

SECURING ACCESS TO JUSTICE

Fighting Unnecessary Court Secrecy

By Rebecca E. Epstein, Leslie A. Brueckner, and Arthur H. Bryant*

Part Three in a series.

As most trial lawyers know, secrecy pervades our civil justice system. Despite court rules and case law that purport to restrict the use of protective and sealing orders, much of the civil litigation in this country is taking place in secret at all stages of the process. Cases are filed under seal; discovery is governed by overbroad protective orders; exhibits and court records are sealed; and cases are settled in secret. Given the high rate of pre-trial settlement and adjudication, the right of public access to trials does not compensate for the lack of openness during earlier stages of litigation.

In 1989, Trial Lawyers for Public Justice launched a special project — Project ACCESS — dedicated to fighting unnecessary secrecy nationwide. We have won many victories, but the problem continues to grow. For example, in *Foltz v. State Farm*, we are fighting for public access to a federal court file in Oregon that was erased from the public record as part of a settlement, despite the evidence it contains that State Farm systematically cheated many of its policyholders. In *Frankl v. Goodyear Tire & Rubber Company*, we are battling to unseal evidence in a New Jersey case about Goodyear tires that are linked to a pattern of fatalities and serious injuries.

The Causes and Dangers of Unnecessary Secrecy

Unnecessary secrecy exists because plaintiffs, their lawyers, and judges do not contest defendants' demands for confidentiality. Although cases sometimes involve



Three U.S. Air Force personnel riding in this GM Suburban were killed and three others were injured when a Goodyear tire came apart. TLPJ is battling to unseal Goodyear tire documents in this rollover case.

Photo by Lt. Col. Fincham, USAF

information that legitimately deserves protection, defendants rarely limit their requests for secrecy to this type of data. Instead, they routinely seek to keep non-confidential information secret to protect their financial interests. Secrecy prevents victims from learning that they have legitimate claims against the defendant, while artificially preserving the defendant's reputation and preempting scrutiny by the press. In addition, secrecy ensures that the government will not develop or enforce laws addressing the dangerous product or unfair practice. Stock prices are protected, and there is no incentive to invest in developing safer products or better practices. Another perverse result of secrecy is that it allows corporations to demand tort reform, while preventing the public and

government from learning the actual results of litigation.

While most plaintiffs and their counsel would prefer openness, they often feel compelled to stipulate to secrecy. Typically, defendants make secrecy a condition of settlement, or a prerequisite to compliance with plaintiffs' discovery requests. Injured plaintiffs in financial need frequently feel that they have no choice but to agree. And judges often fail to scrutinize requests for secrecy because of their over-burdened schedules, or because they view their role as resolving the narrow disputes before them, without considering the public interest.

The social costs of this cycle are intolerably high. Secrecy perverts our system of justice by weakening public confidence in

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the judiciary and by forcing judges to decide duplicative discovery disputes. Secrecy also hides dangers to public health and safety, resulting in wholly avoidable injuries and deaths. And it undermines our democratic system, since it hides the information that is needed to determine whether laws should be changed.

Fight Unnecessary Protective Orders

Protective orders should not be entered unless they are justified and appropriately limited. Under Federal Rule of Civil Procedure 26(c) and many of its state counterparts, defendants must show “good cause” to justify protective orders.

1. Stress the Presumptive Right of Public Access to Discovery Materials.

The corollary of the good-cause requirement to justify protective orders is that there is a presumptive right of access to discovery materials. Proponents of secrecy can only overcome this presumption by making specific factual demonstrations of significant harm. Conclusory statements or general allegations are insufficient.

2. Rebut Any Showing of Good Cause by Learning the Facts.

Frequently, a defendant cannot prove that information it claims is confidential actually qualifies for protected status. A defendant’s supposedly confidential procedures, for example, may actually be standard practice in the industry. Consult plaintiffs’ attorneys with similar cases, appropriate experts, professional groups, and fact witnesses to undermine defendants’ claims for secrecy.

Most often, defendants claim that documents contain trade secrets, and that dis-

closure of the information would cause competitive harm. Make sure to hold defendants to their burden of proof on these claims. The information must fall within the definition of trade secrets, which is generally set forth in the Restatement of Torts, and must have current competitive value. The defective or hazardous nature of a product is not a trade secret; nor is stale data, information that can be reverse engineered, or material that is of general knowledge.

3. Urge the Court to Weigh the Public Interest in Determining Whether to Issue a Protective Order.

Even if good cause is established, a protective order should not be issued if the public interest in access outweighs the need for confidentiality. Courts have held that even trade secrets do not receive automatic

that sharing provisions must be included in protective orders to prevent the needless obstruction of the litigation process.

- Ensure that Defendants Make at Least a Threshold Showing of Good Cause to Justify Any Umbrella Protective Order.

Defendants often attempt to obtain broad “umbrella” protective orders, under which they may unilaterally designate any discovery information as confidential. Under Rule 26(c), defendants must make at least a threshold showing of good cause to justify these orders. At a minimum, they should be required to identify the categories of documents they claim are entitled to protection and to prove good cause for keeping those categories secret.

- Insist That Any Umbrella Protective Order Contain a Mechanism to Challenge Confidentiality Designations.



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Photos by Herman Farrer

The party receiving discovery must be able to contest confidentiality designations made under umbrella protective orders. Such challenges trigger the producing party’s burden to demonstrate specific good cause for the contested document to be

kept secret. This kind of provision has been instrumental in our work in *Frankl*. In that case, the plaintiffs’ attorney, Christine Spagnoli of Santa Monica’s Greene, Broillet, Taylor, Wheeler & Panish, L.L.P., alleged that certain information designated by Goodyear was not confidential, and that it revealed a significant safety hazard that Goodyear failed for years to remedy. Her pleadings have been crucial to TLPJ’s fight to disclose the contested documents in this now-settled case.

4. If You Are Forced to Agree to a Protective Order, Minimize Its Adverse Effects.

- Demand a Sharing Provision.

Protective orders that forbid the sharing of information among plaintiffs’ attorneys thwart the efficient administration of justice. Many courts have found

that sharing provisions must be included in protective orders to prevent the needless obstruction of the litigation process.

- Limit the Terms of Any Protective Order to the Discovery Phase of Litigation.

The Courier-Journal

Louisville, Kentucky

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Courtroom Cover-Ups

EDITORIAL

The battle over sealed records, in cases of alleged sexual abuse by priests, is just the latest round in a long fight to protect the credibility of our judicial system.

That's what's at stake: nothing less than public confidence in the mechanics of American justice.

Secret justice is a contradiction in terms. The federal judges in South Carolina know that, so they've decided, unanimously, to ban secret legal settlements, believing that closed case files make the courts complicit in covering up information the public needs and deserves - for example, about dangerous products, bad doctors and predatory clergy.

Secrecy in product liability, personal injury and sexual abuse suits comes up most often in state courts, where, at least in Kentucky, the usual practice is to file only a paper saying a settlement has been reached in a civil suit. Thus the details are never made part of the court record. This means that in many cases, the public is denied information it deserves.

Locally, we have seen the consequences of shrouding the work of the courts. Then-Circuit Judge John Potter tried, without success, to make public the details of an agreement between Eli Lilly & Co., the maker of the drug Prozac, and the victims of the Standard Gravure shooting, which excluded some evidence from trial in return for payments to victims and families.

There are innumerable examples of attempted secrecy - from the Mike Troop sexual harassment settlement here to the Wen Ho Lee plea agreement in New Mexico, from cases involving the painkiller Zomax and side-mounted GM gas tanks to injury suits involving retailers like Home Depot and Wal-Mart.

It wasn't always so. Arthur Bryant of Trial Lawyers for Public Justice told the *Los Angeles Times*, "This practice has exploded in the last 20 years . . . it's cheaper to hide the truth from the public."

On the other side, Harvard law professor Arthur Miller, offering the usual caveats, warns that a blanket prohibition against secret settlements could discourage the filing and settling of suits and could threaten trade secrets and personal privacy. His rea-

sonable sounding call for flexibility will serve as welcome shelter for those who should face a storm of criticism over promoting secrecy.

Calls for privacy sell well. They appeal to Americans' traditional fear of intrusive power, especially government. But the claim of a right to privacy, which is in no way applicable to a corporation, shouldn't trump other, more important public goals, like an open justice system.

As the 6th U. S. Circuit Court of Appeals declared recently in rejecting the Bush Justice Department's attempt to close immigration hearings, "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution."

In that opinion, Judge Damon Keith wrote for a unanimous panel, "Democracies die behind closed doors. . . . When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."

Again this year, the Freedom Forum First Amendment Center sponsored a national poll on attitudes toward the First Amendment. It

found that 48 percent of

Americans believe there's too little access to government records, as opposed to 8 percent who think there's too much.

So this much is clear: Those who stand for openness are standing with the people. ■

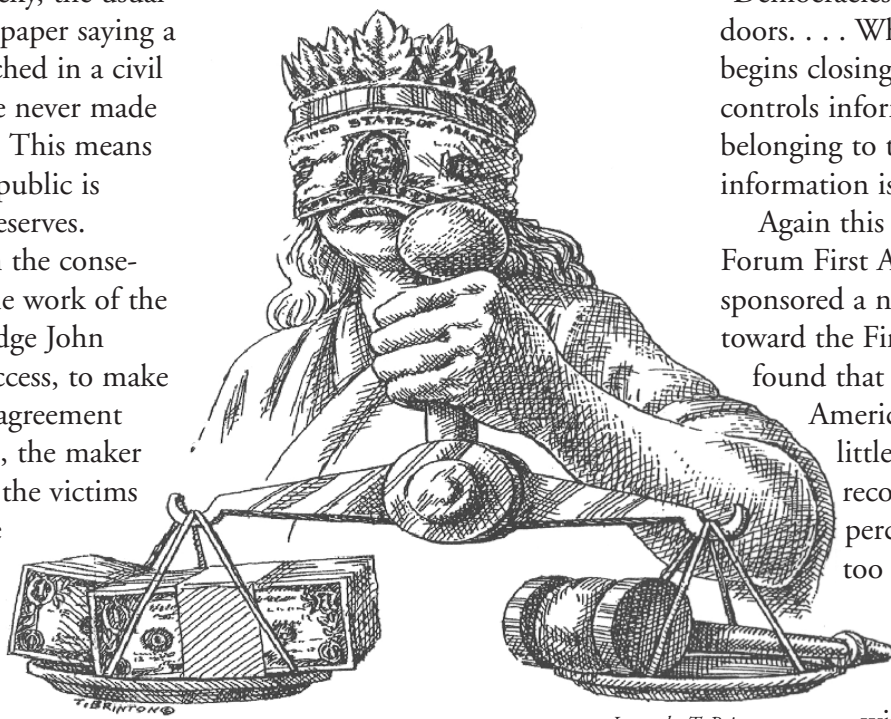


Image by T. Brinton

Defendants commonly try to include provisions to automatically seal court records containing discovery information produced pursuant to a protective order. Such provisions are illegal because an even higher standard applies to justify the sealing of court records, as detailed below.

- Fight Any Provision that Requires Discovery Materials to be Returned to the Producing Party.

An ABA resolution condemns protective orders that require the return of discovery materials at the resolution of the case. Documents must at least be preserved by the producing party to ensure future availability to government agencies or other litigants. Be sure that you do not become the last person to view materials that prove a defendant's misconduct!

Challenge Unnecessary Sealing Orders

While Rule 26(c)'s good-cause standard generally applies to discovery, parties attempting to seal records must meet a significantly higher standard: they must demonstrate a compelling basis for secrecy based on specific facts. If this burden is not met, secrecy is unjustified.

To vindicate this principle, TLPJ is battling in *Foltz v. State Farm* to overturn a federal court order sealing hundreds of court records about State Farm's misconduct. The judge even ordered the case erased from the court's computers and allowed State Farm to remove the entire

case file from the courthouse. After TLPJ intervened, the case file was returned, but court records remained sealed without justification. We recently argued our appeal before the U.S. Court of Appeals for the Ninth Circuit.

Fight Secret Settlements

Secret settlements can also wreak enormous damage, since they prevent the public from learning about defendants' wrongdoing and other important issues addressed in litigation. The public's presumptive right to inspect court records includes access to settlement documents filed in court. A notorious example of the harm caused by secret settlements is the gruesome pattern of injuries and deaths on Bridgestone/Firestone tires, which confidential settlements kept hidden for almost a decade. As a result, millions of unsuspecting consumers continued

to trust their lives to potentially deadly tires. More recently, secret settlements in sexual abuse cases brought against officials of the Catholic church hid information relevant to children's safety. Especially in cases involving public health and safety, TLPJ strongly urges you to resist secret settlements.

Seek Our Help

TLPJ's Project ACCESS challenges unnecessary secrecy nationwide, especially in cases that implicate public health and safety or involve outrageous wrongdoing. If you need help in opposing unnecessary secrecy orders, please call TLPJ or visit our web site at www.tlpj.org to view our cutting-edge briefs on access to justice. We can all benefit from working together. ■

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OUR MISSION

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Through creative litigation, public education, and innovative work with the broader public interest community, we:

- protect people and the environment;
- hold accountable those who abuse power;
- challenge governmental, corporate and individual wrongdoing;
- increase access to the courts;
- combat threats to our justice system;
- and inspire lawyers and others to serve the public interest. ■

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