suffer immediate and irreparable injury before compliance with the notice and hearing provisions can be accomplished.

By issuing temporary sealing orders, a court may allow discovery to proceed without undue delay. Any temporary sealing order that is obtained, however, must set a time for the public hearing and require the movant to post notice and comply with the hearing provisions so that the public interest can be adequately protected. A party, including an intervenor, may seek to dissolve or modify the temporary order.

H. Requirements for Contents of Sealing Orders

A valid sealing order must conform with the requirements of paragraph 6 and the standard in paragraph 1; namely, the order must include findings of fact and conclusions of law that a "specific, serious and substantial interest" clearly outweighs both the presumption of openness and any probable adverse effect that sealing will have upon the general public health or safety,[184] as well as that "no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted." To avoid unjustified "blanket" orders, each trial court decision must reference the specific portions of the court records to be sealed and the specific duration of closure. This ruling should be incorporated in a separate order rather than as a part of a judgment.

183. Under the Rule, these affidavits are open court records.

184. Orders risk reversal if they do not comply with Rule 76a(6)'s instruction to state the specific reasons supporting it. *Cf.* Watkins v. Pearson, 795 S.W.2d 257, 260 (Tex. App.—Houston [14th Dist.] 1990, writ pending) (reversing the trial court's order for sanctions because the offensive acts were not identified with sufficient particularity as TEX. R. CIV. P. 13 requires).

court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

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

7. **Continuing Jurisdiction.** Any person may intervene as a

matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

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

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Comment to 1990 change: New rule to establish guidelines for sealing certain court records in compliance with Government Code § 22.010.

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PUBLIC COURTS, PRIVATE JUSTICE

First of Four Articles

Court Secrecy Masks Safety Issues

Key GM Fuel Tank Memos Kept Hidden in Auto Crash Suits

By Elsa Walsh and Benjamin Weiser
Washington Post Staff Writers

Over the last five years, in defending itself against scores of lawsuits filed by victims of fiery car crashes, General Motors Corp. has used court secrecy procedures throughout the nation to keep closely held and controversial documents about auto safety from becoming public.

GM's legal approach, which is becoming a favored way of preventing the disclosure of sensitive information in civil lawsuits, has helped avoid a public debate about whether the company placed financial considerations ahead of safety concerns in designing the fuel tanks used in most GM cars until the early 1980s. Fuel leaks are a key factor in starting fires, which can cause deaths in otherwise survivable accidents.

The documents that have been kept from public view show that company officials were told in 1970 that the gas tank was vulnerable to puncture during some high-speed crashes. In 1971, the company decided not to move the tank to a more protected location after top engineers concluded that the traditional design was adequate, and that the design change was too expensive and would reduce trunk space. GM's estimates for the cost of the change ranged from $8.59 a car to $11.59.

Two years later, when engineers were assigned to study the fuel tank location again, the question of cost arose once more, and a "Value Analysis" was prepared in a two-page memo dated June 29, 1973.

A GM engineer, Edward C. Ivey, assigned a $200,000 value to each human life and assumed that a maximum of 500 people died annually in GM cars "where the bodies were burnt."

Then, in a two-stage calculation relating to new GM cars, Ivey determined what level of expenditure could be justified to try to avoid the fiery deaths in the 5 million cars GM was producing annually. "This analysis indicates that for GM it would be worth approximately $2.20 per new model auto to prevent a fuel fed fire in all accidents."

Ivey cautioned, however, that "it is really impossible to put a value on human life."

These documents, which were made available to The Washington Post as part of a lengthy examination of the burgeoning use of court secrecy procedures, have remained confidential because of GM's legal strategy.

In case after case, GM has turned over documents to opposing lawyers only under court-imposed confidentiality orders that prohibit disclosure to anyone else. It has paid millions of dollars to settle cases before trial and, as part of those settle-

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ments, has obtained agreements that bar opposing lawyers from discussing what they learned about GM. And in two cases, it has asked judges to punish lawyers who allegedly violated confidentiality orders.

General Motors declined a request for interviews and also said it could not answer two sets of written questions submitted by The Post, citing the confidentiality provisions in effect in numerous lawsuits. The company also said it did not want to discuss a "limited number of documents taken out of context."

The company's position is clearer in its responses to the lawsuits. It has defended the quality of its cars as excellent, asserting that GM's internal standards either meet or exceed government requirements. It also has maintained that its gas tank was safe, would survive most crashes and was the best choice, given that cars cannot be made totally safe and still be affordable. In settling lawsuits, GM has not admitted any liability.

The GM litigation is an example of how a system of private justice has evolved within the public courts, allowing important disputes that often involve serious questions of public safety to be resolved in secret.

This system includes protective orders issued by judges, which permit attorneys to receive internal documents on the condition that they not share them with anyone, including safety regulators; negotiations in which companies offer large settlements, in part to prevent sensitive documents from emerging; settlements in which the two sides privately agree to confidentiality and merely ask judges to dismiss the lawsuit; and, in some cases, judicial sealing orders that remove entire files from the public record—leaving no trace that the lawsuit ever existed.

In D.C. Superior Court, 32 judges have removed more than four dozen cases from the open civil court files, according to court officials. In the federal court here, 23 cases are listed as "sealed," including 12 that are referred to as "*Sealed v. Sealed*"; in most instances, the only information given is the name of the judge, which means the identities of those involved in the suit are not available.

The system has become pervasive. In local and federal courthouses across the country, there are confidentiality orders in hundreds of cases that allege safety problems with widely used products and facilities. Every day, someone gets into a car, takes a drug, sees a doctor or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order.

The broad use of confidentiality provisions has emerged only in the last 15 years, as businesses have found themselves the target of an increasing number of complex lawsuits that allege a product defect or improper conduct. The procedures are popular because they offer something for everyone. Busy judges see the rules as an efficient way to encourage settlements and avoid lengthy trials. Victims' attorneys exploit them to extract larger settlements for their clients. Defense attorneys take advantage of them to limit public debate of their companies' products.

In the GM litigation, for example, one GM attorney said he believed the company wanted to control access to the Ivey analysis because it was concerned about the impression it might create. "It's understandable in one sense that manufacturers say how much a life is worth, but in certain areas society expects more, and this is one of them," said the lawyer, who worked for a firm that GM hired to help defend the company against the lawsuits. "I don't think people expect manufacturers in the design of fuel systems not to spend [money] to save a thousand people from being burned."

Privacy vs. Public Interest

What has been lost in the rush to secrecy are the early warning signals about defective products or questionable conduct that sometimes emerge during open court proceedings. Occasionally, all records of a case are removed from public view. D.C. Superior Court Judge Peter H. Wolf said he sealed the files of a suit that alleged a psychiatrist had violated his professional ethics by engaging in a sexual relationship with a female patient. Wolf said the psychiatrist asked to seal the case, which was settled with no admission of liability, because he was afraid he might lose his license if the suit became public.

"Maybe he should" have lost his license, Wolf said in an interview. "Maybe it is a poor thing for me to go along with that." Wolf would not identify the psychiatrist and said he did not know if the case had been reported to the professional disciplinary board that would investigate such allegations.

Wolf, who has sealed other cases, said he sees no problem with closing records if both sides in the lawsuit agree. "I've never given it too much thought if it's not opposed . . . ," he said. "We are not knights riding white chargers righting wrongs wherever they come up. We

wait until people come to us. This is not to say that public policy should not intrude, of course, but I may be busy enough so that I may approve four or five or six such things before I say, 'Wait a minute.' "

Because the rules in civil litigation compel the opposing parties to exchange proprietary and other internal information—a process known as discovery—judges are particularly sympathetic to arguments that release of the material could provide valuable trade information to a competitor or could be unfairly embarrassing.

Judges, in issuing protective orders that keep discovery material under wraps, have relied in recent years on a 1984 U.S. Supreme Court ruling that upheld their discretion to impose such confidentiality. At the same time, the Supreme Court limited that discretion to cases where there was "good cause" for secrecy, without defining "good cause."

This ambiguity has contributed to a broad philosophical and moral debate in the legal community about how to strike a balance between private rights and the public interest. "Gag orders are strictly that. [They are] designed to keep the public from getting information it is probably good for the public to have," said Brian Shevlin, a Virginia lawyer who has both requested and acquiesced to requests to seal entire records in defending and suing doctors in medical malpractice cases.

D.C. Superior Court Judge Leonard Braman, who has twice sealed cases, said requests for secrecy deserve special scrutiny to ensure they do not conflict with significant public interests such as health or safety. "When parties litigate, they're using a public process," he said.

David Dobbins, a New York lawyer who defends major corporations in product cases, disagreed. "Obviously there are some civil cases where the government is a party, where there are public interests," he said. "But strictly a suit for damages, one party suing another for damages, there really is not much public interest."

But a federal judge in Montana, Paul G. Hatfield, said judges have a responsibility to protect the public in civil lawsuits. He observed in a June 4, 1986, ruling: "Even if the protected information constitutes a valid trade secret . . . the court must consider the need for public dissemination, in order to alert other consumers to potential danger posed by the product."

Francis H. Hare Jr., a Birmingham lawyer who has written a text on confidentiality orders, said in an interview that civil courts have traditionally been a way for the public to scrutinize institutions and corporations. "There's no other way that the public is going to get that information," he said. "It just does not come out through the regulatory agency route."

Despite such misgivings, the system of private justice thrives. Interviews with several hundred lawyers and judges, as well as a review of tens of thousands of pages of confidential documents, show how secrecy can prevent safety issues from becoming public.

■ In Michigan, a protective order prohibits a man and his attorneys from sharing information they received from Honda Motor Corp. in a case involving an alleged defect in the 1980 Honda Civic. The victim in the accident, who was permanently disfigured, alleged that the car's hood disengaged, pierced the windshield and struck him in the face. The hood also had come loose in crash tests, the victim's attorney said in court papers. Honda disputed that there was any defect and said that the hood met all government standards.

The case was settled under a confidentiality agreement. Asked whether others driving the same kind of car were being denied important information, the victim's attorney, Randolph Friedman, said: "All I can say is that there was a confidentiality order . . . . I really can't help you."

■ In Louisiana, attorneys suing Continental Grain Co. after a 1977 grain elevator explosion learned of a company report detailing safety and fire hazards at another elevator in Wisconsin. The report later had been altered to excise any reference to the problems, apparently because of complaints from Continental Grain's vice president for engineering and operations, according to documents reviewed by The Post.

In settling the case for $25 million in 1980 on behalf of the families of 35 workers killed in the blast, the families' attorneys agreed to return the documents and not to alert anyone to the alleged hazards, including workers at the Wisconsin facility, one of the attorneys said. Continental Grain, pointing out no explosion has occurred at the Wisconsin elevator, said in an interview that the facility is safe.

■ In Florida, U.S. District Judge William Zloch ordered a attorney suing the drug company Pfizer Laboratories to refrain from disclosing to "any governmental agency"—including the U.S. Food and Drug Administration (FDA)—any information he obtained from Pfizer, unless the court gave permission.

Yet a central allegation in the lawsuit is that Pfizer withheld information from the FDA. The suit alleges that Pfizer did not issue adequate warnings about the risks of Feldene, a prescription painkiller. The suit, filed on behalf of a Broward County man who claims he bled internally after taking the drug, is pending. Pfizer has said its warnings were proper and its drug is safe. The company disputed that Feldene caused the man's bleeding.

GM: A Case in Point

The GM litigation, which has lasted more than a decade, is one of the clearest examples of how court secrecy procedures can work to a company's advantage. In contrast, Ford Motor Co.'s handling of the Pinto fuel-fed fire trials in the late 1970s—which involved similar allegations about the vulnerability of the Pinto gas tank—is one of the starkest examples of what can happen if a company doesn't demand secrecy.

Ford allowed some of its most sensitive documents to become public, including one that also placed a $200,000 value on human life. The company was hurt both financially and in the public eye. Pinto sales plunged. In a poll conducted by a New York research firm, 38 percent of those interviewed said they had heard Ford cars were somehow unsafe, according to a book on the Pinto litigation. Only 6 percent had heard similar allegations about GM.

Many in the automobile industry knew that Ford's tank location was not unique. The gas tanks on GM cars were located in positions similar to that in the Pinto—under the trunk and close to the rear bumper.

In February 1978, Ford attracted worldwide attention when a California jury awarded $128.5 million in a Pinto case, an amount that later was reduced. A few days later, GM also lost a trial in Detroit, one of the few fuel-fed fire cases the company took to a jury. But the $2.5 million GM verdict received little notice. GM appealed, claiming that the jury was unfairly influenced by the Pinto publicity, then settled the case confidentially for a lesser amount before the appeal was resolved.

The attorney suing GM in that case, Darrel Peters, said GM turned over only seven internal documents. Told of the Ivey analysis that assumed a $200,000 value for a human life, he said no such document was among them. "I didn't know enough to know what to ask for," he said, explaining that it was his first fuel-fed fire case. Peters later received the document when he sued GM in another case in 1981.

Since Peters' victory in the case 10 years ago, GM has only gone to trial in a handful of lawsuits where particularly sensitive documents would not surface. Nearly all of these cases involved high-speed accidents that could be cited as the primary reason for the victim's injury or death, according to the former GM attorney who worked on the fuel-fed fire cases and a review of cases that went to trial.

GM's attorneys have maintained tight control over the far-flung lawsuits. Every piece of paper leaving the company's headquarters in Detroit is stamped with the case name and a thick red line that extends diagonally from corner to corner. Films of crash tests have the case name superimposed over each frame. If a document should surface in another case or be reproduced in the news media, these mechanisms would help the company trace the leak.

It is not clear how many lawsuits have been filed because GM does not disclose the number. One expert witness, used by some attorneys suing GM, said in a 1983 affidavit that he had been hired to consult in approximately 140 separate GM cases.

GM's success stems, in part, from its knowledge that many judges see their mission as limited to resolving the lawsuit before them. When Peters, the Detroit lawyer, objected to GM's request for a broad protective order in a 1981 case, Judge John R. Kirwan sided with the company.

"How would you be harmed? . . ." Kirwan asked Peters at a March 15, 1983, hearing in Wayne County Circuit Court, which includes Detroit. Noting that he had allowed Peters access to more documents than GM had offered, Kirwan said, "You're getting everything for this case."

GM also has taken advantage of judges' reluctance to review voluminous documents to determine which contain genuine trade secrets. At a Sept. 13, 1985, hearing, GM attorney W. Richard Davis told a Texas state judge that he was willing to fight for confidentiality on "a document-by-document approach until Christmas." The judge, David Peeples of San Antonio, replied: "I don't relish the prospect of looking at 15,000 documents."

Peeples imposed a broad protective order, rejecting a less restrictive proposal from the plaintiffs' attorney, David Perry, who wanted permission to share the material with other attorneys suing GM and to release documents to "governmental agencies who may be investigating fuel system integrity matters." The Texas Supreme Court later overturned Peeples' order in a narrowly-focused decision, allowing Perry to share the documents with other attorneys who then had to agree to the protective order already in effect in that case.

GM went to trial last year in the Texas case, and Perry tried to introduce some crucial documents as evidence, which would bring them into open court. But Peeples rebuffed him on several of them, including the Ivey analysis, saying the documents were not relevant to the case. In that case, GM argued that the car was struck from behind at more than 90 miles per hour.

After the trial ended, with GM winning, a court clerk mistakenly allowed a Post reporter to examine a folder that contained the Ivey analysis. After learning of the inadvertent disclosure, Peeples—over GM's objections—ruled that the material was no longer covered by the protective order and would be placed in the open court file for at least one year. Today, this is apparently the only court in the country where the Ivey analysis is publicly available.

At a 1983 trial in Kansas, GM asked for a mistrial when an opposing attorney alluded to the Ivey analysis during questioning of one

witness. After the trial ended and GM won—the estimated speed at impact in this crash, according to GM, was more than 100 miles per hour—the company asked Judge James Buchele to seal the entire transcript and all the exhibits, even though the case had been heard in open court.

The plaintiffs' attorneys objected strenuously, but Buchele acceded to GM's request. "General Motors was making a big deal about it . . . ," he said in an interview. "One way or another, I just wanted to get it out the door."

Rumblings From Within

As a result of GM's strategy, the public record in the fuel-fed fire lawsuits around the country contains few internal company documents. These documents, along with others under protective order, tell at least part of the story that GM has kept from becoming public until now.

Beginning in the late 1960s, the documents show, GM test data showed that its gas tanks might rupture during some rear-end collisions. The company began studying the possibility of moving the tank away from the rear bumper and placing it a few feet forward in a more protected site over the rear axle.

In 1969, interest in the design took on greater urgency when the federal government proposed a safety standard for gas tanks, aimed at preventing deadly fires in otherwise survivable accidents. GM officials resisted the government standard as unnecessary and expensive and, along with other car manufacturers, undertook a lengthy campaign to block or weaken the standard, which delayed its implementation in a weakened form until September 1975 for 1976 model cars. Throughout the battle, government regulators maintained that even the strongest proposal should be viewed as a minimum standard.

Initially, the proposed standard was scheduled to go into effect in January 1970. An engineer at GM's Oldsmobile division wrote in a Feb. 20, 1969, memorandum that "another consideration is that we should not set a precedent by agreeing to such short notice even though we could meet the standard."

The standard did not tell the companies where to put the tank, saying only that tanks must be able to withstand rear-end accidents with minimal leakage. In August 1970, the proposed standard was revised and made more stringent, requiring that the area around the tank be strong enough to withstand a rear-end crash at a speed of about 60 miles per hour with a car of a similar weight. The initial proposal had recommended tanks be able to withstand crashes at about 28 miles per hour.

A Buick gas tank was tested at the higher speed. It punctured or ruptured in five locations, prompting Buick engineer K.D. Taylor to write to GM's engineering staff on Oct. 26, 1970: "The only way we can meet these [proposed federal] requirements is to mount the fuel tank over the axle," away from the bumper.

One month later, Oldsmobile reported similar results after testing two tank assemblies that had been reinforced. Both tanks ruptured. A Nov. 25, 1970, memo on the tests raised a new concern: All the doors had "jammed shut" in one car, making it "impossible to free occupant in a fire." The memo supported moving the tank to "a more protected location."

A Flurry of Mixed Signals

The documents suggest that the company seemed inclined to go ahead with the new design. A Nov. 30, 1970, memo instructed company engineers to cancel production of parts used in the old gas tank assembly. "Reason: over axle tank will be used in 1973 [models]," the memo stated.

Up to this point, the superior performance of the tanks located over the axle was mostly theoretical. Then, on Jan. 11, 1971, the company tested the new design in one of its cars, simulating a crash at 60 miles per hour. There was no leakage.

Over the next several days, the design ran into trouble before two key company committees.

"While the design can be accomplished, it is not without considerable problems . . . ," fuel tank supervisor Thomas R. Leonard told GM's General Technical Committee on Jan. 13, 1971, according to minutes of the meeting. "Trunk capacity is reduced, assembly and serviceability is made more difficult, and increased cost of $8.59 [a car] has been estimated." He recommended that the company stay with the old design, according to an internal summary of the meeting.

The next day, at a meeting of the company's Safety Review Board, Leonard made the same recommendation. Comparing the two designs, Leonard said the new location had been less vulnerable to rear-end collisions in a high-speed crash, noting that it had passed a crash test only days before. But, he theorized, moving the gas tank forward could increase the possibility that fuel would leak into the passenger compartment if it punctured.

See COURTS, A23, Col. 3

COURTS, From A22

"For this reason and because of the increased cost," Leonard suggested that the company stay with the old design, which he said was adequate to meet the less stringent standard that GM was proposing to the government. If the more stringent standard were adopted, he said, the "tank can be moved above the axle at that time."

Both committees concurred, according to internal records.

Last year, in a deposition in a Texas lawsuit, Leonard said he believed in 1971—and still believed—that the old design was superior.

"It was a good location and not expensive," he said. Asked if the company would have spent the extra money to make the change if it believed the new design was better, he said, "We would have spent it. There's no doubt in my mind."

A month after Leonard's presentation to the two committees, GM held a conference on safety for educators, foundation officials and others. The company's director of auto safety engineering, Louis C. Lundstrom, stressed the company's strong commitment to safety. He quoted GM President Edward Cole's remarks at the 1968 dedication of a new company testing facility: "We in GM will not be satisfied until our vehicles provide the greatest possible impact protection for occupants up to the limits of the physical laws of nature and of technological knowledge."

During one of the lawsuits, a top fuel tank and automotive safety engineer, Jack Ridenour, was asked whether this statement reflected the policy of GM, without being told that Cole had made the remark. Ridenour, now retired, said: "I would doubt that . . . . I don't think it would be practicable . . . . I think if we did what you're proposing, you'd have some pretty funny-looking and expensive vehicles."

The company continued to run crash tests and the tanks near the rear bumper continued to leak. Four out of four leaked in one series of high-speed crash tests, according to a Nov. 30, 1971, report.

In the same memo, a senior project engineer on fuel tanks reported that the company could meet the more stringent standard either by moving the tank or reinforcing it. But, he wrote, "no further work on this project is planned" until the government decided what to do.

Anticipating the eventual issuance of some government standard, GM assigned four engineers in the spring of 1973 to take up the issue again for some 1977 models. Out of this study came the Ivey analysis.

The document's purpose was to provide GM with a cost breakdown of what it would be worth to try to "prevent a fuel fed fire in all accidents." After calculating that it was worth only $2.20 a car to try to avoid a fire, Ivey said in his analysis that the calculation must be viewed in context. "It is really impossible to put a value on human life," his analysis said. "This analysis tried to do so in an objective manner but a human fatality is really beyond value, subjectively."

Ivey backed away from his analysis when questioned about it in September 1987 by one of the attorneys suing GM. According to a transcript of the deposition, which has not been made public, Ivey said he picked up the $200,000 figure from a formula used by the National Highway Traffic Safety Administration (NHTSA). Asked what he thought of his analysis now, he said, "I think that there were some incorrect assumptions, and I believe that this particular analysis is, you know, basically invalid."

When it became public in the Pinto case that Ford had used the $200,000 figure, NHTSA officials criticized the company, saying their formula had been developed to calculate the loss of productivity to society when an individual dies in a traffic accident.

In August 1973, GM again decided to stay with the old design for the time being. The following year, both designs performed adequately in new crash tests conducted at 50 miles per hour—a speed that fell between the two standards under consideration by the government, according to one deposition.

When the government's proposed fuel tank standard went into effect in September 1975, it was the less restrictive one favored by the auto industry. GM was able to meet it by using its original design with minor modifications.

But the debate over tank location continued. A company fuel tank coordinator compared the two designs in an April 4, 1977, memo and raised a number of concerns about the more protected over-the-axle location. Other engineers offered a point-by-point rebuttal to the coordinator's objections, writing their views in the margins of the memo.

In the late 1970s, GM began converting many of its cars to front-wheel drive, beginning with the 1980 models, which radically changed the configuration in the rear of the cars and allowed GM to move the gas tank to an even more protected location under the rear passenger seat.

Today, most new GM cars have front-wheel drive. But millions of Americans are driving GM cars with the gas tank in the old location near the rear bumper. According to R.L. Polk & Co., a research firm in Detroit, there were an estimated 39.5 million GM cars with rear-wheel drive still in operation as of July 1, 1987. The large size of some of those cars provides additional protection in rear-end collisions, but the majority have gas tanks in the more vulnerable location, according to Samuel Cole of the Center for Auto Safety in Washington.

It is not known how many people have been injured or have died in fuel-fed fires in GM cars, or whether they might have survived if the tank's location had been elsewhere. According to the Department of Transportation, 514 deaths occurred in 1986 in all types of fires in GM cars, the latest year for which statistics are available. No further breakdown was made.

Violations Can Be Costly

GM has sought to enforce the confidentiality orders it has obtained.

In 1983, the company accused Peters, the Detroit lawyer, of violating a protective order by mentioning the existence of the Ivey analysis to other attorneys suing GM. Peters was the first plaintiffs' attorney to receive the document under protective order.

GM asked a Detroit judge to punish Peters, who did not consider his actions a violation. In 1986, Peters agreed to settle the matter and pay a fine of $8,000. The public records in that case do not reveal the name of the document or its contents. It is identified only by date.

Today, Peters remains barred from commenting about any General Motors documents covered by protective orders. "They took this matter very seriously," he said.

Staff researcher Melissa Mathis contributed to this report.

NEXT: Private justice locally

GENERAL MOTORS RESPONDS

This is the text of a letter dated July 14, 1988, from J. David Hudgens of the public relations staff of General Motors Corp. in Detroit to The Washington Post in response to inquiries and a list of written questions:

We will be unable to answer your questions concerning General Motors' litigation strategy in post-collision fire cases —for a variety of reasons. For example, answers to some of your questions may constitute a waiver of the attorney-client privilege and protection afforded by the attorney work product doctrine. In addition, there are court orders and covenants in effect that prohibit GM from disclosing the contents of certain settlement agreements.

As we have discussed on the phone, the success experienced by GM in products liability litigation is a reflection of the quality of the products and a willingness to defend the integrity of those products against unwarranted attacks.

General Motors has made a commitment to devote the resources necessary to tell its engineering and design story to judges and juries within the context of products liability actions. GM also expects its lawyers to pursue the defense of its products aggressively, while acting responsibly and maintaining the highest ethical standards. Our Legal Staff expects to achieve the same high rate of success in the future as it has in the past.

I'm sorry we're not in a position to respond to your inquiry.

A second letter from Hudgens, dated Aug. 16, 1988, was in response to The Post's second submission of written questions:

I mentioned to you on the telephone not long ago that we would be unable to respond to your request for comment on the various documents you referenced—for the reasons outlined in my letter of July 14 and because of the following:

First, it is apparent that your inquiries are based on certain documents produced by General Motors in [a Texas case presided over by Judge David Peeples]. In that case, the jury spent several weeks considering all relevant evidence pertaining to the plaintiff's allegation that the fuel storage system on the subject vehicle was of a defective design. At the end of that process, the jury concluded that a defect did not exist, and it returned a verdict in favor of General Motors.

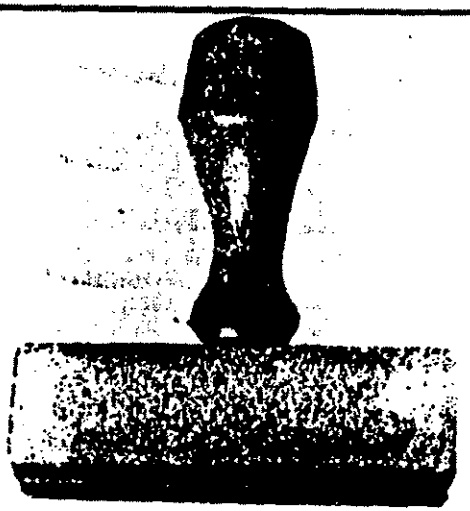
The issues you have raised are complex ones and not readily susceptible to summary discussion. It would be impossible for us to duplicate the evidence presented to the jury in a letter answering questions concerning fuel system design by reference to a selected and limited number of documents taken out of context.

Second, the documents produced in [the Texas case] are subject to the court's protective order. As you know from your review of the case file . . . , there is a court order restricting the dissemination of the documents. In fact, due to the confidential and proprietary nature of the documents, a protective order has been entered in each case in which the documents have been produced. In light of the court's order, it would be inappropriate for GM to comment on the documents.

Accordingly, you are aware that the documents you have inquired about should not be disseminated or discussed outside that litigation except as the order provides. Given this situation, a public discussion of the documents is not possible, since we believe it would be inconsistent with the court's order.

PUBLIC COURTS, PRIVATE JUSTICE

Early Warning Signals on Safety Often Ignored in Rush to Secrecy



CONFIDENTIAL
PROTECTED BY COURT-IMPOSED
PROTECTIVE ORDER

THE TERMS OF SECRECY

A system of private justice has evolved within the public courts, allowing important disputes that often involve serious questions of public safety to be resolved in secret. This system includes:

■ JUDGES' PROTECTIVE ORDERS

These permit attorneys bringing suit to receive internal documents on the condition that the material not be disclosed to anyone. Normally, these orders are sought by those being sued. If opposing attorneys protest, a judge may impose an order over their objections.

■ CONFIDENTIAL SETTLEMENTS

Two sides in a legal dispute may agree privately to confidentiality, sign an agreement and ask judges to dismiss the lawsuit. In some instances, plaintiffs are offered large settlements, in part to prevent sensitive documents from coming into the public domain. Normally, settlements contain no admission of fault.

■ SEALING ORDERS

Judges may seal entire files of a lawsuit, including the original allegations, which removes the records from public view. Occasionally, suits are filed under seal, so that the fact of the suit is kept secret from the outset.

THE WASHINGTON POST

PUBLIC COURTS, PRIVATE JUSTICE

VIEWPOINTS

"We are not knights riding white chargers righting wrongs wherever they come up. We wait until people come to us."

—Peter H. Wolf, a D.C. Superior Court judge who said he sealed files of a suit alleging that a psychiatrist had violated professional ethics by engaging in sex with a client

"When parties litigate, they're using a public process."

—Leonard Braman, a D.C. Superior Court judge who has twice sealed cases but who believes that requests for secrecy deserve special scrutiny

"There's no other way that the public is going to get . . . information. It just does not come out through the regulatory agency route."

—Francis Hare Jr., a lawyer in Birmingham who is the author of a text about confidentiality orders.

"Obviously there are some civil cases where the government is a party, where there are public interests. But strictly a suit for damages, one party suing another for damages, there really is not much public interest."

—David Dobbins, a New York lawyer who defends major corporations in product cases

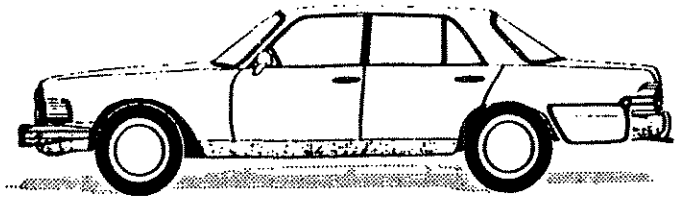
PUBLIC COURTS, PRIVATE JUSTICE

GM

GENERAL MOTORS' LEGAL STRATEGY

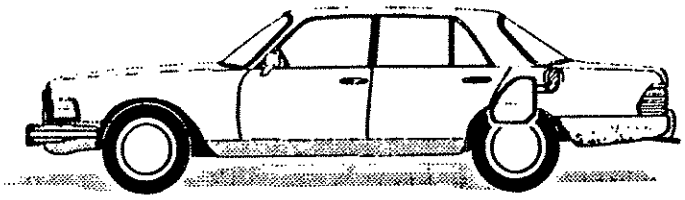
General Motors' legal approach has helped avoid public debate about whether the company placed cost considerations ahead of safety concerns in designing the fuel tanks used in most GM cars until the early 1980s. Fuel leaks are a key factor in starting fires in rear-end collisions. It is not known how many lawsuits have been filed against the company because GM will not disclose the number. In the past 10 years, it has gone to trial in only a handful of lawsuits. GM's success stems in part from its knowledge that many judges see their mission as limited to resolving the lawsuit before them, and the company also has taken advantage of judges' reluctance to review voluminous numbers of documents to determine which contain genuine trade secrets.

REAR-MOUNTED FUEL TANK



Beginning in the late 1960s, GM test data showed that gas tanks located near the rear bumper were vulnerable to puncture in some high-speed, rear-end collisions, according to company documents. GM began studying the possibility of moving the tank to a more protected site over the rear axle.

OVER-AXLE FUEL TANK



Design problems, cost concerns and a belief that the traditional design was adequate led to a 1971 decision to leave it in place. GM estimated a design change would cost $8.59 to $11.59 a car. A 1973 GM analysis calculated that it was worth only $2.20 a car to try to avoid a fire, while noting "it is really impossible to put a value on human life."

BARRY PETERS, a Detroit attorney, won a $2.5 million settlement in February 1978 in a fuel-fed fire case against GM, one of the few such cases the company took to a jury. GM appealed but settled the case confidentially for a lesser amount before the appeal was resolved. Peters said that GM turned over only seven documents and that the analysis setting a value on human life was not among them.

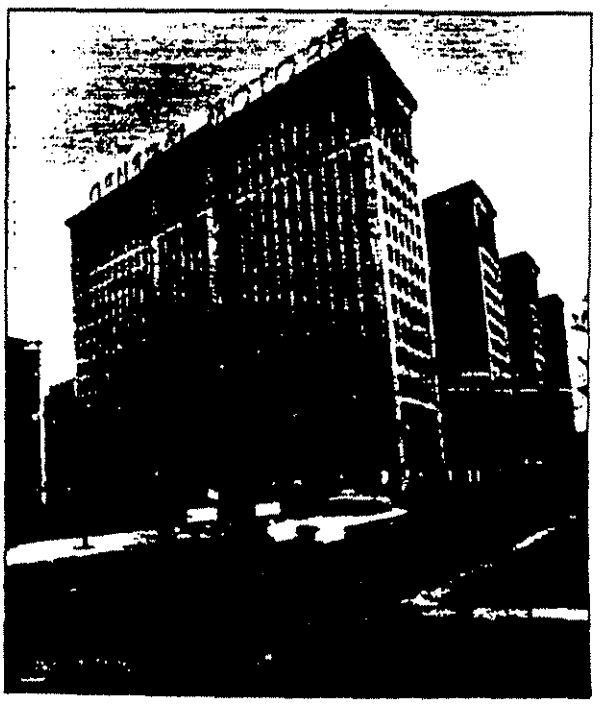
DAVID PERRY, a Corpus Christi, Tex., attorney suing GM, contested a judge's broad protective order that prevented him from sharing GM's documents with other lawyers suing GM and releasing any information to governmental agencies. A Texas appeals court ruled Perry could share material with other lawyers. GM went to trial in this case and won.

BY TODAY THE WASHINGTON POST

GM Assigned $200,000 Value to Human Life

BY JOEL RICHARDSON—THE WASHINGTON POST

Darrel Peters, attorney in suit involving this 1973 Chevrolet, can't talk about GM documents under protective order.



BY JOEL RICHARDSON—THE WASHINGTON POST

GM keeps close tabs on case documents leaving Detroit headquarters.

MONDAY, OCTOBER 24, 1988

PUBLIC COURTS, PRIVATE JUSTICE

Second of Four Articles

Hundreds of Cases Shrouded in Secrecy

Area Suits Often Sealed With Few Queries

By Elsa Walsh
and Benjamin Weiser
Washington Post Staff Writers

On Feb. 26, 1985, case CA 4800-84 disappeared from the public files at D.C. Superior Court.

That day, Judge Paul R. Webber III approved a $1 million settlement of a malpractice lawsuit against Howard University Hospital, ordered that no one discuss the case and sent the records to a locked file cabinet in the D.C. courthouse, according to sources familiar with the case.

The case involved questionable conduct by hospital personnel in the death of a 35-year-old woman who had entered the hospital for minor sinus surgery. A nurse allegedly had falsified the woman's medical chart to conceal the nursing staff's failure to respond to the woman's breathing problems, according to sworn statements in the sealed lawsuit. In one statement, the physician on duty, Dr. Stephen McKenna, said he told the hospital's medical director of the alleged falsification, but the records were not corrected. The nurse still works at Howard.

The hearing before Judge Webber was brief, the sources said, and did not deal with Howard's reasons for seeking the secrecy order. Webber merely acquiesced to the sealing request, which the attorneys for both sides had worked out in advance, according to the sources.

In settling the case, the hospital admitted no responsibility for the woman's death. Hospital officials declined to comment, citing the sealing order.

The Howard case is one of at least 200 lawsuits in the District and its suburbs in which judges have sealed entire case files. In hundreds of other cases, judges have approved confidentiality orders that require both sides in a lawsuit not to disclose informa-

See COURTS, A20, Col. 1

Case Number	Party Type	Date Filed	Case Title
[illegible]	[illegible]	[illegible]/87	[illegible] COURTS
[illegible]24	[illegible]	[illegible]/18/87	SEALED v. SEALED
1:87-cv-J3124	dft	11/18/87	SEALED v. SEALED
1:87-cv-03434	pla	12/17/87	SEALED v. SEALED
1:87-cv-03434	dft	12/17/87	SEALED v. SEALED
1:88-cv-00578	pla	03/03/88	SEALED v. SEALED
1:88-cv-00578	dft	03/03/88	SEALED v. SEALED
1:88-cv-00579	pla	03/03/88	SEALED v. SEALED
1:88-cv-00579	dft	03/03/88	SEALED v. SEALED
1:88-cv-01426	pla	05/25/88	SEALED v. SEALED
1:88-cv-01426	dft	05/25/88	SEALED v. SEALED
1:88-cv-01458	pla	05/27/88	SEALED v. SEAL[illegible]
1:88-cv-01458	dft	05/27/88	SEALED
1:81-cv-00797	[illegible]	[illegible]	[illegible]

COURTS, From A1

tion turned over to each other during the course of the case.

Such secrecy procedures—once used almost exclusively in cases involving business trade secrets, national security and personal privacy—are increasingly being used to prevent debate about critical problems of public safety and policy. Those who have sought to take advantage of secrecy procedures include corporations, hospitals, doctors, lawyers and law firms.

There is a striking lack of consistency and standards among the area's local and federal courts in the way they handle requests to seal cases. In an environment usually governed by formal rules, the process has become almost casual. Judges follow no set procedures, ask few probing questions, offer no notification to the public and often put nothing in the public court records to explain their reasoning in deciding to seal the files.

Judges here have approved secrecy orders in lawsuits involving allegations of misconduct by doctors and lawyers, safety hazards in public facilities and products, and race and sex discrimination. Considering themselves referees who monitor disputes between private parties, judges rarely reject a request to seal a case, according to lawyers and judges interviewed. If the two sides involved in a settlement want the file sealed from public access, most judges see no reason not to go along.

"There isn't any great objection to" it among the judges of the Montgomery County Circuit Court, said Chief Judge John J. Mitchell.

In Fairfax County Circuit Court, Chief Judge Lewis Griffith said, "Normally, the court honors the request."

This informal approach conflicts with the long-accepted American tradition that the public has a right to see basic records in a civil lawsuit, an expectation formally recognized by the U.S. Supreme Court. Although judges have broad discretion in handling cases, courts historically have adhered to the principle that records should be sealed in a selective way, and that open files should contain at least the original complaint, a list of the proceedings in the case and copies of any rulings made by the judge.

No local courthouse keeps a publicly available record of which lawsuits are sealed, and internal record-keeping is so haphazard that most of the courts could not provide reliable figures. At the request of The Washington Post, the clerk's office at D.C. Superior Court searched its records and initially came up with 43 cases. It declined to provide the names of those involved, listing only case numbers, the judge and the attorneys. Told of additional cases not on the list, the clerk's office provided a revised list of 53—which still did not include every sealed case found through other sources.

At the federal courthouse in the District, the clerk's office said it would be difficult to compile a list of all sealed cases; however, the court's files contain 23 references to sealed cases, including 12 referred to as "*Sealed v. Sealed*". At least some appeared to have been sealed when they were filed—the earliest possible time. In U.S. District Court in Alexandria, 31 cases are under seal, according to a clerk.

In Fairfax County, a review of a court clerk's handwritten list suggests there have been 13 sealings in the last two years. There is no record of sealings that occurred before then. In Montgomery County, there were 69 cases sealed before 1984; a change in record-keeping procedures since then makes it difficult to obtain an accurate count. In Prince George's County, the clerk's office said it had no figures. In Arlington County, the clerk's office also said it does not keep specific figures, but one clerk estimated "no more than one a year."

Some judges said in interviews that they did not realize that sealing a case meant the entire file would be removed from public access. When D.C. Superior Court Judge Eugene Hamilton was told that he is listed as sealing the records in five cases, including two medical malpractice matters, he said: "Is that right? The whole suit? Including the names of the plaintiffs and so forth?"

Hamilton said he assumed that his secrecy orders only applied to the amounts of money paid out as part of the settlements, but said it was "never too clear" to him what else would be covered.

Judge Leonard Braman, one of 32 Superior Court judges who have sealed cases, attributed the proliferation of secrecy to busy judges looking for a way to resolve cases. "It was done as a matter of practice and the judges were driven by the desire to keep their calendars churning," said Braman. "It just seems to me that it doesn't necessarily follow that the court has to be a mindless and conscienceless tool that serves the selfish . . . ends of a litigant."

But Judge Stanley Sporkin of the federal court here said courts have only a limited role in civil lawsuits before trial. "Criminal law is the public business. Private lawsuits are usually private business," he said. "The courts don't have much say."

Stephen R. Steinberg, a senior lawyer at a New York firm who heads a committee on trial practice for the American Bar Association, said sealing records is an extraordinary step and that judges should weigh carefully the "public right to know and the constitutional protection of an open court system" against the privacy of those involved in the lawsuit.

"Public interest should be paramount," Steinberg said.

Safety Issues Kept Secret

More than 75 sealed cases and 100 confidential settlements were reviewed for this article. Information about these cases was pieced together from court files, documents provided by sources, and interviews with lawyers, judges and parties in the lawsuits, some of whom did not want to be identified.

Those interviewed drew a distinction between a judge's direct involvement in lawsuits—such as sealing and confidentiality orders—and settlements in which two sides privately agree to resolve the issues, sign a

contract not to discuss the matter and then ask the court to dismiss the lawsuit.

Settlements, which usually involve no admission of fault, serve a variety of purposes. Many cases are resolved, lawyers said, to avoid costly trials.

In nearly all the cases reviewed for this series, settlements had the effect of keeping issues of public concern from surfacing. In the Howard University Hospital case, for example, no outside investigative body learned of the nurse's alleged falsification of records. The settlement included an order, agreed to by both sides, not to discuss the case.

According to pretrial statements, which are confidential, the nurse added entries to a patient's chart to make it appear that the nursing staff had conscientiously monitored the patient as she complained of breathing problems and had summoned McKenna, the on-duty physician, several times.

The patient's chart stated that McKenna had examined the woman three times that day, May 7, 1983, but McKenna said he did not. "I knew that it was a falsification of what had happened and that I had not been notified, and I wanted to get the record straight right then and there," McKenna said at his deposition.

Another patient who was sharing the woman's room said in an affidavit that she tried to alert the nursing staff to the woman's breathing difficulties. "[She] was having problems breathing and kept taking the oxygen mask off and would start to gasp and I would buzz for the nurses. They wouldn't respond," the other patient said.

The woman stopped breathing that night, lost consciousness and died six days later, medical records show. The cause of death was listed as a heart attack brought on by a blood clot in her lung. Breathing difficulties are often a symptom of such blood clots.

When Barry Nace, the attorney for the woman's family, learned of the alleged falsification, he used it as a bargaining chip, according to sources. Unless the hospital agreed to settle immediately, Nace told Howard's attorneys, he planned to alert the media.

The $1 million confidential settlement came a few weeks later.

The hospital's attorney, Francis Smith, declined to comment about the allegations or the settlement, except to say: "It is not the policy of the hospital ever to falsify records." Speaking generally, he said, "Sealing the record is an effort to protect people, from time to time, from illegitimate or . . . misleading implications."

Judge Webber said, "I believe it would be inappropriate for me to discuss the details of any sealed case."

Nace defended the settlement. "Would I like to see confidentiality agreements prohibited and outlawed? Yes . . . but until that happens, our obligation is to our client and not to the rest of the world," he said.

Discovery of allegedly altered records also played a major role in the settlements of two other local medical malpractice cases, according to Ronald Karp, the attorney who brought the lawsuits.

Karp, who is prohibited from discussing the specific details of the two cases, said each was settled for a "six-figure" sum. One involved a surgeon who allegedly had forged an informed-consent form to show that he had told a patient of the risks of surgery, when no such discussion had taken place, Karp said. The patient later suffered major complications in the surgery.

In the other case, Karp said, a doctor allegedly had failed to diagnose symptoms of cancer in a patient and falsified the records to show that he had detected the disease.

Karp said he did not notify medical licensing authorities of the allegations raised in the cases. "I presumed that if I did, it would be discussing the case, and that would be a breach of the settlement terms," he said.

Under a 1986 D.C. law, it is illegal to falsify medical records.

Investigation Roadblocks

Allegations against local doctors or hospitals account for a sizable percentage of the confidential settlements and sealed cases. In D.C. Superior Court, for example, 14 sealed cases involve lawsuits against doctors or hospitals.

In a 1983 case in the D.C. federal court, Judge Thomas Jackson removed from the public file all records of a civil lawsuit that alleged a physician had sexually assaulted a female patient during a gynecological examination, according to sources.

In a deposition during the lawsuit, the doctor denied assaulting the woman, but acknowledged having sexual relations with her during an exam, saying the act was consensual, according to one source familiar with the case. Consensual sexual relationships between doctor and patient can be grounds for disciplinary action, according to medical codes of ethics.

The case was settled for $30,000, the source said. The doctor's partners severed their relationship with him, but the doctor—whose name could not be learned—remains in practice in this area, according to the source.

Even if a disciplinary body is told of possible misconduct, confidential settlements in a lawsuit can sometimes stymie an investigation. Eight years ago, D.C. medical authorities received a complaint alleging that Dr. Paul Weisberg, a prominent psychiatrist, had violated professional ethics by becoming sex-

ually involved with an emotionally-vulnerable female patient during therapy.

The woman had sued Weisberg and was engaged in negotiations to settle the case. A friend of the woman, Clarence Ditlow, said he wanted to alert authorities before the woman agreed to a confidential settlement that might keep her from discussing the matter in the future. Ditlow's fears proved true. When investigators sought to interview the woman, the woman's attorney told them that the terms of the settlement prohibited her client from cooperating, according to sources.

Weisberg, in a deposition taken during the lawsuit, said he began a friendship with the woman on the day that her therapy ended and that it later became a sexual relationship. Therefore, he said, it was not a violation of ethics.

Last year, when the ethics committee of the Washington Psychiatric Society received a complaint about Weisberg's practice, the eight-year-old settlement again caused problems. The ethics committee wanted to interview the woman and tried to negotiate a way around the confidentiality agreement. Before it could be worked out, the committee decided it had enough information to go to the American Psychiatric Association (APA), a committee member said. The committee subsequently had learned about a similar allegation from another patient.

The APA, which could revoke Weisberg's membership but has no authority over his license to practice, has made no decision yet. Weisberg, who has denied any misconduct with either patient, has closed his practice here and moved to California, according to his attorney, John Karr.

Some institutions routinely seek confidentiality agreements that include provisions barring opposing lawyers from discussing settled cases.

The general counsel for Children's Hospital, Lee Doty, said she viewed confidential settlements as agreements between private parties and, in the case of Children's, a way to protect the privacy of the children treated there. "It is the belief that it's nobody's business how we handle things out of court," she said.

She added, "Lawsuits are settled for reasons frequently that have absolutely nothing to do with whether we think [the hospital is] in error. Physicians' reputations may be on the line. The hospital's reputation may be on the line . . . . It may be really unfair to make it public."

Doty said she could not comment on the specifics of two settlements involving the hospital. In both cases, confidentiality agreements prohibit the attorneys and their clients from alerting anyone to the suits, even though there are some documents in the public file that raise questions about safety.

One of the cases, a 1983 suit, alleged that the hospital's decision to delay the purchase of additional infant heart/respiratory monitors had been a factor in causing severe brain damage to a 6-week-old baby, who later died. The baby, who was found in cardiac arrest and not breathing, was being monitored by less sophisticated equipment that measured only respiration, according to court records.

The hospital's top medical staff—including the chairman of neonatalogy, Dr. Gordon B. Avery—had been requesting three more monitors for some time. In one memo to hospital officials, they said the sophisticated monitors were "urgently needed," according to hospital records turned over during the suit and placed in the public court file.

One memo said, "Not uncommonly, a monitor must be taken off one baby to be put on another." Another called it an "unacceptable situation" and said "nor is it consistent with our hospital philosophy of providing safe patient care."

Citing budgetary restraints, the hospital put off the purchase, the records show. In responding to the suit's allegation, the hospital blamed a defect in the less sophisticated monitor. If it had been designed properly, the hospital said, the incident might never have occurred. The hospital denied that its delay in purchasing new monitors was a factor in the child's death.

The case was settled in 1985 for $1.9 million, with the hospital and the manufacturer of the monitor each contributing, court records show. A hospital spokesman, Lon Walls, said Children's since has built a state-of-the-art neonatal facility with "all the monitors needed."

The attorney who sued Children's, Jack Olender, said he could not comment on the case because of the confidentiality provisions in the settlement. Speaking generally, he said, "The public should know about poorly designed or defective medical equipment if we are ever to obtain improvements in the health care delivery system."

The second lawsuit alleged that one of the hospital's surgeons had connected the wrong blood vessel to a 9-month-old baby's heart, causing neurological damage before the mistake was corrected. In a statement filed with the court, the hospital acknowledged the surgeon's mistake and said the child had received treatment that was "not acceptable," but pointed out that the operation was technically difficult because of the child's size. The hospital questioned whether the mistake was solely the reason for the child's condition.

This case was settled in 1986 for $2 million, according to one source.

Secrecy Is Bargaining Chip

In the back and forth of settlement negotiations, secrecy has become leverage.

For example, in a Montgomery County case filed last November, a Maryland physician agreed to settle a claim of sexual misconduct if the lawsuit was filed under seal so that his name would never appear on the public record, according to the attorney who brought the suit on behalf of a female patient. Under terms of the deal, the doctor paid an undisclosed sum to the woman and agreed to enter a rehabilitation program, the attorney said.

In a 1982 case, a judge's willingness to seal the case file became a critical element in the settlement. A group of local dentists sued Chesapeake & Potomac Telephone Co., complaining that the company was refusing to correct a phone number in an advertisement set to appear in 670,000 copies of the new D.C. Yellow Pages.

C&P said it was too late and too expensive to fix the error. D.C. Superior Court Judge David Norman temporarily blocked distribution of the books, which were about to be bound. The case was settled when C&P agreed to correct the phone number—which it called an unprecedented move and not legally required—as long as Norman agreed to seal the case.

C&P did not want other advertisers to know such a remedy was available, Ken Pitt, a C&P spokesman, said. "If every time we had a complaint we had to stop the presses, it would be an impossible situation," Pitt said. "We would never get the books out."

The Washington Post has asked judges in some business cases to impose protective orders on internal company documents relating to individual personnel records and marketing information, but has not sought sealing orders on information filed in court, according to newspaper vice president and counsel Boisfeuillet Jones Jr.

In libel cases, Jones said, The Post seeks to protect the identity of confidential sources, but otherwise turns over records detailing the editorial process without any protective order precluding public access.

Lawyers also have learned to use secrecy when they are sued personally. In D.C. Superior Court, nearly a fourth of the 53 sealed cases involve allegations of legal malpractice or disputes between lawyers. "It's judges and lawyers saying, 'We'll take care of our own,' " said lawyer John Karr.

In Prince George's County, Chief Judge Ernest A. Loveless said he sealed the records of a lawsuit filed in June against a Maryland lawyer because—in Loveless' words—he did not want "nosy" clerks to have access to the file. "You've got people handling that [court] jacket all day long who would know him," Loveless said.

In one case in D.C. Superior Court, attorneys agreed between themselves to seal certain records in a case against Howard University Hospital, only to run into stiff opposition from Judge Gladys Kessler—one of the few instances in which a judge refused to go along with such a request.

The hospital had agreed to pay $275,000 to the family of a 36-year-old Washington man who died after the hospital staff allegedly misdiagnosed his pneumonia as malaria, an allegation that the hospital denied. When they presented the deal at a July 24, 1986, hearing, Kessler said, "Across the board, I believe that court documents are public documents, and the world has a right to look at them," according to a transcript of the hearing.

The case later was settled for the same amount, and the file remained open.

Kessler was surprised when she was reminded during an interview that she, too,

See COURTS, A21, Col. 4

COURTS, From A1

appeared on the list of Superior Court judges who have sealed cases. Told that the case involved a lawyer and a bank, she said she could not discuss her reasons for sealing it but acknowledged her action was "inconsistent" with her stated philosophy.

"It really is a good example of my feeling that sealing is often done on an arbitrary or ad hoc basis," she said. "Sealing is often granted to people who are economically and socially advantaged and are therefore able to hire lawyers who know how to ask for that remedy. I suspect that you will rarely see a case involving poor people which has been sealed."

But defense lawyers say secrecy is just another tool in the vigorous representation of a client. "I will have clients I know are guilty of some wrongdoing civilly and it's still my obligation to go in and defend them as best I can," said Joseph Montedonico, whose D.C. firm has obtained five sealing orders in Superior Court civil lawsuits.

Montedonico, whose firm represented Howard University Hospital in the case that Judge Webber sealed, said lawyers have no ethical responsibility to decide if a confidentiality order is contrary to the public interest. "I don't make the ultimate decision. That's up to the judge," he said.

In another twist on the kind of leverage that secrecy can offer, lawyer Jean D. O'Malley said one of her clients was offered a "substantial increase" in a settlement in return for agreeing to the other side's request to seal a case in D.C. Superior Court.

According to documents apparently left by mistake in the open file, the suit alleged that a 6-month-old child died after a D.C. doctor failed to diagnose and treat diarrhea, a charge the doctor denied.

O'Malley declined to comment on the case, citing the seal. She said she felt ambivalent about closing the records in the case because it involved questions about a doctor's performance. At the same time, she said, her client did not object to the secrecy as long as it meant a higher settlement.

As a general rule, O'Malley said, "secrecy is worth money. No seal, no bucks."

The doctor's attorney said he made no such offer and does not engage in such tactics. "The amount of the settlement was not affected at all by the agreement to seal," he said.

'Top Dollar' for Privacy

Some settlement negotiations have nearly collapsed over the issue of confidentiality. In 1984, Judge James C. Cacheris in Alexandria federal court sent attorneys back to the negotiating table when it was clear there was a difference of opinion over the effect of a proposed confidentiality agreement.

The suit alleged that a Falls Church resident, Michael A. Webber, had suffered a near-fatal rupture of the stomach after taking Arm & Hammer Baking Soda for indigestion, a usage suggested on the package. The baking soda manufacturer, Church & Dwight Co., disputed in court papers that its product had caused Webber's illness.

At a settlement conference with the judge, Church & Dwight Co.'s attorney, Richard H. Lewis, complained that a Washington Post reporter had inquired about the case. Lewis said the company would not go forward unless Webber and his attorneys agreed not to talk about the matter, according to a transcript of the July 25, 1984, hearing.

The company was paying "top dollar" to settle, Lewis said, "but part of that reasoning was . . . no one would discuss this matter with the press or anybody else, not only the dollars and cents, but the facts [of the case]."

Webber's attorneys were reluctant to go along. After a short recess, however, they gave in to the company's demand. Back in court, Cacheris asked Webber, his wife and one of his attorneys, Kenneth Trombly, whether they understood the secrecy provision, repeating his questions several times to make sure. Satisfied, he dismissed the case, saying, "I'm glad you all resolved it."

The strategy worked. No news article appeared about the case.

Staff researcher Melissa Mathis contributed to this report.

NEXT: One company's strategy

Court Confidentiality Stymies Disciplinary Probes

Judges have sealed case files in at least 200 lawsuits in the District of Columbia and its suburbs. Hundreds of other cases have been settled with confidential contracts in which judges are not involved. Such settlements generally bar either side from discussing the suits.

CONFIDENTIAL

PROTECTED BY COURT-IMPOSED PROTECTIVE ORDER

Secrecy procedures are increasingly being used to prevent debate about critical problems of public safety and policy. Those who have sought to take advantage of secrecy procedures include corporations, hospitals, doctors and other professionals.

Party Name	Case Number	Party Type	Date Filed	Case Title / True Party Name
			...77?	SEAL... ASSOCS..ET AL
SEALE, WILL...	...-03546	D	02/01/84	KAHN, ET AL V PHILLIPS, ET AL
SEALED	1:82-cv-00856	D	03/26/82	SEALED
SEALED	1:82-cv-00856	P	03/26/82	SEALED
SEALED	1:83-cv-01401	D	05/16/83	SEALED
SEALED	1:83-cv-01401	P	05/16/83	SEALED
SEALED	1:83-cv-03591	D	12/01/83	NAT.STABIL..ETC.ETL V COMMERCL.SHT.METAL
SEALED	1:83-cv-03591	P	12/01/83	NAT.STABIL..ETC.ETL V COMMERCL.SHT.METAL
SEALED	1:83-x -00200	U	06/22/83	USA V TREADWELL
SEALED	1:84-cv-00050	D	01/06/84	SEALED
SEALED	1:84-cv-00050	P	01/06/84	SEALED
SEALED	1:84-cv-01582	D	05/21/84	SEALED
SEALED	1:84-cv-01582	P	05/21/84	SEALED
SEALED	1:84-cv-02103	D	07/13/84	SEALED
SEALED	1:84-cv-02103	P	07/13/84	SEALED
SEALED	1:85-cv-01094	D	04/05/85	SEALED
SEALED	1:85-cv-01094	P	04/05/85	SEALED
SEALED	1:86-cv-02091	pla	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:86-cv-02091	dft	07/30/86	SEALED v. SEALED, et al
SEALED	1:87-cv-00669	pla	03/12/87	HARD ROCK CAFE, et al v. JOHN DOES
SEALED	1:87-cv-00669	dft	03/12/87	HARD ROCK CAFE, et al v. JOHN DOES
SEALED	1:87-cv-00945	pla	04/06/87	SEALED v. SEALED
SEALED	1:87-cv-00945	dft	04/06/87	SEALED v. SEALED
SEALED	1:87-cv-01175	pla	04/29/87	SEALED v. SEALED
SEALED	1:87-cv-01175	dft	04/29/87	SEALED v. SEALED
SEALED	1:87-cv-01197	pla	05/01/87	SEALED v. SEALED
SEALED	1:87-cv-01197	dft	05/01/87	SEALED v. SEALED
SEALED	1:87-cv-01251	pla	05/08/87	SEALED v. SEALED
SEALED	1:87-cv-01251	dft	05/08/87	SEALED v. SEALED
SEALED	1:87-cv-01547	pla	06/08/87	SEALED v. SEALED
SEALED	1:87-cv-01547	dft	06/08/87	SEALED v. SEALED
SEALED	1:87-cv-02081	pla	07/28/87	MIKE, INC., et al v. JOE'S SPOT, INC., et al
SEALED	1:87-cv-02081	dft	07/28/87	MIKE, INC., et al v. JOE'S SPOT, INC., et al
SEALED	1:87-cv-02372	pla	08/27/87	LOUIS VUITTON, S.A., et al v. LIMSCO, INC., e
SEALED	1:87-cv-02372	dft	08/27/87	LOUIS VUITTON, S.A., et al v. LIMSCO, INC., e
SEALED	1:87-cv-03124	pla	11/18/87	SEALED v. SEALED
SEALED	1:87-cv-03124	dft	11/18/87	SEALED v. SEALED
SEALED	1:87-cv-03434	pla	12/17/87	SEALED v. SEALED
SEALED	1:87-cv-03434	dft	12/17/87	SEALED v. SEALED
SEALED	1:88-cv-00578	pla	03/03/88	SEALED v. SEALED
SEALED	1:88-cv-00578	dft	03/03/88	SEALED v. SEALED
SEALED	1:88-cv-00579	pla	03/03/88	SEALED v. SEALED
SEALED	1:88-cv-00579	dft	03/03/88	SEALED v. SEALED
SEALED	1:88-cv-01426	pla	05/25/88	SEALED v. SEALED
SEALED	1:88-cv-01426	dft	05/25/88	SEALED v. SEALED
SEALED	1:88-cv-01458	pla	05/27/88	SEALED v. SEALED
SEALED	1:88-cv-01458	dft	05/27/88	SEALED v. SEALED
SEALED AIR CORPORATION	1:81-cv-00797	P	04/05/81	SEALED AIR CORP. v. ALFERGIA...
SEALES, DEBORAH	1:85-cv-03333	pla	10/18/85	WELLS...
...AH	1:85-cv-03323	R...	10/...	

THE WASHINGTON POST

A list of files in D.C.'s federal courthouse. "*Sealed v. Sealed*" may mean that even the names involved were shielded at the outset.

Secrecy Boosts Settlements

VIEWPOINTS

KESSLER

"Criminal law is the public business. Private lawsuits are usually private business. The courts don't have much say."

—Stanley Sporkin, a federal court judge who believes that courts have only a limited role in civil lawsuits before trial

". . . I believe that court documents are public documents, and the world has a right to look at them."

—Gladys Kessler, a D.C. Superior Court judge who has ordered one case sealed but who believes that such actions are often done on an arbitrary or ad hoc basis

SPORKIN

MONTEDONICO

"I don't make the ultimate decision [to seal a lawsuit case file]. That's up to the judge."

—Joseph Montedonico, a D.C. lawyer whose firm has obtained five sealing orders in Superior Court civil lawsuits

As a general rule, "secrecy is worth money. No seal, no bucks."

—Jean D. O'Malley, a D.C. lawyer who said a client was offered a "substantial increase" in a settlement in return for agreeing to the other side's request to seal a case in D.C. Superior Court

O'MALLEY

TUESDAY, OCTOBER 25, 1988

PUBLIC COURTS, PRIVATE JUSTICE

Third of Four Articles

Drug Firm's Strategy: Avoid Trial, Ask Secrecy

Records Reveal Story of Zomax Recall

By Benjamin Weiser
and Elsa Walsh
Washington Post Staff Writers

In mid-January 1985, an important memorandum began circulating to top officials at McNeil Pharmaceutical, a major subsidiary of the Johnson & Johnson company, the maker of Band-Aids and Tylenol.

The memo was both a warning and a reminder of a difficult period in McNeil's history. Nearly two years earlier, on March 4, 1983, McNeil had withdrawn its prescription painkiller Zomax after only 28 months on the market. The decision came after reports of hundreds of severe allergic reactions to the drug, a top seller. After the recall, the company faced nearly 600 lawsuits, many alleging that McNeil had failed to adequately warn the medical community about Zomax's risks—an allegation the company has strongly disputed in court.

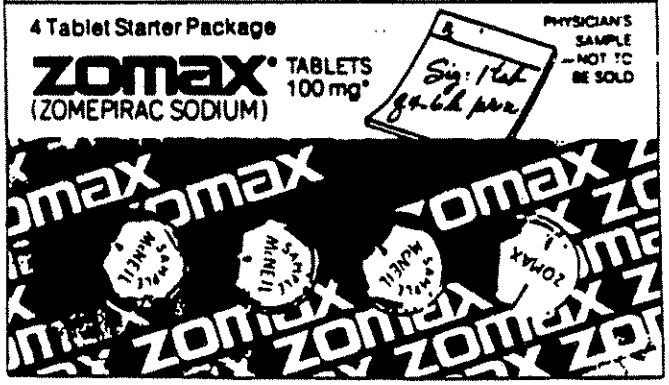
The Jan. 14, 1985, memo, written by McNeil legal aide Herman Lutz, listed 18 lawsuits that "presented McNeil with the most exposure or had sensitive problems." Many of the cases involved patients who had taken Zomax during periods when the company had decided to issue stronger warnings, but had not yet done so. The memo, sent to company President Jack O'Brien, also noted other factors, including the potential testimony of several witnesses that might prove worrisome.

To defend itself against these lawsuits and dozens of others that McNeil's lawyers regarded as serious, the company adopted a strategy that it has pursued vigorously during five years of Zomax litigation in 43 states.

It has used court secrecy procedures—called protective orders—to prevent the disclosure of information that McNeil turned over during the course of the lawsuits. It has taken only three cases to trial, choosing instead to settle cases outside the courtroom without admitting any liability. As part of these settlements, it has obtained confidentiality agreements that prohibit opposing lawyers and their clients from revealing what they have learned about Zomax.

What McNeil's attorneys consistently have managed to keep out of the courtroom are documents and testimony that might have provoked a public debate about whether McNeil withheld information from the medical community about the risks of Zomax. The U.S. Food and Drug Administration concluded in 1985 that the drug was probably a factor in 14 deaths and 403 life-threatening allergic reactions. The material also did not reach congressional investigators who, a month after the recall, held two days of hearings

See COURTS, A12, Col. 1



COURTS, From A1

that centered on the FDA's role in regulating Zomax, and not the company's internal procedures.

McNeil officials, pointing out that drugs are inherently unsafe, said in interviews that they promptly alerted doctors or the FDA whenever they had solid data about Zomax's risks. They sought broad secrecy orders, they said, to prevent disclosure of trade secrets that would be valuable to competitors and because some documents might be misinterpreted. "McNeil's only protection is secrecy," the company has said in court papers.

The Washington Post, as part of a lengthy examination of secrecy in the civil courts, has reviewed much of this still-confidential material. It provides an inside look at how McNeil tested and marketed Zomax, then struggled to understand why the drug—which was being taken safely by millions of people—also was causing unpredicted and life-threatening reactions in some patients.

According to the documents, there were indications during premarketing testing that Zomax might cause a severe allergic reaction known as anaphylaxis, which can lead to seizures and respiratory failure. McNeil said the results were not conclusive enough to include in Zomax's package insert—the primary way that a company warns prescribing doctors of harmful side effects.

A warning about anaphylaxis was first included nine months after the drug went on the market, following several reports of anaphylactic reactions, but one internal memorandum to McNeil's president criticized the company for not acting sooner. "We resisted too much and waited too long," wrote Patrick Seay, McNeil's longtime head of regulatory affairs in a Sept. 8, 1984, critique of the company's overall performance in marketing drugs.

Another internal document is a Feb. 26, 1982, memo sent to the company's sales force immediately after a case of anaphylactic shock was reported in the Journal of the American Medical Association. The memo said, "This information is being sent to you so you will be fully prepared to respond to a physician or pharmacist who initiates discussion on the article. You should not bring up the subject."

Six weeks later, other documents show, the company launched a high-pressure sales campaign shortly after McNeil had sent out a special warning letter to 200,000 physicians. As the letter was being drafted, a McNeil researcher gathered data that suggested Zomax might be riskier for some patients than previously believed.

Concerns within McNeil climaxed in a series of tense weekend meetings on Feb. 5 and 6, 1983, at the firm's headquarters in Spring House, Pa. Three of the company's four top doctors told McNeil's president they no longer had confidence in the drug's safety, according to one of the doctors, James A. Dale. The company considered various options, including a recall, before deciding instead to strengthen its package warning.

As the new warning was being prepared, two people died of anaphylactic reactions allegedly related to Zomax use, and the company took the drug off the market. "They were avoidable deaths," Dale, then McNeil's associate medical director and now in private practice, said in an interview. "They were avoidable side effects . . . . I felt guilty . . . . We met and had the opportunity to take action . . . . We could have done something sooner."

Dale has never testified in any Zomax lawsuit. In several instances where his testimony has been sought, McNeil has settled before he could appear for a deposition, sworn pretrial testimony that is taken outside the courtroom. Information about the Feb. 5 and 6 meetings has never become public.

McNeil also moved quickly to settle two cases in which opposing lawyers had unexpectedly referred to sensitive McNeil documents in publicly filed legal briefs in Miami and Seattle. As part of those settlements, judges in both cases ordered that the entire file be sealed from public view.

During four hours of interviews and in 22 pages of written responses to questions submitted in advance, officials at McNeil and its parent company, Johnson & Johnson, strongly defended both their legal strategy and their handling of Zomax.

"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible," said Roger Fine, associate general counsel of Johnson & Johnson, which handles the legal work for all the company's subsidiaries.

According to Fine, secrecy orders were necessary to guard the company's chemical formulas and marketing methods, as well as to prevent others from using documents to suggest unfairly that McNeil did not care about the safety of its products. The company settled cases, he said, for a variety of reasons, not just concern over documents and testimony.

James E. Burke, chairman of Johnson & Johnson, said in an interview that he was proud of the company's handling of Zomax and rejected any suggestion that the company should have withdrawn the drug immediately after the Feb. 5 and 6 meetings. Once the company decided to recall the drug, he said, "I think we did a good thing—I don't see how you could do it any faster."

Dr. Patricia Stewart, McNeil's head of medical research, said her staff carefully monitored adverse reactions to Zomax for the entire time that it was on the market. McNeil officials said the company's decision to issue a stronger warning after the Feb. 6 meeting was a prudent course of action given what was known at the time.

Lawrence G. Foster, Johnson & Johnson's vice president for public relations, said, "As we demonstrated in response to the Tylenol poisonings and again in the way we managed Zomax, our first responsibility under our credo is to our customers. Anybody who manages a business for the long term, as we do, knows that putting the customer first is the only way to increase sales."

Foster said that nearly 15 million patients used Zomax without incident, and that the recall of Zomax was not an admission that the drug was unsafe for everyone. "Decisions regarding Zomax labeling had to be made based on fragmentary information about possible adverse reactions experienced by a small number of patients out of the millions who actually used the medication," he said. "This is hardly an exact science . . . . And warning of every conjectural side effect, no matter how thin the evidence, results in a label so expansive and indiscriminate that it in effect warns of nothing . . . ."

The company revised its warning labels whenever it had enough information to war-

rant it, he said. "This is the simple truth—and no amount of second-guessing of McNeil's and FDA's judgments . . . can negate it."

Responding to Seay's criticism that McNeil had not issued a warning about anaphylaxis soon enough, Foster said the company's decision was reasonable at the time.

The adequacy of McNeil's warnings is the central issue in the Zomax lawsuits. The courts have long recognized that prescription drugs are inherently unsafe, that what is enormously beneficial for some people may not be for others. Federal law has resolved that medical dilemma by requiring drug companies to assess a drug's risks, as well as its benefits, and issue full and accurate warnings about possible adverse side effects. If a company complies, the courts have ruled, it usually cannot be held liable for an adverse reaction.

Seay, in his 22-page internal critique written 18 months after Zomax was recalled, voiced his belief that the company had failed, at times, to meet its own high standards. "We can do little about the past," he wrote, "but we should perform now strictly according to the letter and spirit of the regulations and to ethical principles to preserve the good name of J&J [Johnson & Johnson]."

Conflicting Interests

The information in this article is drawn from internal McNeil records made available by sources, and from interviews with present and former McNeil employees, lawyers who have sued McNeil and officials at McNeil and Johnson & Johnson.

McNeil's attorneys agreed to discuss some aspects of their legal strategy and to comment on internal documents that The Post had obtained elsewhere. They declined to disclose settlement amounts or to release internal records.

A handful of plaintiffs' attorneys agreed to a limited discussion of their impressions of McNeil's legal strategy. A few other lawyers consented to interviews on the condition that they not be identified by name. Most plaintiffs' attorneys, however, declined to make any comment, saying they feared it might be construed as a violation of court-imposed protective orders or a breach of the confidentiality agreements they have signed with McNeil.

Some of the plaintiffs' attorneys, while acknowledging that they agreed to McNeil's requests for secrecy, took issue with the company's statements about its need for confidentiality.

Allan Kanner, a lawyer in Philadelphia who has represented several clients in Zomax settlements, said, "What they are trying to do is not be accountable to the vast majority of the public for what they've done . . . . They paid my clients a ton of money for me to shut up."

Maryland lawyer Steven Nemeroff, who settled a Zomax lawsuit in Baltimore, said generally of lawsuits involving drugs, "The problem is that they have a gun to your head. The client is concerned about being compensated in full. The lawyer must abide by the concerns and wishes of his client . . . not the fact that [information will remain secret or] other victims may be injured."

For some of Zomax's alleged victims and their families, the legal process left them ambivalent. They agreed to financial settlements—in which the company admitted no fault—and found themselves with important unanswered questions.

Carol Sawyer, whose lawsuit alleged that her 42-year-old husband Michael died of anaphylaxis after taking Zomax, said she settled the case without knowing of the Feb. 6 meeting at which Dale said he and two other McNeil doctors had declared their lack of confidence in Zomax's safety.

Michael Sawyer was one of two people to die of anaphylactic reactions allegedly caused by Zomax in the four-week period between that meeting and Zomax's recall. "That's very upsetting to know, that [his death] might have been prevented," she said. "I just can't believe [McNeil] would take a chance and wait and see."

Devra L. Davis, a Washington toxicologist who settled with McNeil after suffering a near-fatal anaphylactic reaction, said she believes court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes."

If independent scientists could make a thorough study of what happened with Zomax, Davis said, they might be able to learn lessons that would help others in the future.

McNeil's attorneys dispute these characterizations, saying that the civil courts are primarily intended to be a place to resolve private disputes—and, therefore, not the proper forum for a public debate on McNeil's performance. "We don't really have anything to hide in this thing," said David F. Dobbins, of Patterson, Belknap, Webb & Tyler, the New York law firm that has represented McNeil in court throughout the Zomax litigation.

Code Name: Operation 111

In large part, the information contained in McNeil's internal records and in still-confidential depositions shows a side of the drug industry that the public rarely sees: the inevitable tension between the medical staff and the marketing division, the sometimes flawed relationship between a drug company and its regulators at the FDA, and the high-pressure sales tactics used to promote a drug to doctors and hospitals.

When Zomax was approved for sale in October 1980, McNeil called the painkiller a breakthrough, as strong as a narcotic but not addictive. The drug was an immediate success, capturing 11 percent of the new prescription analgesic market within four months, according to McNeil records.

Zomax's initial package insert cautioned that doctors should not prescribe the drug for patients with allergies to aspirin or similar medication, but it made no mention of anaphylactic reactions.

The first reports of anaphylactic reactions—none of which had resulted in death—surfaced soon after Zomax was launched. In July 1981, the company revised its package insert to include a statement that "anaphylactoid reactions have been reported."

Seay, in his internal critique, suggested that the package insert should have been revised sooner. He faulted the company for allowing its marketing division to gain "a greater role in the content and changes of the package insert," an area traditionally left to the medical side.

Pointing out that several severe allergic reactions occurred in 1978 during the premarketing testing of Zomax, Seay said an argument could be made that the company should have interpreted them as anaphylactic—an argument the company rejects. Seay also cited reports of anaphylatic reactions to another McNeil drug, Tolectin. "We knew the

chemical relationship of Zomax to Tolectin and we knew that Tolectin produced anaphylactoid/anaphylactic reactions," he wrote.

McNeil's Foster said, "With hindsight, one can debate whether the label should have been changed a month or two earlier," but not earlier than that.

Another memo shows McNeil's growing concern as anaphylactic reactions escalated through 1981 and into 1982. "Zomax allergic reactions are continuing to be reported at a relatively high rate and need close surveillance," wrote Dr. Stewart, McNeil's medical research chief, on Feb. 18, 1982.

A month later, the company learned of the first fatal anaphylactic reaction in a patient who had taken Zomax. Because the patient was allergic to aspirin and should not have been given a prescription for Zomax, the company decided to issue a special "Dear Doctor" letter to the medical community to call attention to the aspirin warning already in the package insert.

As the Dear Doctor letter was being drafted with the aid of FDA officials, the company undertook a study of the 178 allergic and anaphylactic reactions that had been recorded since Zomax was introduced. The results surprised some members of McNeil's medical staff.

According to a March 31, 1982, internal memo from researcher Thomas Teal to McNeil president O'Brien, the study found a pattern of anaphylactic reactions in patients who took Zomax intermittently—starting, stopping, starting again. It made no conclusions about these statistics.

Intermittent users were Zomax's largest market, about 75 percent. They took Zomax like aspirin, whenever necessary. If they were at risk, that might require a broad warning.

A few days after Teal presented his study to McNeil management, documents show, an explicit paragraph-long warning was drafted for the proposed Dear Doctor letter, specifically citing risks for intermittent users who had no previous problems with Zomax. In the final draft, however, the word "intermittent" was dropped and the warning shortened to a single sentence: "Hypersensitivity upon re-exposure or extended use cannot be ruled out."

In recent interviews, McNeil and Johnson & Johnson officials stood by the letter's final wording. They said the Teal study, while worthy of consideration, was based on fragmentary information. At that point, they said, intermittent use was still an "unproven risk factor."

On April 9, the less explicit version was mailed to 200,000 prescribing doctors.

Seven days later, internal documents show, McNeil instructed its sales force to undertake a major new marketing campaign. An April 16 Mailgram said, "We're calling it 'Operation One-Eleven.' Now, if that sounds like war, well, in our world of selling that's what it is."

It was being called Operation 111, the Mailgram said, because McNeil hoped to garner $111 million in annual sales for Zomax and its sister drug, Tolectin. To do so, the Mailgram instructed the sales force to concentrate exclusively for 10 weeks on those two drugs.

During the duration of the sales campaign, McNeil sent memo after memo to its sales force, all written in mock military language and styled as if they were military intelligence reports. At the top of each was the Operation 111 insignia: crossed rifles. The sales reps received new stationery.

See COURTS, A13, Col. 1

Staff Doctors Voice Concern At Tense Weekend Meetings

COURTS, From A12

adorned with pictures of a tank, a cannon and a fighter plane.

An April 22 memo to the sales force, titled "Operation 111 War Bulletin," warned of a competing drug firm's plans to introduce its own painkiller. It began:

"Situation: Be advised, the invading forces of Pfizer are currently amassing on our borders. Intelligence reports that no aggressive actions have taken place thus far. Each day Pfizer delays gives us more time to make preemptive strikes.

"Mission: We will not only hold our ground but continue to increase our strength by aggressive pursuit of current competitors.

"Strategy: Immediate deployment to all territory representatives and hospital representatives for strengthing the Zomax . . . flanks has begun . . . .

"Tactical support: Our factories have been converted to increase production of samples, direct mail, literature, and journal ads."

Halfway through Operation 111, a memo went out reminding the sales force that "high volume prescribers" of Zomax should be called a minimum of four times before the campaign was over. Each sales representative had been sent a list of these physicians in their area.

At McNeil headquarters, some medical staffers were upset about the sales campaign, believing that it had probably increased sales to intermittent users, according to Dale.

McNeil officials said Operation 111 was a typical sales campaign that had been conceived to respond to the introduction of Pfizer's new drug. They stressed that the sales force also had been sent copies of the Dear Doctor letter, which in their view contained the best warning statements that could be written at that time.

The Demise of Zomax

The internal documents also contain revealing insights into McNeil's dealings with the FDA and provide new details about the company's decision to recall the drug.

By law, drug companies are required to forward all reports of adverse reactions to the FDA. In 1982, documents show, Seay informed the FDA that McNeil had inaccurately reported the seriousness of several adverse reactions to Zomax. According to an April 21, 1982, internal memo by Seay, who was the company's liaison with the FDA, several cases described simply as allergic reactions "should have been designated" as the more serious anaphylactic.

It is clear from Seay's 1984 critique that he considered accurate reporting to the FDA to be of paramount importance. Not naming any specific drugs, he recounted one McNeil official's complaint that the company was "reporting too many adverse reactions on our drugs." Responded Seay, "We must report every adverse drug reaction that is received by us . . . . The requirements are clear."

Seay's critique also criticized other McNeil officials who paid visits to the FDA commissioner's office, which Seay said were seen by the FDA "as a form of pressure" to win favorable decisions. "We are having some difficulty in maintaining credible relations with FDA," he wrote.

Another internal memo criticized Dr. John Harter, the FDA official in charge of regulating Zomax. Robert Z. Gussin, McNeil's vice president for scientific af-

THE WASHINGTON POST

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fairs, described Harter as someone who "seems to have a different cause celebre every week, and we would go out-of-our-minds if we seriously followed up every one," according to his Jan. 25, 1982, memo to a McNeil colleague.

McNeil officials told The Post that Gussin's "colorful choice of words" does not reflect McNeil policies. They said the company took all FDA requests seriously.

By early 1983, with Johnson & Johnson still reeling from the highly publicized Tylenol poisonings in the fall of 1982, a task force was appointed at McNeil to study the deaths associated with Zomax use. At a meeting of McNeil officials, "It was pointed out . . . that this is a sensitive issue which can become the focus of immediate attention," according to minutes of the Jan. 21, 1983, meeting.

The issue came to a head at the Feb. 5 and 6 weekend meetings. At a Sunday session, McNeil president O'Brien heard for the first time that three of his four highest-ranking medical staffers were sufficiently concerned that they would not prescribe the drug for a patient, according to Dale, one of those who participated. His account was confirmed by another McNeil employee who attended the meeting with O'Brien.

McNeil officials differ over what happened next. Dale said there was a consensus that the company should recall the drug and immediately publicize its concerns. Foster, of Johnson & Johnson, said, "The possibility of voluntarily withdrawing the drug from the market was considered, but it is incorrect to state that the medical personnel concluded that a recall should take place."

The company decided to strengthen its package insert again. As it was being prepared, McNeil learned of three cases in which patients with no known allergy to aspirin had died of anaphylactic shock. Then, on March 3, a Syracuse, N.Y., television station carried a report of several nonfatal anaphylactic reactions in that city, the first time the issue had surfaced in the general media.

The next day, Johnson & Johnson announced the nationwide recall.

Troubling Witnesses

From the filing of the first lawsuits, after the wide publicity about the recall, McNeil's lawyers divided the cases into two categories. Many cases were considered frivolous or involved mild reactions that caused no long-term injuries. These were typically settled for less than $20,000, according to McNeil, and involved no extensive exchange of documents or secrecy orders.

The second category were cases deemed more difficult to defend for a variety of reasons, including the severity and timing of the injury, as well as the company's desire to prevent sensitive documents from emerging or certain witnesses from testifying.

One such witness was Jody Perez, a former McNeil sales representative in Texas who had resigned in 1982 because he believed the sales campaign downplayed Zomax's risks. Perez is listed as one factor in some cases on the list of 18 sensitive cases that circulated inside McNeil in January 1985.

McNeil's lawyers said Perez was only one factor in their decision to settle and never the most important one. "We looked at the cases in the total spectrum . . . the injuries involved, the jurisdiction, all the things which go into evaluating a case, and attempted to negotiate a settlement," said Roger Christiansen, another Johnson & Johnson attorney.

McNeil was more concerned about anonymous notes that began mysteriously arriving in 1986 at the offices of attorneys suing McNeil. The notes urged that they "not be deflected" from taking depositions of three McNeil employees—Dale, Seay and Edward Lemanowicz, one of Seay's deputies.

The depositions never took place.

One note went to lawyer W. Thomas Smith. He was the attorney for Carol Sawyer and the children of Michael Sawyer, whose death had occurred in the four-week interval between the Feb. 6 meeting and the recall. The Sawyer lawsuit, filed in Boston federal court, was on McNeil's list of 18 sensitive cases.

Another note went to Florida attorney James Gray, who was representing Higinio Acosta, a 41-year-old construction worker who had a severe reaction on the same day as Sawyer.

Both cases were settled soon after Smith and Gray sought to take the depositions. Under the terms of the settlements, the attorneys said they could not discuss the cases. In the Acosta case, the entire file in the Miami federal court has been sealed "in accordance with certain confidential agreements," according to an Oct. 2, 1986, order by Judge Thomas E. Scott.

McNeil's attorneys said they settled these two cases for a variety of reasons and not because they feared the testimony of potential witnesses.

Referring to the three men, Fine said, "They were not the best spokespeople for the company. It was as simple as that."

Staff researcher Melissa Mathis contributed to this report.

NEXT: A sealed dispute

Settlements Kept Former Drug Salesman's Story Under Wraps

Jody Perez, a former sales representative for McNeil Pharmaceutical, went to his garage in June 1984, retrieved some documents stored there and took them to a law office in downtown Lubbock, Tex.

He was an important witness in several lawsuits against McNeil, which had been filed by alleged victims of Zomax, a prescription painkiller that McNeil pulled off the market in March 1983. Perez, 34, had quit the company in frustration and disgust in 1982, believing that the sales force had participated in a campaign that minimized Zomax's risks.

His audience at the law office was limited: attorneys suing McNeil, attorneys representing McNeil and a stenographer making a record of Perez's words. No judge or jury was present. This was a sworn deposition, pretrial questioning intended to help the lawyers prepare their case, the first of two depositions that Perez gave.

In all, the Perez transcripts total more than 900 pages. But no one, other than that small group of attorneys and their clients, has read them. Before Perez could tell his story in open court, the lawsuits were settled. As part of the settlements, the lawyers are prohibited from discussing the cases.

McNeil's attorneys said the company had many reasons for settling cases in which Perez was deposed, and that Perez was only a small factor. "What he had to say was not something that we were concerned about. We knew what he had said. We had taken his deposition and it wasn't anything extraordinary," said Steven Charen, a lawyer with the New York firm that has represented McNeil in Zomax cases.

McNeil officials, both in court and in recent interviews, rejected any suggestion that the company sales campaign had played down Zomax's risks. Safety concerns, they said, were the company's first consideration in its marketing of drugs, including Zomax. The drug was taken safely by millions and the company issued warnings about its risks whenever necessary, they said.

Perez's testimony and his documents were a mainstay in the five-year legal battle over Zomax. In defending against the Zomax lawsuits, McNeil used an array of court-approved secrecy procedures to control the disclosure of documents and testimony.

The attorneys suing McNeil saw witnesses such as Perez as extra leverage. They knew how some juries might react to his testimony, and they used it in bargaining with McNeil.

Perez had no pharmaceutical background when he was hired at McNeil in June 1981 at an annual salary of $19,500. A former teacher and football coach at Lubbock High School, he went through a weeklong orientation devoted in part to Zomax, which had gone on the market eight months before.

Perez spent much of his time on the road in western Texas, visiting doctors' offices and hospitals. The trunk of his company car was filled with boxes of Zomax samples, along with Zomax-imprinted golf tees, prescription pads and pens that he handed out on sales calls.

Hospital personnel welcomed his visits—and his gifts. "The staff was hungry for some good down-home conversation and service," Perez wrote in a weekly report one week after visiting hospitals in eastern New Mexico. At Guadalupe Hospital in Carlsbad, he noted, "McNeil is the only company where reps bring them donuts, notepads or anything. Very appreciative. They usually have to pry notepads from Lilly rep."

He treated doctors to college football games and boxing matches, delivered pizzas to their offices and took doughnuts to their surgical suites. He gave samples to medical students and medical residents for their headaches, hangovers and menstrual cramps. He flattered nurses and receptionists to gain access to their office supply closets, which he then filled with Zomax samples.

Before Halloween, he carried pumpkins filled with candy and Zomax samples into doctors' offices, announcing, "Doctor, medicine is very serious business and you don't want to trick your patients, so treat your patients [with] Zomax," according to his Oct. 30, 1981, field report.

By early 1982, Zomax had become a phenomenal success, ranking second among McNeil's prescription products behind Tylenol with Codeine. "No other company has ever come close to this record of productivity for a new product launch," according to a Dec. 17, 1981, memo to Perez and McNeil's national sales force. "Let's make the McNeil sales force and Zomax the 'talk of the industry' for the second year in a row."

That same month, Perez learned of four severe anaphylactic reactions associated with Zomax use at local hospitals. At Methodist Hospital, an emergency notice was posted and the staff was told not to prescribe Zomax pending further investigation.

Word quickly spread to doctors throughout Lubbock. Perez's weekly reports took on a worried tone.

Jan. 29: "They want to know the details about what is going on. But the big question is whether they will keep writing for Zomax???"

Feb. 12: "I got kicked out of Dr. Patrick Pappass's office. I just mentioned Zomax and he said, 'Get out if you don't want me to quit writing your other products.' "

Feb. 19: "I won some battles this week concerning Zomax, but I do not believe that the war will be easily won . . . . The overall movement of Zomax in Lubbock is slowing down immensely."

Soon, six of the seven Lubbock hospitals stopped using Zomax. Pharmacists questioned doctors who prescribed the drug, according to one of Perez's reports. For Perez, months of hard work had come undone.

In early March, McNeil's head of medical research, Dr. Patricia Stewart, flew to Texas to investigate the reactions. She met with doctors and one of the people who had an anaphylactic reaction. On her return to McNeil headquarters in Spring House, Pa., she wrote a memo to her superiors, citing Perez for his "outstanding" performance in helping to reassure the Lubbock medical community. "Without his stabilizing influence the situation there would be much more problematic," she wrote.

In early April, Perez and the other sales people received a copy of a letter that McNeil was sending nationwide, reminding doctors that Zomax should not be prescribed for patients with sensitivity to aspirin and noting that "hypersensitivity" was a possible side effect for occasional users. "The attached letter need not be the focus of a Zomax presentation," an April 8 memo said. "However, the issues it raises should be communicated as part of a balanced presentation to physicians and pharmacists . . . . Zomax business is excellent. We are ahead of our sales forecast to date. Keep up the good work!"

A few days later, the company sent another announcement to its sales force, launching a major 10-week sales campaign for Zomax dubbed Operation 111. "Your role is vital" to Operation 111, said a Mailgram signed by Thomas Odiorne, then sales vice president and now McNeil's president. "Use your samples abundantly . . . . Remember, business belongs to those who ask for it."

McNeil officials said in recent interviews that their sales tactics, including Operation 111, are typical of the industry. "The communications to the sales force that are designated 'Operation 111' represent nothing but an unexceptional effort to compete in the marketplace with a resourceful competitor," said Lawrence G. Foster, vice president for public relations at Johnson & Johnson.

As Perez made his rounds to carry out Operation 111,he found strong resistance. One doctor told him that McNeil had, in his view, lost "all credibility" because of Zomax, Perez noted in one report. Perez, too, began to have doubts. At home, he threw away the samples he kept in the medicine cabinet.

At work, he kept his feelings to himself. McNeil was pleased with his efforts to promote the drug. "The Lubbock Zomax situation creates a big challenge," J.W. Davis, one of Perez's supervisors, wrote in Perez's March 1982 performance evaluation. "The goal is to sell as much Zomax as possible . . . . From all I see, you are the man for the challenge."

On May 21, Perez heard from his immediate supervisor, Chuck Marshall, McNeil's regional sales manager. "Wanted to express my appreciation for the outstanding way that you have handled the Zomax . . . situation in Lubbock," Marshall wrote. ". . . Suggest that you do not spend selling time initiating discussion on the Zomax side effects."

He recommended Perez concentrate his efforts on "other products" but then mentioned that he might want to continue offering Zomax samples to those doctors who "have expressed a desire to continue to prescribe the product." Marshall's note concluded: "Jody, most coaches never give up . . . . Most coaches, when their team is down, fight even harder and I know that you are this type of person."

On June 16, Perez heard of another severe reaction, according to one of his reports. Two days later, another Operation 111 memo arrived. "Keep the momentum going," the memo said. "It's looks like we're winning the battle, but the war is far from over . . . . "

A short time later, over breakfast, Perez said he voiced his growing concern with Marshall. "I said, 'What are we doing here? We're passing out stuff that's hurting people. People are dropping . . . . People are near death.' I said, 'Pull the drug off the market.' "

According to Perez, Marshall replied that that couldn't be done, citing competition and "business reasons . . . money reasons."

Asked about Perez's account of his conversation with Marshall, McNeil officials said they spoke with Marshall and he said he had not made those comments. The officials also said the company has never placed financial considerations ahead of public safety.

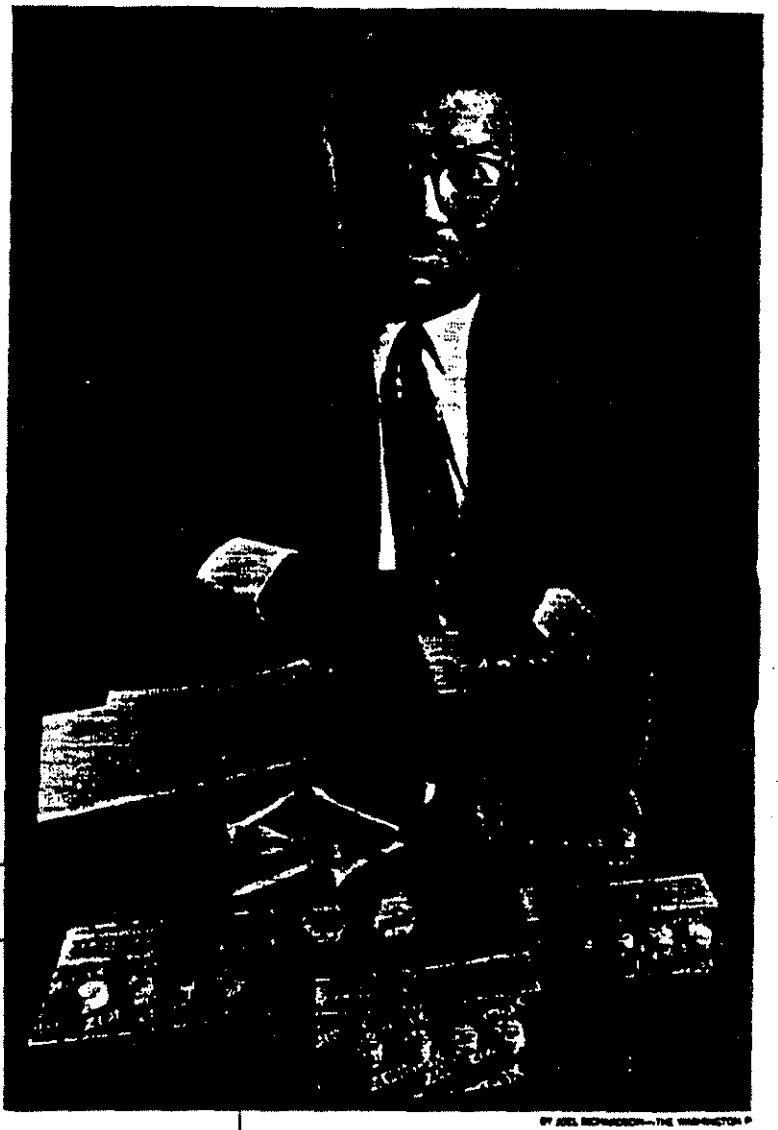
On July 1, McNeil gave Perez a $33-a-week raise, thanking him in a note for his help in "containing the Lubbock situation."

Eight days later, Perez quit.

Asked about Perez's account, McNeil said the cluster of Zomax reactions in Lubbock was an "isolated situation" and "aberrational." The company's attorneys said Perez had allowed his emotions to color his perspective about the highly competitive drug industry. "How drugs are marketed is common knowledge," said David Dobbins, another attorney who represents McNeil. "Jody Perez may think this is bad."

— Benjamin Weiser and Elsa Walsh

Settlements Kept Former Drug Salesman's Story Under Wraps



BY JOEL RICHARDSON—THE WASHINGTON P

McNEIL PHARMACEUTICAL

May 21, 1982

TO: Jody M. Perez

FROM: C. D. Marshall

SUBJECT: Field Work Session

Dear Jody:

Wanted to express my appreciation for the outstanding way that you have handled the ZOMAX® zomepirac sodium situation in Lubbock. You have been the right person for us to have in that location at the right time. Dr. Stewart, Jack Vaughan, Dick Jackson, J. W. Davis, and myself all know that no one could have done a better job. You have kept us informed of the situation, known exactly who should be contacted, and have established the necessary rapport and understanding with your customers to accurately report the facts. We realize you are not responsible for this situation and are concerned over how sales figures in this particular product category may affect your outlook and opinion of McNeil. Let me assure you that you will not be held responsible for this situation.

Suggest that you do not spend selling time initiating discussion on the ZOMAX side effects. We have a lot of other products to sell and I feel that you should be concentrating your efforts on this other items. I really wonder, however, if the physicians shouldn't be offered ZOMAX samples if they have expressed a desire to continue to prescribe the product.

Six weeks before he quit his sales job at McNeil, Jody Perez, above, received a letter from his immediate supervisor praising his handling of the Zomax "situation" in Lubbock, Tex., where there had been several reports of adverse reactions to the drug. The supervisor also suggested Perez not spend "selling time" by bringing up Zomax's side effects.

VIEWPOINTS

SAWYER

"That's very upsetting to know, that [her husband's death] might have been prevented."

— Carol Sawyer, who sued McNeil after her husband, Michael, 42, died of anaphylaxis after taking Zomax

Court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes."

— Devra L. Davis, a Washington toxicologist who settled with McNeil after suffering a near-fatal anaphylactic reaction

DAVIS

KANNER

"What they are trying to do is not be accountable to the vast majority of the public for what they've done . . . they paid my clients a ton of money for me to shut up."

— Allan Kanner, a Philadelphia lawyer who has been involved in a number of Zomax settlements

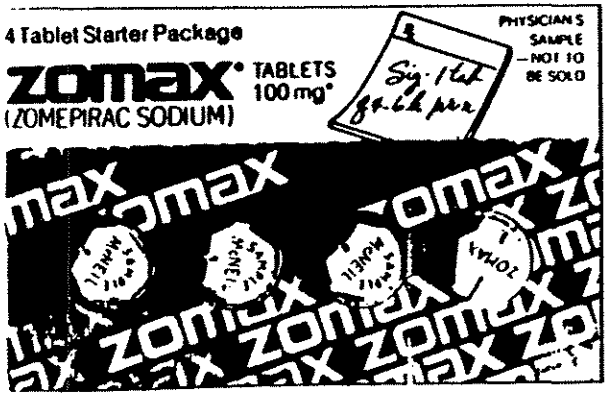
"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible."

— Roger Fine, Johnson & Johnson associate counsel, who believes secrecy orders are needed to guard company formulas and marketing methods

FINE

Drug Label Warnings at Issue in Suits

THE CORPORATE PHILOSOPHY



physician's sample of Zomax, developed / McNeil Pharmaceutical

"I think we did a good thing —I don't see how you could do it any faster."

— James E. Burke, chairman of Johnson & Johnson, rejecting any suggestion that the company should have withdrawn Zomax sooner

OPERATION ONE-ELEVEN

CONFIDENTIAL
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Operation III
ZOMAX® Tactical Maneuvers
22 April

Battle Strategy: ZOMAX, "the other aspirin analgesic," should be promoted to capture the following strongholds beyond the range of aspirin:

Osteoarthritis	Pelvic Sprains
Rheumatoid Pain	Post-Acute Fracture Pain
Post-Acute Surgical Pain	Pelvic Strains

Situations: These positions are currently held by Motrin and Naprosyn-D 200. Focusing on Feldene won't help us meet our objective and may in fact help Pfizer reach theirs.

Tactical Support:

Samples

An airlift operation is underway to provide additional samples by May 1. A second airlift will occur by June 1.

Literature

Two shipments are en route. By May 31 additional file cards and the New York Symposium Highlights brochure will be available to support your effort.

Mail

Several squadrons will drop mailings to universe and near-universe physicians around the clock to support sampling and promotional efforts.

Journal Advertising

Counterpoints are currently in key strategic offshore locations. They will continue to bombard the physician universe reinforcing the ZOMAX "other aspirin" position.

McNEIL PHARMACEUTICAL

"... Our first responsibility under our credo is to our customers."

—Lawrence G. Foster, Johnson & Johnson vice president for public relations, who said that nearly 15 million patients used Zomax without incident

A portion of the corporate philosophy of Johnson & Johnson's founder, below

Johnson & Johnson

"The evidence on this point is clear . . . Institutions, both public and private, exist because the people want them, believe in them, or at least are willing to tolerate them. The day has passed when business was a private matter — if it ever really was. In a business society, every act of business has social consequences and may arouse public interest. Every time business hires, builds, sells, or buys, it is acting for the . . . people as well as for itself, and it must be prepared to accept full responsibility for its acts . . ."

Excerpt from "Or Forfeit Freedom" by General Robert Wood Johnson, 1947

McNeil marketing strategy memo, left, has a military motif. The paper, sealed as part of a lawsuit, bears a "confidential" stamp.

WEDNESDAY, OCTOBER 26, 1988

PUBLIC COURTS, PRIVATE JUSTICE

Last of Four Articles

Secret Filing, Settlement Hide Surgeon's Record

Questions Raised Over Patients' Deaths

By Benjamin Weiser
and Elsa Walsh
Washington Post Staff Writers

On Aug. 25, 1982, heart surgeon Richard N. Scott sued Washington Hospital Center, alleging that the hospital's internal review of the deaths of three of Scott's patients was unfair and improper. He said he learned of the confidential review only when the hospital suspended him from performing open heart surgery pending further inquiry.

Usually, such lawsuits are filed publicly. But Scott's attorneys asked a D.C. Superior Court judge to seal the suit, arguing that a public proceeding would damage Scott's reputation when he may be a victim of the hospital's procedures.

The hospital agreed to the sealing and Judge Frank Schwelb ordered the records closed to the public. To this day, the only available record of the case is a file number in Superior Court.

Scott's suspension came after hospital reviews concluded that his performance had been a factor in two of the three deaths, and criticized his technical skill in the third case, according to hospital records made available to The Washington Post. A year earlier, another review had concluded that his performance had been a factor in two other deaths. Scott denied fault in the five cases; the hospital defended its review process as fair.

Three months after Scott filed suit and before the hospital proceedings were resolved, the two sides reached a confidential settlement. Scott agreed to give up his surgical privileges at the hospital and drop his lawsuit; the hospital agreed to remove selected documents from Scott's personnel file and not to release details of Scott's suspension.

Schwelb's order to seal the court records and the subsequent settling of the case allowed Scott and the hospital to avoid the normal consequence of going to court—that a private dispute becomes public and may result in debate, controversy and

See COURTS, A16, Col. 1

■ *Church pays secret six-figure out-of-court settlement.* *Page B1*

COURTS, From A1

detailed examination of the issues involved.

Today, Scott, 47, runs his own cardiovascular clinic in the District and has privileges at Montgomery General Hospital in Olney, where he has performed vascular surgery since March 1978. Open heart surgery is not performed at Montgomery General.

When Montgomery General conducted a routine review of Scott's credentials in 1983 and asked Washington Hospital Center about Scott, it was told that Scott had been suspended and had resigned for "personal reasons." It was not given access to the review committees' files.

The internal documents, reviewed by The Post as part of a lengthy examination of court secrecy in civil lawsuits, provide a revealing glimpse into the peer-review system that hospitals use to police themselves and their doctors, a process that is confidential.

Peer reviews often address highly technical and sophisticated medical judgments, about which the doctors involved may disagree. Committees look at medical records, and may seek independent opinions or interview those who handled the case. The committees act as fact-finders and report their conclusions to hospital authorities, who then make final decisions.

The internal records show Scott's colleagues candidly debated and assessed Scott's performance. "Entire case was mismanaged by surgeons," one committee reported in 1981 after reviewing a case in which a 69-year-old patient died after Scott's surgical team allegedly failed to maintain an adequate blood supply to the patient during a heart bypass. Scott has denied mismanaging any cases.

That case was examined as part of a routine audit of all heart surgery deaths at the hospital during a six-month period in 1980. The Feb. 12, 1981, audit report concluded that 12 of 26 deaths occurred because of surgeons' alleged mistakes, including judgmental and technical errors, or failure to maintain appropriate life support systems. Scott was singled out for criticism in two cases.

Later, a committee concluded in a Sept. 14, 1982, memorandum to the head of the medical staff: "Dr. Scott's pattern of practice does not comply with the guidelines for open heart surgery of the Washington Hospital Center. His practice of cardio-vascular surgery has shown at times questionable performance and judgment."

Scott and his attorneys declined to be interviewed for this article. After his privileges were suspended in August 1982, he appeared before two committees asked to investigate the matter. He submitted a 24-page statement, in which he offered a rebuttal to the conclusions that led to his suspension and strongly objected to the review process.

Scott criticized the hospital for not examining the performance of other medical staff members, saying their mistakes had contributed to the death of one of his patients. Responding to questions about why he decided to operate in some of the cases, he agreed that the surgery was risky but said he felt the patients would benefit and that the risks were known to the patients and their families.

He alleged that the hospital's investigation violated his rights as well as hospital procedures. He said he had no choice but to file suit, "a regrettable and distasteful process . . . nonetheless the only available alternative."

Scott also outlined his views briefly during a 1984 deposition in an unrelated court case. Asked to explain why his privileges had been suspended, he said, "The reason was due to a difference of opinion on the management of two cardiac cases, and during the hearing that resulted from that suspension it was apparent to me that the medical reasons were not valid for the suspension and that the hearings had escalated to a personal level, and during the hearings I voluntarily resigned my privileges."

Dr. Harold H. Hawfield, vice president for medical affairs at Washington Hospital Center, declined to comment specifically on the hospital's proceedings, citing the confidential settlement with Scott and the court's sealing order.

Referring to Scott's allegations about the fairness of the process, he said Scott "had ample opportunity to respond, ample notice of the meetings and of his rights in the matter" during the investigation that followed the suspension in August 1982.

Hawfield said some doctors who had reviewed Scott's performance were unhappy with the settlement because it "allowed him to leave the hospital" without stronger corrective action, enabling him to continue practicing elsewhere.

Edward J. Krill, Washington Hospital Center's legal counsel, said of the secrecy involved in both the court and the hospital's review, "There's been a balancing of the public's right to know . . . and the privacy of the process . . . . The benefit that is seen is that physicians will come forward, and forthrightly and confidentially evaluate each other in a very vigorous way."

Dr. John J. Lynch, a former president of the D.C. Medical Society and a current member of the D.C. Board of Medicine, which licenses doctors, said he was troubled by the concept of sealing court cases that raise questions about a doctor's performance. "I would worry," said Lynch, who is on the staff at Washington Hospital Center. "What is the gravity of a case that is sealed? Is it something that ought to be looked at in renewing somebody's license? . . . . There's no way of knowing, if it's sealed."

'Profound Concern' Surfaces

The dispute between Scott and the hospital has its origins in the February 1981 audit of 26 heart surgery deaths at the hospital, the first time the records show that questions were raised about Scott's performance. The study, conducted by three departments at the hospital, concluded that doctors' errors were "a predominating factor" in 12 deaths and recommended that the hospital more closely monitor the mortality rates of patients under treatment by its heart surgeons.

Two of the 12 cases were Scott's and involved questions about whether the patients had received an adequate flow of blood during heart bypass surgery. The report cited "profound *concern*" about Scott's handling of the cases.

One patient was Helen Taliaferro, 69, who died Aug. 20, 1980. "Dr. Scott was informed of the situation during entire case," the report said. "Entire case was mismanaged by surgeons."

The second patient was Willard Jackson, 78, who died Aug. 26, 1980. In this case, a major artery near the heart was punctured during a bypass. "Bleeding was not adequately stopped," the report concluded. Scott was assisted in this operation by another doctor. "Between the two of them, case was very mismanaged," the report said.

The records do not reflect Scott's specific response to the allegations against him in these two cases.

Then, in May 1981, came complaints from medical staff members that Scott had prepared a patient for surgery, ordered her placed under anesthesia, then had her awakened 45 minutes later without operating so that he could perform emergency surgery on another patient. Other doctors were available to handle the emergency, according to minutes of a June 18, 1981, meeting of an ad hoc committee reviewing the incident.

Anesthesia contains life-threatening risks for a patient that are separate from the surgery itself. One doctor at the meeting commented that "in all of his years of practice he had never seen a surgeon leave a patient during anesthesia, and he brought up the question of possible abandonment of the patient," according to the minutes. Had such abandonment occurred, it would have been a violation of medical ethics.

Scott appeared before the committee on June 24. He said he did not order the anesthesia and discovered it had been administered only when he came to the operating room to check on the patient. He said the emergency patient was in more critical condition and that he had saved the man's life.

On July 17, Scott was reprimanded about this case by Dr. William J. Fouty, the head of the department of surgergy. Adopting the language of the committee's recommendation, Fouty wrote Scott of "the profound concern of the Department of General Surgery with regard to the serious nature of errors in professional judgment and infractions of prevailing standards of medical practice and operating room policy."

Then, in 1982, came the reviews that eventually led to Scott's suspension of privileges in open heart surgery and his lawsuit. The *reviews* were conducted without Scott's knowledge, which is the hospital's

The first review began in April, when Fouty asked the chief of cardiac surgery, Dr. Jorge Garcia, to investigate the deaths of two of Scott's patients after heart operations.

Garcia convened a five-member committee. It first looked into the April 7 death of Charles Kidd, 64. Committee members debated whether the operation should have been done, given Kidd's severe heart disease and a six-month life expectancy. A routine pathology report said Kidd died from bleeding in a major artery, which apparently began after the surgery.

Scott's technique also became a subject of the committee's deliberations. Scott used an artificial heart valve that was too large and then implanted it "at a strikingly abnormal angle," according to the pathology report by Dr. William C. Roberts, a top pathologist at the National Heart, Lung and Blood Institute, one of the National Institutes of Health in Bethesda.

Scott, in his 24-page statement, said the bleeding that caused Kidd's death was the result of mistakes by other medical staff members. He said he implanted the correct heart valve and had positioned it properly. He described the operation as "extremely high risk" because of Kidd's deteriorating heart condition, but said Kidd and his family were fully aware of the risks.

On April 22, Richard Fortkiewicz, 60, died of complications after Scott performed a bypass operation. Garcia's committee concluded on May 20 that Fortkiewicz was a good candidate for surgery but that the operation had taken too long. The committee also questioned why Scott had completed only two of the three grafts needed to bypass blockages. The report said, "In all probability the death was related to the procedure."

Scott, in his statement, suggested that other surgical staff members were at fault in the death for their inept handling of a catheter, causing complications during surgery. He also cited their "inappropriate" use of certain drugs and "belated" resuscitative efforts.

As Garcia's committee was reviewing these two cases, a third patient of Scott's died after surgery. Fouty asked the head of vascular surgery, Dr. Nicholas P.D. Smyth, to examine the matter.

Smyth reported that Walter H. Fields, 77, died of a stroke after Scott conducted two operations to improve the blood flow in Fields' partially obstructed carotid arteries, the major vessels that supply blood to the brain.

Fields had cancer, and Smyth questioned whether the surgery was necessary or safe, suggesting that the stroke may have been caused by the operations. A surgical resident, Dr. Frederick Finelli, had objected to the surgery and had refused to "scrub" for the first operation, according to Smyth's report.

When the stroke occurred, another doctor telephoned Scott and urged him to operate immediately to reverse the stroke's effects. Scott, who was outside the hospital, said such an operation was ill-advised so soon after the stroke. He did not come to the hospital to examine the patient. Fields went into a coma and died three days later.

Smyth said in his report that he believed Fields' treatment was "inadequate" from the outset, including "the pre-operative work-up, the indications for the surgery, the timing of the surgery, and the management of the post-operative complications."

Scott said in his statement that the operations were necessary and that the stroke was caused by other factors. The patient knew the risks of the surgery and had agreed, Scott said.

Members of three of the five patients' families, contacted recently, said they were not told of the 1981 audit or the subsequent reviews, which are normally conducted in confidence.

On Aug. 18, 1982, the hospital notified Scott that it was suspending his privileges to perform open heart surgery. A letter to Scott said the decision was based on a "preliminary review" of the Fields, Kidd and Fortkiewicz cases. The next day, the hospital appointed a fact-finding committee of the Department of Surgery to conduct a full-scale investigation.

Acting to Ensure Privacy

On Aug. 25, Scott went to Superior Court in hopes of stopping the investigation. One of Scott's attorneys, Jacob Stein, met with the hospital's attorney at the time, George Hart, and Hart said the two sides agreed to ask for the case to be sealed. "Obviously both parties agreed that they were both well served by having it under seal," said Hart, who now lives in Buffalo.

At a closed hearing, Judge Schwelb rejected Scott's request for immediate action on the hospital's review, ruling that the investigation could continue while the lawsuit was progressing, Hart said.

Schwelb did agree, however, to seal the records in the case. "He listened very carefully and posed a number of questions," Hart said. "He was concerned about the public's right to know."

Schwelb, who is now on the D.C. Court of Appeals, declined to comment. It could not be learned how much Schwelb knew about the dispute between Scott and the hospital when he sealed the records.

Two weeks later, the ad hoc committee interviewed Scott and his partner in several of the operations and received the 24-page statement, which rebuked the hospital for failing to notify Scott of the reviews of the Kidd, Fields and Fortkiewicz cases before suspending him.

On Sept. 14, the committee reported that it had examined the records in the three deaths—as well as the Taliaferro and Jackson cases—and had looked at the mortality rate of Scott's 49 open-heart surgery patients from 1980 to 1982. Six of Scott's patients had died, or a rate of 12 percent. Hospital guidelines called for open-heart surgeons to have a rate of less than 7 percent.

The committee criticized Scott's judgment and performance in a letter to Dr. Nelville K. Connolly, head of the medical and dental staffs. The matter was then referred to one of the hospital's highest-ranking committees, the Standards of Professional Conduct Committee, headed by Dr. David Morowitz.

On Oct. 25, after another interview with Scott, the committee said Scott, while technically capable, was "not equipped to make preoperative and intraoperative decisions relative to performing" heart surgery without "the strictest" supervision.

After the hospital took the matter to its highest committee, the Appellate Review Board, Scott's attorneys and the hospital's attorneys reached a confidential settlement of the pending lawsuit and the hospital's investigation. On Nov. 12, 1982, the two sides asked the court to dismiss the case. In a routine action, Judge Frederick Weisberg signed the order. The seal remained intact.

In 1983, when Montgomery General Hospital began a routine review of Scott's privileges to conduct vascular surgery there, it sent a letter to Washington Hospital Center.

"It has come to [our] attention that there was some question regarding Dr. Richard N. Scott at your institution," said the April 11, 1983, letter. "It would be most helpful in our deliberations if you could shed some light on this issue."

Hawfield replied in a two-paragraph letter that Scott had been reprimanded in a July 1981 case and that his privileges had been suspended in August 1982. His April 19 letter also said, "During the hearing procedures [that followed the] suspension, Dr. Scott resigned from the Medical and Dental Staff of the Washington Hospital Center for personal reasons."

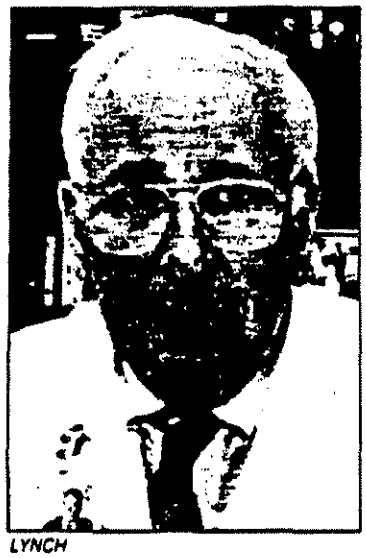
Montgomery General was told that it could not have access to the records of the review committees, according to Dr. John N. Delahay, Montgomery General's chairman of surgery. "All I know is [we] were told that only some material would be available for review. All matters would not be," Delahay said. After obtaining Scott's permission, Delahay said, several doctors from Montgomery General examined medical charts of some of Scott's patients.

Based on this limited review, Montgomery General renewed Scott's privileges.

Staff writer Susan Okie and staff researcher Melissa Mathis contributed to this report.

Case Number Only Trace of Suit Involving Surgeon's Performanc

THE DISPUTE OVER DR. SCOTT



LYNCH

"What is the gravity of a case that is sealed? . . . There's no way of knowing, if it's sealed."

— Dr. John J. Lynch, a member of the D.C. Board of Medicine that licenses doctors, who says he is troubled by the concept of sealing court cases that raise questions about a doctor's performance

Scott "had ample opportunity to respond, ample notice of . . . his rights in the matter . . ."

— Dr. Harold H. Hawfield, vice president for medical affairs, Washington Hospital Center, referring to Scott's allegations about fairness of the disciplinary process

HAWFIELD

Helen Taliaferro, 69, died in 1980 after heart bypass surgery. A hospital report cited "profound concern" about Scott's performance and said that the "entire case was mismanaged by surgeons." Records do not reflect Scott's specific response to the allegations, but he has denied mismanaging any cases.

Willard Jackson, 78, also died after bypass surgery in 1980. A hospital report called the case "very mismanaged." The records do not reflect Scott's specific response to the allegations in this case either, but in a 24-page statement, he objected strongly to the conclusions of hospital review committees.

Walter H. Fields, 77, died of a stroke after Scott conducted two operations to improve blood flow in arteries that supply the brain. Questions were raised as to whether the surgery was necessary or safe. Scott's statement said the operations were necessary and the risks of the surgery were known to the patients and their families.

About This Series

On Sunday, The Washington Post began a series of articles examining the burgeoning use of court secrecy in civil lawsuits; the first article reported how General Motors Corp. has used these procedures and avoided a public debate about the safety of its automobile fuel tanks.

Monday's article looked at secrecy procedures in Washington area courts and how judges often ask few questions in sealing cases. More than 200 lawsuits have been sealed from public view, many of which deal with questions of public policy or safety. Hundreds of other lawsuits have been settled with confidential agreements that prevent discussion of what was learned in the case.

Yesterday's story examined how McNeil Pharmaceutical, a major subsidiary of Johnson & Johnson, used court secrecy and avoided a public debate about whether the company withheld critical information from the medical community before it recalled its pain-killing drug Zomax.

THE NATION'S NEWSPAPER
USA TODAY

March 16, 1989

DEBATE

Open court records to protect public

The people's courts are shutting out the public. And what you don't know can hurt you.

What 50,000 heart patients don't know about problems that led to the 1986 recall of a Pfizer Inc. heart valve could still hurt them.

More than 100 patients have died because of broken valves, the Food and Drug Administration says. But the special report it ordered the New York company to make is locked away in a California vault. Pfizer has paid millions to settle civil suits over the valves. But court orders keep the report secret even to a congressional committee.

What residents of a Webster, N.Y., neighborhood don't know about chemical contamination from a Xerox plant could endanger them. They're in the dark because a judge sealed records of suits the company settled by paying two families $4.75 million.

On this National Freedom of Information Day, judges across the USA are giving their seal of approval to secret deals. They're issuing protective orders that block public review so they can settle thousands of civil suits and clear their clogged courts.

Such injudicious action has lawmakers in states and Congress alarmed. They fear that when courts close files, they also hide facts about environmental hazards, medical malpractice and defective products we all need to know.

Several states are already taking action:

▶ Maryland has bills to open more civil proceedings.

▶ Virginia last month passed a bill to limit secrecy in civil cases affecting health and safety.

▶ And Texas has similar legislation pending.

In Congress, Rep. Cardiss Collins, D-Ill., proposed a bill on March 1 to limit court protection orders, and Sen. Arlen Specter, R-Pa., is developing legislation.

Some critics, like the writer across the page, don't think we need laws to shed light on secret deals. Civil cases, they say, are private concerns. Protective orders help bring relief to victims faster and settle cases quickly.

They're wrong. Speedy relief shouldn't come at public expense. But these secret deals have cost the public.

Protective orders helped settle scores of lawsuits by victims of fiery car crashes. But they kept millions of other buyers of 1970s General Motors cars from knowing the Detroit automaker could have made its fuel tank safer.

Such orders helped settle a Louisiana suit stemming from a grain elevator explosion in which 35 died. But they kept Wisconsin workers from knowing that their company had spotted similar hazards in their elevator.

Such orders helped Johnson & Johnson settle dozens of suits by people in 43 states who suffered life-threatening reactions from the painkiller Zomax or who lost a loved one. But they keep independent scientists from learning lessons from Zomax's problems to save victims of other drugs.

Justice should never blind us. Judges should close files only in rare cases where national defense or a business's trade secrets are truly endangered.

Judges should not be guilty of blocking the flow of information to the public. What we don't know can hurt us.

QUOTELINES

"It is perfectly appropriate for the parties to a lawsuit to insist that everything that's happened in the lawsuit will be kept confidential if that helps encourage settlement."
— Peter Blaskly, Xerox lawyer

"Even if the protected information constitutes a trade secret, the court must consider public dissemination in order to alert other consumers to potential danger posed by the product."
— Paul Hatfield, federal judge in Montana

"I've never seen a trade secret in 27 years as a lawyer."
— Bernard Cohen, author of Va. disclosure bill

"They paid my clients a ton of money for me to shut up."
— Allan Kanner, Philadelphia lawyer of Zomax victim

THE NEW YORK TIMES
March 3, 1991

Corporate Privacy vs. the Right to Know

In Lawsuits, How Much Should the Courts Keep Secret?

By JOSEPH F. SULLIVAN

NEW BRUNSWICK, N.J.

THE growing national debate about the long-standing practice of sealing court records and the terms of settlements in civil suits has recently brought about changes in the New York court system, and bills that would further restrict the secrecy stamp are now being considered by state legislatures in Trenton and Albany.

On one side of the debate are those who say they want more disclosure to protect the public from harmful products or environmental threats. On the other are those who say changes in the present system will destroy a company's ability to protect valuable commercial information and result in fewer voluntary settlements and more litigation.

At present, about 97 percent of civil cases nationally are settled by the contesting parties with minimal court involvement, according to Sanford N. Jaffe, director of the Center for Negotiation and Conflict Resolution at Rutgers University. But lawyers for plaintiffs and for the press are increasingly demanding public access to what went into the settlements as well as the information uncovered in discovery, the process in which lawyers on both sides of a case gather evidence.

Last year, Florida and Texas enacted laws barring secrecy in settlements that minvolve possible threats to public health and safety. Earlier this year, New York's Chief Judge, Sol Wachtler, announced new rules, now in effect, that reverse long-standing policy by prohibiting court records from being sealed in most cases. The New York and Virginia Legislatures are studying bills calling for more openness in civil proceedings.

Two bills modeled on Florida's "Sunshine in Litigation" act, which opens such information to the public, have been introduced in the New Jersey Legislature. These bills, both similar, would bar court orders, confidentiality agreements or other contracts that have "the purpose or effect of concealing a public hazard," which is defined as "any device, instrument, procedure or product" that has caused or is likely to cause injury.

In this session of Congress, Representative Cardiss Collins, Democrat of Illinois, has introduced a bill prohibiting courts from denying public access in product-liability cases, especially to those seeking product-safety information uncovered during a case.

The New Jersey bills, currently being studied by the Assembly Judiciary Committee, have sharpened local debate. Last week a seminar entitled "Secrecy in Settlement: Privacy v. Public Access" was held at Rutgers and drew not only legal scholars but also trial lawyers and jurists.

Mr. Jaffe, who led the seminar, said the concern about the sealing of court documents and settlements goes beyond those about harmful products and toxic waste. Race-, sex- and age-discrimination suits and government misconduct often are the subjects of civil actions closed to public scrutiny.

Last week, for instance, the Xerox Corporation settled an age-discrimination suit filed by 13 employees that had been fought in Federal court for eight years and that had, at one point, become a class-action suit covering 1,300 employees. Although the class-action suit was later dismissed for lack of evidence, the company settled with the original plaintiffs, who charged that Xerox had a policy of laying off workers after the age of 40, of passing them over for promotion and of pressuring them to take early retirement.

The company settled the case just before it was scheduled to come to trial and released a statement denying it had engaged in age discrimination. The terms of the settlement were not released because of a confidentiality agreement between the corporation and the plaintiffs. Mr. Jaffe said information about discrimination by any corporation is potentially important to job-seekers, and that aspect should be considered by the court before such cases are sealed.

Marina Corodemus, first vice president of the Association of Trial Lawyers-New Jersey, represents plaintiffs in civil suits against corporations. The corporations' payment of settlements "in return for secrecy is tantamount to hush money," she said.

Sealing court records in toxic-waste damage cases, Ms. Corodemus and other lawyers at the seminar said, raises an ethical dilemma that lawyers, plaintiffs and the courts should address. The plaintiffs who settle with a defendant corporation, she said, "often don't care about their neighbors down the street. Their attitude is 'Let them die, give me the money.' "

Corporate lawyers, however, said opening up evidence discovered in one case to everyone would allow plaintiffs' lawyers to "piggyback" lawsuit after lawsuit against the corporations. If information obtained in discov-

ery procedings was not sealed by protective orders, they said, corporations would be reluctant to submit requested information or to engage in settlement proceedings. The result would increase the civil case backlog. In New Jersey, because criminal cases receive greater priority, civil cases now take more than two years to come to trial.

Philip Kirschner, vice president for legal affairs of the New Jersey Business and Industry Association, said the present system, which enables judges to use their discretion in issuing protective orders, works and should be continued. Corporations would fight over unsealing each and every document if the system were changed, he said.

Peter N. Perretti Jr., a former New Jersey Attorney General whose clients include corporations, also objected to changing the system, saying the rights of defendants in criminal cases are protected better than those of corporate defendants if a lawyer only had to file a complaint, seek discovery from an adversary and have the information made available to the press and other lawyers before the case was finished and an agreement reached.

Federal District Court Judge H. Lee Sarokin, who said he once routinely signed orders sealing documents when requested to do so by both sides in a dispute, said he now doesn't believe the consent of the parties should be enough.

"Do we have some duty to the public and press when considering such actions in certain cases?" he asked.

Judge Sarokin answered his own question a few years ago when he refused to seal information obtained through discovery in a case brought against the tobacco industry accusing it of producing a cancer-causing product. He ruled that the evidence produced during the civil case should be available to other lawyers and the press. The Third Circuit Court of Appeals modified his ruling, saying the discovery material could be made available to lawyers for other potential plaintiffs, but not to the press.

Mary Cheh, professor of law at the George Washington University National Law Center in Washington, said that "the debate remains a debate, and we will probably have to look toward a legislative solution that will, as carefully and surgically as possible, prohibit secrecy only for those cases that deal with special kinds of harm."

CALIFORNIA LAWYER
October, 1990

Put an End to Secret Settlements

The public loses when civil lawsuits are settled confidentially

BY TERRY O'REILLY

YOUR CASE HAS finally settled. No more midnight faxes. No more letters reeking of indignation over your failure to answer interrogatory 173. The client is happy with the sum the insurer has grudgingly agreed to pay.

But one more prickly issue remains. The insurer is demanding the return of all documents in the litigation and absolute confidentiality regarding the terms and amount of the settlement.

In the glow of a substantial settlement, this probably seems a small price. The client seldom objects. The urge to clear the file room and cash the settlement check becomes overwhelming. Under these circumstances, demands for confidentiality are readily accepted. I certainly have accepted my share of such demands in my own plaintiffs practice.

But confidentiality agreements, I've come to believe, are contrary to the public interest. The time has come for the Legislature to terminate the practice.

Other jurisdictions have taken steps in that direction. Earlier this year the Florida Legislature enacted the Sunshine in Litigation Act, which severely restricts secret settlements, and the Texas Supreme Court has adopted court rules similar to this legislation.

In large part, my change of heart came about earlier this year after reading that Ford Motor Co. paid $6 million to a San Diego family to settle a personal injury lawsuit involving lap-only rear seat belts. The plaintiffs, insisting the public had a right to know about dangers associated with the seat belts, had the considerable courage to refuse to sign the settlement statement until the confidentiality clause was removed.

Confidentiality really only benefits one party, the defendant. In product liability cases, the defendant does not want the public to know that cases are being settled or that a possible suit exists for a specific defect. But consumers need to know more about products and devices, such as lap-only seat belts, that pose serious dangers. Information concerning the catastrophic results of defective devices is an important way to educate the consuming public.

The most dangerous aspect of confidentiality is a defendant's demand that all related documents be returned or destroyed. Document production and analysis is the most difficult and tedious part of any product liability action. When large manufacturing interests, for example, retain control over the storage of pertinent documents, a burden falls on the plaintiffs lawyer to figure out how to locate crucial information. It is astonishing how often a plaintiffs lawyer in an earlier case comes up with documents that have quietly vanished from the defendant's original files.

The only effective counterbalance is to retain the documents after the suit is over. Only the right to do so can protect the interests of the public. The true "smoking gun" is rare in product liability cases. But when the gun is found, no public interest is served by having it exposed in only one case.

'Those who are irritated by the truth often need the irritation.'

▼▼▼

Of course, there are abuses in retaining litigation documents. More than one entrepreneurial plaintiffs firm has attempted to sell documents as part of case preparation. Regardless of how one views such practices, they are better than having vital documents disappear into the maw of some gloomy document warehouse where they may never see the light of day.

I concede that a plaintiffs lawyer who makes these arguments against secret settlements is subject to charges of self-interest. The plaintiffs bar is often accused of being belligerently adolescent in its craving for attention. Of all the devices for establishing name recognition, however, public awareness of a judgment or settlement is perhaps the least obnoxious, since the recognition at least is for a professionally earned achievement.

In fact, I believe the benefit of nonsecrecy to plaintiffs lawyers is relatively slight. A typical consumer may remember a large settlement in a seat belt case but is unlikely to recall the name of the plaintiff's counsel. Name recognition for trial lawyers generally comes from continued media exposure.

It is even possible that plaintiffs attorneys face a risk with the publication of large settlements reached out of court. Prospective jurors frequently react with hostility when asked during voir dire about previous large settlements with which they're familiar. Much of the public apparently has a lingering suspicion that someone is making easy money in these cases. It often takes courtroom exposure to an injured plaintiff for jurors to realize how deserving a plaintiff's judgment can be.

In the end, the only serious objection to prohibiting confidentiality agreements is fear that the number of lawsuits will increase. But is that fear realistic? Most plaintiffs' settlements already are grist for the media mill, and only cases involving significant public concerns tend to draw attention.

Silence is hardly a valuable commodity in a democracy. Those who are irritated by the truth often need the irritation. As a lawyer who has readily consented to secrecy agreements in the past, I no longer see any value in confidentiality. I believe the time has come to terminate this ill-advised practice.

Terry O'Reilly is a partner in the Menlo Park law firm of O'Reilly & Collins.

LOS ANGELES TIMES
San Diego County
September 9, 1990

New Ruling Lifts Veil of Secrecy in Civil Cases

■ Justice: Contending private accords were keeping 'damaging information' from the public, the San Diego Superior Court is in the forefront of a nationwide movement with its action.

By ALAN ABRAHAMSON
TIMES STAFF WRITER

When James and Patricia Miller went public with the news that the Ford Motor Co. was paying them $6 million to settle a lawsuit, their disclosure was the exception rather than the rule.

Ford had wanted to keep secret the terms of the agreement ending the $25-million suit—which the Millers had brought in San Diego Superior Court over a car crash on a country road near Carlsbad.

The Millers, who live in Carlsbad, had agreed to keep quiet—but only if the company would notify its customers about what the family claims is a need to fit the rear seats of Ford autos with shoulder harnesses and lap belts, not just the belts.

Ford declined, contending that a damage suit settlement was not the way it wanted to debate seat belt policy—and so, last April, when the deal was done, the Millers told all about the $6 million.

The family's action marked a departure from the secrecy that increasingly has enveloped court cases fought over product and environmental hazards and over medical malpractice.

In San Diego, however, it no longer is the exception to make public the details of civil settlements such as the one the Millers negotiated with Ford. It is, in fact, the rule.

In a first for a California court, the San Diego Superior Court has enacted a rule that does away with secrecy agreements in most civil cases. It came about after the court's former presiding judge complained that secrecy agreements were being used to keep "damaging information" from other victims in all kinds of cases, but especially those involving hazardous products.

The rule, which took effect July 1, goes well beyond settlements. It includes the other documents in the court file on the case and any exhibits, too.

Under the rule, a court file can remain secret only after a three-part test proves that secrecy is "in the public interest," the material contains trade secrets or other privileged material and disclosure "would cause serious harm." Everything else remains open.

The court's presiding judge, Judith McConnell, said the rule is likely to be controversial because it had become so common for lawyers, especially defense attorneys, to seek confidentiality.

Lawyers had sought to keep secret information that could be damaging. But, just as routinely, they would seek to stifle material that was just plain embarrassing. Even they concede there were abuses.

David E. Monahan, a San Diego lawyer, said it got to the point that "you would wind up with something about as confidential as a laundry ticket being marked, 'Attorneys' Eyes Only.' "

Still, defense attorneys said, there can be legitimate reasons for secrecy.

During a case, a corporation might have a genuine business reason for keeping material from a rival who is able to peek into the court file, said Wayne Boehle, a Santa Monica lawyer and president of the Assn. of Southern California Defense Counsel.

And, when it's over, the company might not want to release the amount of a settlement for fear it will be inundated by thousands of other lawsuits, only some of which may have merit, Boehle said. Going to court, if only to file dismissal papers, takes time and money, and the public already is frustrated with clogged courts, he said.

"Without further clarification and some indication as to how this [rule] is going to be utilized, I would hope it does not filter its way up into the Los Angeles court system," Boehle said.

But, given the San Diego court's reputation for innovation—it was the first court in California to experiment with a fast-track system that pushes civil cases to trial speedily, a plan that since has spread throughout the state—McConnell said she suspects the rule may be copied.

And, she said, the court's judges, who enacted the rule by themselves and without outside lobbying, are sure it's the right rule.

"If you're going to use public courts, you have to be willing to expose yourself to public scrutiny," she said.

That sentiment is the precise motivation behind a movement emerging around the nation to keep court files open to the public—despite lawyers' efforts to the contrary.

In the past few months, Texas passed a court rule and Florida enacted a law calling for open files. A similar rule is under consideration in New York. And a Virginia law that took effect in July, 1989, allows attorneys in separate but similar personal injury cases to share information.

However, in Rhode Island, an open files law that passed the legislature earlier this summer was vetoed by Gov. Edward D. DiPrete after pressure by a lobbyist with ties to General Motors and by defense lawyers from around the nation.

The new rules shift control over secrecy from partisan lawyers to impartial judges—requiring the judges to grant secrecy only when it is justified under the rules or as a matter of law.

The fight over secrecy signals that the legal system is "in the throes of completely changing the perception of a civil lawsuit," according to George Washington University law professor Mary Cheh.

With the government unwilling or unable to look at harm being caused by unsafe products or other dangers, lawsuits are replacing consumer protection agencies, she said.

In an interview last week, Cheh said tension always has been inherent in the court system, because the courts are publicly funded yet provide a forum for suits between private parties.

"We never really thought about the implications of that until we realized that lawsuits sometimes were the only way to vindicate serious harms by large corporations or other aggregates of power," she said.

Consumers and government regulators might remain unaware of a safety hazard until it becomes the focus of a high-profile lawsuit, she said. The suit, and the public attention it sparks, then serves as the vehicle for change, she said.

But lawsuits bring change, she said, only if the results reach consumers, who then can shun an offending product; manufacturers, who can opt to stop producing it; and the government, which can regulate the field.

Texas Supreme Court Justice Lloyd Doggett, the author of the openness rule in that state, concurs.

"There are a number of cases in which the general public health and safety is seriously undermined by secrecy," he said, because problems are handled case by case rather than as an overall problem affecting many people.

According to the Assn. of Trial Lawyers of America, a national organization that serves plaintiffs' lawyers, the use of secrecy practices in civil cases has jumped "steadily and significantly" since the mid-1970s. Specific figures on the number of cases kept secret are not available.

Typically, the secrecy process is initiated by defendants, judges and lawyers said.

That's because, under the wide-ranging questions that both sides pursue under court authority in preparing for a trial, called "discovery," a plaintiff can demand all information that a defendant has about the cause and circumstance of an injury.

Under a protective order, issued by a judge, a party to a suit is legally barred from distributing information received from the opposing side to others. In a 1987 manual produced for defense lawyers, the attorneys were urged to routinely seek protective orders in all complex products liability cases.

Most civil cases are settled before a trial. Under a confidentiality agreement, a plaintiff promises, in return for a favorable settlement, to keep quiet.

That paid-for secrecy is often too attractive to pass up for a plaintiff—especially if the plaintiff is handicapped or elderly or has a fixed income—or for a cash-strapped plaintiff's lawyer, who probably operates on a contingency fee.

After commonly waiting two or three years since filing the suit, the choice then becomes to accept the immediate cash or "wait another year to go to trial and risk that they may not win," said Michael C. Maher, an Orlando, Fla., attorney and the current president of the trial lawyers' group.

"They can't afford that risk. Literally."

But, in the process, the public is denied vital truths on health, safety and the environment that could protect people from injuries and even death, plaintiffs' lawyers claim.

According to the trial lawyers' group, secrecy has kept the public and regulators from learning about such hazards as automobile fuel systems that could ignite upon impact, exploding cigarette lighters, defective heart valves and chemical leaks.

Since the Miller settlement with Ford became public knowledge, it has generated intense press attention over the safety of lap-only rear seat restraints, said Craig McClellan, the family's San Diego lawyer. His office has collected an inch-thick collection of newspaper clippings on the case.

The suit stemmed from a 1988 head-on collision that killed one of James Miller's 11-year-old twin sons and left the other a paraplegic.

Both boys were seated in the rear of the family's 1986 Ford Escort and were wearing lap belts. The parents, who were seated in the front, wore shoulder belts and escaped with bruises and broken bones.

"We felt that, if we kept quiet about this that it wouldn't help anybody else in the future," said James Miller, 45, a fireman.

"It didn't matter how much money they offered," he said. "We weren't going to keep quiet."

Ford's San Diego lawyers declined to comment on the case or could not be reached. The company has denied any liability in connection with the accident.

Defense lawyers, meanwhile, claim that an avalanche of additional suits is not the sole product of widespread publicity about settlements.

They said that widespread publicity about settlements can make it more difficult for any company to obtain a fair jury in a future case. And, they said, a settlement in one case may mistakenly indicate the value of claims in another case.

In addition, defense lawyers said, some plaintiffs' lawyers are too interested in publicity for themselves and distort the nature of cases and reasons for a settlement.

"The question is whether it's the public's right to know or a special interest group wanting to be able to get information for litigation in subsequent cases, whether that's an overriding interest," said Edward D. Chapin, a San Diego defense lawyer.

Judge Michael I. Greer, the former presiding judge of the San Diego Superior Court, said that the defense concerns have validity. But, he said, the San Diego rule came about at his urging after he "became acutely aware of the widespread abuse" of secrecy practices.

In a memorandum he sent last December to the court's approximately 70 other judges, Greer said confidentiality agreements and protective orders were "being used to conceal damaging information from potential plaintiffs in a wide variety of cases."

"Suppose I have a case against XYZ Products Co.," Greer said in an interview. "XYZ answers [questions in the case], but the court says those answers can be used only for this lawsuit and may not be passed onto other lawyers, just because XYZ contends they're trade secrets.

"But we've got 200 other lawsuits against XYZ in the court. Are we going to go through that 200 times?"

McConnell, the current presiding judge, said the new rule still allows for some secrecy. Tax returns in domestic cases, psychological evaluations in custody cases and cases that the law keeps confidential—such as juvenile and adoption cases—will remain secret, she said.

The rule does not define when or how secrecy is "in the public interest."

Defense attorneys said judges' busy calendars might prove the ultimate flaw with the San Diego rule.

"If the court is confronted with issuing an order permitting a confidential agreement or running some risk of not settling the case, I guarantee you the judge is going to issue the order permitting the agreement and settling the case," said Douglas M. Buts, president of

the San Diego Defense Lawyers, a defense bar group.

Michael I. Neil, a San Diego attorney and a past president of the Assn. of Southern California Defense Counsel, the nation's largest group of insurance defense lawyers with about 2,300 members, said he thinks the rule may be a mistake.

"I'm not so sure that's in the best interest of the litigation process," he said. "Courts are inundated with suits right now. I think we ought to be doing everything we can to encourage settlements. If that proves to discourage settlements, it's not in the best interest in my opinion of the judicial system or taxpayers."

Still, Buts said, "I don't envision any massive uprising in response to this rule."

Cheh, the law professor, said she could envision several ways for inventive lawyers to get around the rule.

The case could be brought in any other county in California but San Diego, she said.

Or settlements could be reached before the case ever makes it to the courthouse door, she said.

Or, she said, a case could be taken out of the mainstream court system and into the increasingly popular rent-a-judge market, where the two sides agree to have it heard by a private judge.

Or, since the whole point of having a settlement agreement signed by a judge is to make it enforceable as a court judgment, defense lawyers could simply insist that the judge never sign off on the deal—a likely prospect if a check is presented with the proposition.

McConnell even conceded that there are ways around the rule.

"It's one of those things that, if a party clearly wants to keep a settlement confidential, they can do it," she said. "It doesn't take a great deal of intelligence to figure out."

But, she said, "We are going to take them one case at a time." She added, "And the courts are supposed to be open to the public unless there's some reason to be closed."

SUMMARY OF DEVELOPMENTS ON SECRECY ISSUE *

Legislation

Enacted:	Florida (1990, 1991) North Carolina (1989) Oregon (1991) Virginia (1989)
Pending:	Alaska (1991) California (1991) Hawaii (passed House, 1991) Maine (1991) New Jersey (1991) Pennsylvania (1991) Wisconsin (1991)

Court Rules

Adopted:	New York (1991) Texas (1990) Delaware (1990) California, San Diego County Superior Court (1990)
Proposed:	Michigan (1991) New Jersey (1991) South Carolina (1991)

* For more details, please see attached.

August 20, 1991

LEGISLATION:

Enacted

GENERAL ASSEMBLY OF NORTH CAROLINA
1989 SESSION
RATIFIED BILL

CHAPTER 326
SENATE BILL 456

AN ACT TO AMEND AND IMPROVE THE NORTH CAROLINA PUBLIC RECORDS LAW.

The General Assembly of North Carolina enacts:

Section 1. Chapter 132 of the General Statutes is amended by adding the following new section:

"**§ 132-12.2. Settlements made by or on behalf of public agencies, public officials, or public employees; public records.**

(a) Public records, as defined in G.S. 132-1, shall include all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, except in an action for medical malpractice against a hospital facility. No agency of North Carolina government or its subdivisions, nor any counsel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, except in an action for medical malpractice against a hospital facility. No settlement document sealed under subsection (b) of this section shall be open for public inspection.

(b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that are sufficiently specific to permit a reviewing court to determine whether the order was proper.

(c) Except for confidential communications as provided in G.S. 132-1.1, the term 'settlement documents,' as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts."

Sec. 2. This act shall become effective July 1, 1989, and apply to settlements finalized on and after that date.

In the General Assembly read three times and ratified this the 15th day of June, 1989.

JAMES C. GARDNER

James C. Gardner
President of the Senate

J. L. MAVRETIC

J. L. Mavretic
Speaker of the House of Representatives

1989 SESSION

LD6213440

HOUSE BILL NO. 1582

Offered January 23, 1989

A BILL to amend the Code of Virginia by adding a section numbered 8.01-424.1, relating to confidential settlements; court orders.

Patrons--Cohen, Jennings, Putney, Stafford and Stambaugh

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-424.1 as follows:

§ 8.01-424.1. Confidential settlements.--An agreement between the parties to keep the terms of any settlement confidential shall not be binding on the parties unless the court so orders. An order to keep the terms of the settlement confidential shall be issued only upon motion of either party and a finding by the court, based on clear and convincing evidence, that (i) confidentiality is needed to protect one or more of the parties to the suit and (ii) the public interest will not be harmed. An order issued pursuant to this section shall not bar an attorney or party to the cause from voluntarily sharing with another any materials and information gathered during discovery or otherwise during the preparation or investigation of the case provided such information or material does not disclose the terms of the settlement agreed to by the parties.

Official Use By Clerks	
Passed By The House of Delegates	**Passed By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
_____	_____
Clerk of the House of Delegates	Clerk of the Senate

FLORIDA 1990

ENROLLED
SB 278

Second Engrossed

A bill to be entitled

An act relating to the concealment of public hazards; creating s. 69.081, F.S.; providing a definition; providing that a court may not enter a judgment which conceals a public hazard; providing that certain contracts or agreements are void; providing standing for certain persons; providing for an action for declaratory judgment; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 69.081, Florida Statutes, is created to read:

69.081 Sunshine in Litigation; Concealment of Public Hazards Prohibited.--

(1) This section may be cited as the "Sunshine in Litigation Act."

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

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting

CODING: Words ~~stricken~~ are deletions; words underlined are additions

themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information

or materials necessary or useful to the public regarding the public hazard.

Section 2. This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date.

CODING: Words ~~struckeen~~ are deletions; words underlined are additions

SENATE BILL NO. 278

THIS ACT originated in the Senate; it was passed by the Senate on May 30, 1990, and has been examined and found to be correctly enrolled.

PRESIDENT OF THE SENATE

SECRETARY OF THE SENATE AND
ENROLLING CLERK

PASSED the House of Representatives on May 28, 1990

SPEAKER OF THE HOUSE OF REPRESENTATIVES

CLERK, HOUSE OF REPRESENTATIVES AND
EX-OFFICIO ENROLLING CLERK

APPROVED this 1st day of June, 1990

GOVERNOR

FILED in Office of the Secretary of State on

JIM SMITH
SECRETARY OF STATE

By

An act relating to public officers, candidates for public office, and public employees; amending s. 69.081, F.S.; prohibiting confidential settlement of actions involving the state; providing standing to contest such settlements; directing custodians of records to comply with public records laws; providing sanctions; providing an exception for trade secrets and certain other confidential information; requiring notice of certain settlements; amending s. 112.312, F.S.; providing additional definitions for purposes of the code of ethics for public officers and employees and s. 8, Art. II, State Const.; amending s. 112.313, F.S.; including provisions regulating representation before certain agencies by legislators, statewide elected officers, and agency employees, and standards of conduct for legislators and legislative employees; removing provisions relating to disclosure of certain specified interests by public officers and employees and candidates for public office; revising an exemption from the prohibition against doing business with one's own agency or entering into a conflicting employment relationship and providing additional exemptions; repealing s. 112.3141, F.S., relating to representation before certain agencies by legislators, statewide elected officers, and agency employees, and standards

of conduct for legislators and legislative employees; amending s. 112.3143, F.S.; revising provisions relating to voting conflicts and disclosure with respect thereto; amending s. 112.3145, F.S.; requiring certain officers, candidates, and employees who hold a specified relationship with certain business entities to file a disclosure statement as part of their financial disclosure statement; amending ss. 112.3146, 112.3147, and 112.3148, F.S.; correcting references; amending s. 112.317, F.S.; prescribing penalties for violating the code of ethics or s. 8, Art. II, State Const., relating to ethics in government; providing for civil actions to recover certain penalties; amending s. 112.320, F.S.; specifying that the Commission on Ethics is the commission provided for in s. 8, Art. II, State Const.; amending s. 112.322, F.S.; prescribing investigatory and other powers and duties of the commission with respect to a sworn complaint of a breach of the public trust; providing for issuance of advisory opinions by the commission; authorizing the commission to delegate the authority to administer oaths and issue and serve subpoenas; authorizing the commission to make rules; creating s. 112.3231, F.S.; providing time limitations for filing sworn complaints of violation with the commission; amending s. 112.324, F.S.; modifying procedures on complaints of violations of part III, ch.

112, F.S., or s. 8, Art. II, State Const.; designating proper disciplinary officials; specifying conditions under which the commission may dismiss a complaint; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (8), (9), and (10) are added to section 69.081, Florida Statutes, 1990 Supplement, to read:

69.081 Sunshine in litigation; concealment of public hazards prohibited.--

(8)(a) Any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced. Any person has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this subsection by motion in the court that entered such order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(b) Any person having custody of any document, record, contract, or agreement relating to any settlement as set forth in this section shall maintain said public records in compliance with chapter 119.

(c) Failure of any custodian to disclose and provide any document, record, contract, or agreement as set forth in

this section shall be subject to the sanctions as set forth in chapter 119.

This subsection does not apply to trade secrets protected pursuant to chapter 688, proprietary confidential business information, or other information that is confidential under state or federal law.

(9) A governmental entity which settles a claim in tort which requires the expenditure of public funds in excess of $5,000, shall provide notice, in accordance with the provisions of ch. 50, of such settlement, in the county in which the claim arose, within 60 days of entering into such settlement; provided that no notice shall be required if the settlement has been approved by a court of competent jurisdiction.

Section 2. Section 112.312, Florida Statutes, as amended by chapter 90-502, Laws of Florida, is amended to read:

112.312 Definitions.--As used in this part and for purposes of full-and-public-disclosure-under the provisions of s. 8, Art. II of the State Constitution, unless the context otherwise requires:

(1) "Advisory body" means any board, commission, committee, council, or authority, however selected, whose total budget, appropriations, or authorized expenditures constitute less than 1 percent of the budget of each agency it serves or $100,000, whichever is less, and whose powers, jurisdiction, and authority are solely advisory and do not include the final determination or adjudication of any personal or property rights, duties, or obligations, other than those relating to its internal operations.

CODING: Words stricken are deletions; words underlined are additions.

LEGISLATION:

Pending

HOUSE BILL NO. 171

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced: 2/27/91
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act restricting court orders and certain private agreements relating to the concealment of public hazards and information on public hazards; and amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.25 is amended by adding new sections to read:

Sec. 09.25.230. COURT ORDERS ON MATERIALS CONCERNING PUBLIC HAZARDS. (a) A court may not enter an order or judgment that has the effect of concealing a public hazard or information concerning a public hazard. If an order or judgment that violates this subsection contains provisions that do not violate this subsection, those provisions are valid.

(b) Upon the motion by a party to litigation for an order prohibiting the disclosure of materials produced or to be produced in discovery, the court shall examine the materials in camera. The court shall deny the motion if it finds that the materials have previously been disclosed to the public in this or another jurisdiction or that the materials concern a public hazard. If the court finds that only a portion of the materials have been previously disclosed or

concern a public hazard, the court may enter an order prohibiting disclosure of the portion that has not been previously disclosed and does not concern a public hazard.

(c) An interested person alleging that a judgment or order entered by a court violates (a) or (b) of this section may contest the order by filing a motion to vacate the judgment or order at any time with the court that entered the motion. An interested person alleging that a requested judgment or order would, if entered, violate (a) or (b) of this section may contest the request by filing an opposition with the court where the request is pending.

Sec. 09.25.240. PRIVATE AGREEMENTS ON MATERIALS CONCERNING PUBLIC HAZARDS. (a) That part of an agreement or contract executed in order to settle civil litigation or in connection with discovery in civil litigation that has the purpose or effect of concealing a public hazard or information concerning a public hazard is void and may not be enforced.

(b) An interested person who believes that an agreement or contract that violates (a) of this section is being enforced may bring an action for injunctive relief against a party to the agreement or contract.

Sec. 09.25.250. DEFINITIONS FOR AS 09.25.230 - 09.25.250. In AS 09.25.230 - 09.25.250,

(1) "interested person" shall be construed as that term is used in AS 44.62.300, but does not include a party to the litigation in which the contested judgment or order was entered or in relation to which the contested agreement or contract was executed;

(2) "public hazard" means an instrumentality that has caused injury to a person or property, and includes a device, instrument, person, procedure, or product, and a condition of a device, instrument, person, procedure, or product.

*** Sec. 2.** The provisions of sec. 1 of this Act have the effect of changing Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2) by limiting the discretion of the court in entering protective orders regarding discovery in civil litigation, by limiting the discretion of the parties to civil litigation to enter into agreements regarding discovery procedures, and by granting automatic limited intervenor status to certain persons challenging certain court orders or motions in civil cases.

*** Sec. 3.** AS 09.25.230(c) and 09.25.240, added by sec. 1 of this Act, are applicable only to orders or judgments entered by a court, or agreements or contracts entered into by parties to civil litigation, on or after the effective date of this Act.

*** Sec. 4.** This Act takes effect only if sec. 2 of this Act receives the two-thirds majority vote of each

house required by art. IV, sec. 15, Constitution of the State of Alaska.

CALIFORNIA

LEGISLATIVE COUNSEL'S DIGEST

Bill No.

as introduced, Lockyer.

General Subject: Confidentiality of writings.

Existing law provides for the confidentiality of trade secrets, government records, records maintained by financial and other institutions, privileged communications, and other writings.

This bill would provide, as a matter of public policy, that in actions based on personal injury or wrongful death no confidentiality agreement, settlement agreement, stipulated agreement, or protective order which bars public disclosure of a writing or writings, as defined, shall be valid except as specified. The bill would establish a procedure for contesting a court order, judgment, agreement, or contract that violates this provision, and would provide that a prevailing plaintiff is entitled to attorneys' fees and costs, as specified. The bill would make conforming changes in the law

regarding trade secrets.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

An act to amend Section 3426.5 of the Civil Code, and to add Section 1988 to the Code of Civil Procedure, relating to confidentiality.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3426.5 of the Civil Code is amended to read:

3426.5. In Subject to Section 188 of the Code of Civil Procedure, in an action under this title, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

SEC. 2. Section 188 is added to the Code of Civil Procedure, to read:

188. (a) Notwithstanding any other provision of law, as a matter of public policy, in actions based on personal injury or wrongful death, no confidentiality agreement, settlement agreement, stipulated agreement, or protective order, other than one issued to protect information which is privileged pursuant to Section 1040 of the Evidence Code, which bars public disclosure of a writing or writings, as defined in Section 250 of the Evidence Code, shall be valid except for trade secrets as determined by the court in subdivision (b) and as limited by subdivision (c). This policy shall be diligently

enforced by the courts in order to encourage the broadest availability of information to the public.

(b) Trade secrets may be granted confidentiality only where there is a particularized showing, document by document, of all of the following:

(1) Secrecy is in the public interest.

(2) The proponent has a cognizable interest in the material, in that the material contains trade secrets, privileged information, or is otherwise protected by law from disclosure.

(3) Public disclosure would cause serious harm to the party requesting confidentiality.

(c) If the court determines that there a confidential trade secret pursuant to subdivision (b), the court shall also determine whether the document or documents indicate a public hazard or danger which would cause serious environmental damage, or indicate the posing of a serious threat to the health and safety of one or more persons. If the court makes a determination that such a public hazard or danger is indicated, the confidentiality agreement or protective order shall be invalid as to all relevant documents unless all interested regulatory agencies with possible jurisdiction over that damage or threat, and the Attorney General of the state, are affirmatively notified of the evidence or knowledge

pertaining to that damage or threat, and the protective order or agreement is extended to include such notification. In cases where such notice is given, the recipient agency shall comply with the agreement or order to maintain confidentiality, unless disclosure is required, in its judgment, to protect the environment or the health and safety of one or more persons.

(d) Any person has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered the order or judgment, or by writ of mandate review pursuant to Section 1085, as appropriate. Upon such a motion or writ, the court shall review the contested documents in camera. If the court finds there are writings or portions of writings of an agreement which are not properly confidential pursuant to this section, and it is reasonably feasible to excise or redact them, then the court shall make those portions not properly confidential public and subject them to disclosure. Any person bringing an action against the court or the party seeking protection under this section, and who prevails in any part of his or her motion or writ, shall be entitled to costs and reasonable attorney's fees from the party seeking protection.

(e) Nothing in this section shall be deemed to compel the disclosure of any writing or interest protected by Section 1 of Article 1 of the California Constitution.

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HOUSE OF REPRESENTATIVES
SIXTEENTH LEGISLATURE, 1991
STATE OF HAWAII

H.B. NO. 2019 H.D. 1

A BILL FOR AN ACT

RELATING TO CIVIL JUSTICE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the civil justice system is funded by the public to resolve disputes in accordance with justice and the public laws. And the public has an interest in acquiring information pertaining to "public hazards".

The legislature further finds that it is not in the best interest of members of the public to have information and knowledge concerning "public hazards" concealed. The public's trust and faith in a legal system depends upon the dissemination of information and evidence which has become known to a party during the course of litigation.

The purpose of this Act is to provide public access to information and documents concerning matters before the civil courts.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER

SUNSHINE IN LITIGATION ACT

§ -1 Public Hazard. As used in this Act, "public

hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure or product, that has caused and is likely to cause injury.

§ -2 Discovery of public hazard. Except pursuant to this Act, no court shall enter an order restricting any party to a civil suit from discovering or obtaining information or evidence where such evidence or information pertains to a "public hazard" or restricting any party or his authorized representative from disseminating such information or evidence to any other parties or their authorized representatives in similar or related litigation.

§ -3. Dissemination of information concerning public hazard. (a) Except as provided herein, no court shall enter an order restricting or prohibiting any party from disseminating information or evidence obtained from any other person where such information or evidence pertains to a "public hazard".

(b) Any person upon motion and good cause may obtain an order restricting or prohibiting the dissemination of information or evidence where there exists a compelling need for the non-dissemination of the information and evidence and that:

(1) The specific interest of the person sought to be protected clearly outweighs the strong public interest

in having such information or evidence disseminated and the person will suffer substantial and irreparable harm if the information is disseminated;

(2) No less restrictive alternative will adequately protect the specific interest of the person sought to be protected; and

(3) Non-dissemination will effectively protect the specific interest of the person sought to be protected without being overbroad.

§ -4. **Unenforceable contracts; settlement agreement.** No contract or agreement which provides for the non-dissemination of any information or evidence which pertains to a "public hazard" shall be enforceable. Nothing in this provision shall prevent the parties to a civil suit from entering into an agreement prohibiting any party from revealing the amount or conditions of any settlement to any third person."

SECTION 3. This Act shall take effect upon approval.

THE SENATE
SIXTEENTH LEGISLATURE, 1991
STATE OF HAWAII

JAN 3 1 1991

S.B. NO. 1838
JDC

A BILL FOR AN ACT

RELATING TO THE CIVIL JUSTICE SYSTEM

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Findings and purpose. The legislature finds that, although the civil justice system is funded by the public for the purpose of resolving disputes in accordance with justice and public laws, the public cannot determine whether such purpose is being met if relevant information is kept secret.

The legislature finds that unnecessary secrecy in the civil justice system has the following detrimental effects on our society: (1) it undermines public health and safety by preventing both the public and government officials from learning about, and protecting the public from, potential dangers to public welfare; (2) it undermines the just, speedy, and inexpensive resolution of disputes in our civil justice system by increasing the cost and difficulty of discovering the truth, precluding potential litigants from learning that they have claims, prohibiting similarly situated litigants from efficiently obtaining and voluntarily sharing relevant information, and requiring the judiciary to repeatedly hear and resolve similar disputes in different cases; and (3) it undermines the democratic process by

preventing the public from determining whether the civil justice system is operating justly or whether the system or laws need to be changed.

The purpose of this Act is to permit public access to information and documents concerning matters before civil courts.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER

SUNSHINE IN LITIGATION ACT OF 1991

§ -1 Civil justice system presumed open. The following information and documents concerning matters before the civil courts are presumed to be open to the public:

(1) All information and documents of any nature filed with, submitted to, or issued by any civil court in connection with any matter before it;

(2) All discovery in any matter before any civil court, whether or not the discovery is filed with or submitted to the court; and

(3) All settlement agreements in any matter before any civil court, whether or not they are filed with or submitted to the court.

§ -2 Standard for overcoming presumption of public access. A court may enter an order having the purpose or effect of limiting public access to any of the information or documents referred to in section -1 only if it finds that the person seeking to limit public access has met the burden of proving, with clear and convincing evidence, that:

(1) There is a specific, serious, and substantial interest in limiting public access to the information or documents;

(2) The information or documents constitute private facts concerning a natural person or trade secrets or other confidential research, development, or commercially secret data;

(3) The interest in limiting public access to the information or documents clearly outweighs both the presumption public access and any adverse effect that limiting public access might have on anyone's safety or health; and

(4) No less restrictive means than limiting public access will adequately and effectively protect the interest asserted in secrecy.

§ -3 Access of government officials and similarly situated litigants. No court may enter an order having the purpose or effect of limiting the access of the following persons to information or documents referred to in section -1, even when the standard set forth in section -2 has been met, if those persons voluntarily submit themselves to the jurisdiction of the court for the purpose of permitting enforcement of the provisions of the court's order limiting public access:

(1) A federal, state, or local government official with regulatory, investigative, administrative, legislative, judicial, law enforcement, or other responsibility in regard to which the information or documents is relevant; and

(2) A litigant or an attorney for a litigant in a case or potential case in regard to which the information or documents is relevant.

§ -4 Notice of motion to overcome presumption of public access. (a) An order limiting public access described in section -2 may be entered only upon a written motion, which shall be open to public inspection.

(b) Upon filing the motion, or upon learning that any of the information contained in a notice previously issued pursuant to

this section is incorrect, the movant shall:

(1) Post a notice, in a public place to be designated by the clerk of the court, which shall provide the following information:

(A) The specific time and place of the hearing on the motion, pursuant to procedures to be established by the clerk of the court;

(B) The style and number of the case;

(C) The identity of the movant;

(D) That a hearing will be held in open court on a motion to limit public access in the case;

(E) A brief but specific description of both the nature of the case and the information or documents in regard to which secrecy is sought;

(F) That any person may appear, intervene, and be heard on matters relevant to the motion; and

(G) The names, addresses, and phone numbers of the attorneys for the parties;

(2) Send a copy of the notice, by first class mail or speedier means, to all members of the public, including all members of the news media, who, in accordance with procedures to be established by the clerk of the court,

have filed a standing request to receive notice of motions seeking to limit public access; and

(3) File a verified copy of the notice, along with proof of its posting and service, with the clerk of the court for inclusion in the case file and the clerk of the supreme court for inclusion in a publicly open file to be established to enable the state and its citizens to monitor the extent to which motions to limit public access are being filed.

§ -5 Hearing on motion to overcome presumption of public access. A public hearing shall be held in open court on all motions seeking to limit public access as soon as practicable, but not less than fourteen days after the motion is filed and notice or, where applicable, revised notice is posted and served. Any person may appear, intervene, and be heard as a matter of right on any matter relevant to the motion.

§ -6 In camera review and temporary order limiting public access. Notwithstanding other provisions of this chapter, in order to facilitate a determination of whether certain information and documents are open to the public, a court may:

(1) Receive and review information and documents in camera either to determine whether they are discoverable or to

determine whether a motion to limit public access to them should be granted; and

(2) Upon a written motion and with notice to all parties in the case, enter one temporary and non-renewable order limiting public access to specific information or documents for not more than 30 calendar days so that a hearing can be held and a ruling entered on a motion to limit public access, if:

(A) The movant demonstrates a compelling need for it by proving, through affidavit or verified petition, specific facts which establish that immediate and irreparable injury will result to a specific interest of a movant before notice can be given and a hearing held in accordance with sections -4 and -5;

(B) The order establishes the time and place for the hearing on the motion to limit public access and requires the party seeking it to immediately provide the notice of the hearing required by this, unless such a hearing has previously been scheduled and such notice has previously been given; and

(C) The order explicitly provides that it may be withdrawn or modified upon the motion of any person, with notice to the parties and hearing conducted as soon as practicable, and shall not reduce in any way the burden of the person seeking to limit public access at the hearing.

§ -7 Order on motion to overcome presumption of public access. A motion to limit public access shall be decided by written order, open to the public, that rules solely on the motion and states the style and number of the case, the specific reasons for finding and concluding whether or not the showing required by section -2 has been made, and, if it finds and concludes that such a showing has been made, and the specific information and documents which are to be closed to be public, and the time period for which they are to be so closed. Any such order limiting public access shall be carefully tailored to ensure that it does not limit public access to any information or documents in regard to which the showing required by section -3 of this subtitle has been made.

§ -8 Appeal of order on motion to overcome presumption of public access. Any order or portion thereof ruling on a motion to limit public access or any other request to limit a person's

access to information or documents referred to in section -1 shall be immediately appealable by any person who participated in the hearing preceding issuance of the order.

§ -9 Intervention. Any person may intervene as a matter of right in any civil action at any time before or after judgment to seek to obtain, modify, or vacate an order limiting public access to information and documents relevant to the case. Any person meeting the requirements of section -3 may also intervene as a matter of right in any civil action at any time before or after judgment to seek to obtain access to information or documents pursuant to the provisions of that section.

§ -10 Continuing jurisdiction, enforcement, and modification. A court that enters an order limiting public access retains continuing jurisdiction to enforce, alter, or vacate that order. Motions to enforce, alter, or vacate such orders shall be subject to this chapter, including the notice and hearing provisions of sections -4 and -5, respectively. An order properly entered in accordance with this chapter shall not be reconsidered at the request of a party or intervenor who had actual notice of the hearing preceding issuance of the order unless the party or intervenor shows that some relevant circumstance, not necessarily related to the case in which the

order was entered, has changed. No challenged or reconsidered order limiting public access shall remain in effect unless the standard set forth in section -2 is met at the time at which the order is challenged or reconsidered.

§ -11 Return and destruction of documents. No court may enter an order having the purpose of effect or requiring any litigant, any attorney, any government official, or any member of the public to return or destroy any legally obtained information or document referred to in section -1.

§ -12 Access to information in other cases. No court may enter an order having the purpose or effect of limiting a person's access to information or documents in a case not before the court.

§ -13 Attorneys' fees. Any person who substantially prevails in opposing a motion to limit public access shall be entitled to recover an award of costs and reasonable attorneys' fees from the person that moved or joined in the motion to limit public access.

§ -14 Agreements and order to the contrary void and unenforceable. All provisions in contracts, agreements, and court orders that are contrary to the provisions of this chapter are void and unenforceable.

§ -15 Application of this chapter. This chapter is not applicable to provisions in contracts, agreements, and court orders that took effect before its effective date unless a motion to vacate, modify, reconsider, or declare void and unenforceable is filed in regard to those provisions. Any such motion shall be heard and resolved pursuant to the provisions of this subtitle.

§ -16 Effect on other laws. Nothing in this Chapter shall be deemed to open to the public any information or documents to which public access is otherwise restricted by law."

SECTION 3. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: Russell Blair

115th MAINE LEGISLATURE

FIRST REGULAR SESSION-1991

Legislative Document **No. 1430**

H.P. 985 House of Representatives, April 4, 1991

Reference to the Committee on Judiciary suggested and ordered printed.

Ed Pert

EDWIN H. PERT, Clerk

Presented by Representative KILKELLY of Wiscasset.
Cosponsored by Representative JACQUES of Waterville, Representative DORE of Auburn and Representative STEVENS of Bangor.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-ONE

An Act to Allow Disclosure of Litigation Information in Cases That Settle.

Printed on recycled paper

Be it enacted by the People of the State of Maine as follows:

14 MRSA c. 13 is enacted to read:

CHAPTER 13

SUNSHINE IN LITIGATION

§271. Short title

This chapter is known and may be cited as the "Sunshine in Litigation Act."

§272. Public hazard; defined

As used in this chapter, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure or product or any condition of a device, instrument, person, procedure or product that has caused or is likely to cause injury.

§273. Concealing a public hazard

Except pursuant to this chapter, a court may not enter an order or judgment that has the purpose or effect of concealing a public hazard or any location concerning a public hazard, nor may the court enter an order or judgment that has the purpose or effect of concealing any information that may be useful to members of the public in protecting themselves from injury that may result from the public hazard.

§274. Agreements void

Any portion of an agreement or contract that has the purpose or effect of concealing a public hazard or any information that may be useful to the members of the public in protecting themselves from injury that may result from the public hazard is void, contrary to public policy and may not be enforced.

§275. Protection of trade secrets

Trade secrets, as defined in Title 10, section 1542, subsection 4, that are not pertinent to the public hazard are protected pursuant to Title 10, chapter 302.

§276. Standing

Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or

contract that violates this section by motion in the court that entered the public ... judgment or by bringing a declaratory judgment pursuant to chapter 707.

§277. Examination by court

Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials that have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds the information or materials consists of information concerning a public hazard or information that may be useful to the members of the public in protecting themselves from injury that may result from a public hazard, the court shall allow disclosure of the information or materials. In allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

STATEMENT OF FACT

The purpose of this bill is to aid Maine consumers in obtaining information necessary to protect their health and safety. This bill prohibits courts from entering orders on judgments that have the result of concealing public hazards.

ASSEMBLY, No. 3794

STATE OF NEW JERSEY

INTRODUCED OCTOBER 29, 1990

By Assemblywoman MULLEN and Assemblyman COHEN

AN ACT concerning the disclosure of information about public hazards and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. As used in this act:

a. "Public hazard" means an instrumentality, including, but not limited to, any device, instrument, procedure, or product, or a condition of any device, instrument, procedure, or product, that has caused and is likely to cause injury.

b. "Trade secret" means the whole or any portion of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value. A trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

2. Except as provided in this act, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard.

3. Any provision of any contract or other agreement which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, shall be void as against public policy and unenforceable.

4. Any substantially affected person, including, but not limited to any representative of the news media, has standing to contest an order, judgment, agreement, or contract that violates this action. A person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered such order or judgment, or by bringing an action for declaratory judgment in the Superior Court.

5. Nothing in this act shall be deemed to require the disclosure of any information with regard to any trade secret unless that information is pertinent to a public hazard.

6. Upon motion and good cause shown by a party attempting to

prevent disclosure of information of materials which have not previously been disclosed, including, but not limited to, alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. The court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

7. This act shall take effect on the 30th day following enactment and shall apply to any contract, agreement or judgment entered on or after that date.

STATEMENT

Recently, there has been a growing concern relating to the practice in civil cases, especially cases involving product liability, of including as part of the settlement an agreement not to disclose information regarding hazardous products or having a court enter an order precluding such disclosure. Critics feel that this practice deprives the public of information to which the public is entitled concerning potentially dangerous products.

In order to address this concern, this bill would prohibit the entry of an order or judgment which has the purpose or effect of concealing a public hazard. The term "public hazard" is defined to include any device, instrumentality, procedure or condition thereof that has caused and is likely to cause injury.

The bill also provides that any provision of a contract or any agreement which has the effect or purpose of concealing a public hazard is contrary to public policy and void. The bill confers standing to any substantially affected person to contest any order, judgment contract or agreement that violates the provisions of the bill. Substantially affected person specifically includes representatives of the news media.

Under the bill, trade secrets unless pertinent to a public hazard would be protected from disclosure and a party seeking to prevent disclosure of any information may request the court to hold an in camera hearing to determine if disclosure of that information is necessary to protect the public.

CIVIL JUSTICE

Prohibits contract provisions and civil case settlements which fail to disclose public hazards.

ASSEMBLY, No. 4110

STATE OF NEW JERSEY

Bob Lembo
from 72 Dept

INTRODUCED OCTOBER 29, 1990

By Assemblyman CHARLES

AN ACT concerning the disclosure of information about public hazards and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. As used in this act:

a. "Public hazard" means an instrumentality, including, but not limited to, any device, instrument, procedure, or product, or a condition of any device, instrument, procedure, or product, that has caused and is likely to cause injury.

b. "Trade secret" means the whole or any portion of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value. A trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

2. Except as provided in this act, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard.

3. Any provision of any contract or other agreement which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, shall be void as against public policy and unenforceable.

4. Any substantially affected person, including, but not limited to any representative of the news media, has standing to contest an order, judgment, agreement, or contract that violates this action. A person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered such order or judgment, or by bringing an action for declaratory judgment in the Superior Court.

5. Nothing in this act shall be deemed to require the disclosure of any information with regard to any trade secret unless that information is pertinent to a public hazard.

6. Upon motion and good cause shown by a party attempting to

prevent disclosure of information of materials which have not previously been disclosed, including, but not limited to, alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. The court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

7. This act shall take effect on the 180th day following enactment and shall apply to any contract, agreement or judgment entered on or after that date.

STATEMENT

Recently, there has been a growing concern relating to the practice in civil cases, especially cases involving product liability, of including as part of the settlement an agreement not to disclose information regarding hazardous products or having a court enter an order precluding such disclosure. Critics feel that this practice deprives the public of information to which the public is entitled concerning potentially dangerous products.

In order to address this concern, this bill would prohibit the entry of an order or judgment which has the purpose or effect of concealing a public hazard. The term "public hazard" is defined to include any device, instrumentality, procedure or condition thereof that has caused and is likely to cause injury.

The bill also provides that any provision of a contract or any agreement which has the effect or purpose of concealing a public hazard is contrary to public policy and void. The bill confers standing to any substantially affected person to contest any order, judgment contract or agreement that violates the provisions of the bill. Substantially affected person specifically includes representatives of the news media.

Under the bill, trade secrets unless pertinent to a public hazard would be protected from disclosure and a party seeking to prevent disclosure of any information may request the court to hold an in camera hearing to determine if disclosure of that information is necessary to protect the public.

CIVIL JUSTICE

Prohibits contract provisions and civil case settlements which fail to disclosure public hazards.

PRINTER'S NO. 828

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 751 Session of 1991

INTRODUCED BY VEON, MICHLOVIC, McGEEHAN, COHEN, STURLA, McNALLY, COWELL, SALOOM, TRELLO, PESCI, FREEMAN, KASUNIC, HECKLER, BUNT, MIHALICH, GODSHALL, STEELMAN, ITKIN, JAMES, BLAUM, JOSEPHS, KUKOVICH, COLAIZZO, TRICH, GIGLIOTTI, MELIO, KRUSZEWSKI, KOSINSKI, JOHNSON, RICHARDSON, LAUGHLIN AND SURRA, MARCH 13, 1991

REFERRED TO COMMITTEE ON JUDICIARY, MARCH 13, 1991

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for protective court orders.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 42 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 7104. Protective court orders.

(a) General rule.--In any action subject to this section, no person shall seek, and no court shall enter, a protective order which is inconsistent with the provisions of this section, and any order to the contrary shall be void and of no effect.

(b) Scope.--No person subject to a protective order shall be forbidden from making any document or other information furnished to that person pursuant to such order available to any of the following:

(i) Federal, State or local regulatory or law enforcement agency, or legislative or judicial body, where the person furnishing such information reasonably believes that such agency or body has regulatory, law enforcement, legislative or adjudicative authority with respect to the product involved in such action, and the opposing counsel are notified that documents or information has been furnished within five days after they are made available.

(2) An attorney who the person furnishing such information reasonably believes is duly licensed to practice law in a state or the District of Columbia and representing a person claiming losses from the same product as is involved in this action provided that the attorney receiving the documents or other information agrees in writing to be bound by the protective order and to be subject to the jurisdiction of the court issuing it in connection with the matter relating to it, and a copy of the agreement is promptly furnished to opposing counsel.

(c) Settlement restriction.--In any action subject to this section, no person shall request, as a condition of settlement, that the claimant or the claimant's attorney agree to any of the following:

(1) Not to disclose the amount of the settlement.

(2) To return or destroy documents related in any way to the action provided that it shall not be improper to continue a valid protective order in effect or to enter a valid post-dismissal protective order.

(3) In the case of an attorney, not to represent any other claimant in a similar action or in any other action against any of the defendants.

(d) Other rights.--Nothing in this section shall impair or diminish any other right of any person to obtain access to any document or information related in any way to an action subject to this act.

Section 2. This act shall take effect in 60 days.

PRINTER'S NO. 829

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 752 Session of 1991

INTRODUCED BY VEON, MICHLOVIC, McGEEHAN, COHEN, STURLA, McNALLY, COWELL, SALOOM, TRELLO, PESCI, FREEMAN, KASUNIC, HECKLER, BUNT, MIHALICH, GODSHALL, STEELMAN, ITKIN, JAMES, BLAUM, JOSEPHS, KUKOVICH, TRICH, COLAIZZO, GIGLIOTTI, MELIO, KRUSZEWSKI, KOSINSKI, JOHNSON, RICHARDSON, LAUGHLIN AND SURRA, MARCH 13, 1991

REFERRED TO COMMITTEE ON JUDICIARY, MARCH 13, 1991

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, prohibiting the concealment of a public hazard.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 42 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 7104. Concealment of public hazards.

(a) Agreement or contract to conceal public hazard unenforceable.--Any portion of an agreement or contract that has as its purpose or effect the concealment of a public hazard is void and may not be enforced.

(b) Order to conceal public hazard prohibited.--A court may not enter an order that has as its purpose or effect the concealment of a public hazard.

(c) Penalty.--A person who intentionally, knowingly or

recklessly conceals a public hazard commits a misdemeanor of the first degree.

(d) Standing.--Any person has standing to contest an order that violates this section.

(e) Procedure and venue.--A person may contest an order that violates this section by bringing an action in any court of competent jurisdiction.

(f) Attorney fees.--Any party or attorney that prevails in litigation under this section shall have the right to petition the court for attorney fees and costs to be charged against the losing or settling party.

(g) Applicability.--This section applies only to an order rendered or a contract or agreement entered into on or after the effective date of this section. An order rendered or a contract or agreement entered into before the effective date of this section is governed by the law in effect at the time the order was rendered or the contract or agreement was entered into and that law is continued in effect for that purpose.

(h) Definition.--As used in this section, the term "public hazard" means an instrument, device or substance or a condition of an instrument, device or substance, that has caused or may cause bodily injury to more than one individual.

Section 2. This act shall take effect in 60 days.

(d) Other rights.--Nothing in this section shall impair or diminish any other right of any person to obtain access to any document or information related in any way to an action subject to this act.

Section 2. This act shall take effect in 60 days.

PRINTER'S NO. 687

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 656 Session of 1991

INTRODUCED BY GREENLEAF, JONES AND ANDREZESKI, MARCH 12, 1991

REFERRED TO JUDICIARY, MARCH 12, 1991

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, prohibiting concealment of public hazards.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 42 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 7104. Concealment of public hazards prohibited.

(a) Court orders.--Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(b) Agreements and contracts.--Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard or any

information which may be useful to the public in protecting themselves from injury which may result from the public hazard is void, contrary to public policy and may not be enforced.

(c) Trade secrets.--Trade secrets which are not pertinent to public hazards shall be protected by agreement or order.

(d) Persons affected.--

(1) Any substantially affected person, including, but not limited to, representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section by a motion in the court that entered the order or judgment.

(2) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including, but not limited to, alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

(e) Definition.--As used in this section, the term "public hazard" means an instrumentality, including, but not limited to, any device, instrument, person, procedure, product or a condition of a device, instrument, person, procedure or product that has caused or is likely to cause injury.

Section 2. This act shall take effect in 60 days.

An ACT to amend Ch. 801 and 804 of the statutes, relating to creating a presumption of openness for the civil justice system and establishing a procedure for and standards for limiting access to the civil justice system.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 801.20 (title) of the statutes is created to read:

801.20 (title) OPEN COURT RECORDS.

SECTION 2. 801.20 of the statutes is created to read:

801.20(1) Legislative findings. The legislature finds:

(a) The civil justice system is funded by the public to resolve disputes in accordance with justice and the public laws.

(b) The public cannot determine whether the civil justice system is resolving disputes in accordance with justice and the public laws if information relevant to the disputes or the system's resolution of them is secret.

(c) Unnecessary secrecy in the civil justice system:

1. Undermines the public health and safety by preventing both the public and government officials from learning about, and protecting the public from, potential dangers to the public welfare;

2. Undermines the just, speedy, and inexpensive resolution of disputes in our civil justice system by increasing the cost and difficulty of discovering the truth, precluding potential litigants from learning that they have claims, prohibiting

similarly situated litigants from efficiently obtaining and voluntarily sharing relevant information, and requiring the judiciary to repeatedly rehear and resolve similar discovery disputes in different cases; and

3. Undermines the democratic process by preventing the public from determining whether the civil justice system is operating justly or whether the system or laws need to be changed;

(2) Civil Justice System Presumed Open. The operations of the civil justice system, including the following information and documents concerning matters before the civil courts, are presumed to be open to the public:

(a) all information and documents of any nature filed with, submitted to, or issued by any civil court in connection with any matter before it;

(b) all discovery in any matter before any civil court, whether or not the discovery is filed with or submitted to the court;

(c) all settlement agreements in any matter before any civil court, whether or not they are filed with or submitted to the court.

(d) The provisions of this section [801.20] shall not apply to matters arising under the Family Code.

(3) Standard for Overcoming Presumption of Public Access. No court may enter an order having the purpose or effect of limiting public access to any of the information or documents referred to in s. 801.20 (2) unless it finds that the person seeking to limit public access has met its burden of proving, with clear and convincing evidence, that no less restrictive means than limiting public access will adequately and effectively

protect the interest asserted in secrecy and:

(a) there is a specific, serious, and substantial interest in limiting public access to the information or documents. The mere facilitating of a settlement or relief of a court's caseload shall not constitute compliance with this subsection; or

(b) the information or documents constitute private facts concerning a natural person or trade secrets or other confidential research, development, or commercially secret data; or

(c) the interest in limiting public access to the information or documents clearly outweighs both the presumption of public access and any adverse effect that limiting public access might have on anyone's safety or health.

(4) Access of Government Officials and Similarly Situated Litigants. No court may enter an order having the purpose or effect of limiting the access of the following persons to information or documents referred to in s. 801.20 (2), even when the standard set forth in s. 801.20 (3) has been met, if those persons voluntarily submit themselves to the jurisdiction of the court for the purpose of permitting enforcement of the provisions of the court's order limiting public access:

(a) a federal, state, or local government official with regulatory, investigative, administrative, legislative, judicial, law enforcement, or other responsibility in regard to which the information or documents is relevant; and

(b) a litigant or an attorney for a litigant in a case or potential case in regard to which the information or documents is relevant.

(5) Notice of Motion to Overcome Presumption of Public Access. An order limiting public access in accordance with s. 801.20 (3) may only be entered upon a written motion, which shall be open to public inspection. Upon filing the motion, or upon learning that any of the information contained in a notice previously issued pursuant to this section is incorrect, the movant shall:

(a) determine the time and place of the hearing on the motion;

(b) post a notice, at the place where notices for meetings of county governmental bodies are required to be posted, stating: the caption and file number of the case; the identity of the movant; that a hearing will be held in open court on a motion to limit public access in the case; a brief but specific description of both the nature of the case and the information or documents in regard to which secrecy is sought; the specific time and place of the hearing; that any person may intervene, pursuant to s. 803.09, Wis. Stats., for the limited purpose of being heard on matters relevant to the motion; and the names, addresses, and phone numbers of the attorneys for the parties;

(c) file a verified copy of the notice, along with an affidavit of its posting, with the clerk of the court and the clerk of the Supreme Court for inclusion in a publicly open file enable monitoring the extent to which motions to limit public access are being filed.

(6) Hearing on Motion to Overcome Presumption of Public Access. A public hearing shall be held in open court on all motions seeking to limit public access as soon as practicable after the motion is filed and notice is posted and served. Any

person who has been granted the right to intervene pursuant to s. 803.09 may be heard as a matter of right on any matter relevant to the motion.

(7) In Camera Review. Notwithstanding any of the foregoing, in order to facilitate a determination of whether certain information and documents are open to the public, a court may receive and review information and documents in camera to determine whether a motion to limit public access to them should be granted.

(8) Order on Motion to Overcome Presumption of Public Access. A motion to limit public access shall be decided by a written order that rules solely on the motion and states the specific reasons for finding and concluding whether or not the showing required by s. 801.20 (3) has been made, and, if it finds and concludes that such a showing has been made, the specific information and documents which are to be closed to the public, and the time period for which they are to be so closed. Any such order limiting public access shall be carefully tailored to ensure that it does not limit public access to any information or documents in regard to which the showing required by s. 801.20 (3) has not been made. A copy of the order shall be filed with the Clerk of the Supreme Court for inclusion in the file created under s. 801.20 (5).

(9) Appeal of Order on Motion to Overcome Presumption of Public Access. Any order or portion thereof ruling on a motion to limit public access or any other request to limit the person's access to information or documents referred to in s. 801.20 (2) shall be appealable pursuant to s. 808.03 (1) by any person who participated in the hearing.

I. Continuing Jurisdiction Over Sealing Orders

Paragraph 7 affirms the trial court's continuing authority to enforce, alter, or vacate its sealing orders. With regard to these, including protective orders applying to "court records" as defined in Rule 76a, the court's plenary power is extended indefinitely rather than limited to thirty days after judgment.[185] Third parties may intervene before or after judgment in order to change or terminate sealing.[186] This procedure ensures that sealing orders will not exist indefinitely without the possibility of future intervention, when secrecy is no longer justified.[187] During consideration of any proposed modification, the justification for sealing should be evaluated based on the facts as they exist at the time of the challenge. The original movant retains the burden of proof with regard to showing, in accordance with paragraph 1, the necessity for continued secrecy.[188] Pursuant to the procedures of Rule 120a, at any subsequent hearing on sealing the movant should be able to introduce the transcript of, and evidence and affidavits produced at, the original closure hearing. If changed circumstances are alleged, however, further evidence is likely to be required. Moreover, if the movant relied on affidavits in the first hearing, the nonmovant can subpoena the affiants to cross-examine their statements at the subsequent hearing.

Fear of the continuing jurisdiction provision's effect on the "judiciary's limited resources" is overstated.[189] First, few cases are likely to gain the notoriety that would subject them to repeated attempts to alter or vacate the sealing order. Second, by notifying area media and other nonparties who may develop some future interest in the matters of the original hearing, the attorney seeking sealing may reduce the likelihood of having to relitigate closure. Third, an order sealing or unsealing court records may not be reconsidered on the motion of a party or intervenor

185. *See* TEX. R. CIV. P. 329b(d). A trial court now has plenary power to modify a protective order covering court records encompassed by Rule 76a, in contrast to the restrictions placed upon such authority by Garcia v. General Motors Corp., 786 S.W.2d 12, 14 (Tex. App.—San Antonio 1990, no writ).

186. The only reported Texas cases involving postjudgment attacks on sealing, however, held that intervention was improper because the court entering the order had lost jurisdiction when the judgment became final. *See* Times Herald Printing Co. v. Jones, 730 S.W.2d 648, 649 (Tex. 1987); Express-News Corp. v. Spears, 766 S.W.2d 885, 888 (Tex. App.—San Antonio 1989, orig. proceeding [leave denied]).

187. It also precludes a result such as that achieved in Littlejohn v. BIC Corp., 851 F.2d 673, 683 (3d Cir. 1988), where post-trial withdrawal of exhibits destroyed their character as court records.

188. Rule 76a corresponds to the federal scheme in this respect. *See* Annotation, *Modification of Protective Order Entered Pursuant to Rule 26(c), Federal Rules of Civil Procedure*, 85 A.L.R. FED. 538 (1987).

189. *See, e.g.*, TEX. RULES OF COURT, Concurring and Dissenting Statement 2 (Gonzalez & Hecht, JJ.) (West Supp. 1990).

who had actual notice of the hearing without first showing changed circumstances materially affecting the order. If relitigation is initiated by a previously notified party, the change in circumstances that must be established relates not solely to the case, but also includes external factors such as additional health and safety problems of the type involved in the original action.

Once court records are created, they are accessible to the public unless and until a sealing order is directed by the court. Agreements of counsel[190] not to disseminate discovery information classified as "court records" are directly contrary to the Rule's provisions and are not enforceable. The Rule provides for temporary sealing orders to protect information pending a full hearing.[191]

Attorneys who successfully obtain a sealing order should notify their clients that future litigation to unseal the documents may arise under the court's continuing jurisdiction and that counsel may be required in the future to maintain the documents' secrecy.

J. Appellate Review

Because timely appellate review of trial courts' sealing orders is important, paragraph 8 provides that these rulings shall be deemed severed and final, appealable judgments. This obviates the need for mandamus actions that have traditionally been employed to review confidentiality orders.[192] Appeal may be taken by any party or intervenor who participated in the hearing on sealing. No specific provision is made for expedited appeal, but the rules applicable to acceleration of appeals generally should govern sealing orders.[193]

In addition to its usual authority to review the judgment of the trial court, an appellate court is specifically empowered to order the trial court to guarantee strict compliance with the notice and hearing provisions or to require it to make the specific findings mandated by Rule 76a. Abatement is a particularly useful tool when the notice is vague or incomplete, so that nonparties are unable to determine whether the proceeding merits their attention and participation. Requiring the trial court to take these further actions ensures an opportunity for representation of the public interest and will significantly enhance the appellate court's ability to engage in a meaningful review of the sealing order.

Conversely, the appellate court may exercise its inherent power to

190. *See* TEX. R. CIV. P. 11; *supra* note 53.
191. *See supra* Part III(G).
192. *See, e.g.*, Garcia v. Peeples, 734 S.W.2d 343 (Tex. 1987, orig. proceeding).
193. *See* TEX. R. APP. P. 42(b).

stay the trial court's proceedings.[194] Unless a stay is issued, however, the trial court may proceed to trial on the merits and judgment despite a pending appeal on sealing. A stay of the entire proceeding should be granted only in extraordinary circumstances. Although the Rule makes no provision for suspension of the severed sealing order on appeal, nothing suggests that the trial court cannot set an appropriate supersedeas bond.[195] This would appear to be the best course of action to prevent immediate disclosure of records that the trial court has refused to seal, although the alternative means of a stay by the trial court or by the appellate court to preserve jurisdiction over the appeal is also available. If these procedures are not employed and properly executed, a court's order not to seal stands during appeal and the records are accessible to the public. The appellate court may exercise its authority to impose sanctions for frivolous appeals,[196] such as those brought solely to delay the effectiveness of the sealing order. A limited stay of additional hearings on sealing may be appropriate to conserve judicial resources, unless changed circumstances are alleged. During the pendency of an appeal, nonparties who did not participate in the original hearing on sealing and who wish to challenge the trial court's order are advised to consider filing amicus briefs in the court of appeals.

An important aspect of the Rule is the standard of review on appeal. The Rule recognizes that it is considerably more difficult for an appellate court to exercise genuine review when the only issue presented concerns whether the trial court abused its discretion on good cause. Thus, rather than according broad discretion to the trial court, the Rule delineates clear standards for sealing determinations. The decision whether to seal is a legal one reviewed on appeal under legal and factual sufficiency standards. While the findings of the trial court are a useful guide on appeal, the reviewing court is free to weigh the factors delineated in paragraph 1 differently from the lower court or to redetermine whether a particular document is encompassed within the term "court records."

K. Effective Date

Paragraph 9 makes Rule 76a prospective in operation except for cases that were pending on September 1, 1990. Court records exchanged in those cases after that date are subject to the Rule's provisions even if covered by a prior sealing or protective order. Moreover, any motions in

194. *See* TEX. GOV'T CODE ANN. § 22.221 (Vernon 1988); Riverdrive Mall, Inc. v. Larwin Mortgage Investors, 515 S.W.2d 2, 4 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

195. TEX. R. APP. P. 47(f).

196. *See* TEX. R. APP. P. 84, 182(b).

a pending case to alter a sealing order that has been issued prior to September 1 are governed by the new Rule.

IV. Conclusion

Although Texas is the first state to adopt such a comprehensive "Courtroom Glasnost"[197] rule, Rule 76a is but the leading edge of a much broader movement to improve access and ensure greater openness in the judicial process. Significant reforms have also come from Florida, San Diego County, California, and New York. Shortly after the adoption of Rule 76a, Florida passed the "Sunshine in Litigation" Act to prevent judicial concealment of any "public hazard."[198] The San Diego Superior Court adopted a rule recognizing that "confidentiality agreements and protective orders are disfavored."[199] New York, the most recent jurisdiction to restrict the use of secrecy, adopted a rule whose scope is limited to documents filed with the court.[200] While requiring a written finding of "good cause" as a prerequisite to sealing, this term is not defined nor is there any required finding regarding the effect upon public health and safety.[201] Otherwise, the rule represents a step in "[e]xpanding the public's access to information about environmental and consumer hazards."[202]

At least two states have enacted less comprehensive measures. Since becoming effective in July 1985, Georgia's Uniform Superior Court Rule 21 has provided a strong statement of a public policy supporting openness, declaring that no order limiting access may be granted "except upon a finding that the harm otherwise resulting to the privacy of a per-

197. *Courtroom Glasnost: Laudable Ruling Means More Trial Records Will Be Open*, Houston Post, Apr. 22, 1990, at C2, col. 1.

198. 1990 FLA. SESS. LAW SERV. 90-20 (West) (codified at § 69.081). The Florida law protects trade secrets only if "not pertinent to public hazards." *Id.* § 69.081(5).

199. San Diego County, Ca., Superior Court Rules, Div. II, General Civil Litigation § 6.9 (1990). It provides that a file may not be sealed unless secrecy is in the public interest, the information contains trade secrets or other privileged material, and disclosure would cause serious harm. *Id.* Judith McConnell, then the San Diego Superior Court's presiding judge, explained the motivation behind the rule: "If you're going to use public courts, you have to be willing to expose yourself to public scrutiny." Abrahamson, *New Ruling Lifts Veil of Secrecy in Civil Cases*, L.A. Times, Sept. 9, 1990, at B1, col. 5 (San Diego county ed.).

200. *See* N.Y. CIV. PRAC. L. & R. 216.1(a) (McKinney, forthcoming); Kolbert, *New York Bans Routine Sealing of Court Records*, N.Y. Times, Feb. 5, 1991, at A12, col. 1 [hereinafter *Sealing Court Records*]. Explaining part of the rule's rationale, New York Court of Appeals Chief Judge Sol Wachtler said: " '[W]hen you have the courts being used for redressing a wrong, it is the public that is providing and paying for the court procedure and making it available for private litigants[;]' " therefore, " '[t]hese litigants should not then say to the public, "It's none of your business." ' " Kolbert, *New York's Top Judge Urges Less Secrecy in Settling Cases*, N.Y. Times, June 20, 1990, at A1, col.3 (quoting Chief Judge Sol Wachtler).

201. *See* N.Y. CIV. PRAC. L & R. 216.1 (McKinney, forthcoming).

202. Kolbert, *Sealing Court Records*, *supra* note 200, at A12, col. 1.

son in interest clearly outweighs the public interest."[203] Concern over unreasonable judicial restrictions upon access to discovery resulted in a Virginia statute authorizing attorneys to share information relating to personal injury or wrongful death actions.[204] In Rhode Island, a bill authored by Representative Jeffrey Teitz to forbid protective orders barring attorneys from sharing information about hazardous products received legislative approval with few dissenting votes, but was vetoed by the governor.[205] In other states[206] and at the congressional level,[207] the possibility of legislation is also being considered.

Texas's reforms are more extensive than these initiatives. In that regard, some deem Rule 76a a radical departure from prior legal practice in Texas. Others view it as merely a codification of preexisting law. To some extent, both are correct. Much of Rule 76a reflects only the better approach already followed by courts; it is ground-breaking in insisting that these guarantees be applied consistently in all relevant cases despite agreements between counsel.

Undoubtedly the implementation of the Rule will involve some difficulties and ultimately require further refinement of its provisions. Rule 76a represents an initial attempt by the Texas Supreme Court to balance the limited interests of litigants in secrecy with the broad public policy favoring openness as well as the important objective that the general public health and safety not be adversely affected by closure in what some may characterize as "private" litigation. Texas has adopted the philosophy expressed in *Atlanta Journal v. Long*[208] during the Georgia Supreme Court's review of a somewhat more narrow open records procedural rule:

203. GA. UNIFORM SUP. CT. RULE 21.2.

204. VA. CODE ANN. § 8.01-420.01 (Supp. 1990). It basically codifies the general right of attorneys to share information that Texas recognized in Garcia v. Peeples, 734 S.W.2d 343, 349 (Tex. 1987, orig. proceeding). *See supra* note 90 and accompanying text.

205. Ziegler, *Trend in States*, *supra* note 6, at 9, col. 3. Bills designed to open civil records recently died in committee in Alaska, Georgia, Maryland, and Missouri. Ziegler, *Sunshine*, *supra* note 6, at 8, col. 5.

206. *See* Marcus, *supra* note 25, at B1, col. 3; Walsh, *Rising Secrecy in Civil Cases Prompts Legislative Backlash*, Wash. Post, Feb. 20, 1989, at B1, col. 2; *Legislatures Prepare for Battle on Protective Orders*, FOR THE DEFENSE, Sept. 1990, at Defense Law News (insert) 3 (reporting that Alaska, California, Georgia, Hawaii, Illinois, Maryland, and Missouri will attempt to restrict protective orders); Schwaneberg, *Proposals Aim to Ban Court Secrecy Agreements on Dangerous Products*, Star-Ledger (New Jersey), Nov. 25, 1990, § 1 (detailing attempts in New Jersey to curtail court-sanctioned secrecy agreements); Ziegler, *Sunshine*, *supra* note 6, at 8, col. 2 (discussing initiatives in California and Colorado).

207. *Court Secrecy Hearing*, *supra* note 14, at 3. Senator Herb Kohl, Chairman of the Courts and Administrative Practices Subcommittee, conducted hearings on the implications of courtroom secrecy. Representative Candiss Collins has introduced H.R. 129, which will bar courts from issuing orders that preclude disclosure to a federal agency of information relating to product safety. *See* H.R. 129, 101st Cong., 1st Sess. (1989).

208. 258 Ga. 410, 369 S.E.2d 755 (1988).

"Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reason. Like a candle, court records hidden under a bushel make scant contribution to their purpose."[209]

209. *Id.* at 411, 369 S.E.2d at 757. This philosophy was similarly sounded, though not immediately heard, in Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. App.—San Antonio 1989, orig. proceeding [leave denied]): "If judge and counsel are required to act under the public gaze they are more strongly moved to strict conscientiousness in the performance of their duties. Throughout history, secret tribunals have exhibited abuses which are absent when judicial proceedings and records are freely accessible to the public." *Id.* at 890 (Cadena, J., dissenting).

APPENDIX

RULE 76a. Sealing Court Records

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

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

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of

(10) Continuing Jurisdiction, Enforcement, and Modification. A court that enters an order limiting public access retains continuing jurisdiction to enforce, alter, or vacate that order. Any person may bring a motion to enforce, alter, or vacate such orders, subject to all of the provisions of this section, including the notice and hearing provisions of (5) and (6), respectively. An order shall not be reconsidered at the request of a party or intervenor who had actual notice of the hearing preceding issuance of the order unless the party or intervenor shows that some relevant circumstance, not necessarily related to the case in which the order was entered, has changed. No order limiting public access shall remain in effect unless the standard set forth in s. 801.20 (3) is met at the time in which the order is challenged or reconsidered.

(11) Return and Destruction of Documents. No court may enter an order having the purpose or effect of requiring any litigant, any attorney, any government official, or any member of the public to return or destroy any legally obtained information or documents referred to in s. 801.20 (2).

(12) Access to Information in Other Cases. No court may enter an order having the purpose or effect of limiting a person's access to information or documents in a case not before the court.

(13) Attorneys' Fees and Costs. Any person who substantially prevails in opposing a motion to limit public access shall be entitled to recover reasonable attorneys' fees and costs from the party seeking to limit public access.

(14) Agreements and Orders to the Contrary Void and Uneforceable. All provisions in contracts, agreements, stipulations, and court orders that are contrary to the provisions of this subtitle are void and uneforceable.

(15) Initial Applicability. This act shall apply to all actions pending on or commenced after its effective date.

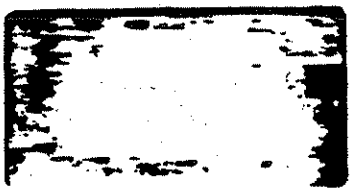
(16) Effect on Other Laws. Nothing in this subtitle shall be deemed to open to the public any information or documents to which public access is otherwise restricted by law.

(17) Provisions Severable. If any provision of s. 801.20 or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, that invalidity shall not affect any other provision or application of s. 801.20 which can be given effect without the invalid provision or application and, for this purpose, the provisions of s. 801.20 are declared severable.

SECTION 3. 804.01 (2) (e) of the statutes is created to read:

804.01 (2) (e) No party may refuse to provide discovery solely on the ground that public access to such discovery should be limited pursuant to s. 801.20; provided, however, that the court may, upon motion and for good cause shown, restrict the use of such discovery to that use necessary to continue to pursue the cause of action, pending hearing on the motion to restrict access.

(END)



FEB-25-1991 12:00 FROM WI ACADEMY TRIAL LAWYERS TO ATLA P.01

Wisconsin Academy of Trial Lawyers

44 East Mifflin Street, Suite 103
Madison, WI 53703
(608) 257-5741
Fax#: (608) 255-WATL

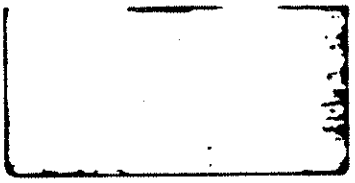
Date: 2/25/91 **Time:** 11:50 a.m.

To: Jim Rooks

Fr: Jane Garrott / Nancy Rottier

# of Pages (inc. cover): 8

Comments: Copy of our draft of anti-secrecy legislation.



COURT RULES:

Adopted

NEW YORK STATE COURT RULE

ADOPTED 2-4-91

Part 216

SEALING OF COURT RECORDS
IN CIVIL ACTIONS IN THE
TRIAL COURTS

Section 216.1. Sealing of court records. Except where otherwise provided by statute or rule, a court shall not enter an order sealing court records except upon a finding of good cause. 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 an opportunity to be heard.

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).

Enacted

TEXAS RULES OF CIVIL PROCEDURE

Adopted by the Supreme Court of Texas, April, 1990;

Effective September 1, 1990

Rule 76a. Sealing Court Records

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

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

(2) documents in court files to which access is

otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government;

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Notice.** Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the

movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a, upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. A temporary sealing order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof

of a party requesting sealing at the hearing required by paragraph 4.

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

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment)

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

9. **Application.** Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

*****

APPLICABLE PORTIONS OF RELATED RULES

Rule 166b **Forms and Scope of Discovery; Protective Orders; Supplementation of Responses**

5. **Protective Orders.** On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

Rule 120a. Special Appearance

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

*****

For further information contact: **Justice Lloyd Doggett**
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711
512/463-1344
Adm. Asst: Virginia Smith

 Filed

01/26/89 House Bill 698

By Holmes

A BILL TO BE ENTITLED

AN ACT

relating to the concealment of certain public hazards; creating the criminal offense of concealment of certain public hazards.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 136 to read as follows:

CHAPTER 136. CONCEALMENT OF CERTAIN PUBLIC HAZARDS

Sec. 136.001. DEFINITION. In this chapter, "public hazard" means an instrument or a device, or a condition of an instrument or device, that has caused or may cause serious bodily injury to more than one individual.

Sec. 136.002. AGREEMENT OR CONTRACT TO CONCEAL PUBLIC HAZARD UNENFORCEABLE. Any portion of an agreement or contract that has as its purpose or effect the concealment of a public hazard is void and may not be enforced.

Sec. 136.003. ORDERS TO CONCEAL PUBLIC HAZARD PROHIBITED. A court may not enter an order that has as its purpose or effect the concealment of a public hazard.

Sec. 136.004. STANDING. Any person has standing to contest an order that violates this chapter.

Sec. 136.005. PROCEDURE AND VENUE. A person may contest an order that violates this chapter by:

(1) motion in the court that entered the order; or

(2) bringing suit in any district court.

SECTION 2. Chapter 48, Penal Code, is amended by adding Section 48.03 to read as follows:

Sec. 48.03. CONCEALMENT OF CERTAIN PUBLIC HAZARDS. (a) In this section, "public hazard" means an instrument or a device, or a condition of an instrument or device, that has caused or may cause serious bodily injury to more than one individual.

(b) A person commits an offense if the person intentionally, knowingly, or recklessly conceals a public hazard.

(c) An offense under this section is a Class A misdemeanor.

SECTION 3. (a) This Act takes effect September 1, 1989.

(b) Section 1 of this Act applies only to an order rendered or a contract or agreement entered into on or after the effective date of this Act. An order rendered or a contract or agreement entered into before the effective date of this Act is governed by the law in effect at the time the order was rendered or the contract or agreement was entered into and that law is continued in effect for that purpose.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

IN THE SUPREME COURT OF TEXAS

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE, TEXAS RULES OF APPELLATE PROCEDURE, AND TEXAS RULES OF CIVIL EVIDENCE

ORDERED:

1. That Texas Rules of Civil Procedure 3a, 4, 5, 10, 13, 18a, 18b, 21, 21a, 26, 45, 47, 57, 60, 63, 67, 87, 106, 107, 113, 120a, 166, 166a, 166b, 167, 167a, 168, 169, 183, 200, 201, 206, 208, 215, 216, 223, 237a, 245, 248, 269, 294, 296, 297, 298, 299, 301, 305, 306c, 308a, 534, 536, 571, 687, 749a, 749c, 751, 769, 771, 781, and 792 are amended as set forth below.

2. That Texas Rules of Civil Procedure 72, 73, 184, 184a, and 260 are repealed.

3. That Texas Rules of Civil Procedure 18c, 21b, 76a, 299a, and 536a are added as set forth below.

4. That Texas Rules of Appellate Procedure 1, 3, 4, 5, 9, 12, 15a, 17, 20, 40, 41, 43, 46, 47, 49, 51, 52, 53, 54, 56, 57, 59, 72, 74, 79, 90, 91, 100, 130, 131, 132, 133, 134, 135, 136, 140, 160, 170, 172, 181, 182, 190, 202, and 210, and certain captions and an appendix, are amended as set forth below.

5. That Texas Rule of Appellate Procedure 21 is added as set forth below.

6. That Texas Rule of Civil Evidence 703, and the comment to Rule 604, are amended as set forth below.

7. That these changes in the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence shall take effect September 1, 1990.

8. That the comments appended to these changes are incomplete, that they are included only for the convenience of the bench and bar, and that they are not a part of the rules.

6. That the Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

7. That the Clerk shall file an original of this Order in the minutes of the Court to be preserved as a permanent record of the Court.

SIGNED AND ENTERED in duplicate originals this 24th day of April, 1990.

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez

Oscar H. Mauzy

Eugene A. Cook

Jack Hightower

Nathan L. Hecht

Lloyd Doggett

CONCURRING AND DISSENTING STATEMENT BY JUSTICE GONZALEZ AND JUSTICE HECHT

We concur in the changes to the Texas Rules of Civil Procedure adopted by this Order except the addition of Rule 76a and the concomitant amendment to Rule 166b.5.c. We agree that that it is appropriate to articulate standards for sealing court records which recognize and protect the public's legitimate interest in open court proceedings. Our concern is that the adopted rules are excessive.

Strong arguments have been made that pleadings, motions and other papers voluntarily filed by a party to avail itself of the judicial process should not be sealed absent specific, compelling reasons. The arguments are much weaker for denying protection from public disclosure of information which a person is ordinarily entitled to hold private and would not divulge except for the requirements of the discovery process. It is one thing to require that pleas to a court ordinarily be public; it is quite another to force a person to give an opponent in a lawsuit private information and then require disclosure to the world. On balance, we believe that the adopted rules do not afford litigants adequate protection of their legitimate right to privacy.

The procedural burdens created by the adopted rules are thrust principally upon already overburdened trial courts and courts of appeals. The trial courts must now conduct full, evidentiary hearings before ordering court records sealed. After records are ordered sealed, any party who did not have actual notice of earlier proceedings may request reconsideration of the order. Because it is impossible to give actual notice to the world, an order sealing records can never be effectively final. Trial courts must either hold as many hearings as there are requests by people without actual notice of prior hearings, or surrender and unseal the records. All parties, for and against sealing, are entitled to appeal. The demand of the adopted rules on the judiciary's limited resources is impossible to assess.

Finally, Rule 76a and the change in Rule 166b.5.c are probably more controversial than any rules ever adopted by this Court. Although issues relating to sealing court records have been addressed across the country, adoption of rules like these two is unprecedented. Despite strongly conflicting views of the members of our Rules Advisory Committee, the Court has not invited the same public comment on these two rules as it has on the others. People outside the rules drafting process, lawyers and non-lawyers alike, have only recently become aware that these two rules were being considered. Even without inviting comment, the Court has received a relatively large number of sharply divergent views of these rules. The stridency of the controversy, the dearth of precedent, and lack of opportunity for full public comment all counsel a more measured response by the Court than the rules it adopts. We have refused this year to change the rules pertaining to the preparation of jury charges because of conflicting comments on the proposed amendments. The reasons for deferring sweeping changes in the charge rules for further debate apply equally to Rule 76a and Rule 166b.5.c.

We agree with the Court generally that court records should be open to the public. We do not agree with the manner in which the Court has chosen to effectuate this policy.

RULES OF THE COURT OF CHANCERY

OF THE

STATE OF DELAWARE

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS; DEPOSIT AND SECURITY FOR COSTS

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS; APPEARANCE AND WITHDRAWAL THEREOF

(g) Sealing of Court Records. (1) Except as otherwise provided in this Rule 5(g), all pleadings and other papers, including deposition transcripts and exhibits, answers to interrogatories and requests for admissions, and affidavits or certificates and exhibits thereto ("documents") filed with the Register in Chancery shall become a part of the public record of the proceedings before this Court.

(2) Documents shall not be filed under seal unless and except to the extent that the person seeking such filing under seal shall have first obtained, for good cause shown, an order of this Court specifying those documents or categories of documents which should be filed under seal; provided, however, the Court may, in its discretion, receive and review any document *in camera* without public disclosure thereof and in connection with any such review, may determine whether good cause exists for the filing of such document under seal.

(3) The provisions of paragraph (2) of this Rule 5(g) notwithstanding, the Court may, in its discretion, by appropriate order, authorize the parties or other persons to designate documents to be filed under seal pending a judicial determination of the specific documents or categories of

documents to which such restriction on public access shall continue to apply. In all such cases the Court shall require submission of the matter within ten days of such initial order and shall make such a determination as soon as practicable.

(4) Whenever any brief or letter subject to Rule 171 is filed under seal with the Court because it would disclose information from a document which is otherwise required to be filed under seal pursuant to this Rule 5(g), the following procedures shall be followed:

(A) if the restricted documents had been designated by the party filing the brief or letter, he shall also file a copy of the brief or letter for public inspection omitting only such restricted information which he believes should continue to be sealed for good cause; or

(B) if the restricted document had been designated by another person, the party filing the brief or letter under seal shall give written notice to such person that a copy of the entire brief or letter will be filed for public inspection unless such person files, within 3 days of the filing of the brief or letter under seal, a copy of the brief or letter for public inspection omitting only such restricted information which such person believes should continue to be sealed for good cause; or

(C) if the brief or letter discloses information from a restricted document which had been designated by the party filing the brief or letter and also discloses information from a restricted document which had been designated by another person, the party filing the brief or letter under seal and such other person shall jointly prepare and file, within 3 days of the filing of the brief or letter under seal, a copy of the brief or letter for public inspection omitting only such restricted information as each of them believes should continue to be sealed for good cause.

(5) Any person who seeks the continued sealing of any portion of a brief or letter pursuant to paragraph 4 of this Rule 5(g) shall also file a certification signed by his attorney of record (or, in the event such person is not represented by an attorney, signed by such person) that said attorney has personally reviewed the brief or letter filed under seal and that he believes to the best of his knowledge, information and belief that the restricted information should continue to be sealed for good cause. Said certificate shall briefly set forth the reasons why he believes that good cause exists for continued filing of the brief or letter under seal.

(6) Any party who objects to the continued restriction on public access to any document filed under seal pursuant to paragraphs (2) or (3) of this Rule 5(g) or to any portion of a brief or letter filed under seal pursuant to paragraph (4) of this Rule 5(g) shall give written notice of his objection to the person who designated the document for filing under seal. To the extent that such person seeks to continue the restriction on public access to such document, he shall serve and file an application within 7 days after receipt of such written notice setting forth the grounds for such continued restriction and requesting a judicial determination whether good cause exists therefor. In such circumstances, the Court shall promptly make such a determination.

(7) The Register in Chancery shall promptly unseal any document or brief or letter in the absence of timely compliance with the provisions of this Rule 5(g). In addition, 30 days after final judgment has been entered without any appeal having been therefrom, the Register in Chancery shall send a notice to any person who designated a document to be filed under seal that such document shall be released from confidential treatment if required to be kept by the Register or, if not required to be kept, returned to the person at his expense or destroyed, as such person may elect, unless that person makes application to the Court within 30 days for further confidential treatment for good cause shown.

(Amended, effective Sept. 1, 1990.)

Revisor's note. — The 1990 order amending this rule by adding (g) provided: "The Registers in Chancery for each county shall take such steps as are appropriate to notify members of the bar resident in their respective counties of this amendment."

Effect of amendment.

The 1990 amendment, effective Sept. 1, 1990, added (g).

As the rest of the rule was not affected by the amendment, it is not set out in this Supplement.

III. PLEADINGS AND MOTIONS

RULE 9. PLEADING SPECIAL MATTERS

A claim of conspiracy to defraud must be pled with particularity. A complaint alleging conspiracy must allege facts which, if true, show the formation and operation of a conspiracy, the wrongful act or acts done pursuant thereto, and the damage resulting from such acts. Facts, not legal conclusions, must be pled, including facts showing damages. Atlantis Plastics Corp. v Sammons, Del. Ch., 558 A.2d 1062 (1989).

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

I. AMENDMENTS.

Amendment of statutory claim. — To permit a party to amend a statutory claim to include fraud claims would impermissibly broaden the legislative remedy. Cede & Co. v. Technicolor, Inc., Del. Supr., 542 A.2d 1182 (1988).

II. RELATION BACK.

Amendments which do not relate back. — Proposed amendment to complaint which would add sole stockholder of plaintiff corporation as a plaintiff and assert a claim of fraud against certain defendants did not relate back to the original complaint and was barred due to failure to assert the claim within the 3-year statute of limitations period of 10 Del. C. § 8106. Atlantis Plastics Corp. v. Sammons, Del. Ch., 558 A.2d 1062 (1989).

RULE 8.

QUESTIONS WHICH MAY BE RAISED ON APPEAL

Effect of failure to raise argument in Superior Court.

Federal preemption claim on appeal was barred under this rule where the litigant failed to raise the issue of federal preemption at trial. GMC v. Local 435 of Int'l Union, Del. Supr., 546 A.2d 974 (1988).

Raising of claim for first time on appeal barred. — A claim that the amount of restitution was improperly calculated may not be raised for the first time on appeal. Gaines v. State, Del. Supr., 571 A.2d 765 (1990).

Failure to move for speedy trial. — Although defendant's failure to file any motions for a speedy trial on his own behalf in the trial court could cause his appeal on that issue to be summarily denied under this rule, it was considered as a factor weighing heavily against defendant's claim of violation of his right to a speedy trial. Skinner v. State, Del. Supr., 575 A.2d 1108 (1990).

RULE 9.

THE RECORD

(bb) Sealing of Court Records. With the exception of criminal cases, proceedings originating as or in criminal cases, and proceedings originating in the Family Court, any prior order of the trial court notwithstanding, no part of the record or other document filed with the Clerk of this Court shall be maintained under seal for more than 3 days, unless an application is made to this Court within 3 days from the filing of the notice of appeal, or by such other time as the Court may fix, setting forth the grounds for the maintenance of such document under seal and requesting a judicial determination that good cause exists for the continued maintenance of the specified documents under seal. In any criminal appeal, any document or other part of the record which has been sealed by order of the trial court shall remain sealed unless this Court, for good cause shown, shall authorize the unsealing of such document or record. Except as provided herein, the Clerk of the Court shall treat as unsealed any part of the record or other document with respect to which a timely application is not filed.

(Amended, effective Jan. 12, 1990.)

Effect of amendment.

The 1990 amendment, effective Jan. 12, 1990, added (bb).

As the rest of the rule was not affected by the amendment, it is not set out in this Supplement.

RULE 12.

ATTORNEYS OF RECORD; WITHDRAWAL

Participants in appeals. — Only a member of the Bar of this Court, a party appearing pro se, or an attorney admitted pro hac vice, may participate in an appeal in the State Supreme Court. Townsend v. Griffith, Del. Supr., 570 A.2d 1157 (1990).

6.7 Proofs of Service

In addition to the requirements of Code of Civil Procedure sections 417.10, 1011 and 1013, all proofs of service filed with the court shall specify the name of the party so served, the nature and status of his/her involvement in the case, i.e. plaintiff, defendant, cross-complainant, etc., and the name, address and phone number of his/her counsel of record, if any.

(Effective 7/1/90)

6.8 Organization of Pleadings

Multiple Causes of Action - Identity of Parties and Causes of Action. In addition to the requirements of CRC 201(e), each separate cause of action or affirmative defense must be specifically identified by written designation in words typed in capital letters, two spaces below the preceding paragraph and centered. Each cause of action must also be identified as to (1) its nature (breach of contract, fraud, etc.), (2) the particular plaintiffs asserting it, and (3) the particular defendants against whom it is asserted. Failure to comply with this requirement is a ground for striking the cause of action with leave to amend.

(Effective 7/1/90)

6.9 Confidentiality Agreements and Protective Orders

It is the policy of this court that confidentiality agreements and protective orders are disfavored and should only be approved by the court when there is a genuine trade secret or privilege to be protected. Such agreements will not be recognized or approved by this court absent a particularized showing (document by document) that:

(1) Secrecy is in the public interest; and

(2) The proponent has a cognizable interest in the material, i.e. the material contains trade secrets, privileged information, or is otherwise protected by law from disclosure; and

(3) That disclosure would cause serious harm.

(Effective 7/1/90)

6.10 Lodged Documents

The provisions of CRC 319 will be followed by this court. In the alternative, an attorney service pick-up slip may be submitted with the lodged materials. If the lodged material is not accompanied by either a stamped, self-addressed envelope or an attorney service pick-up slip, the clerk is authorized to refuse to accept lodged material. If the clerk is persuaded to accept the material despite non-compliance with the above, the risk of loss is on counsel and it is solely the responsibility of the attorney to arrange for retrieval of the material at counsel's expense within five court days of the date of the hearing. Papers not retrieved within five court days may be disposed of without further notice to counsel. A Notice of Lodging listing all of the items lodged, must be filed and served on all appearing parties at the time any matter is lodged with the court.

(Effective 7/1/90)

6.11 Exhibit Preparation

Counsel are urged to be mindful of environmental concerns when constructing trial exhibits and to use biodegradable and/or recyclable materials whenever possible.

(Effective 7/1/90)

SUMMARY OF DEVELOPMENTS ON SECRECY ISSUE *

Legislation

Enacted:	Florida (1990, 1991) North Carolina (1989) Oregon (1991) Virginia (1989)
Pending:	Alaska (1991) California (1991) Hawaii (passed House, 1991) Maine (1991) New Jersey (1991) Pennsylvania (1991) Wisconsin (1991)

Court Rules

Adopted:	New York (1991) Texas (1990) Delaware (1990) California, San Diego County Superior Court (1990)
Proposed:	Michigan (1991) New Jersey (1991) South Carolina (1991)

* For more details, please see attached.

August 20, 1991

COURT RULES:

Proposed

PROPOSED CHANGE TO

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 78(h) Sealing Court Records

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

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

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government;

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party(s) written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of South Carolina.

4. Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 26.

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rule 12 upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. A temporary sealing order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the

style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

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

10. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

****

APPLICABLE PORTIONS OF RELATED RULES

Rule 26(c) 9. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph shall be made in accordance with the provisions of Rule 78d with request to all court records subject to that rule.

MICHIGAN: PROPOSED COURT RULE AMENDMENTS

MCR 2.310(B)(4)

...but; no order or judgment shall be entered which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the Court enter an Order of Judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard. A "public hazard" as used in this section means an instrumentality, including but not limited to any device, instrument, person, procedure or product that has caused and/or is likely to cause injury.

MCR 2.310(C)(8)

but; no order or judgment shall be entered which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the Court enter an Order or Judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard. A "public hazard" as used in this section means an instrumentality, including but not limited to any device, instrument, person, procedure or product that has caused and /or is likely to cause injury.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

SONIA JAMES, Plaintiff, v. GENERAL MOTORS OF CANADA, LTD., a foreign corporation, GENERAL MOTORS CORPORATION, a Delaware corporation, ROMAN WHEELS WEST, INC., a Texas corporation, FRIDAY OLDS, INC., an Oregon corporation, JIM WESTON PONTIAC-GMC, INC., an Oregon corporation, ROMAN WHEELS MID-WEST, an Indiana corporation, ROMAN WHEELS SOUTH, INC., a Florida corporation, CURTIS MATTERN, O. G. KENNEDY, JR., L. PAUL MILLER, JUNSEN, INC., an Indiana corporation, and RICK GALLES CORPORATION, a New Mexico corporiation, doing business in Arlington, Texas as Galles Van Conversions, Defendants.	No. A8604-01955 ORDER COMPELLING PRODUCTION AND REQUIRING VIDEOTAPED DEPOSITION; PROTECTIVE ORDER

The motions of the plaintiff, Sonia James, for an order compelling production of documents from defendants General Motors of Canada and General Motors Corporation; for an order permitting the videotaped deposition of Mr. Edward McKenna of General Motors Corporation; and defendants' motion for a protective order were heard before the Honorable Donald H. Londer, circuit court judge, on November 16, 1987. Plaintiff appeared by and through her attorneys Robert K. Udziela and Daniel C. Dziuba of Pozzi, Wilson, Atchison, O'Leary & Conboy; defendants General Motors of Canada and General Motors Corporation

POZZI WILSON ATCHISON O'LEARY & CONBOY
Attorneys at Law
9th Floor Standard Plaza
Portland, Oregon 97204

Defendants' motion for a protective order is granted in part and denied in part. Defendants' motion is granted only to the extent that any documents, or copies thereof, which have been or will be produced or otherwise made available to the plaintiff by General Motors of Canada, Ltd., and by General Motors Corporation in the course of these proceedings shall not be disclosed in any manner to any person or entity who is a generally recognized competitor of defendants General Motors of Canada and General Motors Corporation.

Plaintiff's counsel will advise all persons to whom the documents are shown that there is in effect a protective order that forbids disclosure to any recognized competitor of General Motors of Canada and General Motors Corporation. In all other respects, defendants' motion for a protective order is denied.

At the hearing on the form of the order compelling discovery, defendants' counsel asked the Court to order that, at the end of this litigation, plaintiff's counsel return to General Motors of Canada, Ltd., and to General Motors Corporation all materials produced by General Motors of Canada, Ltd., and General Motors Corporation in this case. Defendants' counsel also asked, by way of defendants' Objections to Proposed Order, the Court to order that, while the documents to be produced by defendants can be shown to other attorneys besides plaintiff's counsel, the documents are not to be copied for those attorneys. The Court denies defendants' requests.

/s/ Donald H. Londer
Donald H. Londer
Circuit Court Judge

Page made up from several pages.

LEVEL 2 - 1 OF 1 STORY

September 23, 1991

SECTION: ANALYSIS; Pg. 29

LENGTH: 2485 words

HEADLINE: Protective Orders and Nest-Feathering

BYLINE: BY ROBERT N. WEINER; Robert N. Weiner, a partner at D.C.'s Arnold & Porter, is a defense lawyer who handles product-liability and other commercial cases.

HIGHLIGHT:
Plaintiffs lawyers around the nation are pressing for laws that would open discovery files in personal-injury cases to public scrutiny. Their motivations are not nearly as pure as many suppose.

BODY:
The plaintiffs' personal-injury bar has declared war on confidentiality in

litigation. In state after state, plaintiffs lawyers have proposed new court rules or statutes that sharply limit protective orders, override privacy considerations, and breach trade secrets -- all under the banner of openness and public safety.

Despite this political offensive, most legislatures and courts have refused to strip courts of their longstanding discretion to weigh the facts of each case and, where appropriate, bar disclosure of information produced in discovery. About a dozen such efforts have failed in recent years.

But some states have taken such steps. Analysis of these new laws reveals that openness and public safety are not the real issues. It reveals that the outspoken moralism and zeal for the public welfare that the proponents of these measures profess actually coincide with their economic interest. And it reveals that these highly touted "reforms" in fact impose enormous costs and burdens on defendants, while conferring significant benefits on -- no surprise -- plaintiffs lawyers.

Florida, for example, has enacted protective-order legislation that is little more than a welfare act for the personal-injury bar. It provides that no court may issue a protective order that conceals "information concerning a public hazard." Fla. Stat. Ann. 69.081(3) (West Supp. 1991) (emphasis supplied). A

public hazard includes any product that "has caused or is likely to cause injury," whether or not the manufacturer was negligent or liable on any ground, whether or not the benefits of the product outweigh its risks, and whether or not the injury resulted from gross misuse of the product.

(Submitted by Phil Chadsey)

Under this provision, it is almost inconceivable that a defendant could obtain a protective order in any product-liability case where some injury occurred. In addition, almost by definition, all the defendant's records will "concern" a public hazard -- the product. Thus, for example, no protective order could issue in cases involving roller skates, baseball bats, bicycles, ince floors, bathtubs, knives, and thousands of other non-defective products a laintiff might claim unreasonably hazardous.

That disclosure of the defendant's records may invade the privacy of individuals, that it may broadcast to all potential plagiarists research and development in which the defendant has invested millions of dollars, that it may place the defendant at a competitive disadvantage by airing its marketing strategies or pricing policies, and that it may enable others to make counterfeit products or replacement parts, count for nothing under this statute.

If a court were to deem it relevant, the Coca-Cola Co. could have to reveal its secret formula in a case brought by someone who claimed that drinking Coke

made him ill. A manufacturer of polio vaccine could have to throw open its files to public scrutiny in a suit by someone who suffered from the well-known side effects that unavoidably affect a small percentage of the people who receive that life-saving product. Automobile manufacturers might be unable to protect internal drawings and design specifications that replacement-part pirates can use to make indistinguishable copies of the original manufacturer's own parts.

The most pernicious aspect of the statute is that it allows these deprivations on no basis other than a plaintiff's filing of a suit. A defendant forfeits the right of privacy and protection for trade secrets and confidential tters merely on the basis of an unsupported accusation, before any charges ve been proven, any verdict returned, or any judicial decision rendered. Even if the defendant wins at trial, as more than half of defendants do when they go to trial, and even if the defendant wins a summary judgment, he cannot restore the privacy forfeited against his will.

This threat of forfeiture translates into leverage for plaintiffs lawyers. No doubt, many defendants would rather settle a case for a sum unjustified by the merits to avoid sacrificing their privacy and property rights -- a subtlety not likely lost on the sponsors of this legislation.

The rule on protective orders promulgated by the Supreme Court of Texas is almost as one-sided. It applies to discovery "concerning" any matter that has a "probable adverse effect" on public health or safety. Tex. R. Civ. P. 76a2(c) (emphasis supplied). Yet a plaintiff can easily describe any personal-injury case as a matter that has a probable adverse effect on public health and safety and argue that any discovery in the case therefore "concerns" such a matter. It is unclear how a court is to determine whether public health is or is not implicated without hearing evidence and effectively trying the case.

Texas Beleaguered

To obtain a protective order in Texas, moreover, a defendant must make an traordinary showing of a "specific, serious and substantial interest which

clearly outweighs" a presumption of openness to the general public and any "probable adverse effect" on public health. The defendant must also prove that its interests cannot be protected any other way.

Even if a protective order is entered -- after a public hearing open to any participant (including competitors) -- the party producing materials can never rely on it. There is no finality. Anyone can challenge it at any time, even well after the case has been resolved in the defendant's favor. On each challenge, the party that produced materials in reliance on an assurance of

confidentiality must meet the same burden again and again. A plaintiff who serves a well-designed discovery request thus gains a bargaining chip. A defendant may either settle for a premium before producing documents or place its private and proprietary information at perpetual risk of disclosure.

California is the latest and largest battlefield in the ongoing offensive against protective orders. Senate Bill 711, sponsored by the California Trial Lawyers Association and reported out by the Senate Judiciary Committee, would permit courts to grant protection for trade secrets only document by document.

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If the court needs just one minute to review each document, no matter how many pages or how complex, the court will have to spend 166 hours, or four work weeks, doing nothing else. It then must hold a hearing and prepare an order

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Moreover, under the terms of S.B. 711, any person or organization can contest a protective order at any time. If that person overturns the confidentiality as to even one document out of hundreds or thousands or more, he is entitled to

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Thus, for example, a person who suffered an adverse reaction to the drug Zomax testified before Congress that protective orders have prevented the public from hearing about the drug's supposed dangers. But her own testimony flatly belied that assertion. She was able to testify at length about her own
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When pressed to demonstrate that protective orders have in fact systematically suppressed information that would inform the public about otherwise concealed hazards, the advocates from the personal-injury bar take refuge behind the claim that the orders entered prevent them from knowing precisely what was suppressed. One wonders, then, how they could have an adequate factual basis for the claim in the first instance.

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protective orders would impede that function without appreciably enhancing public safety.

In sum, the problem here is chimerical. Those who argue that the current system is flawed and that judicial discretion must be curtailed have misperceived the role of courts, disparaged their ability and diligence, and profferred untrustworthy, implausible evidence in support of their claims. Moreover, the solutions proposed just happen to feater the nest of those who advanced them -- the plaintiff's personal-injury bar.

The time has come to drop the false pieties. This is not a campaign for a

free press, for the public health, and for product safety. It is an effort by the plaintiffs bar to make litigation easier and more profitable for themselves and their clients. That is in their economic interest. But it is not necessarily in the public's interest.

RAPHIC: Illustration, no caption, SHARON COHEN

MEMORANDUM

November 4, 1991

TO: Council on Court Procedures

FROM: Janice M. Stewart

RE: Exclusion of Witnesses at Depositions

ISSUE

Does ORCP 36 C(5), ORCP 39 D, or ORE 615 give the trial court authority to exclude witnesses from depositions for the same reason that witnesses may be excluded from trial?

CONCLUSION

The rules are unclear.

PERTINENT RULES

ORCP 36 C(5) permits the court by motion and "for good cause shown" to:

> "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following: . . .
>
> > (5) that discovery be conducted with no one present except persons designated by the court."

ORE 615 states:

> "At the request of a party the court may order witnesses excluded until the time of final argument, and it may make the order of its own motion."

This is a modified version of FRE 615 which includes the phrase "so that they cannot hear the testimony of other witnesses",

instead of "until the time of final argument."

ORCP 39 D provides that in depositions, "[e]xamination and cross-examination of witness may proceed as permitted at the trial."

DISCUSSION

This issue arose out of a case in which seven plaintiffs filed similar claims against the same defendants and wanted to attend each other's depositions. The trial court issued a protective order excluding from each plaintiff's deposition any person who is or may be a witness at the trial of any plaintiff's claim. In State, ex rel Irwin v. The Honorable Stephen N. Tiktin, plaintiffs filed a petition for writ of mandamus to vacate the protective order. The Oregon Supreme Court denied plaintiffs' petition in April 1991, without an opinion.

Plaintiffs argued:

1. ORE 615 is ambiguous because it only refers to trials, not depositions. Same for the Commentary.

2. ORE 101 and 102 do not extend the Rules of Evidence to depositions, but state that they apply only by their terms or as their terms are extended by specific language within ORE 101. The only reference to depositions is in ORE 101(3), which applies the rules of privilege to "all stages of all actions, suits and proceedings."

3. There is no Oregon case law interpreting ORE 615 with regard to its application to depositions.

4. Application of FRE 615 to depositions has been denied by some federal courts. BCI Communication Systems, Inc. v. Bell Atlanticom Systems, Inc., 112 FRD 154 (ND Ala 1986), relying on Skidmore v. Northwest Eng'g. Co., 90 FRD 75 (SD Fla 1981).

5. The protective order violates constitutional rights, such as the right to assemble and attend public events. A trial (and hence, a deposition) are public events.

6. ORCP 39 D does not address exclusion of witnesses. Instead, the relevant rule is ORCP 36 C(5), which permits exclusion for good cause to protect a person from "annoyance, embarrassment, oppression or undue burden or expense." Seeking to avoid deposition testimony from being tainted or influenced by listening to other witnesses testify is not grounds for good cause under this rule.

Defendant's arguments:

1. The rationale for excluding witnesses at depositions is the same as excluding witnesses at trial, and perhaps even more imperative when a witness is describing the facts for the first time under oath.

2. When ORE 615 was enacted in 1981, some federal courts had already held that FRE 615 applies to depositions. Naismith v. Professional Golfers Assoc., 85 FRD 552, 567 (ND Ga

1979); Williams v. Electronic Control Systems, Inc., 68 FRD 703 (ED Tenn 1975). Since 1981 another court has followed suit, Lumpkin v. Bi-Lo, Inc., 117 FRD 4512 (MD Ga 1987).

3. The right to free assembly preserves the opportunity for free political discussion, not for circumventing procedural court rules.

4. Courts have certain inherent powers irrespective of specific grant by constitution or legislation.

RECOMMENDATION

Amend ORCP 39 D to provide that:

> "Examination and cross-examination of witnesses may proceed as permitted at the trial. At the request of any party, potential trial witnesses shall be excluded . . ."

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* MEMBER OREGON AND WASHINGTON BARS
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‡ MEMBER OREGON, WASHINGTON AND CALIFORNIA BARS

October 29, 1991

Mr. Fredric Merrill
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

Dear Fred:

I am pleased that the Council is interested in the problem of untimely papers, as discussed in my October 3 letter.

In your October 24 letter, you request specific suggestions for amendments to the rules that might cure the problem. How about adding the following section to Rule 17:

> D. Late Filings. If a party files a pleading, motion, response to a motion, or other paper outside the time permitted by these rules, the court upon motion or its own initiative may:
>
> D.(1) Strike the pleading, motion, response to motion, or other paper;
>
> D.(2) Extend the time, if any, for the opposing party or parties to respond to the pleading, motion, response to motion, or other paper; or
>
> D.(3) Impose upon the party, or the party's counsel, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the late filing of

> the pleading, motion, response to motion, or other paper, including a reasonable attorney fee.

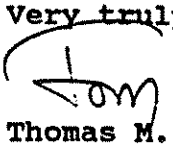
If this section is added to the rule, section C should be amended as follows:

> If a pleadings, motion or other paper is signed in violation of section A of this rule, the court upon motion or upon its own initiative . . . .

The emphasized language is new.

Thank you again for your attention.

Very truly yours,



Thomas M. Christ

TMC:ack

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OF COUNSEL
JOHN G. McLAUGHLIN
LEONARD D. DuBOFF**

October 17, 1991

Mr. Frederick R. Merrill
Executive Director
Counsel on Court Procedures
University of Oregon
School of Law
Eugene, Oregon 97403-1221

RE: ORCP 39C(4)

Dear Mr. Merrill:

I recently represented a plaintiff in a sexual harassment case. The decision to assert her claim was a difficult one. The discovery process through the use of video depositions was humiliating and unnecessary. My client was a very timid woman who found it difficult to talk about the specific instances of harassment. This difficultly was unnecessarily extenuated when she showed up at her deposition to face a room full of people including the defense attorney, his associate, a video camera operator, a representative for the corporate defendant and the individually named defendant. Since part of her claim included a claim for emotional distress, the defense attorney inquired at length into each and every possible episode in her life that could have caused her emotional distress. I don't believe there was any need to have this deposition video taped. In my opinion, the video taping served to intimidate and embarrass my client. I would support an amendment to ORCP 39C(4) which would requirement a proponent of a video taped deposition to establish the reasons necessary for having the deposition video taped.

Sincerely,

COONEY, MOSCATO & CREW, P.C.

Connie K. Elkins

Connie K. Elkins

CKE:jma

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

SONIA JAMES, Plaintiff, v. GENERAL MOTORS OF CANADA, LTD., a foreign corporation, GENERAL MOTORS CORPORATION, a Delaware corporation, ROMAN WHEELS WEST, INC., a Texas corporation, FRIDAY OLDS, INC., an Oregon corporation, JIM WESTON PONTIAC-GMC, INC., an Oregon corporation, ROMAN WHEELS MID-WEST, an Indiana corporation, ROMAN WHEELS SOUTH, INC., a Florida corporation, CURTIS MATTERN, O. G. KENNEDY, JR., L. PAUL MILLER, JUNSEN, INC., an Indiana corporation, and RICK GALLES CORPORATION, a New Mexico corporiation, doing business in Arlington, Texas as Galles Van Conversions, Defendants.	No. A8604-01955 ORDER COMPELLING PRODUCTION AND REQUIRING VIDEOTAPED DEPOSITION; PROTECTIVE ORDER

The motions of the plaintiff, Sonia James, for an order compelling production of documents from defendants General Motors of Canada and General Motors Corporation; for an order permitting the videotaped deposition of Mr. Edward McKenna of General Motors Corporation; and defendants' motion for a protective order were heard before the Honorable Donald H. Londer, circuit court judge, on November 16, 1987. Plaintiff appeared by and through her attorneys Robert K. Udziela and Daniel C. Dziuba of Pozzi, Wilson, Atchison, O'Leary & Conboy; defendants General Motors of Canada and General Motors Corporation

POZZI WILSON ATCHISON O'LEARY & CONBOY
Attorneys at Law
9th Floor Standard Plaza
Portland, Oregon 97204

Defendants' motion for a protective order is granted in part and denied in part. Defendants' motion is granted only to the extent that any documents, or copies thereof, which have been or will be produced or otherwise made available to the plaintiff by General Motors of Canada, Ltd., and by General Motors Corporation in the course of these proceedings shall not be disclosed in any manner to any person or entity who is a generally recognized competitor of defendants General Motors of Canada and General Motors Corporation.

Plaintiff's counsel will advise all persons to whom the documents are shown that there is in effect a protective order that forbids disclosure to any recognized competitor of General Motors of Canada and General Motors Corporation. In all other respects, defendants' motion for a protective order is denied.

At the hearing on the form of the order compelling discovery, defendants' counsel asked the Court to order that, at the end of this litigation, plaintiff's counsel return to General Motors of Canada, Ltd., and to General Motors Corporation all materials produced by General Motors of Canada, Ltd., and General Motors Corporation in this case. Defendants' counsel also asked, by way of defendants' Objections to Proposed Order, the Court to order that, while the documents to be produced by defendants can be shown to other attorneys besides plaintiff's counsel, the documents are not to be copied for those attorneys. The Court denies defendants' requests.

/s/ Donald H. Londer
Donald H. Londer
Circuit Court Judge

Page made up from several pages.

LEVEL 2 - 1 OF 1 STORY

Legal Times

September 23, 1991

SECTION: ANALYSIS; Pg. 29

LENGTH: 2485 words

HEADLINE: Protective Orders and Nest-Feathering

BYLINE: BY ROBERT N. WEINER; Robert N. Weiner, a partner at D.C.'s Arnold & Porter, is a defense lawyer who handles product-liability and other commercial cases.

HIGHLIGHT:
Plaintiffs lawyers around the nation are pressing for laws that would open discovery files in personal-injury cases to public scrutiny. Their motivations are not nearly as pure as many suppose.

BODY:
The plaintiffs' personal-injury bar has declared war on confidentiality in

litigation. In state after state, plaintiffs lawyers have proposed new court rules or statutes that sharply limit protective orders, override privacy considerations, and breach trade secrets -- all under the banner of openness and ıblic safety.

Despite this political offensive, most legislatures and courts have refused to strip courts of their longstanding discretion to weigh the facts of each case and, where appropriate, bar disclosure of information produced in discovery. About a dozen such efforts have failed in recent years.

But some states have taken such steps. Analysis of these new laws reveals that openness and public safety are not the real issues. It reveals that the outspoken moralism and zeal for the public welfare that the proponents of these measures profess actually coincide with their economic interest. And it reveals that these highly touted "reforms" in fact impose enormous costs and burdens on defendants, while conferring significant benefits on -- no surprise -- plaintiffs lawyers.

Florida, for example, has enacted protective-order legislation that is little more than a welfare act for the personal-injury bar. It provides that no court may issue a protective order that conceals "information concerning a public hazard." Fla. Stat. Ann. 69.081(3) (West Supp. 1991) (emphasis supplied). A

public hazard includes any product that "has caused or is likely to cause injury," whether or not the manufacturer was negligent or liable on any ground, whether or not the benefits of the product outweigh its risks, and whether or not the injury resulted from gross misuse of the product.

(Submitted by Phil Chadsey)

Under this provision, it is almost inconceivable that a defendant could obtain a protective order in any product-liability case where some injury occurred. In addition, almost by definition, all the defendant's records will "concern" a public hazard -- the product. Thus, for example, no protective order could issue in cases involving roller skates, baseball bats, bicycles, dance floors, bathtubs, knives, and thousands of other non-defective products a plaintiff might claim unreasonably hazardous.

That disclosure of the defendant's records may invade the privacy of individuals, that it may broadcast to all potential plagiarists research and development in which the defendant has invested millions of dollars, that it may place the defendant at a competitive disadvantage by airing its marketing strategies or pricing policies, and that it may enable others to make counterfeit products or replacement parts, count for nothing under this statute.

If a court were to deem it relevant, the Coca-Cola Co. could have to reveal its secret formula in a case brought by someone who claimed that drinking Coke

made him ill. A manufacturer of polio vaccine could have to throw open its files to public scrutiny in a suit by someone who suffered from the well-known side effects that unavoidably affect a small percentage of the people who receive that life-saving product. Automobile manufacturers might be unable to protect internal drawings and design specifications that replacement-part pirates can use to make indistinguishable copies of the original manufacturer's own parts.

The most pernicious aspect of the statute is that it allows these deprivations on no basis other than a plaintiff's filing of a suit. A defendant forfeits the right of privacy and protection for trade secrets and confidential matters merely on the basis of an unsupported accusation, before any charges have been proven, any verdict returned, or any judicial decision rendered. Even if the defendant wins at trial, as more than half of defendants do when they go to trial, and even if the defendant wins a summary judgment, he cannot restore the privacy forfeited against his will.

This threat of forfeiture translates into leverage for plaintiffs lawyers. No doubt, many defendants would rather settle a case for a sum unjustified by the merits to avoid sacrificing their privacy and property rights -- a subtlety not likely lost on the sponsors of this legislation.

The rule on protective orders promulgated by the Supreme Court of Texas is almost as one-sided. It applies to discovery "concerning" any matter that has a "probable adverse effect" on public health or safety. Tex. R. Civ. P. 76a2(c) (emphasis supplied). Yet a plaintiff can easily describe any personal-injury case as a matter that has a probable adverse effect on public health and safety and argue that any discovery in the case therefore "concerns" such a matter. It is unclear how a court is to determine whether public health is or is not implicated without hearing evidence and effectively trying the case.

Texas Beleaguered

To obtain a protective order in Texas, moreover, a defendant must make an extraordinary showing of a "specific, serious and substantial interest which

clearly outweighs" a presumption of openness to the general public and any "probable adverse effect" on public health. The defendant must also prove that its interests cannot be protected any other way.

Even if a protective order is entered -- after a public hearing open to any participant (including competitors) -- the party producing materials can never rely on it. There is no finality. Anyone can challenge it at any time, even well after the case has been resolved in the defendant's favor. On each challenge, the party that produced materials in reliance on an assurance of

confidentiality must meet the same burden again and again. A plaintiff who serves a well-designed discovery request thus gains a bargaining chip. A defendant may either settle for a premium before producing documents or place its private and proprietary information at perpetual risk of disclosure.

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RE: Exclusion of Witnesses at Depositions

ISSUE

Does ORCP 36 C(5), ORCP 39 D, or ORE 615 give the trial court authority to exclude witnesses from depositions for the same reason that witnesses may be excluded from trial?

CONCLUSION

The rules are unclear.

PERTINENT RULES

ORCP 36 C(5) permits the court by motion and "for good cause shown" to:

> "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following: . . .
>
> > (5) that discovery be conducted with no one present except persons designated by the court."

ORE 615 states:

> "At the request of a party the court may order witnesses excluded until the time of final argument, and it may make the order of its own motion."

This is a modified version of FRE 615 which includes the phrase "so that they cannot hear the testimony of other witnesses",

instead of "until the time of final argument."

ORCP 39 D provides that in depositions, "[e]xamination and cross-examination of witness may proceed as permitted at the trial."

DISCUSSION

This issue arose out of a case in which seven plaintiffs filed similar claims against the same defendants and wanted to attend each other's depositions. The trial court issued a protective order excluding from each plaintiff's deposition any person who is or may be a witness at the trial of any plaintiff's claim. In State, ex rel Irwin v. The Honorable Stephen N. Tiktin, plaintiffs filed a petition for writ of mandamus to vacate the protective order. The Oregon Supreme Court denied plaintiffs' petition in April 1991, without an opinion.

Plaintiffs argued:

1. ORE 615 is ambiguous because it only refers to trials, not depositions. Same for the Commentary.

2. ORE 101 and 102 do not extend the Rules of Evidence to depositions, but state that they apply only by their terms or as their terms are extended by specific language within ORE 101. The only reference to depositions is in ORE 101(3), which applies the rules of privilege to "all stages of all actions, suits and proceedings."

3. There is no Oregon case law interpreting ORE 615 with regard to its application to depositions.

4. Application of FRE 615 to depositions has been denied by some federal courts. BCI Communication Systems, Inc. v. Bell Atlanticom Systems, Inc., 112 FRD 154 (ND Ala 1986), relying on Skidmore v. Northwest Eng'g. Co., 90 FRD 75 (SD Fla 1981).

5. The protective order violates constitutional rights, such as the right to assemble and attend public events. A trial (and hence, a deposition) are public events.

6. ORCP 39 D does not address exclusion of witnesses. Instead, the relevant rule is ORCP 36 C(5), which permits exclusion for good cause to protect a person from "annoyance, embarrassment, oppression or undue burden or expense." Seeking to avoid deposition testimony from being tainted or influenced by listening to other witnesses testify is not grounds for good cause under this rule.

Defendant's arguments:

1. The rationale for excluding witnesses at depositions is the same as excluding witnesses at trial, and perhaps even more imperative when a witness is describing the facts for the first time under oath.

2. When ORE 615 was enacted in 1981, some federal courts had already held that FRE 615 applies to depositions. Naismith v. Professional Golfers Assoc., 85 FRD 552, 567 (ND Ga

1979); Williams v. Electronic Control Systems, Inc., 68 FRD 703 (ED Tenn 1975). Since 1981 another court has followed suit, Lumpkin v. Bi-Lo, Inc., 117 FRD 4512 (MD Ga 1987).

3. The right to free assembly preserves the opportunity for free political discussion, not for circumventing procedural court rules.

4. Courts have certain inherent powers irrespective of specific grant by constitution or legislation.

RECOMMENDATION

Amend ORCP 39 D to provide that:

> "Examination and cross-examination of witnesses may proceed as permitted at the trial. At the request of any party, potential trial witnesses shall be excluded . . ."

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October 3, 1991

Mr. Fredrick Merrill
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

Dear Fred:

I am writing to suggest an amendment to ORCP 17.

I sit as a judge pro tempore in Multnomah County Circuit Court. Recently, I was assigned to hear a motion for summary judgment filed by the plaintiff in an action to collect an alleged debt of nearly $300,000. The motion was filed on August 22, which meant the defendant's response was due on September 11. See ORCP 47C. That date came and went without the defendant filing a response or a motion for additional time. On the eve of the hearing (September 30), the defendant filed an opposing memorandum and an affidavit contravening the plaintiff's affidavit. The papers were two weeks late and deprived the plaintiff of its right to file a reply before the hearing.

At the hearing, plaintiff moved to strike the defendant's memorandum and affidavit. I was tempted to grant the motion, but didn't, because, if I did, it probably would have resulted in a judgment against the defendant, since the plaintiff's motion would then be unopposed. I did not think it was fair to impose that extreme sanction on the defendant because of the mistake of his attorney. Accordingly, I denied the motion to strike and instead postponed the hearing to allow the plaintiff additional time to file a reply.

It occurred to me, however, that the defendant's lawyer should not get off so lightly. He delayed the proceedings and

wasted my time and the time of the plaintiff's lawyer. Accordingly, I informed the parties that I would entertain a motion for sanctions against defense counsel. I had in mind ordering the defendant's lawyer to reimburse the plaintiff for any expenses, including attorney fees, that it incurred in preparing for the hearing, which, because of the late filing, had to be continued. But when I consulted the ORCP, I found no authority for such a sanction.

Rule 17 authorizes the court to impose sanctions for frivolous pleadings, motions, and other papers. In the case I am describing, the defendant's papers were not frivolous -- they were simply untimely.

The ORCP are full of deadlines for filing pleadings, motions, and other papers. But, there are no sanctions for missing those deadlines, except an order striking the paper, which may cost a party the case. That extreme sanction may be unjustified, especially since the party's lawyer, as opposed to the party itself, is usually to blame. There is a need for a less severe sanction.

In my view, ORCP 17 should be amended to permit sanctions to be imposed against a party or the party's lawyer, including an award of attorney fees, for untimely pleadings, motions, and papers, as well as frivolous pleadings, motions, and other papers. Untimely papers may be just as vexatious as frivolous papers.

Thank you for your attention.

Very truly yours,

Thomas M. Christ

Thomas M. Christ

TMC:ack
(Dictated but not read.)

EX 2-2

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October 17, 1991

Mr. Frederick R. Merrill
Executive Director
Counsel on Court Procedures
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Eugene, Oregon 97403-1221

RE: ORCP 39C(4)

Dear Mr. Merrill:

I recently represented a plaintiff in a sexual harassment case. The decision to assert her claim was a difficult one. The discovery process through the use of video depositions was humiliating and unnecessary. My client was a very timid woman who found it difficult to talk about the specific instances of harassment. This difficultly was unnecessarily extenuated when she showed up at her deposition to face a room full of people including the defense attorney, his associate, a video camera operator, a representative for the corporate defendant and the individually named defendant. Since part of her claim included a claim for emotional distress, the defense attorney inquired at length into each and every possible episode in her life that could have caused her emotional distress. I don't believe there was any need to have this deposition video taped. In my opinion, the video taping served to intimidate and embarrass my client. I would support an amendment to ORCP 39C(4) which would requirement a proponent of a video taped deposition to establish the reasons necessary for having the deposition video taped.

Sincerely,

COONEY, MOSCATO & CREW, P.C.

Connie K. Elkins

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CKE:jma

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October 30, 1991

Professor Fredric Merrill
Executive Director of Council on
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Re: ORCP 32

Dear Professor Merrill:

You may be aware that the Fall 1991 issue of the Willamette Law Review contains an article by Portland lawyer Philip Emerson entitled "Oregon Class Actions: The Need for Reform." Mr. Emerson concludes, based on developments since the Council on Court Procedures last considered the class action rule in 1981, that "ORCP 32 inadequately serves its stated purposes." 27 Will L Rev at 761. He goes on to offer certain proposals for reforming ORCP 32.

Since I have been involved in much of the litigation discussed in Mr. Emerson's article, I have been heading up a group of lawyers who are preparing a set of revisions to ORCP 32. We had hoped to be able to provide our proposals to you for circulation to the Council in advance of its November meeting.

However, we recently learned that the Advisory Committee on Federal Rules has been considering revisions to the federal class action rule, FRCP 23. While the Advisory Committee deferred action on this proposal this year, we felt it important to review what the Advisory Committee has had before it before making our proposal to the Council. I believe that we will receive materials from the Advisory Committee in sufficient time so that I can get our proposal to you for circulation to the Council in advance of its December meeting.

In the meantime, the Council might be interested in Mr. Emerson's article. I am sending under separate cover sufficient copies for you to distribute one to each Council member and to retain three copies for your use. If you need additional copies, please call Phil Emerson at 224-2823.

Sincerely,

Phil Goldsmith

PG:rr
Enclosures

ARTICLES

WILLAMETTE LAW REVIEW

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OREGON CLASS ACTIONS: THE NEED FOR REFORM

PHILIP EMERSON*

I. INTRODUCTION

Any debate over class action procedure is not strictly a debate over procedure. It is also a debate over substantive law and which substantive laws will be enforced.[1] Oregon's class action practice is governed by Oregon Rules of Civil Procedure (ORCP) 32. ORCP 32 contains barriers to class litigation not found in any other state's class action rule.[2] Similarly, ORCP 32 places greater constraints on class action practice than its federal counterpart, Federal Rule of Civil Procedure (FRCP) 23. This was apparently the intent of the Oregon legislature when it enacted ORCP 32 in 1973.[3]

At the same time, the legislature may not have intended some of the results of ORCP 32. Class actions are the procedural vehi-

* Attorney, Portland. B.A. 1987, University of Oregon, J.D. 1990, Northwestern School of Law at Lewis and Clark College. This Article is dedicated to Professor John E. Kennedy, 1934-1989, for his lifelong contributions as a lawyer, teacher, and scholar. The author gratefully acknowledges the assistance of Phil Goldsmith and Rosemary Rettig.

1. Miller, *Proceedings of the Thirty-Ninth Annual Conference of the District of Columbia Circuit*, 81 F.R.D. 263, 298 (1978).

2. 2 H. NEWBERG, CLASS ACTIONS § 8.35, at 169-70 n.380 (2d ed. 1985). The claim form procedure of ORCP 32 (F)(2) appears to be unique. The so-called "prelitigation notice" provision, ORCP 32(H), is also unique.

3. Bernard v. First Nat'l Bank of Oregon, 275 Or. 145, 152, 550 P.2d 1203, 1208 (1976).

When ORCP 32 was enacted, many judges and scholars viewed class actions as, at best, a mixed blessing. Despite the common-law tradition of the representative suit, and its long acceptance in American law,[19] conservative jurists and commentators decried the class action as "Frankenstein's monster."[20] However, judicial resistance to the class action has faded. The class action as a procedural device has been embraced by such eminent conservative jurists as Judge Posner[21] and the Chief Justice of the United States Supreme Court.[22] Experience has shown that the class action is "a valuable procedural tool affording significant opportunities to implement important public policies" and that "private injunctive and damage actions . . . are often essential if widespread violations of those policies are to be deterred."[23]

In 1981, Oregon's Council on Court Procedures recommended several changes in ORCP 32, including deletion of 32(F)(2). These changes were rejected by the 1981 Legislature.[24] The principal argument advanced against the changes was that "[t]he proponents of the amendments made no showing that there was a need for change — that meritorious class actions were abandoned because of problems with the existing law."[25]

That assertion cannot be made fairly today. Since 1981, at least one meritorious class action was abandoned because the claim form requirement precluded the possibility of meaningful monetary

estimating damages for fraudulent billings of a health care provider. Oregon Management & Advocacy Center, Inc. v. Mental Health Div., 96 Or. App. 528, 534, 774 P.2d 1113, 1117 (1989), *rev. denied*, 308 Or. 405 (1989).

19. As early as 1853, the Supreme Court endorsed the equitable representative action as manifestly necessary to promote justice. Smith v. Swormstet, 57 U.S. 288, 303 (1853).

20. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting). The phrase was picked up by the popular media. *See Why Those Big Cases Drag On*, TIME, Jan. 8, 1979, at 62-63.

21. The law and economics school vigorously approves of the private class action as a true procedural device that allows efficient judicial enforcement of substantive policy, compensation of victims and deterrence of defendants' wrongdoing. *See* R. POSNER, ECONOMIC ANALYSIS OF THE LAW § 21.9, at 536-37 (3d ed. 1986).

22. Rehnquist wrote in *Phillips Petroleum Co. v. Shutts* that the class suit vindicates the rights of the plaintiff whose "claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually. . . ." 472 U.S. 797, 813 (1984).

23. *Report and Recommendations of the American Bar Association Special Committee on Class Action Improvements*, 110 F.R.D. 195, 198 (1986).

24. 4 COUNCIL ON COURT PROCEDURES, 1979-81 BIENNIUM, AMENDMENTS TO RULE 32: BACKGROUND MATERIAL.

25. *Id.* at Item 7, p.1 (memorandum by William McAllister).

recovery.[26] Additionally, in the tax and insurance reserve cases, *Derenco* and *Guinasso*, the wrongdoing defendants retained over two million dollars in illegally-obtained profits with the aid of ORCP 32(F)(2).[27]

During the last two decades, state courts have assumed increasing importance as class action forums.[28] This trend was prompted by Supreme Court decisions that drastically curtailed the availability of federal diversity jurisdiction to class action plaintiffs.[29] It gained importance with the proliferation of state consumer protection statutes and some concurrent federal and state jurisdictional provisions in federal remedial statutes.[30] Recently, the Supreme Court held that federal law does not preempt the recovery of damages for classes of consumers under pertinent state antitrust statutes, even though such damages are unavailable under federal law.[31] The increasing importance of state court class actions underscores the need for a more workable rule in Oregon.

This Article explains how ORCP 32 inadequately serves its stated purpose, and offers a suggestion for its reform. The first section traces the evolution of ORCP 32 and its early application by Oregon courts. The second section outlines the reform attempt aborted by the 1981 Legislature. The history of this reform attempt is important because the guiding premise of the reform's opponents has proven false. The third section examines *Best v. United States National Bank*[32] and the tax and insurance reserve cases. These cases illustrate the critical role of the mandatory claim form procedure in Oregon class action practice. Finally, this Article proposes reform that will make ORCP 32 more fair and workable: the repeal of ORCP 32(F)(2) as a damage limitation and a provision for escheat for unclaimed damage awards to the state common school fund.

26. *See infra* text accompanying notes 111-18.

27. *See supra* note 14.

28. 3 H. NEWBERG, *supra* note 2, § 13.45, at 87.

29. *See, e.g.*, Zahn v. International Paper, 414 U.S. 291, 301 (1973) (each plaintiff in FED. R. CIV. P. 23(b)(3) class action must satisfy $10,000 jurisdictional amount, and those who do not must be dismissed from action); Snyder v. Harris, 394 U.S. 332, 341 (1969) (class members may not aggregate individual claims to satisfy $10,000 jurisdictional amount).

30. *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 2301-12 (1988)).

31. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989).

32. 303 Or. 557, 739 P.2d 554 (1987).

II. BACKGROUND AND DEVELOPMENT OF ORCP 32

A. *Case Development*

In 1973, the Oregon legislature enacted the antecedent to ORCP 32.[33] Prior to 1973, a class action for money damages could not be brought in Oregon courts.[34] As originally introduced in committee, ORCP 32 was an exact duplicate of FED. R. CIV. P. 23. However, it was modified extensively in committee. In *Bernard v. First National Bank of Oregon,* Justice Holman, applying ORCP 32 for the first time, summarized its legislative history:

> There can be no doubt that the purpose of the amendments was to prevent abuses perceived under Rule 23 . . . and that the scope of the class action in Oregon was intended to be circumscribed to a greater extent than is the case under some federal courts' interpretation of Rule 23.[35]

Bernard involved an action by a class of commercial borrowers challenging a banking practice known as the "365/360" method of interest computation.[36] Under this method, the borrower pays an interest rate 1.388 percent above the nominal rate.[37] Other states have allowed similar actions to proceed.[38] However, under Oregon's class action rule, the action was not maintainable.[39] The Oregon Supreme Court noted that with the large class of commercial borrowers it was likely that a substantial number would have knowledge of the challenged practice.[40] Prior knowledge of the practice was a substantive defense to liability.[41] Therefore, the court held that resolution of the prior knowledge issue would be a matter of individualized proof, requiring separate adjudications.[42] For this reason, claims or defenses common to class members did

33. 1973 Or. Laws ch. 970.

34. American Timber & Trading Co. v. First Nat'l Bank of Oregon, 263 Or. 1, 7-9, 500 P.2d 1204, 1206-07 (1972).

35. 275 Or. 145, 152, 550 P.2d 1203, 1208 (1976).

36. *Id.* at 147, 550 P.2d at 1206.

37. *Id.* at 148, 550 P.2d at 1206.

38. *See, e.g.,* Perlman v. First Nat'l Bank of Chicago, 15 Ill. App. 3d 784, 305 N.E.2d 236 (1973); Holisak v. Northwestern Nat'l Bank of St. Paul, 297 Minn. 248, 210 N.W.2d 413 (1973); Silverstein v. Shadow Lawn Sav. & Loan Ass'n, 51 N.J. 30, 237 A.2d 474 (1968).

39. 275 Or. at 169, 550 P.2d at 1218.

40. *Id.* at 156, 550 P.2d at 1211.

41. *Id.*

42. *Id.* at 157, 550 P.2d at 1211.

not predominate over purely individual issues.[43]

Many class actions following *Bernard* were unremarkable in their size, complexity, or contributions to the growth of Oregon class action law.[44] Distinct from these cases were the tax and insurance reserve cases. They were perhaps the most important, and certainly the most successful, class actions in Oregon history: *Derenco v. Benj. Franklin Savings & Loan Association,*[45] *Guinasso v. Pacific First Federal Savings & Loan Association,*[46] and *Powell v. Equitable Savings & Loan Association.*[47]

Derenco, the lead case, was filed in 1974.[48] The class members, who were mortgage borrowers, challenged the savings and loan's (S&L's) retention of the proceeds from the borrowers' tax and insurance reserve accounts.[49] At the beginning of each year, homeowners whose mortgages were secured by their properties paid lump sums into accounts earmarked for taxes and insurance.[50] Throughout the year, these deposits generated earnings which the S&Ls retained without reporting them to the mortgagors.[51] The trial court held that the defendants were unjustly enriched and ordered all illegally-obtained profits to be disgorged.[52] The defend-

43. *Id.* at 162-63, 550 P.2d at 1214.

ORCP 32(B)(3) specifies that a class action for money damages may proceed if:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members *if the court finds it likely that final determination of the action will require separate adjudications of the claims of separate members* of the class, unless the separate adjudications relate primarily to damages. . . .

Id. (emphasis added). The California Supreme Court, in a case brought under that state's Business and Professions Code Sec. 17335, has held that, in a comparable action, a class restitutionary recovery need not be predicated on class members' lack of knowledge. Fletcher v. Security Pacific Bank, 23 Cal. 3d 442, 453, 591 P.2d 51, 58, 153 Cal. Rptr. 28, 35 (1979).

44. *See, e.g.,* Newman v. Tualatin Dev., 287 Or. 47, 597 P.2d 800 (1979) (consumer contract/warranty); Hurt v. Midrex Div. of Midland Ross Corp., 276 Or. 925, 556 P.2d 1337 (1976); Joachim v. Crater Lake Lodge, Inc., 48 Or. App. 379, 617 P.2d 632 (1980).

45. 281 Or. 533, 577 P.2d 477 (1978).

46. 89 Or. App. 270, 749 P.2d 577 (1988).

47. 57 Or. App. 110, 643 P.2d 1331 (1982).

48. 281 Or. at 535, 577 P.2d at 480.

49. *Id.* at 535-36, 577 P.2d at 480.

50. *Id.* at 535-37, 577 P.2d at 480-81.

51. *Id.*

52. *Id.*

ants raised several issues on appeal, including the propriety of the class certification order.[53]

As in *Bernard*, the defendant raised individual knowledge of the S&L's practice as a substantive defense.[54] The defendant proposed that individual adjudications would be necessary to resolve this issue, thus destroying the predominance of common questions of law or fact.[55] The Oregon Supreme Court disagreed, factually distinguishing *Bernard*.[56] The *Bernard* court was unwilling to accept the premise that the class of commercial borrowers was uniformly unaware of the lenders' practices.[57] *Derenco*, however, did not involve commercial borrowers.[58] A loan officer employed by the defendant testified that the income from tax and insurance reserve accounts was not mentioned in the various loan agreements. Additionally, loan officers, as a matter of routine, never raised the subject with the borrowers, and borrower inquiries into the practice were isolated and infrequent.[59] The court affirmed the judgment, concluding that few borrowers were even aware of their beneficial interest in the reserve funds.[60]

Derenco was followed by two similar cases. One proceeded to a plaintiffs' verdict, sustained on appeal,[61] and the other settled.[62] According to the defendants' records in these cases, the plaintiff class members sustained an aggregate of nearly $6 million in damages due to the profits gained from the S&L's illegal conduct.[63] Because of the mandatory claim form requirement of ORCP 32, however, only a fraction of the award was claimed by class members and paid out in damages. The defendants retained the use and enjoyment of the unclaimed damages, which totalled nearly one-third of the ascertainable class damages.[64]

53. *Id.* at 568, 577 P.2d at 497.
54. *Id.* at 568-70, 577 P.2d at 497-98.
55. *Id.*
56. *Id.* at 570-72, 577 P.2d at 498-99.
57. *Id.* at 572, 577 P.2d at 499.
58. 281 Or. at 572, 577 P.2d at 499.
59. *Id.*
60. *Id.* at 573, 577 P.2d at 499.
61. Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 89 Or. App. 270, 749 P.2d 577 (1988).
62. Powell v. Equitable Sav. & Loan Ass'n, 57 Or. App. 110, 643 P.2d 1331 (1982).
63. *Derenco*, No. 404-741 at 2 (Mult. Co. Oct. 17, 1980).
64. In *Guinasso*, out of $2.3 million in ascertainable damages, only about $1.5 million was claimed. Pacific First Federal retained $812,116.20. The trial court awarded some $525,000 in plaintiff's attorneys' fees to be paid out of the unclaimed portion. Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, No. 416-583 (Mult. Co. Sept. 16, 1985). The Court of Appeals later held these fees directly taxable to Pacific. 89 Or. App. at 278-79, 749 P.2d at 583. In effect, then, Pacific has retained use and benefit of the $800,000 which it procured illegally from its customers. In *Derenco*, the defendant retained over $1.2 million in unclaimed damages. *Derenco*, No. 404-741 at 2 (Mult. Co. Oct. 17, 1980).

In 1979, a class action was filed that would lead eventually to an expansion of Oregon's substantive law.[65] In *Best v. United States National Bank of Oregon*, holders of non-business checking accounts challenged the bank's fees for servicing non-sufficient-funds (NSF) checks.[66] The plaintiffs originally pleaded several theories of liability.[67] Eventually, the Multnomah County Circuit Court granted summary judgment in favor of the defendant, and plaintiffs appealed.[68]

The Oregon Court of Appeals reversed the summary judgment against one claim which alleged that the bank had violated its implied contractual duty to set NSF fees in good faith.[69] The Oregon Supreme Court affirmed this holding.[70] The bank had not informed its customers of its NSF fees.[71] It possessed the unilateral authority to set those fees, constrained only by the implied contractual duty of good faith and fair dealing.[72] Whether on the facts of the case the bank had violated this duty, the Oregon Supreme Court held, was a matter for the jury.[73] The case was remanded to the trial court[74] but was never tried.

B. Efforts at Legislative Reform

Between 1973 and 1979, legislative reformers made two attempts to change ORCP 32. One attempt, offered in the 1979 legislative session, attracted considerable support. It sought to replace the existing ORCP 32 with the Uniform Class Actions Act, promulgated by the National Law Institute's Commission on Uniform State Laws.[75] The Uniform Act included several provisions

65. Best v. United States Nat'l Bank of Oregon, 303 Or. 557, 739 P.2d 554 (1987).
66. *Id.* at 558, 739 P.2d at 555.
67. The originally pleaded theories included breach of good faith, unlawful penalty, and unconscionability. Best v. United States Nat'l Bank of Oregon, 78 Or. App. 1, 3, 714 P.2d 1049, 1050 (1986).
68. *Id.*
69. Best v. United States Nat'l Bank of Oregon, 78 Or. App. 1, 714 P.2d 1049 (1986).
70. 303 Or. at 572-73, 739 P.2d at 563.
71. *Id.* at 561, 739 P.2d at 557.
72. *Id.*
73. *Id.* at 565, 739 P.2d at 559.
74. *Id.* at 573, 739 P.2d at 563.
75. UNIFORM LAW COMMISSIONER MODEL CLASS ACTIONS ACT (1976).

that departed radically from Oregon procedure. One such provision authorized fluid recovery.[76] Other provisions either waived individual notice to class members or shifted the costs of notifying class members to the defendants.[77] The bill was withdrawn due to objections from several legislators; the objectors asserted that any changes to the ORCP first ought to be considered and approved by the Council on Court Procedure (CCP).[78] The CCP has the power to set purely procedural rules for Oregon courts.[79]

The CCP appointed a class action subcommittee which heard testimony from the defense bar and from attorneys representing class action plaintiffs. Plaintiffs' attorneys testified to a strong need for reform. They claimed ORCP 32 made class actions to vindicate consumer rights "completely unworkable."[80] Defense attorneys were generally content with ORCP 32.[81]

In December 1981, the CCP amended ORCP 32. The changes included: (1) eliminating the mandatory thirty-day prelitigation notice to defendant required in class actions for money damages;[82] (2) eliminating the mandatory notice to class members whose individual recoveries were estimated at less than $100;[83] (3) granting the trial court discretion to shift notice costs to the defendant upon a preliminary finding plaintiffs were likely to prevail; (4) modifying the certification criteria in class actions for money damages to conform with FRCP 23;[84] (5) adding a provision that regulates attorneys' fee awards to prevailing plaintiffs;[85] and (6) eliminating the mandatory claim form procedure.[86]

76. *Id.* § 15(a). Fluid recovery is explained in text accompanying *infra* notes 140-63.

77. *Id.* § 7(d)-(f).

78. 4 COUNCIL ON COURT PROCEDURES, *supra* note 24, at Item 1, correspondence from Vern Cook, Chairperson of Senate Judiciary Committee to Donald McEwen, Chairperson of Council on Court Procedures, June 8, 1979.

79. ORS 1.735 (1989).

80. 3 COUNCIL ON COURT PROCEDURES, 1979-81 BIENNIUM, AMENDMENTS TO RULE 32: BACKGROUND MATERIAL, Item 5, minutes of meeting of June 28, 1980 (remarks of Henry E. Carey).

81. *Id.* at Item 5, minutes of meeting of June 18, 1980 (remarks of William McAllister, Norman Wiener, and R. Alan Wight).

82. ORCP 32(H).

83. Patterned after the UNIFORM CLASS ACTIONS ACT § 7(d) (1976).

84. A number of criteria are listed in both the federal and state rules to guide the court in determining whether a class action is a superior method of resolving the controversy in a (B)(3) class action. Among these are:

> The interest of members of the class in individually controlling the prosecution or defense of separate actions, the extent and nature of any litigation concerning controversy already commenced by or against members of the class, the desirability or undesirability of concentrating the litigation of the claims in the particular forum [and] the difficulties likely to be encountered in the management of the action.

FED. R. CIV. P. 23(b)(3)(A-D); ORCP 32(B)(3)(a-d). In addition, the Oregon rule directs the court to consider

> (e) whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the litigation, to afford significant relief to the members of the class; and
>
> (f) after a preliminary hearing or otherwise, the determination by the court that the probability of the success of sustaining the claim or defense is minimal.

ORCP 32(B)(3)(e) & (f). The CCP amendments eliminated these final two criteria.

85. Adapted from UNIFORM CLASS ACTIONS ACT §§ 16-17 (1976). This was eventually incorporated as ORCP 32(N).

86. For the reasons cited herein. *See supra* notes 38-39.

87. Testimony of Bill McAllister representing United States National Bank, 61st Leg. Sess. (1981), Min. at Tape 348, Senate Comm. on Justice, July 20, 1981; Testimony of Diana Godwin representing Oregon Savings & Loan League, 61st Leg. Sess., Exhibit G, Senate Comm. on Justice, July 9, 1981.

88. ORS 1.735 (1989).

89. *See, e.g.*, Tolbert v. First Interstate Bank, 96 Or. App. 398, 722 P.2d 1393 (1989), *rev. granted*, 309 Or. 333, 787 P.2d 887 (1990).

90. H.B. 3122, 61st Leg. Sess. Summary (1981); *see* 1981 Or. Laws Ch. 912.

91. Senate Committee on Justice, minutes of meeting of July 28, 1981, at 6:

> SENATOR WYERS stated that what he had asked Mr. Barrows [Dave Barrows, President of the Oregon Savings and Loan League] to do was to release the other vehicle which is sitting out there ready to have the whole bill or any part of it he wants stuck in to it. Mr. Wyers asked Mr. Barrows if he would support concurrence in the House.
>
> MR. DAVE BARROWS . . . stated that they would support HB 3122 as amended by the Committee. . . . Mr. Barrows stated that he thought Senator Wyers was giving him more credit than he deserved . . . .

It was to be the role of the CCP to propose the amendments, and of the legislature to dispose of them. The proposed changes worked against the state's financial institutions, and their representatives in Salem lobbied vigorously against the CCP amendments.[87] Under state law, the amendments were to take effect automatically, unless the legislature modified or overruled them.[88] With *Best* and the other NSF cases[89] looming on the horizon, and two tax and insurance reserve cases still unresolved, a great deal was at stake for the state's financial institutions. House Bill 3122, introduced in the 1981 legislative session, effectively reinstated ORCP 32 as it had been enacted in 1973.[90] The day the Senate Justice Committee voted to repeal the CCP amendments, one senator wryly commented on the mastery those lobbying against the rule changes had asserted over the legislature.[91]

While plaintiffs' attorneys will disagree, it seems that most of the CCP's proposed changes to ORCP 32 were not absolutely nec-

essary to class action practice. The requirement for mandatory prelitigation notice, for example, never has presented a barrier to class action litigation. The mandatory notice provisions of ORCP 32 have been interpreted flexibly — allowing published notice in conjunction with individual notice.[92]

The 1981 effort was the last well-organized attempt to reform Oregon's class action rule. When the legislature enacted ORCP 32 in 1973, it intended the rule to facilitate the aggregation of small claims.[93] The service of ORCP 32 to that purpose has been hindered by one fatal flaw.

III. *BEST* AND *GUINASSO*: TWO CASES THAT ILLUSTRATE THE RULE'S CRITICAL FLAW

Best v. United States National Bank of Oregon[94] and *Guinasso v. Pacific First Federal Savings & Loan Association*[95] illustrate the functional inadequacy of ORCP 32. *Best* was abandoned because the mandatory claim form procedure precluded a significant damage recovery.[96] In *Guinasso*, the guilty defendant retained a large part of its ill-gotten gains because of ORCP 32's inability to effect their disgorgement.[97]

In *Best*, the bank had not informed its customers of its NSF fees.[98] The bank's only means of notification was by extracting the fees. The trial court in *Best* granted summary judgment against plaintiffs' claims.[99] The Oregon Supreme Court noted that the bank's own records proved it had gained millions of dollars in profits from setting NSF fees greatly in excess of its costs and normal profit margins, "in an effort to reap the large profits to be made from the apparently inelastic 'demand' for the processing of NSF checks. . . ."[100] The plaintiffs' theory was that the bank's practice of unilaterally setting and raising NSF fees should be subject to the

92. The court, for example, allowed for published class notice in *Guinasso*, No. 416-583 (Mult. Co. Sept. 6, 1985).

93. Bernard v. First Nat'l Bank of Oregon, 275 Or. 145, 152, 550 P.2d 1203, 1208-09 (1976).

94. 303 Or. 557, 739 P.2d 554 (1987).

95. 89 Or. App. 270, 749 P.2d 577 (1988).

96. Telephone interview with Phil Goldsmith, plaintiffs' co-counsel (Nov. 17, 1988) [hereinafter Goldsmith interview].

97. *See supra* note 64.

98. 303 Or. at 561, 739 P.2d at 555.

99. *Id.*

100. *Id.*

implied duty to perform all contracts in good faith.[101]

The Oregon Court of Appeals reversed the summary judgment.[102] The Oregon Supreme Court affirmed, and remanded for trial on the good-faith claim.[103] The case, however, was never tried.

Predicting the trial outcome in any case is a difficult task. The plaintiffs' task in *Best* was doubly difficult. Proving and recovering damages were separate concerns. Under ORCP 32, assessed damages can equal only the sum of those claimed individually by class members. This created two problems. First, many class members could not be located.[104] Second, class members who could be located were unlikely to have kept any records of NSF fees paid ten years earlier. This made it unlikely that they would remember any damages they had suffered, much less be able to document them.[105]

As the trial date neared, each side advanced settlement proposals.[106] The bank's proposals reflected the strength of its position. The plaintiffs' attorneys, aware that even a victory at trial likely would be a hollow one, were not positioned to bargain aggressively.[107]

The terms of the settlement required that the bank notify all current customers and publish notice in the state's newspapers.[108] Class members were entitled to submit coupons redeemable for $10 off any number of bank services. Plaintiffs' attorneys were paid $225,000.[109] By the time the settlement offer closed, over 4,000

101. *Id.*; *see also* U.C.C. § 1-203.

102. *Id.*

103. *Id.* at 573, 739 P.2d at 563.

104. The bank had written records of each of its customers during the period in question. Goldsmith interview, *supra* note 96.

105. Describing a similar situation, the federal House Committee on the Judiciary opined:

> This committee emphatically rejects the notion that our constitutional requirements are so rigid that they somehow require each of millions of potential claimants for individually trivial sums be paraded through the court to prove his personal damages, when the best evidence and often the only appropriate measure of the scope of the violation is found in the records of the defendants themselves.

HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 459, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, 2571, 2585.

106. Goldsmith interview, *supra* note 96.

107. Goldsmith interview, *supra* note 96. For an analysis of economic factors bearing on settlement negotiations, see R. POSNER, *supra* note 21, at 522-28.

108. Settlement Agreement, Nov. 16, 1988, at 3; Best v. United States Nat'l Bank, No. 87905-0253 (Mult. Co. Nov. 16, 1988).

109. *Id.*

class members had claimed their coupons.[110] Even if the bank's costs of delivering the services represented by the coupons was equal to their face value, the settlement's benefit to the class was less than $50,000. By comparison, it is useful to note that the bank cleared a $1.6 million profit from NSF fees in 1976 alone.[111] Under these circumstances, the settlement agreement signifies the abandonment of a legitimate class action suit in the face of an intractable procedural obstacle — ORCP 32F(2).

We will never know how *Best* would have been resolved by a jury. *Guinasso,* however, proceeded to a verdict that was upheld on appeal.[112] Evidence obtained from the defendant's records indicated who the class members were and to what extent each had been damaged.[113] Claim forms were sent to all the class members, but not all were returned. In the end, some $822,000 of the total available judgment funds remained unclaimed.[114] The defendant, Pacific First Federal, retained the unclaimed money, although every penny, as the trial court judgment reveals, was obtained wrongfully.[115] The facts in *Derenco* are parallel to those in *Guinasso.* There, the defendant retained over $1.3 million in illegal profits.[116]

Not only have meritorious class actions been abandoned because of the language in ORCP 32, but wrongdoing defendants have been allowed to retain the fruits of their wrongdoing because of its provisions. This was certainly not the intention of the legislature when it enacted ORCP 32 in 1973. In addition, protection of unjustly enriched defendants was clearly not within the contemplation of the 1981 legislature.[117] Results in *Derenco* and *Guinasso,* however, should alert the legislature of the need for change.

110. Correspondence from Rece Bly, counsel for U.S. National Bank, to Phil Goldsmith, plaintiffs' co-counsel (Sept. 8, 1989).

111. Brief for Appellant at 10, Best v. United States Nat'l Bank, 78 Or. App. 1, 739 P.2d 554 (1986).

112. 89 Or. App. 270, 749 P.2d 577 (1988).

113. *Guinasso,* No. 416-583, at 2 (Mult. Co. Sept.6, 1985).

114. *Id.*

115. *Id.*

116. *See supra* note 14.

117. 61st Leg. Sess., Min. at Tape 404, House Comm. on Judiciary, May 21, 1981. Representitive Smith stated that "one of the compelling factors on this issue is the notion of unjust enrichment for defendants." He didn't feel there should be a possibility of that happening. *Id.*

IV. AGGREGATION OF DAMAGES AND RATIONALES FOR THE CLASS ACTION

There are three commonly-recognized rationales for the class action to vindicate consumer rights. The three rationales are: (1) compensating victims; (2) disgorging profits illegally or wrongfully obtained; and (3) deterring future illegal conduct.[118] Where the plaintiff class is large and the individual recovery small, the compensation value loses importance. However, the two other elements remain to animate the public interest in class litigation.[119]

At times, ORCP 32 has failed to serve either objective. The *Guinasso* and *Derenco* defendants retained substantial proceeds of their tax and insurance reserve gambits. To the extent the defendants, at the end of the day, profited, there was incomplete disgorgement. The non-claiming class members received no compensation. Allowing a defendant to retain wrongfully-obtained funds, as a means of deterring wrongful behavior, is counterproductive. These results flow predictably, however, from the claim form regime.[120]

The concepts of disgorgement and deterrence are as related as the two sides of a coin. A system that limits defendants' exposure by imposing the burden of proof on individual class members undermines both objectives. Congress recognized this when it considered and passed the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (Act).[121]

The Act authorizes state attorneys general to sue as representatives of their citizens to recover damages for antitrust violations. Illegal overcharges addressed by the bill are suffered by thousands, possibly millions, of consumers, typically in small amounts. Section IX of the Act provides for proof of damages independent of any individualized showing.[122] This allows the court to hear evi-

118. Dam, *supra* note 4; *see also* Kennedy, *Federal Class Actions: The Need for Legislative Reform,* 32 SW. L. J. 1209 (1979).

119. Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action,* 80 COLUM. L. REV. 299, 326 (1980).

120. *See, e.g.,* DuVal, *supra* note 10, at 1355. After an extensive survey of antitrust litigation in the Fifth Circuit, Professor Duval commented: "We found that settlements that limited defendants' liability to the amount of claims filed had been unsuccessful in forcing defendants to pay out a major part of the damages sustained by the class." DuVal, *supra* note 10, at 1355.

121. 15 U.S.C. § 15a-e (1988).

122. 15 U.S.C. § 15d (1988) states:

> [D]amages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable

dence of aggregated damages, proved with the aid of a number of sufficiently reliable methods. It frees the court of the strictures imposed by an individualized proof regime. The sense of Congress was that "[a]ggregation of damages, as provided by [the Act], is necessary because the proof of individual claims and amounts would be impracticable and virtually impossible. . . . Few consumers keep receipts for all the goods and services they purchase or use . . . ."[123]

In addressing the argument that aggregation of damages is unfair to defendants, the legislative history states emphatically:

> [Aggregation] is fair to both plaintiffs and to defendants.
>
> There is no injustice in permitting aggregation and estimation after defendant's liability to the class has been established.
>
> The committee believes that a defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation.[124]

There is precious little case law interpreting Hart-Scott-Rodino. In the first major action brought under the statute, the United States Supreme Court severely limited its scope, holding that only direct purchasers of goods whose prices were artificially raised because of proven illegal anticompetitive conduct could recover under federal antitrust laws.[125] This holding, unrelated to the aggregation issue, restricted development of case law under the statute.[126]

A procedure to aggregate and assess damages in large class actions where individual recoveries are small is necessary to force guilty defendants to fully disgorge illegally-obtained profits. Some

system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the action was brought.

123. HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 459, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2571, 2584.

124. *Id.* at 2585 (citing Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968)); *see also In re* Sugar Indus. Antitrust Litigation, 73 F.R.D. 323 (E.D. Pa. 1976) (statistical sampling methods proper as means of ascertaining class-wide damages in nationwide antitrust action).

125. Illinois Brick Co. v. Illinois, 423 U.S. 720 (1984).

126. *Id. But see* California v. ARC Am., 490 U.S. 93 (1989) (Supreme Court limited reach of *Illinois Brick*). It is unlikely that *ARC* will have an impact on Hart-Scott-Rodino, however, because that statute enhances federal antitrust law, whereas *ARC* will allow for expansion of state law antitrust actions.

federal courts have resorted to aggregated damage formulas.[127] Alternative means of damage computation are available. For example, defendant's own records[128] or statistical and sampling methods can be used.[129]

There are two necessary steps in any aggregated damages regime. The first step, computing the size of the damage fund, generally is not as controversial.[130] The second step, however, distribution of the damage fund, has been perhaps the most controversial element of class litigation jurisprudence and commentary.

V. DISTRIBUTION ALTERNATIVES: FLUID RECOVERY AND ESCHEAT

Aggregation of damages carries with it the potential for a damage fund, parts of which are not claimed by class members. Disposition alternatives for unclaimed portions of the fund may be categorized under two general headings: fluid recovery and escheat.

A. Fluid Recovery

The fluid recovery method of distribution was the principal concern voiced by the claim form procedure's apologists during the 1981 legislative session. Under the fluid recovery method, part of the damage fund is distributed to claimants. The remainder, pursuant to either a settlement agreement or the court's order, is distributed in a manner calculated to best serve the interests of the class. In this way, all the proceeds of the losing defendant's wrongful conduct are disgorged and returned, at least indirectly, to damaged parties.[131]

The fluid recovery method is derived from the *cy pres* doctrine in the law of charitable trusts. When compliance with the literal

127. *See, e.g.*, Boeing Inc. v. Van Gemert, 444 U.S. 472 (1979).

128. This was the computation method used in *Guinasso* and *Derenco.*

129. *See* Rosado v. Wyman, 322 F. Supp. 1173 (S.D.N.Y. 1970); MANUAL FOR COMPLEX LITIGATION § 2.712 (1973). There is some acceptance of statistical and sampling computation in Oregon. *See* Oregon Management & Advocacy Center, Inc. v. Mental Health Div., 96 Or. App. 528, 774 P.2d 1113 (1989).

130. *But see In re* Fibreboard Corp., 893 F.2d 706, 707 (5th Cir. 1990) (improper for consolidated trial of 3031 asbestos to proceed as FED. R. CIV. P. 23(b)(3) class action; statistically based classwide presumptions about causation and damages altered substantive Texas tort law in violation of Rules Enabling Act).

131. *See generally* Comment, *Fluid Recovery and Due Process*, 53 OR. L. REV. 225 (1973).

terms of a charitable trust becomes impossible, the funds can be put to the next best use in accord with the dominant charitable purposes of the donor.[132]

Fluid recovery has sometimes taken the form of court-ordered rate reductions to redress past illegal overcharges. It may involve the distribution of unclaimed funds to a government agency for use on projects that benefit nonclaiming class members and promote the purposes of the original cause of action.[133] Other approaches to distribution of the fund also exist.[134]

A 1981 Oregon Attorney General's opinion concluded that the CCP's amendments to ORCP 32, which eliminated the claim form requirement, removed the procedural obstacles to fluid recovery.[135] While the amendments did not reflect a substantive change in legal relationships, they did, the opinion stated, raise due process questions.[136] This reflected the view, articulated in *Eisen v. Carlisle & Jacquelin*,[137] the lead class action case of the era, that denying class action defendants the ability to confront each claimant in open court was to deny them due process of law.[138]

Eisen was an antitrust action brought on behalf of a class of six million odd-lot stock purchasers to recover alleged commission overcharges.[139] Writing for the United States Court of Appeals for the Second Circuit, Judge Medina emphatically rejected the notion that relief afforded to the "class as a whole" was an equitable solution to the management problems presented by large classes composed of small individual stakeholders.[140] On review, the Supreme

132. Quick v. Hayter, 188 Or. 218, 226, 215 P.2d 374, 378 (1950); Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

133. Market St. Ry. v. Railroad Comm'n, 28 Cal. 2d 363, 171 P.2d 875 (1946).

134. *See, e.g.*, State v. Levi-Strauss & Co., 41 Cal. 3d 460, 715 P.2d 564, 224 Cal. Rptr. 605 (1986). *Levi-Strauss* was a class action brought under the Cartwright Act, a California statute which, among other things, prohibits price fixing, the gravamen of this action. Drawing heavily on Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), the California Supreme Court approved, in concept, a settlement agreement calling for either a *cy pres* distribution or an escheat of unclaimed damage funds to the state, with proceeds earmarked to indirectly benefit class members, in order to further the substantive goal of deterrence advanced by the underlying statute. *See also* Feldman v. Quick Quality Restaurants, Inc., N.Y.L.J. July 22, 1983 at 12, col. 5 (N.Y. Sup. Ct. July 15, 1983) (damages distributed to class by way of future price reductions; no proof of individual damage required).

135. 41 Op. Att'y Gen. 527, 537 (1981).

136. *Id.*

137. 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

138. *Id.*

139. *Id.* at 1005-06.

140. *Id.* at 1018.

Court declined to rule on the constitutionality of fluid recovery, and to this day has not done so. In *Eisen's* wake, however, other circuits adopted its strident tone.[141]

The 1980s saw an evolution and refinement of the federal judiciary's attitude toward the fluid recovery or *cy pres* concept. An early manifestation of the change was evident in *Simer v. Rios*,[142] a Seventh Circuit opinion which endorsed use of *cy pres* distribution vehicles, while failing to impose one based on the facts of that particular case:

> [A] careful case-by-case analysis of use of the fluid recovery mechanism is the better approach. In this approach we focus on the various substantive policies that use of a fluid recovery would serve in the particular case. The general inquiry is whether the use of such a mechanism is consistent with the policy or policies reflected by the statute violated.[143]

In *Nelson v. Greater Gadsden Housing Authority*,[144] the United States Court of Appeals for the Eleventh Circuit approved a *cy pres* distribution in a class action brought by tenants of a public housing complex to recover damages resulting from the defendant's inadequate utility allowances. The district court entered an injunction mandating the defendant's readjustment of the allowances and awarding compensatory damages based on the inadequacy of past allowances. Any compensatory damages that remained unclaimed after a specified time period were to be applied by the defendant to increase the energy efficiency of the plaintiff class' apartment units.[145] The defendant appealed the unclaimed damage award, raising the fluid recovery issue and relying on *Eisen*.[146]

The Eleventh Circuit discounted *Eisen* as authority on the fluid recovery issue, stating that the issue "may not have been properly before the court" and that "[o]ther courts [h]ad addressed fluid recovery systems with different results."[147]

In a more recent case, *Six (6) Mexican Farmworkers v. Arizona*

141. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59, 72 (4th Cir. 1977) (fluid recovery concept "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper").

142. 661 F.2d 655 (7th Cir. 1981).

143. *Id.* at 676.

144. 802 F.2d 405 (11th Cir. 1986).

145. *Id.* at 409.

146. *Id.*

147. *Id.*

Citrus Growers,[148] the United States Court of Appeals for the Ninth Circuit approved use of a *cy pres* distribution of unclaimed damage funds, although it rejected the specific plan ordered by the district court.

The evolving view of fluid recovery, as exemplified by *Simer, Nelson, Six Mexicans*, and state court class actions such as *State v. Levi Strauss & Co.*,[149] emphasize pragmatic analysis of fluid recovery in light of its service to the underlying goals of the class action: deterrence, compensation, and disgorgement. The view of fluid recovery epitomized by *Eisen*, which sees fluid recovery as a means of circumventing the management problems presented by large classes,[150] appears to be declining.

Congress, through the Hart-Scott-Rodino Antitrust Improvement Act, prescribed two specific approaches for distribution of unclaimed damage funds awarded. One commits the funds to the court's discretion. The other allows the funds to escheat to the respective states upon whose behalf the action is brought.[151]

In addition to the due process/manageability argument represented in *Eisen*,[152] two other arguments commonly are raised against fluid recovery. The first is that such recoveries principally benefit plaintiffs' attorneys.[153] The second is that the fluid recovery option that distributes unclaimed funds to those class members who actually file claims, on a *pro rata* basis (sometimes advanced as

148. 904 F.2d 1301 (9th Cir. 1990). This case was a class action on behalf of thousands of Mexican farmworkers for violations of the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. § 2041 *et seq.* On appeal, the Ninth Circuit gave a qualified endorsement to the notion of a *cy pres* distribution but rejected the distribution plan advanced by the trial court. The district court's plan called for payment of unclaimed, aggregated statutory damages to the Inter American Fund for indirect distribution in Mexico. The Ninth Circuit held that the "plan does not adequately target the plaintiff class and fails to provide adequate supervision over distribution." *Id.* at 1309. The Ninth Circuit remanded for further consideration, with instructions for the district court to consider escheat for the unclaimed funds to the United States Treasury under 28 U.S.C. § 2042 "if the district court is unable to develop an appropriate cy pres distribution, or finds cy pres no longer appropriate." *Id.*

149. *See supra* note 134.

150. *See, e.g., Nelson*, 802 F.2d at 409. "The objections to fluid recovery appear to relate to the use of this system to relieve plaintiff classes of the burden of proving individual damages or to avoid the dismissal of unmanageable class actions. Neither problem exists here."

151. 15 U.S.C. § 15(d) (1988).

152. This argument retains vitality even yet: *see In re* Fibreboard Corp., 893 F.2d 706, 708 (5th Cir. 1990).

153. *See, e.g.*, Kline v. Coldwell Banker & Co., 508 F.2d 226, 237 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

a distribution alternative), results in a windfall for those claimants.[154]

The evolution of federal and state case law may be leading toward broad acceptance of fluid recovery in appropriate cases. Nevertheless, the majority of fluid recovery outcomes are the result of negotiation and settlement.[155] The fact that fluid recovery settlements are negotiated at all, however, is likely due to the availability of aggregated damages and pragmatic distribution regimes and their influence on settlement negotiations.

It is no coincidence that notable fluid recovery settlements have been achieved under circumstances where limits on damages similar to those imposed by ORCP 32(F)(2) were not present. Defendants' incentives to settle are at least partly a function of their potential exposure to liability.[156] An Oregon class action defendant, whose damage exposure is sharply limited by ORCP 32(F)(2), is not influenced by the downside risk present in other jurisdictions.

Fluid recovery, as a procedural vehicle, will remain controversial. There is, however, another often-used means of forcing defendants to disgorge all their ill-gotten gains. This vehicle involves the escheat of unclaimed damage funds to the treasury of the appropriate jurisdiction.

B. Escheat

Escheat is a widely-practiced and hence more politically acceptable model for administering unclaimed judgment funds.[157] Under this solution, the court's discretion to dispose of the funds is guided by the jurisdiction's law of unclaimed judgments.

Both federal and state courts have used this device to avoid

154. *See* Van Gemert v. Boeing Co., 739 F.2d 730, 736 (2d Cir. 1984) (rejecting *pro rata* as a form of fluid recovery). *But see Six (6) Mexicans*, 904 F.2d at 1307 n.4 ("We express no view as to the propriety of this distribution method.").

155. *See, e.g.*, West Virginia v. Chas. Peizer Co., 314 F. Supp. 710 (S.D.N.Y.), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *see also In re* Agent Orange Product Liability Litigation, 818 F.2d 179 (2d Cir. 1987).

156. *See* R. POSNER, supra note 21, at 522-24.

157. Under 28 U.S.C. § 2042 (1988), the federal district court may hold judgment funds for up to five years. After that time,

> such court shall cause such money to be deposited in the treasury of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States Attorney, and full proof of the right thereto, obtain an order directing payment to him. *Id.*

See In re Folding Carton Antitrust Litigation, 744 F.2d 1252 (7th Cir.), *cert. dismissed*, 471 U.S. 1113 (1984).

either a fluid distribution or a return of unclaimed damages to the losing defendant.[158] One court, discussing the latter alternative, noted that "permitting reversion of the unclaimed funds to this defendant would be equivalent to awarding it the benefit of its own wrongdoing, a result which should not be sanctioned."[159] The Ninth Circuit recently rejected a district court's *cy pres* fluid recovery distribution plan, with instructions for the district court to consider, on remand, an escheat to the federal treasury if it couldn't devise an appropriate plan.[160]

In a Sixth Circuit case, *S.E.C. v. Blavin*,[161] the defendant, found to have violated federal securities laws, challenged the district court's disgorgement order.[162] The district court ordered defendant to surrender all wrongful profits.[163] After the individual claims had been satisfied, the unclaimed funds were to escheat to the United States Treasury.[164] The defendant appealed, claiming that the escheat order violated his due process rights.[165] The Sixth Circuit disagreed. The court noted, "[T]he purpose of disgorgement is to force a defendant to give up the amount by which he was unjustly enriched rather than to compensate the victims of fraud."[166] The district court had the equitable power to impose complete disgorgement "without inquiring whether, and to what extent, identifiable private parties have been damaged by Blavin's fraud."[167]

Federal and state class actions have demonstrated that aggregation of damages independent of individual claims is necessary to effect complete disgorgement of illegally-obtained profits. Complete disgorgement is essential to the substantive goal of deterrence.

158. S.E.C. v. Golconda Mining Co., 327 F. Supp. 257 (S.D.N.Y. 1971); Friar v. Vanguard Holding Corp., 125 A.D.2d 444, 509 N.Y.S.2d 374 (1986).

159. *Friar*, 125 A.D.2d at 446, 509 N.Y.S.2d at 376. *See also Six (6) Mexican Workers*, 904 F.2d at 1309 ("In light of the deterrence objectives of FLCRA and the nature of the violations, . . . reversion of the [unclaimed damage] funds to the defendants is not an available option.").

160. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990).

161. 760 F.2d 706 (6th Cir. 1985).

162. *Id.* at 708.

163. *Id.* at 710.

164. *Id.*

165. *Id.* at 712-13.

166. *Id.* at 713 (citing S.E.C. v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 102 (2d Cir. 1978)).

167. 760 F.2d at 713.

With a view toward disgorgement and deterrence, the assessment and collection of an appropriate damage remedy is more important than precisely how the damage fund is distributed. All that is really necessary to realize the disgorgement and deterrence functions is the certainty that damages will be assessed based on the defendant's wrongful gain, and that the wrongful gain will be as completely disgorged as due process of law will allow. Fluid recovery, closely tailored to the characteristics of the class, is probably the most efficient vehicle to compensate the class. Fluid recovery most often results from settlement. Without the looming possibility of a judicially-enforced disgorgement, however, the unjustly enriched defendant has little reason to settle.

VI. CONCLUSION

Oregon's class action rule is an automobile without an engine. Despite its elaborately constructed machinery, it is capable only of travelling downhill — it lacks the power to deal with large, difficult cases. As a result, it is inadequate to fulfill its purpose.

The engine has two necessary components. The capacity to aggregate and award damages independent of individual claims is one necessary component. The other is a distribution regime — either fluid recovery or escheat — which is adequate to effect complete disgorgement of all illegally-obtained profits. The controversy over fluid recovery probably never will be resolved. Such a controversial procedural vehicle has little chance of being adopted. Escheat, however, is the more widely accepted and thus, most politically feasible alternative for procedural reform.

Under Oregon law, funds escheated to the state eventually end up in the state's Common School Fund.[168] Oregon's current political and fiscal climate make this fund a very attractive destination for unclaimed portions of class action judgments. The Oregon Legislature should address the fundamental inadequacy of Rule 32 by repealing ORCP 32(F)(2) and enacting legislation to direct the escheat of unclaimed class action damages to the Common School Fund.

168. ORS 98.386 (1989).