COUNCIL ON COURT PROCEDURES

Minutes of Meeting of December 14, 1991

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

Present: Richard L. Barron, Richard C. Bemis, Susan G. Bischoff, William D. Cramer, Paul J. DeMuniz, Susan P. Graber, Bruce C. Hamlin, John E. Hart, Maury Holland, Bernard Jolles, Henry Kantor, R. L. Marceau, Robert B. McConville, Michael V. Phillips, William C. Snouffer, Janice M. Stewart, Elizabeth Welch

Excused: Lee Johnson, John V. Kelly, Richard T. Kropp, Winfrid K.F. Liepe

Absent: Lafayette Harter, Charles A. Sams

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Executive Assistant. In addition, the following were present: Kathryn H. Clarke (representing OTLA); Chelsea Brown, Jan Inman, Bob Keyser, and Ron Smith (all representing the Oregon Association of Process Servers); Terri Mundt (with Court Reporters Association); Sue Grabe (Oregon State Bar.)

The meeting was called to order by Chair Henry Kantor at 9:30 a.m.

Agenda Item No. 1: Approval of minutes of meetings held October 12 and November 9, 1991. The Chair stated Larry Wobbrock wanted to make a correction on page 3 of the November 9, 1991 minutes by changing the reference to Senate Bill 579 to Senate Bill 580. With that change being made, the minutes of both meeting were unanimously approved.

Agenda Item No. 2: Oaths for depositions by telephone (Executive Director) (see pages 1 and 2 of attached memorandum from Executive Director dated December 4, 1991). The Executive Director summarized the suggestions made in his memorandum, and a

discussion followed. Several council members suggested that it was not clear who would choose the person to administer the oath. It was suggested that the draft of subsection 39 C(7) begin with the words, "At the election of the party taking the deposition ...". Mike Phillips said the draft of the rule was not clear in its relation to ORCP 38 B. He also suggested that the Council might not want to set the location of the deposition at the place where the deponent was located. Bruce Hamlin suggested that if ORCP 39 C(7) were amended, ORCP 39 G(1) would also have to be changed because it refers to a certification that the deponent was sworn in the court reporter's presence. The Chair appointed Mike Phillips and Bruce Hamlin to a subcommittee to work on the problem of administration of oaths in depositions by telephone. The Council members present unanimously indicated that they wished to retain the practice of having a local court reporter administer the oath to an out-of-state deponent testifying by telephone. The Executive Director stated that he would confer via telephone conference call with Bruce Hamlin and Mike Phillips to arrive at clarifying language to present at the next meeting of the Council.

Agenda Item No. 3: Exclusion of witnesses at depositions (Janice Stewart) (see attached memorandum from Janice Stewart dated November 4, 1991). Janice Stewart discussed whether 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. Her conclusion had been that the rules are unclear and that her recommendation would be to amend ORCP 39 D to clarify the question (see page 4 of her memorandum).

The Executive Director asked whether this would be a rule of evidence and beyond the rulemaking power of the Council. Council members pointed out that the rule did not deal with the admission or exclusion of evidence at trial but with the procedure of conducting a deposition. Henry Kantor asked whether the rule would allow the court to control the number of representatives of a corporation that could attend a deposition. Janice Stewart said the intent was to have the same rule for persons attending depositions that applies to trials. Mike Phillips asked if the rule required a court order for exclusion or was mandatory in every case. After further discussion, the Executive Director was asked to confer with Janice Stewart and suggest some language that addressed the concerns expressed by Council members.

Agenda Item No. 4: Service of summons at employee's place of business and malpractice insurance for process servers (Executive Director) (see pages 2 and 3 of attached memorandum from Executive Director dated December 4, 1991). Ron Smith, with Capitol Investigation Co., Bob Keyser, with the Legislative Performance Group (representing the Oregon Association of Process Servers (OAPS), Jan Inman, President of OAPS, and Chelsea Brown

(with OAPS) were all present at the meeting. The Executive Director summarized the suggestions made in his memorandum.

On the subject of service of summons by service on a person's employer, several Council members said they felt this was not an adequate way of providing notice to the defendant. Susan Bischoff also asked whether it would create a potential liability for the employer who fails to deliver the summons to the employee. William Cramer stated that there was a privacy issue involved because serving his employer might have an adverse effect on the employee defendant. Judge Welch suggested that if the only way to serve an employee was to leave it at his or her place of employment, the rules would allow this as the best possible manner of service under the circumstances or the plaintiff could get a court order authorizing such service. A motion was made by Ron Marceau, seconded by Judge DeMuniz, that the Council decline to enact the proposed rule allowing service upon an employer. The motion passed with 16 in favor and 1 opposed.

On the question of malpractice insurance for professional process servers, it was the consensus of the Council that the question of whether professional process servers should be licenced or subject to insurance requirements was not a procedural matter and not an area of concern for the Council. It was suggested that the general qualifications for service of summons remain in ORCP 7 E. The Executive Director was asked to see if there were other statutes that modify ORCP 7 E other than ORS 180.260.

Agenda Item No. 5: Proposed amendment of Rule 17 to cover late filing (see attached letters from Tom Christ dated October 3 and October 29, 1991).

Kathryn Clarke, Attorney, Portland, appeared on behalf of OTLA, and opposed Tom Christ's proposed amendment. She stated that it would be a bad idea to have attorneys sanctioned for late filings. Judge Graber asked whether Rule 17 was not broad enough already to allow such sanctions. Other Council members expressed objection to increasing the attorneys' exposure to penalties and sanctions. After an extended discussion, the Council declined to take action to amend Rule 17, and the Executive Director was asked to inform Tom Christ of the decision.

Agenda Item No. 6: Pleading mitigation of damages and avoidable consequences (Henry Kantor) (see attached letters from Henry Kantor dated May 6, 1991 and Garry Kahn dated June 25, 1991 and excerpt from Marcoulier opinion).

Kathryn Clarke stated she was appearing on behalf of Garry Kahn. Mr. Kahn had a case where he represented a person who had not worn a bicycle helmet and was involved in an accident. It

was not clear whether the failure to wear the helmet was comparative negligence or failure to mitigate damages. If the failure was comparative negligence, it would have to be pleaded as an affirmative defense. If it is mitigation of damages, the same notice is needed. It is unfair to have notice of the issue depend upon whether or not it is characterized as comparative negligence.

Bruce Hamlin suggested that the real problem was where expert witnesses were involved. It would be a bad idea to require pleading of failure to mitigate in the average case where the defense starts asking a plaintiff about failure to carry out an exercise program. You would have to plead mitigation of damages in every personal injury case.

The Council discussed whether the burden of proof was on the plaintiff or defendant on the issue of mitigation of damages. There was a lack of agreement and it was suggested that there should be a distinction between the burden of producing evidence and the burden of persuading the jury. A question was raised whether this was a matter of substantive law, but it was pointed out the burden of pleading involved was procedural.

A motion was made by Bernie Jolles, seconded by Judge Snouffer, to table the proposal to amend ORCP 19 B. The motion passed with 15 in favor and 2 opposed.

Agenda Item No. 7: Schedule of meetings (Henry Kantor). The Chair stated he had spoken with members of the Bar and that arrangements had been made by the Bar for the Council to have a meeting room at the same location where the annual Bar Convention will be held in Seaside on September 26, 1992. The meeting schedule from February through December 1992 is as follows:

February 8	Salem (PUBLIC MEETING - FIFTH CONGRESSIONAL DISTRICT)
March 14	Oregon State Bar Center (PUBLIC MEETING)
April 11	Eugene (PUBLIC MEETING - FOURTH CONGRESSIONAL DISTRICT)
May 9	Oregon State Bar Center
June 13	Ashland (PUBLIC MEETING - SECOND CONGRESSIONAL DISTRICT)
August 1	East side of Portland (PUBLIC MEETING - THIRD CONGRESSIONAL DISTRICT)
September 26	Seaside (PUBLIC MEETING - FIRST CONGRESSIONAL DISTRICT)

October 17	Oregon State Bar Center
November 14	Oregon State Bar Center
December 12	Oregon State Bar Center

Agenda item No. 8: Videotape depositions - status report (Executive Director). The Executive Director recommended this item be carried on the agenda for the next few meetings since the Council had received only one letter so far on the subject. The Chair asked that a handout entitled "The Video Advantage" appearing in the ABA Journal be attached to the minutes of this meeting for the perusal of Council members.

NEW BUSINESS

A letter, together with an article entitled "More Public Access to Discovery Documents," from Bernard Jolles dated December 11, 1991 was distributed at the meeting and is also attached to these minutes. In addition, the Chair requested that another article appearing in the ABA Journal entitled "Secrecy versus Safety" be attached to these minutes.

The Chair announced that Circuit Judge Charles Sams had been appointed to the Council for a four-year term to replace Judge Mattison, whose term had expired.

The Chair stated that Phil Goldsmith had sent a packet of materials containing proposed revisions to ORCP 32, and packets were distributed to those members present (packets will be mailed to those members not present). The Chair appointed a subcommittee consisting of Janice Stewart, Maury Holland, and Mike Phillips to take a look at the subject, determine whether Council action is necessary, and report back at the next meeting. Janice Stewart was asked to chair the subcommittee.

A letter from Attorney Karen Creason dated December 4, 1991 was distributed at the meeting and is also attached to these minutes. Ms. Creason's concern was that the amendments to Rule 55 promulgated by the Council (which become effective January 1, 1992) introduced a significant problem because of the failure to exempt hospital records from its reach (leaving them to be covered by the preexisting 55 H rules). Justice Graber said she thought Creason was correct; the Council did not intend to make hospital records subject to the new procedure but failed to exclude them in the rule. The Executive Director stated he would come back with some specific suggestions to amend Rule 55.

Judge Snouffer suggested that there were some problems with ORCP 70 relating to submission of forms of judgment. It was

suggested that he confer with the Executive Director to determine if the amendments to ORCP 70 during the last biennium cured the problem.

The meeting adjourned at 11:40 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

December 4, 1991

M E M O R A N D U M

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Fred Merrill, Executive Director

RE: Meeting of December 14, 1991

The following are comments relating to matters on the agenda for this meeting:

2. Oaths for depositions by telephone. After consulting with Keith Burns, I suggest that the following be added at the end of subsection 39 C(7);

> "The oath or affirmation may be administered to the deponent, either in person or over the telephone, by a person authorized to administer oaths by the laws of this state, by a person authorized to administer oaths by the laws of the place where the deposition is taken, or by a person specially appointed by the court in which the action is pending. If the witness is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the witness were physically present before the officer. For purposes of this rule, subsection 46 A(1), subsection 46 B(1), subsection 55 C(1) and subsection 55 F(2), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to the deponent."

The first sentence provides flexibility in administering the oath. It may either be done by someone at the questioning end of the telephone call or someone who is in the presence of the deponent. The second sentence is taken from the proposed amendment to Arizona Rule of Civil Procedure 30(c). It makes clear that an oath outside the presence of the person administering the oath is as effective as an oath in the presence of such person. The last sentence is a modified version of FRCP 30 C(7). It actually goes beyond the problem raised by Mr. Burns. There are a number of places in the ORCP where it may be important to determine where a deposition by telephone is being taken. Under the existing rule you could argue that the deposition is taken where the questions are asked or where the deponent is located. The draft follows the federal rule in opting for the location of the deponent.

To define when a deposition has been regularly taken, administration of an oath at either end of the telephone line and by a person authorized to administer oaths by either state or by the court should be adequate. The Oregon court rules can control what formalities must accompany a deposition in order to be valid and usable in Oregon Courts. ORCP 38 A and B identify the same persons as proper oath givers for depositions taken within and without the state.

Whether the provision would subject an out-of-state deponent to prosecution for perjury is less clear. For purposes of defining the crime of perjury in Oregon, Oregon law would control. A definition of a proper form of oath for a deposition in the ORCP would apply in determining whether the deponent had lied under oath. The crime of perjury could be committed by a person outside the state who is testifying by telephone.

One difficulty is that an absent foreign deponent would usually not be subject to arrest and prosecution within the state of Oregon. This difficulty could be addressed in several ways:

1. **Prosecute the deponent in the state where the deponent was located during the deposition**. Most states have a crime of perjury or false swearing that would involve making a false statement under oath. The state where the deponent is located has an interest in controlling any improper conduct committed within its borders. A deponent who intentionally testifies falsely in an Oregon judicial proceeding, after having a standard oath or affirmation administered by a person authorized to do so by Oregon law, is engaging in improper conduct.

2. **Use extradition**. If the perjury was serious enough to warrant prosecution of a foreign defendant, it probably is a crime subject to extradition.

3. **Ignore the problem**. Perjury prosecutions are so rare for depositions that, if there is a problem when oaths are administered to a foreign deponent by a local court reporter, it is more theoretical than actual.

It should be noted that the rules already contain a procedure that presents the same problem. ORCP 38 B provides that, for a deposition taken outside the state in a case pending in Oregon, the oath may be administered by a person appointed by the court. That person probably would not be someone authorized to administer oaths by the laws of the foreign state.

4. **Service of summons at employee's place of business and malpractice insurance for process servers**.

Place of business. The Process Servers Association has asked that we consider an amendment to ORCP 7 D(2) which would allow service of summons upon any employee by service at any

office of his or her employer. They furnished us with copies of summaries of seven states which they said allow employee service by service on the employer. In checking the statutes of those states, I find nothing similar to the type of service suggested. I could not find any office service or employee service at all in a couple of the states. The other five have provisions for service very similar to our office service, that is, referring to service at the defendant's office or usual place of business. For example, California Civil Code sec. 415.20(a) provides for service upon a defendant "... by leaving a copy of the summons and complaint during usual office hours in his or her office with the person who is apparently in charge thereof ...", followed by supplementary mailing.

The question for the Council is whether we wish to create a form of employment service that allows service upon a person by leaving at their place of employment. The language suggested in the Process Servers' bill would allow service at any office maintained by a defendant's employer, whether or not the defendant worked at that office. That seems too broad. For employers with multiple offices, such service would not be reasonably calculated to get notice to the defendant. We could try to limit service to the office or place of business where a defendant actually works by using one of the following alternatives:

> 7 D(2)(c) If the person to be served maintains an office for the conduct of business, <u>(or is employed in an office)(or has a usual place of business),</u> office service may be made by leaving a true copy of the summons and complaint at such office <u>(or usual place of business)</u> during normal working hours with the person who is apparently in charge. ...

<u>Malpractice insurance</u>. As finally amended, the Process Servers' house bill relating to malpractice insurance (attached) ended up as a statute regulating professional process servers. Whether professional process insurers should have malpractice insurance is not a matter of procedure and is not a concern for the Council. Although the Council asked for an opportunity to review the original bill because it would have applied to all service of process, after the amendment we had nothing to do with the bill failing to pass. We should recommend that Sec 1.(1) of the bill be deleted and ORCP 7 E not be repealed. The general rules for service of summons should remain in the ORCP. If the malpractice insurance requirement did pass, ORCP 7 E could be prefaced by the words: "Except as provided in ORS (malpractice provision)". In fact, ORCP 7 E probably should already say: "Except as provided in ORS 180.260, a summons may be served (etc.)".

5. <u>Amendment of Rule 17 to cover late filing</u>. At the last meeting, Council members were furnished with copies of a letter from Thomas Christ suggesting an amendment of ORCP 17 to clearly

provide sanctions for a late filing. Since the sanctions described are those already described in the existing rule, I am submitting the following as an alternative suggested draft that would use the existing sections rather than add a new section:

B. Pleadings, motions and other papers not signed **or not filed within time limits.** If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. **If a pleading, motion or other paper is not filed within the time period allowed by rule or statute or by court order, or agreed to by stipulation of the parties, it may be stricken by the court.**

C. Sanctions. If a pleading, motion or other paper is signed in violation of **section A of** this rule, **or is not filed within the time period allowed by rule or statute or by court order, or agreed to by stipulation of the parties,** the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing or untimely filing of the pleading, motion or other paper, including a reasonable attorney fee.

In any case, I think it is important that the time periods referred to not be limited to those established by the ORCP. Some time limits for filing may be established by rule or statute outside the ORCP, by a court order, or by stipulation of the parties.

Enclosure: A-Engrossed House Bill 3155

A-Engrossed

House Bill 3155

Ordered by the House May 28
Including House Amendments dated May 28

Sponsored by COMMITTEE ON JUDICIARY

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.

Prohibits service of summons by person other than sheriff, **sheriff's deputy or employee of attorney licensed by state** unless person files $100,000 certificate of errors and omissions insurance with Secretary of State.

1 A BILL FOR AN ACT

2 Relating to service of summons; creating new provisions; amending ORS 180.260; and repealing
3 ORCP 7 E.

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

5 **SECTION 1. (1)** A summons may be served by any competent person 18 years of age or older
6 who is a resident of the state where service is made or of this state and is not a party to the action
7 nor an officer, director or employee of, nor attorney for, any party, corporate or otherwise. Com-
8 pensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed
9 by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service.
10 This compensation shall be part of disbursements and shall be recovered as provided in ORCP 68.

11 (2) Notwithstanding subsection (1) of this section, no person other than the sheriff, a sheriff's
12 deputy or the employee of an attorney licensed to practice law in this state shall serve a summons
13 for a fee unless the person has filed with the Secretary of State a current certificate of errors and
14 omissions insurance with limits of not less than $100,000 per occurrence from a company authorized
15 to do business in this state.

16 **SECTION 2.** ORS 180.260 is amended to read:

17 180.260. (1) Notwithstanding [*ORCP 7 E.*] **section 1 of this 1991 Act** or any other law, em-
18 ployees and officers of the Department of Justice other than attorneys may serve summons, process
19 and other notice, including notices and findings of financial responsibility under ORS 416.415, in
20 litigation and other proceedings in which the state is interested. No employee or officer shall serve
21 process or other notice in any case or proceeding in which the employee or officer has a personal
22 interest or in which it reasonably may be anticipated that the employee or officer will be a material
23 witness.

24 (2) The authority granted by subsection (1) of this section may be exercised only in, and within
25 reasonable proximity of, the regular business offices of the Department of Justice, or in situations
26 in which the immediate service of process is necessary to protect the legal interests of the state.

27 **SECTION 3.** ORCP 7 E. is repealed.

28

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

<u>MEMORANDUM</u>

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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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.)

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October 29, 1991

Mr. Fredric Merrill
Executive Director
Council on Court Procedures
University of Oregon
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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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May 6, 1991

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

RE: Council on Court Procedures

Dear Fred:

As a new matter to be considered at the next meeting of the Council, whenever that is, we should take a look at Marcoulier v. Umsted, 105 Or. App. 260 (1991), from which a petition for review has been filed but not yet ruled on as far as I know. The court held that ORCP 19B does not require that the defenses of mitigation and avoidable consequences be pleaded affirmatively. Assuming review is denied or the Court of Appeals is affirmed, that seems inconsistent with what I have understood the intent of the Council to be regarding the pleading of affirmative defenses, so I think the Council should consider explicitly overruling Marcoulier. It would be helpful to have your thoughts on this at whatever meeting this matter gets raised.

Very truly yours,

Henry Kantor

HK:lb
cc: Mr. Ronald L. Marceau

JUN 27 1991

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June 25, 1991

Mr. Ronald L. Marceau
Chair, Council on Court Procedures
1201 N. W. Wall St., Suite 300
Bend, Oregon 97701

Re: Mitigation of Damages as Affirmative Defense
Marcoulier v. Umsted, 105 Or.App. 260 (1991)

Dear Ron:

In my opinion, the Council on Court Procedures should consider a rule that would require the pleading of a mitigation of damage claim. In Marcoulier v. Umsted, 105 Or.App. 260 (1991), the Court holds that although the Defendant has the burden of proof regarding mitigation of damages, it need not be pleaded as an affirmative defense. I do not believe this is a step in the right direction for "notice pleading."

I learned of this ruling while doing some research in a case where the Defendant had pleaded that the Plaintiff was at fault for a bike/truck collision in not wearing a bike helmet. I moved to strike the defense on the grounds that if such evidence was admissible at all, it would only be admissible on the issue of mitigation of damages. Quite frankly, I do not believe it should be admissible at all. In any event, the Court ruled that the Motion to strike the defense would be allowed, but indicated that the Defendant could prove that Plaintiff failed to wear a bike helmet in mitigation of damages if they had evidence to support such a claim. However, the Court specifically ruled on the basis of Marcoulier that the Defendant would not be required to plead the defense in mitigation of damages.

Think of the consequences of such a ruling. In my case, the Defendant could have filed a general denial and at the time of trial showed up with a biomedical/engineer expert to prove that if the Plaintiff would have been wearing a bike helmet, his damages would have been lessened, etc. According to Marcoulier v. Umsted, such a claim could have been made without any notice having been given to the Plaintiff about the Defendant's intention to put on such evidence.

There are many other examples I could cite where such an "ambush" could occur. It seems to me that the better rule would require the Defendant to plead affirmatively a mitigation of damages defense.

Very truly yours,

Garry L. Kahn

GLK:de

cc: Mr. Henry Kantor
Vice-Chair, Council on
Court Procedures

On the merits, the trial court concluded that, under ORCP 19B, the defenses of mitigation and avoidable consequences must be pleaded affirmatively. Appellants rely on *Zimmerman v. Ausland*, 266 Or 427, 513 P2d 1167 (1973), and *Blair v. United Finance Co.*, 235 Or 89, 383 P2d 72 (1963), for the opposite conclusion.[2] Appellants are correct. The court said in *Zimmerman*:

> "In considering whether plaintiff is required to mitigate her damages by submitting to surgery we must bear in mind that while plaintiff has the burden of proof that her injury is a permanent injury, defendant has the burden of proving that plaintiff unreasonably failed to mitigate her damages by submission to surgery. * * * However, evidence that plaintiff could reasonably have avoided all or part of the damages is admissible under a general denial." 266 Or at 432. (Citations omitted.)

It said in *Blair*:

> "The defense [of avoidable consequences] need not be affirmatively alleged. * * * Evidence that a plaintiff reasonably could have avoided all or part of the damages is admissible under the general issue." 235 Or at 91. (Citations omitted.)

See also Nelson v. EBI Companies, 296 Or 246, 252, 674 P2d 596 (1984).

ORCP 19B was adopted after *Zimmerman* and *Blair* were decided. It provides, as material:

> "In pleading to a preceding pleading, a party shall set forth affirmatively [several enumerated defenses, not including mitigation or avoidable consequences] and any other matters constituting an avoidance or affirmative defense."

The Council on Court Procedures staff comment notes that:

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of the record setting out the specific ruling." If the point of that statement is that the assignment of error is deficient, we agree, and it is not unique among appellants' assignments in that respect. *See* 102 Or App at 66. However, on this remand from the Supreme Court, we are not at liberty to refuse to consider an assignment of error that ve did address in our earlier disposition of the appeal, notwithstanding the inadequacy f the assignment.

[2] Appellants and the trial court appear to treat the doctrines of avoidable conseuences and mitigation of damages interchangeably. Although we question the anatical accuracy of that treatment, it appears to find support in *Zimmerman v. usland, supra*. In any event, whether the doctrines are or are not correctly viewed as nonymous or as overlapping, no reason occurs to us why the pleading and proof quirements that ap[illegible] them should differ.

"Section 19B does not change the existing burden of pleading," although some "specific affirmative defenses which do not appear in the federal rule but which are the subject of Oregon cases are included." Merrill, *Oregon Rules of Civil Procedure: 1990 Handbook* 57. ORCP 19B does not affect the holdings in *Zimmerman* and *Blair*, and the trial judge erred by excluding the evidence on the ground that he did.[3]

As part of their second assignment, appellants also contend that the court erred by denying their motion for a directed verdict, made on the ground that Umsted's proof of damages failed because there was no evidence of mitigation. As the cases on which appellants rely make clear, Umsted had no burden of proof on mitigation. Hence, no directed verdict should have been allowed against him on the ground that he did not prove mitigation.

In the same assignment, appellants also attempt to challenge the court's refusal to give an instruction on avoidance of damages. Any such error in the jury instructions is intertwined with the error in excluding the evidence and will be curable on remand in the trial court. The Supreme Court's instructions in its remand to us do not affect the portions of our earlier opinion relating to the other assignments of error, and we adhere to them.

Appellants argue that, because the error on the mitigation question goes to all of Umsted's compensatory damages, a remand on all issues is necessary. They are not correct. In the first place, we have affirmed the judgment for Umsted in the partnership dissolution proceeding, and it is not affected by our present disposition of the third-party claim. On that claim, Umsted was awarded $100,000 damages for lost future income and profits and $25,000 in punitive damages. The mitigation/avoidable consequences defense can relate directly only to the compensatory damages. Appellants argue that the punitive damages award cannot stand in the absence of an award of compensatory damages. Umsted takes the opposite view, relying on *Goodale v. Lachowski*, 97 Or App 158, 775 P2d 888 (1989). We held there that proof of actual harm, even in the absence of an award of actual damages, is

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substantive legal questions concerning the defenses are before us, and we

The Video Advantage

BY MARVIN D. MAYER

Hiring a professional video service to record a deposition is something that many lawyers decide to try once. Then, as the benefits become apparent, they wonder how they ever did without this cost-effective time-and-energy saver.

For me, the most valuable thing about video—as opposed to the old-fashioned court stenographer process—is that it results in many more cases being settled out of court. Why? First, there's a distinct tendency for all parties to stick with the issues and cut to the chase when they're on camera.

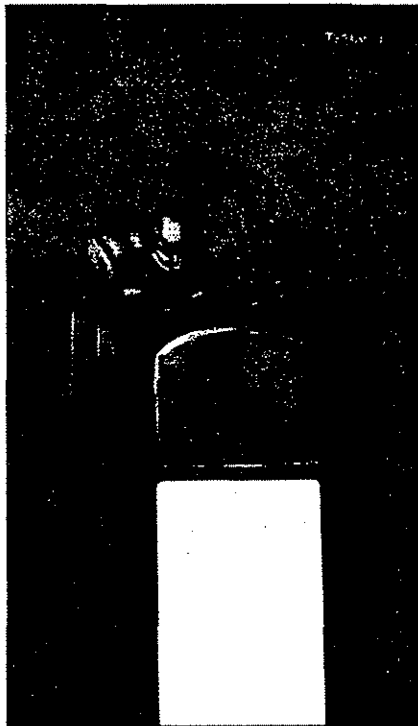
And second, video allows attorneys to see how their clients will "perform" in court. A client's tendency to grow flustered and fidget, for example, gives an indication that he or she may be more comfortable with a less protracted method of settlement.

Video depositions will become more commonplace as states continue to incorporate video technology into courtrooms. In California, Riverside County Superior Court Judge William H. Sullivan, who has had a complete video system in his courtroom for two years, says, "It's far superior to a cold, written transcript."

Judge Edwin A. Schroering Jr. of the Jefferson County Circuit Court in Kentucky explains that with video he now has more orderly trials, quicker disposal of cases, and better-prepared attorneys. "It's like graduating from the horse-and-buggy age," he says.

California attorney John Lautsch, who specializes in business litigation, says, "Not only does the camera almost always guarantee a higher degree of civility, but I've recorded the smoking gun more than once. For example, I asked an accountant if he had seen certain records. When he said no, I was able to show him the documented evidence I obtained—as the camera rolled."

Some benefits are pure serendipity. A colleague said, "I don't know why this happens, but culprits tend to confess when a camera is rolling. They say such incriminating things—without prodding—that I caution my clients not to overspeak."



In my own experience, I find that I'm often granted permission to use cuts from video depositions at trial. This is especially valuable since so many jurors are members of the so-called "video generation."

Celinda Tabucchi, a Southern California attorney who specializes in probate law, explains an additional use for video taping: "When I record wills I read a portion and ask the client on camera, 'Do you understand what this means and do you have any questions on this point?'

"Not only does this method document that the client is of sound mind, but knowing that this back-up exists restrains any who would challenge the will down the line. Seeing and hearing—and having proof—is believing."

Most lawyers first review a deposition and prepare a written summary. With the video going in my office, I can glance at it for a first run-through while I'm doing other things. Then I can easily re-run the tape and take notes.

Attorneys who use video cite its ability to save time. While written depositions generally have a turn-around time of two to four weeks, the video deposition is much quicker (as little as one day) and is returned while the incident is still fresh in the attorney's mind.

Keep in mind the following considerations when videotaping depositions:

▶ An experienced video deposition team should have notarized credentials. Someone's relative who owns a camcorder will not do.

▶ The team should have state-of-the-art, unobtrusive equipment. In average-sized conference rooms, up-to-date amplifiers should provide sufficient sound pick-up, with no need for participants to wear cumbersome lapel mikes. Equipment also should include color monitors.

▶ A video service should be able to return finished audio copies within half a day. Video also should be available with a short turnover time, with multiple copies available to opposing attorneys.

▶ The crew should be willing to prepare the site of the deposition in advance, with back-up equipment in case of emergency.

When weighing the advantages of video over traditional stenographic recording, cost is a consideration, along with issues such as accuracy and timeliness.

Of course, costs vary in different parts of the country. One video company in Orange County, Calif., for example, charges about $200 for half a day, including set-up and take-down; additional costs are billed at $50 per hour. It charges $45 per copy for the video, which is generally provided within three days (there is an additional charge for speedier delivery).

High tech meets law and order in myriad ways. As we move into the '90s, electronic eyes and ears will be a natural part of this country's legal future. ■

Marvin D. Mayer is a lawyer in Orange County, Calif.

ILLUSTRATION BY TIM TEEBKEN

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December 11, 1991

Fred Merrill, Executive Director
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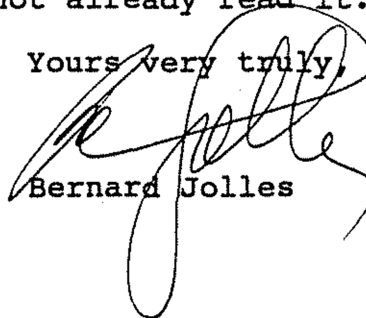
Dear Fred:

Enclosed is an article on public access to discovery documents published in the Fall 1991 ABA publication of *Litigation* (Vol. 18, No. 1). Perhaps the Council members would be interested in it if they have not already read it.

Yours very truly,



Bernard Jolles

BJ:wh

Enclosure(s)

More Public Access to Discovery Documents?

by John S. Kiernan and Shlomo Huttler

Although there are many who believe in Justice Brandeis's famous dictum that "sunlight is . . . the best of disinfectants," litigants are not always among them. The rules of discovery or evidence often compel litigants to reveal information they prefer not to reveal. When they try to limit the dissemination of that information, the public role of the litigation process may clash with its role as a means for resolving private disputes.

In recent years, courts have wrestled increasingly with efforts by the press, public, and sometimes individual parties to obtain or disseminate information revealed in litigation and with efforts by other litigants to keep that information private. Legislatures and rule-making bodies of several states have recently joined the fray. The results are more uncertainty and more openness.

This article is about traditional law and traditional practice, changing law and changing practice—and ways that resourceful counsel can still prevent the full airing of information they want protected.

Because the judicial system is public, every litigant surrenders some hegemony when the lawsuit begins. The surrender can be substantial, particularly when a party is forced to provide information to an adversary. Never mind that this information is commercially sensitive, unflattering, embarrassing, or highly proprietary. Discovery can be compelled as long as it is also reasonably calculated to lead to the discovery of admissible evidence. Parties can compel discovery of records of sensitive internal deliberations, employee reviews, medical records, and even important trade secrets that are germane to the dispute. It is not surprising that many parties, especially defendants, want to limit the spreading of that information.

Information has inherent value for many businesses. Disseminating proprietary information is inherently painful. Few companies, for example, want to publicize their corporate directives or organizational charts, much less their business plans, strategic analyses, internal projections, employee evaluations, or materials reflecting disputes over company policy or direction. The fact of a lawsuit is itself embarrassing to some companies irrespective of the merits. Publicity about settlement not only is embarrassing but also may suggest that the defendant has admitted wrongdoing. Worse from the defendant's point of view, it may inspire others to sue. Few lay people distinguish between settlement and jury verdict; both mean the plaintiff got money.

Parties have traditionally been able to keep litigation private by obtaining protective and sealing orders or by contracting with their adversaries. Under Federal Rule 26(c), a party that shows "good cause" can obtain a protective order prohibiting dissemination outside the litigation of information produced in discovery. The rule specifically mentions only an order "that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way." However, courts have broad discretion under the rule and know that findings about "good cause" are hard to upset on appeal.

Likely Accommodation

Lawyers have often obtained confidentiality orders with their adversaries' agreement and with little interference by the courts. Sometimes both sides want to keep their information private. Sometimes a party will agree to a confidentiality order to maximize discovery without distracting motion practice. Accommodation is most likely when both sides have information to protect or when the party seeking the information is concerned solely with pursuing its own claims and not with expanding the conflict to new plaintiffs or related litigation.

Courts have often viewed discovery as the business of the parties to the extent they could proceed without squabbles. They have rubber-stamped confidentiality agreements—

Mr. Kiernan is a partner and Mr. Huttler is an associate at Debevoise & Plimpton in New York City.

even "umbrella" provisions that do not define what can be characterized as confidential and not for dissemination outside the litigation. Under these circumstances, lawyers often label as confidential virtually every document produced in discovery. In large document productions, legal assistants, armed with "Confidential" stamps and instructions to be conservative, have without challenge stamped such obviously nonconfidential or unimportant materials as minutes of public meetings, public financial statements, routine correspondence, press releases, and even newspaper articles.

In many courts, sealing orders respecting filed materials have had similar histories. Merely filing litigation materials enhances their public significance. Yet many judges, particularly in state courts, have almost automatically permitted agreements to seal not only the settlement papers but all records of the proceeding. If papers were originally filed under seal, courts have generally honored the request for confidential treatment as well. Again, the rationale has been that litigation should be left to the parties and that private compromise eliminates the public nature of a dispute. Courts supporting this approach have relied on broadly articulated common law or statutory rules consigning the sealing power to trial courts' discretion. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978); *Dorothy D. v. New York City Probation Dept.*, 49 N.Y.2d 212, 215 (1980).

Often the parties have not even needed the court to keep litigation records from the public. When a case settles before trial, the only document that must be filed in most jurisdictions is a stipulation of dismissal. It need not recite any terms of the settlement. At that point, court records will rarely contain much (if any) of the sensitive discovery material. Although Federal Rules 5(b) and 30(f) provide for the filing of deposition transcripts and other discovery materials in court, most local rules protect the court from this avalanche.

To block access to discovery materials, many lawyers have conditioned settlement on the adversary's promise to destroy or return all discovery materials and not disseminate information about the case. Because defendants are often willing to pay extra for permanent peace without the threat of more lawsuits, plaintiffs' attorneys usually agree to that condition—unless they have already corralled more plaintiffs with the same claim for the next round of suits. In these circumstances, even a court's refusal to seal has until recently meant only that the small number of papers on public file would be available for public scrutiny.

But confidentiality agreements and sealing orders are no longer automatic. Over the last dozen years, the press, public interest groups, plaintiffs' lawyers, and others have focused on expanding the public component of litigation. Concealing information is against the public interest, say these advocates. Many have successfully challenged litigants' attempts to keep their disputes private.

The First Amendment has served them well, though not in all litigation contexts. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court recognized for the first time that the press and the public have a presumptive right of access to significant components of court proceedings. In declaring a First Amendment right of access to a criminal trial, the Court relied on the tradition of openness in criminal trials, the important watchdog role played by the press, and the positive function in the democratic process served by permitting open access to criminal proceedings. Subsequent cases have expanded *Richmond Newspapers* far beyond criminal trials. Circuit courts have consistently found that the constitutional right of access extends to civil as well as criminal trials, and in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), the Supreme Court held that the right also extends to certain pretrial proceedings. These First Amendment rights can be overcome only by an "overriding interest."

Compared with the constitutional right of access to court proceedings, nonparties' right to documents in court files has developed more erratically. The press and public have long had a common law right to inspect and copy judicial records, reaffirmed in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The common law right is easier to overcome than the First Amendment right of access to court proceedings. Still, it does create a presumption in favor of public access if someone requests it.

The application of the First Amendment right to documents filed with a court has been clouded by the existence of the common law right. Some courts have suggested that there is no such First Amendment right. That was the apparent position in *Nixon*, which predated the recognition of that right in *Richmond Newspapers*. Many other courts find a tradition of access to court documents reflected in the common law right. They see no reason to distinguish between information stated orally in a court proceeding and information provided to the court in a document.

The Difference Between the Rights

In practice the most important difference between the two rights is that each requires a different party to obtain court action. The attorney seeking closure of a court proceeding must come forward with substantial reasons for denying access. By contrast, when a party has filed documents under seal, another party must take affirmative steps to gain access. In fact, many state courts still reflexively accede to parties' requests to seal the record after settlement, despite the universal recognition of presumptive rights of access.

Heady from their successes with access to court proceedings, press and public interest organizations began in the mid-1980s to seek access to depositions and materials produced in discovery. They argued that discovery is at the heart of what is supposed to be an open litigation process, that many courts' rules have integrated discovery into the public component of litigation by requiring the filing of deposition transcripts and interrogatory responses, and that without such access, defendants will conceal matters of great public interest by settling before the facts become a part of the court record.

These arguments rarely succeeded. Courts saw no tradition of access to discovery, noting that the institution of discovery is only of recent vintage. Courts also saw no overriding purpose for access to discovery, sometimes even suggesting that revealing discovery materials to nonparties might conflict with the principle that parties should have the opportunity to develop their cases through broad discovery—including discovery of sensitive information of no more than attenuated relevance.

The Supreme Court obliquely resolved many of these issues in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984). This case involved a newspaper libel defendant's challenge to a protective order. The order prohibited the newspaper from disseminating discovered information about the plaintiffs, a religious group subject to harassment. Although *Seattle Times* focused primarily on litigants' right to disseminate information, the Court said that there was no First Amendment right to obtain discovery materials. Later courts emphasized that the First Amendment right of access applies only to what happens inside the courthouse.

Without the sword of the First Amendment, nonparty advocates of access to discovery information must sharpen other weapons. They must combat the allegations of "good cause" for confidentiality (while trying to enlist the support of one of the parties). Or they must ask the court to exercise its general inherent power over court records or its specific power to compel the filing of discovery materials under Rules 5(b) and 30(f). In most cases, however, unless a party cooperates, the issue is never presented to the court. After all, the court has not seen the parties' discovery materials. And the nonparties have been either ignorant of the dispute or unable to offer concrete examples of the hidden information they should be allowed to see.

Of course, the easiest route for a nonparty seeking access has always been voluntary disclosure by individual parties. *Seattle Times* confirmed that unless a court has entered a protective order for good cause, any litigant has an unlimited right to disseminate information that it obtains in the litigation. In recent years, many litigants either have wanted to disseminate discovery information or at least have been willing to accede to outside pressures to resist confidentiality orders. That has been especially so in mass tort cases, in which the public interest claim has been particularly strong. Often the plaintiffs' lawyers themselves want to pool their knowledge, including materials obtained in discovery, to attract new clients and litigate their claims.

Defense counsel commonly react by seeking protective orders. They argue that the information plaintiffs seek to disseminate is irrelevant, proprietary, and potentially inflammatory and that plaintiffs will misuse the information to transform a single lawsuit into a mass litigation. Their success has been mixed. When counsel could persuade the courts that the information was highly confidential and likely to give their clients' competitors an edge, the courts have protected against general disclosure to nonlitigants. Defense counsel have also got mileage out of persuading courts that plaintiffs are using the discovery process for purposes unrelated to the merits—to obtain and disclose commercially sensitive information, for example, or to litigate their claims in the press.

At the same time, advocates of open access have increasingly persuaded courts to consider the public interest in openness before finding good cause for a protective order in cases of obvious general importance. The good cause provisions of Federal Rule 26(c) do not explicitly refer to public interest. They appear to contemplate only an inquiry into whether the material is truly a "trade secret or other confidential research, development or commercial information." But advocates of access have argued that soft terms like "commercial information" must be interpreted by weighing the nature and importance of the assertedly confidential material against the scope of the public interest in access.

A number of courts have questioned whether First Amendment analysis is appropriate in considering objections to a requested protective order. *See, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118–30 (3d Cir. 1986). In practice, however, there is little doubt that the intensity and validity of the public interest in openness have affected courts' scrutiny of requests for orders of confidentiality. Several courts have granted press and public interest groups' motions to intervene in actions, even after they were terminated, to challenge good cause for continued confidentiality. *Id.* In some of these cases a willing plaintiff has been allowed to disseminate even discovery materials never filed with the court.

Competitive Harm

When public interests are at stake, courts are more likely to ask precisely what competitive harm would result from disclosure. Defense counsel have more resistance to overcome, especially when someone has objected to the entry of permanent umbrella protective orders permitting unchecked designation of materials as confidential. The burden of distinguishing documents that need protection from those that do not has shifted in many of these cases. In the past, the party opposing confidentiality had to identify the documents that should not have been designated as confidential. Now the party seeking confidentiality must affirmatively support each designation. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790–91 (1st Cir. 1988); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 94 (D.N.J. 1986).

Legislatures and rule-making bodies have also acted to increase public access to litigation. Since 1986, seven states have passed statutes of widely varying scope affecting access. Other states are actively considering such measures, though legislative efforts have recently faced opposition or stalled in Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Mississippi, Montana, New Mexico, South Dakota, and Virginia. *See* A. R. Miller, "Private Lives or Public Access?" *ABA Journal*, August 1991, at 65–66. There is dispute about whether the evil sought to be corrected really exists and whether the new provisions are workable or appropriate in their regulation of judicial activity. However, the momentum for change is strong.

The new statutes are generally grounded on these five premises:

1. Many courts habitually seal their records at the request of the parties, especially upon the settlement of cases, without serious examination of whether the foreclosed information warrants public airing.

2. The public interest is relevant to the appropriateness of sealing, and interested nonparties should be given an opportunity to advance those interests before sealing is ordered.

3. Compelling courts to hold an open hearing and make written findings before they can order sealing will greatly reduce the frequency of sealing.

4. Parties have used confidentiality protections under existing law to conceal health hazards or other information of public importance that would otherwise have been revealed.

5. Attorneys are placed in an untenable position when they are forced to choose between serving their clients by agreeing to confidentiality as a condition to settlement and serving the public by rejecting the condition.

There is something to be said for some of those premises. For example, the special committee that drafted Massachusetts's rules found that some courts were routinely sealing records in medical malpractice and divorce cases. *ABA Journal*, Nov. 1, 1986, at 22. Medical malpractice, certainly, is an area in which advocates of access might reasonably discern a public interest in openness.

On the other hand, it is uncertain whether any confidentiality or sealing orders have concealed hazards that would otherwise have been exposed. Commentators have argued that a single litigation rarely leads to revelation of a hazard, that the press and public learn about hazards without regard to courts' sealing practices, that plaintiffs' lawyers are unlikely to accept confidentiality conditions on settlement if more than one person has been injured, and that corporate defendants in settling one action over a hazard will generally assume that more suits are coming if the hazard is real and will take steps to correct the hazard before further suits are filed. *See, e.g.*, Arthur R. Miller, *Memorandum to the New York State Office of Court Administration on Proposed Rule 216.1 Regarding the Sealing of Court Records*, Dec. 10, 1990, at 4–7.

Of all the new laws, the July 1989 Virginia statute, Virginia Code § 8.01–420.01, addresses these issues most modestly. It says merely that protective orders in personal injury actions may not foreclose attorneys from sharing information with others involved in similar or related matters. But first there must be notice to the court, an opportunity for other parties to the protective order to complain, and a written promise of confidentiality by the newly informed lawyer. This arrangement makes sense as a sheer concession to the shortness of life; only the most avid defender of confidentiality would require each new plaintiff to reinvent the wheel against a defendant that has already gathered and produced substantial litigation material. Indeed, the statute arguably just codifies existing law. *See, e.g., Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980).

The North Carolina statute, Chapter 132 of the Public Records Law (effective July 1, 1989), is narrower than Virginia's new law in that it applies only to government entities and "settlement documents." Otherwise, however, it extends further than Virginia's law. It not only prohibits sealing of government settlement documents without findings of "an overriding interest" but also forbids the government from agreeing to any settlement conditioned on a promise of confidentiality about settlement terms.

Parties' power to agree on confidentiality is even more limited in Florida's July 1990 Sunshine in Litigation Act, Florida Statutes Ch. 69.081. That statute prohibits court orders and private agreements that have "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." Public hazard is defined to include "any instrumentality that has caused and is likely to cause injury." That definition seems to cover almost any possibly recurring personal injury claim. The statute also gives standing to the news media and any other "substantially affected person" to challenge any such arrangement.

The provision may force courts to consider whether a public hazard is implicated before they grant sealing orders or accede to confidentiality agreements. Limiting sealing orders may have little impact because the publicly filed documents to which a sealing order applies often will not reveal any public hazard. By contrast, the restrictions on parties' power to enter into confidentiality agreements and on courts' power to approve those agreements could have wider significance.

Plaintiffs' counsel can now agree to a conditional settlement, get the settlement money, and then repudiate the agreement as void and unenforceable under the Florida statute. If public interest groups or individual parties oppose consensual confidentiality orders, the statute will require courts to scrutinize confidentiality requests much more closely for possible implications of public hazard.

Sealing Court Records

The Washington, New York, and Massachusetts provisions focus exclusively on sealing of court records. They shift the presumption away from mechanical or automatic sealing upon the completion of a litigation. Massachusetts was the first state to adopt Article VIII of its Trial Court Rules (entitled Uniform Rules on Impoundment Procedures). That statute, effective September 1, 1986, prohibits sealing without a formal motion and requires notice (at the court's discretion) to interested third parties, opportunity for nonparties to be heard, and written findings. Sealing requires a good cause determination.

In Rule 15 of its General Court Rules, Washington also requires a hearing before sealing can be ordered, effective on September 22, 1989. It subjects sealing requests to an even more rigorous requirement of "compelling circumstances." The statute does not expressly provide for consideration of the public interest or notice to the press and public, but the orientation to maximize access is unmistakable.

New York became the most recent state to join the trend when it adopted Part 216 of its Uniform Rules for Trial Courts, effective March 1, 1991. It, too, prohibits sealing of any documents filed with the court except on a written finding of good cause. It also requires courts making the good cause determination to "consider the interests of the public as well as of the parties."

By far the most sweeping of the new provisions is Rule 76a of the Texas Rules of Civil Procedure, effective Septem-

(please turn to page 58)

color or even undermine a whole range of relationships, including those between lawyer and judge, opposing lawyers, lawyers and clients, and even colleagues practicing in the same law firm.

The Committee on Civility of the 7th Federal Judicial Circuit, chaired by The Honorable Marvin E. Aspen, U.S. District Judge for the Northern District of Illinois, has issued an interim report. Judge Aspen writes:

> Causes for the legal profession's civility problems are numerous. No one cause is the dominant culprit. But combined, several fairly recent developments in the practice of law pose serious potential threats to the orderly function of our legal profession and judicial system.

Disquiet about adversarialism, greed, and incivility is nothing new. Both English barristers and U.S. lawyers have criticized those qualities since at least the early 19th century. What makes them particularly worrisome today is that they have been significantly exacerbated by changes in procedure (Rule 11 of the Federal Rules of Civil Procedure), alterations in the stakes and intensity of litigation, and shifts in the demographics and economics of the profession.

We must take a critical look at the web of relationships connecting those who are involved in our adversary process. Procedural shifts that have compelled judges to more actively manage litigation have brought them more regularly into conflict with counsel. Do these changes threaten judicial neutrality? And do the stakes in modern litigation—or the litigation environment itself—create new inducements to unprofessional conduct and call for novel ethical constraints to control aggressive, dilatory, or obfuscatory behavior? The adversary system assumes that clients will control their cases, but is this true today?

Our democracy both requires and nurtures our adversary system. We must improve it. There are problems of access. There is a forensic revolution. And there are issues of civility. We can solve these problems by making simple individual choices to "do the necessary" rather than "everything conceivable" in litigation, by providing pro bono representation, by maintaining general skills, and by treating one another with respect.

Public Access

(continued from page 22)

ber 1, 1990. The rule begins by declaring that all court records are presumptively "open to the general public" and by prohibiting any sealing of records absent findings of

> a specific, serious and substantial interest which clearly outweighs [both the] presumption of openness [and] any probable adverse effect that sealing will have upon general public health or safety, [and that] no less restrictive means other than sealing records will adequately and effectively protect the specific interest asserted.

What makes the rule far-reaching is the definition of "court records" that are controlled by these standards. Court records include unfiled settlement agreements (except for the amount paid in settlement) and unfiled discovery materials that concern "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."

In other words, a court can prohibit destruction of privately exchanged discovery materials (and settlement agreements) that have never been filed in court if the materials concern matters having a probable adverse effect on general public health or safety. It is presumed that any person or entity—even unrelated to the dispute—is entitled to see the discovery materials. Before they can be sealed, moreover, notice of the request for sealing must be publicly posted and an open hearing must take place.

The Texas rule raises serious issues of policy and administration, which were fiercely debated before passage. It appears to impose on litigants obligations of record retention and public access far greater than have been previously required in any other jurisdiction. There is no guidance on what "matters" are within the rule's ambit. Yet the rule appears to require settling parties who do not want to litigate over confidentiality to make their own determinations about what materials fall within the "matters" definition and to keep those materials publicly available on a more or less permanent basis. Parties may no longer treat litigation as a bipartite private dispute to be resolved by private agreements. They must now serve as permanent public repositories of discovery information.

The new Texas rule may have more bark than bite. *Texas Lawyer* surveyed the first 14 cases under Rule 76a in which the required notices of motions to seal had been posted with the Texas Supreme Court. It found that five requests had not been ruled on and eight had resulted in sealings. Five of the eight sealings had been of the entire case file, despite the rule's unrealistic requirement of document-by-document review. Only one sealing request had been denied. The requests to seal had been opposed in only five cases, tending to confirm that the parties are frequently willing to cooperate in this area. Only one hearing had lasted more than five minutes. *See also Feffer v. Goodkin Wechsler et al.*, N.Y.L.J. Feb. 19, 1991, at 25 (Sup. Ct. N.Y. Cty.), applying New York's new rule but permitting sealing where "the material sought to be sealed for the most part involves the internal finances of defendants' law firm and is of minimal public interest."

Shifting Inertia

The greatest significance of the new statutes and rules may be that they shift the inertia of busy courts and litigators away from reflexive sealing and place the onus on parties seeking confidentiality to demonstrate the need for it. When the public record is not particularly troubling, many parties that would previously have requested sealing may not bother. When a litigant seeks to protect a genuine interest, courts will make assessment (usually quickly and often based on little or no knowledge) of the public interest and will grant or deny sealing. Many courts were making that assessment long before the new rules were promulgated. The ones that did not do so may change their practices, but their inquiries are likely to be limited if they have previously been too busy to make such inquiries.

In matters without obvious public interest, the defendant will most likely remain able to protect confidentiality

without major fights. Regardless of the ultimate prospects for maintaining confidentiality, the following are some suggestions for attorneys seeking protection:

1. Seek agreement from your adversary before going to the court. Busy judges are not much more likely to second-guess an agreement between the parties today than they have been in the past.

2. Place the onus to rebut confidentiality on the opposing party. To the extent a confidentiality order allows the defendant to designate documents as confidential subject only to the plaintiff's right to disagree by motion to the court, the plaintiff often will not bother to disagree, and the plaintiff's identification of points of disagreement may strike courts as a questionably motivated distraction.

3. Identify internally the subset of documents that it is most important to protect. If there are challenges to the scope of the confidentiality order, it may become useful to circle the wagons around the most important documents or to show them to the court as illustrations of why protection is appropriate.

4. Keep a disciplined eye on whether sensitive proprietary information sought in discovery is relevant or reasonably calculated to lead to the discovery of admissible evidence. If a fair claim can be made that the material is not properly discoverable, the avoidance of production will always be the best way of preventing general dissemination.

5. Keep documents and deposition transcripts out of court records and out of general circulation. Materials that remain exclusively in the attorneys' possession are easier to protect and are unaffected by denials of sealing orders.

6. Condition delivery of the settlement check on return or destruction of discovery materials. Once the settlement is final, promises made in confidentiality agreements tend to be left unattended; courts cannot be counted on to remain protective if the dispute has been resolved and nonparties are clamoring for access.

7. Try to keep a low public profile on the dispute. Once the interests of the press and public have been piqued, confidentiality becomes much harder to sustain.

8. Make the entry of a confidentiality order less work for the judge than crafting an access order would be.

9. Develop a clear sense of the business harm that the client could suffer from general dissemination of the material for which protection is sought. If your opponent resists a confidentiality order, your prospects of success will often depend on your ability to show that your clients are motivated by the desire to protect proprietary information, not the desire to conceal the awful truth about themselves.

Despite abundant efforts to change the balance of confidentiality and disclosure, courts will not relish the distraction of disputes over rights to disseminate materials. The inertia and desire for private resolution that have led to protective orders and sealing orders in the past are likely to survive the new wave of demands for increasing access.

Literary Trials

(continued from page 64)

to announce the name of the new supervisor who was to take Dan White's old job. Dan White did not enter City Hall through the main entrance with its guards and metal detectors. Instead, he entered through a large window in the basement. He then went straight to Mayor Moscone's office and shot the mayor four times. White then reloaded the gun and went to Harvey Milk's office and shot him five times. In both instances, the victims were first shot in their bodies, and then, after they were on the floor, were each shot twice in the head.

Two Simple Cases

Those were the facts. Two simple cases of premeditated, first-degree murder. Why premeditated?

How could it be otherwise? White took his gun and extra bullets. He avoided the metal detectors. He executed his victims. And he had a personal motive. The mayor was not going to give him his job back, and Harvey Milk had been instrumental in convincing the mayor not to, a fact that Dan White knew. And his motive may have gone even deeper. At the time, Harvey Milk was the only publicly avowed homosexual in public office in the U.S. Mayor Moscone was friendly toward the large, politically active homosexual community of San Francisco. White not only had a personal motive based on a single discussion, he may also have had a far more deep-seated and politically explosive motive, relating to Harvey Milk's homosexuality and White's own attitudes toward that and the growing political power of the homosexual community of San Francisco.

Could it have been a murder born out of hatred? Out of some sort of homophobia?

Could it have been, in the true sense, a political murder?

Either of these possibilities could have become an explosive issue especially in San Francisco, especially in 1979.

But none of these issues ever came up at the trial.

In May 1979, White, charged with two counts of first-degree murder, was tried in San Francisco. He pleaded "not guilty by reason of diminished responsibility."

Diminished responsibility under California law has a very specific meaning, which is defined in the instructions given to the jury:

> If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, or any other cause, you must consider what effect, if any, this diminished capacity had on the defendant's ability to form any of the specific mental states that are essential elements of murder and voluntary manslaughter.

This contrasts with first-degree murder, in which the murderer must have carried out an unlawful killing with "malice aforethought," in other words, premeditation or planning. Like taking extra ammunition and avoiding metal detectors.

The defense hired four psychiatrists and one psychologist to act as expert witnesses. All five came to the same conclusion. Dan White could not have carried out a premeditated, first-degree murder because he had "diminished capacity." He was not capable of such

BY BOB GIBBINS

SECRECY versus SAFETY

Restoring the Balance

COMMENTARY

In 1984, a San Francisco federal court case set the stage for a display of the potential of protective orders to delay government regulation and conceal threats to public health. It provides a potent look at the workings of secrecy in litigation—and clearly reflects why determined action is essential to restore balance to America's justice system. (For another view, see Arthur Miller's "Private Lives or Public Access," August 1991 *ABA Journal*, page 64.)

That case, *Stern v. Dow Corning Corp.* (U.S. Dist. Ct., N.D. Cal., No. C83-2348), involved silicone breast implants used in reconstructive surgery. The jury rendered a verdict for the plaintiff on her complaint that the manufacturer committed fraud and failed to warn of the potential for severe side effects. The case was settled while on appeal.

After *Stern* was concluded, a protective order demanded by the implant manufacturer remained in force. It prohibited the plaintiff's attorneys and expert witnesses from telling government regulators or anyone else what the discovery documents showed about safety tests of the product.

Even at a 1988 U.S. Food and Drug Administration hearing held to consider requiring implant manufacturers to demonstrate safety, a *Stern* attorney subject to that protective order was unable to disclose information about clinical or animal tests.

A medical school professor who examined more than a dozen breast implant litigation files has been similarly prohibited, by protective orders in every case, from sharing his knowledge of tests with FDA or congressional investigators. Here is an example of a publicly funded inquiry of a possibly dangerous product; yet a medical school professor is legally gagged through a process funded by taxpayers.

The protective-order strategy was used by several manufacturers, and it bought them time. Manufacturers produced and sold implants for at least six years after the *Stern* verdict, until the FDA took its first look at the companies' clinical data in 1991.

The agency concluded that no test results submitted by any manufacturer demonstrated the safety of implants, and one manufacturer has since recalled its entire line and announced its withdrawal from the breast implant market. But while the FDA vacillated and numerous product liability cases were settled with confidentiality "agreements" and protective orders, 150,000 new patients received implants each year.

Secrecy devices have been used increasingly in litigation during the past decade. A comprehensive new study of products liability litigation involving punitive damages awards revealed a marked increase in the use of confidential settlements after 1986. Conducted by professors Michael Rustad of Suffolk University Law School and Thomas Koenig of Northeastern University, the study examined a quarter-century of data.

Recent litigation involving the prescription sleeping medication Halcion further shows how secrecy, along with lax pharmaceutical regulation, multiplies consumer risks. In 1989 a blanket protective order was entered in *Grundberg v. The Upjohn Co.* (U.S. Dist. Ct., D. Utah, No. C89-274), a case that alleged severe, unpredictable mood changes caused by this drug now used by several million Americans. The *Grundberg* protective order effectively made all documents produced by the defendant confidential and required their return or destruction following the conclusion of the lawsuit. But shortly after *Grundberg* was settled, Halcion's manufacturer acknowledged that clinical data submitted to the FDA during the drug approval process were incomplete.

As it stands, the *Grundberg* protective order leaves an unknown number of patients and doctors wondering what caused side effects. Considering that the plaintiff in *Grundberg* had killed her own mother (although charges against her were dismissed because of involuntary intoxication with Halcion), access to complete information is crucial. A consumer organization is now asking the court to modify the protective order.

Other examples of the threat posed by secrecy are, unfortunately, not hard to come by:

- A patient with a Shiley artificial heart valve is unable to learn of the danger that the device's mechanism may fracture. She dies when the valve fails, and her husband later learns that the manufacturer secretly settled litigation brought by other victims years before.

In part through that practice, the company avoids the notoriety that could have led to earlier warning of patients and/or withdrawal of the valves from the market.

A congressional investigative report ("The Bjork-Shiley Heart Valve: Earn as You Learn," House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, 2/90) cites "numerous instances" of deaths that might have been avoided had patients and doctors been aware of the danger earlier. *Barbee v. Shiley, Inc.* (claim was settled in 1989 without filing complaint).

- The widow of a police officer killed in the crash of a traffic-control

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ILLUSTRATION BY SAM WARD

plane is denied discovery of evidence of the airplane's design defect because of a confidential settlement "agreement" in another case. The aircraft type is still in use. *Turnberger v. Cessna Aircraft Co.*, Broward Cty., Fla., 17th Jud. Cir. Ct., No. 83-12392.

▶ A scientist who herself suffered a potentially fatal allergic reaction to a painkiller—later withdrawn from the market—discovers that other victims were similarly affected several years earlier but were sworn to secrecy. She also discovers that some confidential settlement "agreements" even prohibited discussion of adverse reactions in scientific journals. *Davis v. McNeilab, Inc.*, U.S. Dist. Ct., D.C., No. 85-CV-3972 (case settled in 1986).

While private matters having no public impact and true trade secrets justify confidentiality, it is inconsistent with the impartial administration of justice for a publicly created and maintained legal system to help hide responsibility for misconduct.

Events that lead to litigation often have an impact well beyond the immediate parties, and that impact can be deadly. In today's age of mass manufacturing and distribution, a dispute brought before a court can involve a potentially life-threatening hazard that already may have affected thousands of citizens, and may affect even more in the future.

Confidentiality "agreements" in products liability cases can keep information about the dangers of defective products from coming to the attention of government regulators, the news media and others who could alert the public.

And in medical negligence cases, the doctors alleged to have caused an injury may well have other patients undergoing the same procedures. Secret settlements and sealed files can enable physicians to keep practicing without having to account for substandard care. The same concerns apply to injurious behavior in other professions.

In fact, in all types of tort litigation, both the deterrent and compensation functions of the civil justice system can be stifled by secrecy. Beyond leaving past victims ignorant of the cause of their injuries and future victims vulnerable, secrecy also can make it more difficult for victims to prepare and prove their cases.

Secrecy can make it more likely that critical evidence will be concealed or destroyed without ever being discovered.

A legal system that functions in this way is out of balance, which is why there is growing support for changes in court rules and procedures to eliminate unwarranted secrecy. Those who advocate such change seek a fairer balance between privacy and property rights

on one side, and public health and safety on the other. Restoring lost balance also could help to reduce injuries and resulting litigation.

The imbalance in the tort litigation system is rooted in abuses of otherwise legitimate rights. The litigation playing field was level when the Federal Rules of Civil Procedure and other similar reforms of litigation practice were inaugurated in the 1930s. The system at that time provided protection for truly personal information (the reasons why a divorce was sought, or why child custody was refused) and true trade secrets (chemical formulae, manufacturing methods, details of distribution networks).

Some segments of the legal community now attempt to protect classes of information that go well beyond the original plan. They are advised to misuse the "trade secret" and "privacy" labels, claiming special protection for information never intended to have confidential status under the rules of civil procedure, and claiming corporate privacy rights never recognized by American law.

From this attempt to expand the idea of protected information into new areas, there has developed a well-known arsenal of devices intended to protect wrongdoers:

▶ "Agreements" that prohibit disclosure of the compensation paid in a settlement, the names of the parties, and sometimes even the fact that litigation occurred;

▶ Sealed court files that can conceal the very existence of the lawsuit;

▶ Protective orders that require the return or destruction of discovery information after the termination of the litigation, and prohibit sharing discovery material with other attorneys handling similar cases or with government agencies; and

▶ Prohibitions against attorneys handling similar cases in the future.

New secrecy strategies are still emerging. In medical malpractice cases, for instance, negotiated dismissals of individual physicians have been used to keep the doctors' names out of the federal government's data bank of malpractice verdicts and settlements, thus thwarting an important public policy.

Secrecy proponents argue that confidentiality makes litigation go more smoothly and promotes early settlement, and indeed it may—when the advocates of secrecy get their way.

But secrecy also can delay the resolution of litigation, consume large amounts of lawyers' time, and strain the courts' capacity to move cases toward a conclusion—as shown by a recent federal court opinion in *Wauchop v. Domino's Pizza, Inc.* (U.S. Dist. Ct., S.D. Ind., No. S90-496). The plaintiffs in *Wauchop* sought information on the corporation's promise to deliver food by car in 30 minutes or less, arguing that the policy may have led to an auto collision.

The defendants demanded that much of the discovery material requested by the plaintiffs be protected against further disclosure. The court concluded that secrecy was not justified for most categories of the material, but the defendants' demand for a protective order forced the court to read motions, review and analyze numerous discovery requests, and render its conclusions in an opinion and order more than 30 pages long. The judge properly lamented that the federal rules on discovery "should be self-executing through the cooperation of counsel."

To stabilize this out-of-balance system and counteract the harm secrecy can cause, this country needs a strong presumption of openness for court proceedings and records.

We need adequate procedures to ensure that the trial judge will consider the public's interest in information that would be concealed under a proposed protective order. Advocates of secrecy argue that existing procedures already allow courts to consider the public interest as part of the exercise of judicial discretion, but widespread approval of protective orders and confidenti-

ality "agreements" suggests that the public interest has not been made a routine part of the courts' calculus.

The Association of Trial Lawyers of America acted in 1989 to focus attention on the multiple problems caused by secrecy. ATLA's Board of Governors passed a resolution encouraging:

▶ Courts to scrutinize requests for secrecy and grant them only when information sought to be protected is a true trade secret or can qualify for some other privilege;

▶ Courts to allow sharing of discovery material with attorneys handling similar cases, regulatory agencies and professional boards;

▶ Courts to liberally grant relief from pre-existing orders and "agreements" that unfairly impose secrecy; and

▶ Attorneys to resist secrecy demands that preclude sharing information with regulatory agencies and other lawyers, and discouraging them from agreeing to proposed secrecy orders.

By now eight states have joined the movement away from secrecy. Some of this initiative has come from judges themselves. In 1990, the Texas Supreme Court was the first court to amend its rules to recognize a presumption of openness for all court proceedings, and to establish procedures to be followed for any request to seal court files.

Court rules with a similar focus on openness have been adopted by the New York State Administrative Board of the Courts, the San Diego County Superior Court, and the Delaware Supreme Court and Chancery Court.

In 1990, a different approach was taken by Florida, which passed legislation that identified a class of dangers as "public hazards," and prohibited concealment of such hazards through judicial processes.

Narrower mechanisms have been adopted in several other states. These include specific procedures to be followed in disclosing discovery material to attorneys handling similar cases (adopted in Virginia in 1989), and standards for confidentiality regarding litigation by and against state government (adopted in North Carolina, Florida and Oregon).

Other bills and proposed court rules are under consideration in many states, most based on either the Texas or Florida models, and usually with the support of consumer, labor, environmental, senior citizen or media organizations.

The mechanics of the new measures aside, an obvious question is what the new rules and procedures change, and what they leave unchanged.

The new mechanisms give no one any new substantive rights of action. They cannot engender new cases. Nor, in any known case, do they expose strictly personal information or reveal genuine trade secrets to the public.

The changes do, obviously, give judges new duties of review in a number of situations. But once it becomes clear that requests for secrecy will be measured against the public interest, the number of secrecy demands should decrease, so that the net result is the same or better than what has been observed in the past.

The same effect should be noticeable in terms of the cost of litigation. Market forces can be expected to work against satellite litigation when clients realize that demands for unjustified secrecy will not succeed, and that they may be penalized.

Perhaps most importantly, the new measures do not infringe on judicial discretion. Indeed, they depend on judges to exercise discretion as much as the former rules ever did. They provide standards to be met by litigants, like many other written standards of proof, and prescribe what the result will be if the judge determines that the standards have not been met.

There is at least some evidence of improvement already. An ATLA member who practices in Minnesota, where no legislation has yet been passed on secrecy, recently observed a dramatic reversal of the Shiley heart valve manufacturer's previous use of secrecy demands, as well as judges' awareness of the issue of secrecy and the potential it has for harm.

These developments suggest that secrecy advocates' dire warnings about increased satellite litigation and diminished access to information are exaggerated. Their predictions imply that America's judges would allow the courts to slow to a crawl, and that members of the bar and the public would accept dramatic increases in litigation costs. Experienced judges and trial lawyers, however, will not tolerate such a result.

The goal here is to have a safer society. One way to attain that goal is to create mechanisms designed to help protect us all. ■

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December 4, 1991

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Re: Council on Court Procedures

Dear Fred:

This letter is to confirm an issue we discussed by telephone a week or so ago. Among the amendments promulgated by the Council which become effective January 1, 1992 are changes to Rule 55 concerning subpoenas. In particular, it is my understanding that the intent of the addition to Rule 55A/B is to permit the use of subpoenas to obtain non-party documents without conducting a pro forma deposition of the holder of the documents, in much the same way that preexisting Rule 55H permitted with respect to hospital records. I believe that the proposed change, while generally desirable, has unintentionally introduced a significant problem, because of the failure to exempt hospital records from its reach (leaving them to be covered by the preexisting 55H rules).

In particular, I am concerned that attorneys will use Rule 55A/B to attempt to obtain hospital records rather than continuing to use Rule 55H. If they do so, 55B indicates that the receiving hospital must produce the requested materials unless within 14 days after service, it serves written objections to the inspection or copying of the designated material. As you know there are numerous authorities in both case law and health care provider regulations requiring medical providers to protect the confidentiality of medical information they hold and to release it only upon proper authorization. Often the patient is not even a party to the lawsuit. A hospital receiving such a subpoena would be required to routinely prepare an objection. That responsibility is even more urgent if the record happens to contain particular kinds

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of information subject to special protections in the federal law (for example, drug and alcohol treatment information) or entitled to special protection under state statutes (HIV tests, certain mental health records, etc.). With respect to those kinds of information, there are explicit statutory provisions prohibiting response to such a demand short of a court order or specific written patient consent. The mere issuance of a subpoena by a litigant will not suffice in such cases even if the patient happens to be a party or otherwise gets notice of the demand.

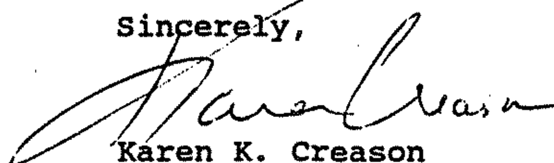
When litigants used the 55H process to obtain hospital records, that problem was circumvented because the facility was authorized to prepare a certified copy of the record, seal it (together with the appropriate information necessary to authenticate it), and forward that sealed package to the presiding officer - judge, workers' compensation hearing officer, etc. The materials were not thereafter opened and distributed absent a direction of the presiding officer to do so. That minimal judicial involvement is lacking under the revised 55A and B processes; the hospitals will have to routinely object to assure that patient rights are protected and to avoid liability for unauthorized release of information. Such objections will, in turn, clog the court motion calendar unnecessarily.

I believe the appropriate resolution of the problem is to exempt production of hospital records from Rule 55A and B and require that they be obtained, as before, under Rule 55H. To do otherwise will impose significant burdens on the parties, the courts, and on the hospitals who will be called on to prepare the necessary objections.

I would very much appreciate the Council's attention to this problem. If something in its prior action addresses this concern, I would appreciate your official comments on how the problem is avoided under the rule changes you have proposed. As I mentioned on the phone, I serve as counsel to the Oregon Association of Hospitals and will need to get information out in their next newsletter about this new process. Unless some reasonable assurances are available to indicate that they are protected in responding to 55A and B requests for documents which are not accompanied by either patient consent or court order, I will have to advise them to make official objections in all cases. In addition, I expect

they will experience considerable confusion trying to figure out whether a subpoena is being issued under 55A and B or under 55H (i.e., whether or not they can respond by preparing the certified copy and mailing it to the presiding judge rather than delivering it directly to a party). I suspect that attorneys preparing subpoenas will have little appreciation for the distinction, either. Given the January 1 implementation date, I would appreciate your response about "legislative history" of the changes as soon as possible.

Sincerely,



Karen K. Creason

KKC:jb