

MEMORANDUM

TO: Texas Supreme Court

FROM: Chuck Herring
Co-Chair -- Supreme Court Advisory Committee's Ad Hoc
Subcommittee on Court Sealing

DATE: March 5, 1990

RE: Proposed Rule 76a and companion amendments to Rule
166b(5)

I. Introduction

As a member of the Court's Advisory Committee, and as Co-Chair (with Lefty Morris) of the Subcommittee on Sealing Court Records, I had the privilege (albeit sometimes painful) of sitting through several days of hearings and proceedings that culminated in the proposed draft of Rule 76a and the companion amendment to Rule 166b(5), concerning sealing court records. We received hundreds of pages of letters, drafts and written input, as well as many hours of testimony and spirited debate. Without attempting to inflict that complete experience on the Court, I do want to attempt to distill for the Court's benefit some of the testimony and input we received from those participants who expressed "alternative viewpoints," which otherwise would not be before the Court. I hope that this will

be useful background for the Court as it deals with this important and controversial rule-making.¹

I should also mention that the Texas Bar Journal will be publishing the text of the rule, together with commentary articles written from various perspectives, in the April issue. This should elicit substantial additional input from the Bar, and I would hope that the Court's schedule will permit consideration of that information before final adoption of the rule.

Discussed below are the background of the Committee's consideration of the proposed rule (section II, infra), the general operation of the proposed rule (section III); and some of the more controversial issues related to the rule, including discovery (section IV), settlements (section V), the legal standard of the public's right of access (section VI), trade secrets (VII), "public health or safety" provisions (section VIII) and appeals (section IX).

1. Personally, while I certainly agree that the purpose of the rule is salutary, I voted against the final drafts of Rules 76a and 166b(5) as recommended by the Supreme Court's Advisory Committee. Nonetheless, I do not agree with all of the views expressed below by the opponents of the proposed rules.

II. Background

The Texas Legislature adopted section 22.010 of the Texas Government Code effective September 1, 1989. Section 22.010 provides as follows:

"SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed."

Accordingly, the Supreme Court Advisory Committee Chairman Luke Soules appointed a subcommittee to propose a draft rule. The subcommittee conducted two public hearings, on November 18, 1989 and December 15, 1989, and also received substantial input at the Texas Supreme Court's public hearing on November 30, 1989. Twenty-seven participants, including several representatives of public interest and citizen's groups, as well as several media attorneys and representatives, attended and provided valuable input at the hearings. (A list of participants appears under Tab "Y.") The subcommittee accumulated several hundred pages of draft proposals, court decisions, law review commentaries and position statements from many sources.

The Co-Chairs presented a draft proposal to the full Advisory Committee for consideration at its February 9, 1990 meeting. In a not-quite ringing endorsement of the Co-Chairs' work, the Committee almost immediately rejected the Co-Chairs' draft and adopted as a working draft a proposal from Dallas Morning News counsel, Tom Leatherbury and John McElhaney of Locke Purnell.

After another twelve hours of consideration, amendments, sometimes heated debates, and sharply divided votes extending over three sessions (February 9, 10 and 16), the Advisory Committee produced the draft now before the Court.

The remainder of this memo discusses the general structure of the rule and reviews the arguments against some of the rules' most controversial provisions.

(Included under Tab "E" is the original Locke Purnell version, together with its supporting brief and explanatory memorandum. A draft of an article prepared by Tom Leatherbury and John McIlhaney explaining the final draft of the rule as adopted by the Advisory Committee is under Tab "F.")

III. Proposed Rule 76a and Companion Amendment to Rule 166b(5): General Operation

The draft Rule 76a, appearing under Tab "A," defines in paragraph (A)(1) the "compelling need" standard that a moving party must meet to obtain an order sealing "court records," which the rule also defines (paragraph (A)(2)). The draft also provides procedures for the motion to seal (paragraph (B)(2)), notice to the public (paragraph (B)(2)) and the hearing required before court records may be sealed (paragraph (B)(1)). The draft sets out the requirements for sealing orders (paragraph (B)(4)), and provides for emergency temporary sealing orders (paragraph (B)(3)). Finally, the draft specifies the trial court's continuing jurisdiction (paragraph (C)), appeal rights (paragraph (D)), and concludes with a

prohibition against unauthorized removal of court records (paragraph (E)).

The amendment proposed for Rule 166b(5) prohibits protective orders or agreements relating to information involving public health or safety or public office unless the party seeking protection files the discovery with the clerk and complies with Rule 76a. See Tab "A."

IV. Discovery

(a) Introduction. Rule 76a expressly excludes discovery from its definition of "court records." The companion amendment to Rule 166b(5), however, reverses that result as to many discovery records. That anomaly resulted from sharply divided votes of the Advisory Committee in dealing with the final draft of the Rule.

Rule 76a excludes from its coverage all "materials simply exchanged between the parties or . . . discovery made by a party pursuant to a discovery request and not filed with a court" Paragraph (A)(2). At the Supreme Court Advisory Committee's meeting on February 9, 1990, after several hours of argument concerning whether or not to include discovery, a majority of the Committee voted to adopt that language and to table a proposal to include discovery within the scope of the Rule.

The following week, however, on February 16, with a smaller number of the Committee membership in attendance, a majority voted to add language to Rule 166b(5), which effectively

inserted discovery back into Rule 76a, as to any "matters of public health or safety or information concerning the administration of public office or the operation of government"

Clearly, the Committee was sharply divided on this issue, which generated some of the most heated debate of the entire process.

In summary, the arguments against this provision are:

(1) Inclusion of the specified discovery materials subjects a vast amount of litigation to a cumbersome, time-consuming process, unnecessarily and dramatically multiplying litigation costs and delays.

(2) The law has traditionally recognized that discovery materials are fundamentally different from "court records," and that even the common law right of access is inapplicable to discovery. Seattle Times Company v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199 (1984). The rule would completely reverse this view.

(3) The rule's reference to all "matters of public health or safety" is vague but also is vastly overbroad, apparently encompassing all cases involving physicians, hospitals, and perhaps all products liability and personal injury suits, regardless of whether such suits contain information concerning matters that might conceivably pose any risk to the public health or safety.

(4) The requirement that discovery sought to be protected be filed with the clerk will overburden the storage capacity of clerks' offices, thereby creating unnecessary space and budgetary problems. Those problems were the main reasons for the 1988 rule amendments abolishing the filing requirement for most discovery materials.

(5) Even if discovery materials should be subject to the sealing procedure, the last-minute, back-door amendment to Rule 166b(5) makes no sense; the issue should be confronted directly in the definition of "court records" in Rule 76a. In light of the proposed amendment to Rule 166b(5), the language excluding discovery in paragraph (A)(2) of Rule 76a is nonsense.

(6) The "good cause" standard for protective orders pertaining to discovery, including sealing orders, provides a workable, proper standard, and should not be changed.

(b) Nature of Discovery. Opponents of the proposed amendment to Rule 166b(5) argued that historically, at least prior to this amendment, courts have treated discovery differently from the public part of civil trials. See David Chamberlain's draft article, Tab "G"; Lester Houtz letter (2/7/90), Tab "M," item no. 12.

In Seattle Times Company v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199 (1984) the United States Supreme Court held that pretrial depositions and interrogatories were not open to the public at common law, that those materials are not public components of civil trials, and that restraints on discovery do not restrict a traditionally public source of information.

"Moreover, pretrial depositions and interrogatories are not public components of a civil trial.¹⁹

19. Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. See Fed. Rule Civ. Proc. 5(d). Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. See ibid; Wash. Super. Ct. Civil Rule 26(c). Federal district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. See, e.g., C.D. Cal. Rule 8.3; S.D.N.Y. Civ. Rule 19. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

Such proceedings were not open to the public at common law, . . . and, in general, they are conducted in private as a matter of modern practice. . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information. Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny."

104 S. Ct. at 2207-08. Following Seattle Times, courts have consistently recognized that same "fundamental difference." See, e.g., Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) ("[D]iscovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process."); In Re Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987) ("appellant's common law right of access does not extend to information collected through discovery which is not a matter of public record").

Thus, amended Rule 166b(5) would radically change the way discovery has been treated in Texas and throughout the country. Because of the unusual procedure followed to adopt this amendment -- as an indirect piggyback on Rule 76a after failure to achieve the same result directly -- the Supreme

Court Advisory Committee's subcommittee on Rule 166b did not have the opportunity to study the implications of this change.

(c) Cost and Delay. What is clear, the opponents of this change argued, is that a tremendous increase in the number and length of pretrial hearings will occur. Especially in trade secret and related litigation, which frequently involves large amounts of confidential information, litigants can expect multiple, repetitious, hard-fought, and extremely expensive hearings to become the order of the day.

As Lester Houtz argued, "[T]he public's interest in expediting litigation also requires that the courts be able to guarantee the confidentiality of discovery materials. . . . In the absence of such protection, disputes over discovery requests are likely to be even more bitter and protracted Such a result would benefit neither the parties, the courts, nor the public in general." Houtz letter (2/7/90), Tab "M," item no. 12. See Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) ("The public's interest is in seeing that the [discovery] process works and the parties are able to explore the issues fully without excessive delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this in turn could lead to lengthy and expensive interlocutory appeals"); In re Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) ("A smoothly operating system of liberal

discovery is in the interests of litigants and society as a whole, for it contributes to a full and fair airing of all material facts in controversy. If parties are to be forthcoming in responding to requests for discovery, they must have fair assurance that legitimate countervailing interests will be protected, if necessary by a restraining order.").

(d) Existing Good Cause Standard. Rule 166b(5)(c) currently provides a procedure for a trial court to order "that for good cause shown results of discovery be sealed or otherwise protected; that its distribution be limited; or that its disclosure be restricted." Opponents of the proposed amendment argued that the existing rule and the "good cause" standard have worked well with respect to discovery and should not be changed.

Texas practice in this regard has generally followed federal practice, which has recently been reviewed by the Federal Courts Study Committee. Congress created the Committee "to examine problems facing the courts of the United States and to develop the first-ever long range plan for the Federal Judiciary." The Committee issued its recommendations on December 22, 1989, and specifically recommended continuation of protective order practice as to discovery materials:

"Federal courts should continue to use protective orders to preserve the confidentiality of sensitive materials in order to expedite discovery. . . .

Particularly in complex litigation, confidentiality of materials produced through discvoery can assume substantial importance. . . .

. . . Denial of general access by protective orders can serve legitimate interests, such as the protection of trade secrets, as well as easing the discovery process. . . . [T]here are public as well as private interests in expediting proceedings and settlements; consequently, not all information revealed in the course of one litigation should automatically be open to the public or to other litigants who might find it useful."

FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT: DECEMBER 22, 1989, 73-74 (1989).

V. Settlements

The proposed draft would apply to settlement agreements "whether or not filed of record, which restrict public access to matters concerning public health or safety or to information concerning the administration of office or the operation of government." Paragraph (A)(2).

(a) Conflict with Policy Favoring Settlements. The chief argument against subjecting settlement agreements to the rule's formal sealing procedures is that this will discourage settlements and is therefore inconsistent with the well-established policy in Texas law to encourage settlements. See, e.g., Adams v. Petrade Ind. Inc., 754 S.W.2d 696 (Tex. App. -- Houston [1st Dist.] 1988, writ denied); Hernandez v. Telles, 663 S.W.2d 91 (Tex. App. -- El Paso 1983, no writ) (the policy of the law favoring settlements is even stronger than the DTPA policy to protect consumers). Critics of this provision argued that in this time of congested court dockets the last thing the rules should attempt to do is to adopt a policy that will require more trials and less settlements.

This discouragement of settlement may be particularly true in small cases; as David Chamberlain stated:

"[I]n certain instances parties simply cannot afford to settle even frivolous lawsuits by means of public settlement, for to do so would open the floodgates to an endless series of additional frivolous claims. Simply stated, if plaintiff and defendant cannot settle a case on their own terms, they may choose to forego settlement altogether."

Chamberlain draft article, Tab "G." In reaffirming the need for protective orders concerning confidential information, the Federal Courts Study Committee also commented in its December 22, 1989 recommendations that "there are public as well as private interests in expediting . . . settlements." FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 74 (1989).

One attorney participant argued that the rule's impediments to confidential settlements in injury cases may harm both plaintiffs and defendants -- such settlements are often used to protect plaintiff/clients "from those who would approach them with the knowledge that they had received substantial sums of money, and with the knowledge that they were either physically impaired, brain-damaged, or grieving from the death of a close family member." Louis M. Scofield letter (2/19/90), Tab "M," item no. 19.

As Douglas Corderman of Emerson Electric Co. -- an electrical and electronic manufacturing company with \$7 billion in annual sales, 70,000 employees (and two plants in Texas) -- analyzed the real-life importance of settlements for his company:

"Settlements ease case loads, provide for a speedier resolution of disputes, and frequently reduce the total cost to the parties by minimizing legal expenses and avoiding excessive verdicts. One of the principal reasons parties are willing to settle is because settlement terms remain private. If this condition were to change, companies such as Emerson would be much more reluctant to settle."

Corderman letter (1/19/90), Tab "M," item no. 5.

Compare the intent of the Advisory Committee's own recommendation for the amendment to Rule 166, which would include a new paragraph (o), reading: "The settlement of the case. To aid such consideration, the court may encourage settlement." The Comment to that proposed change states that the change is intended "to express the ability of the trial courts at pretrial hearings to encourage settlements."

Compare also the approach of the Minnesota Supreme Court in Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197 (Minn. 1986), in affirming a trial court's action in sealing filed settlement documents in five related cases. The court held that a common law standard applied to the review of restricted access. The court noted that,

"The litigants requested that the files be sealed in order to protect the families of the deceased crash victims from public intrusion into their private lives and also to protect against influencing settlements of other suits against Galaxy involving the same air crash. The families believed that allowing the public access to these amounts could result in thefts, exploitation, trespass, and physical injury to them."

392 N.W.2d at 200. The Minnesota Supreme Court held that the trial court did not abuse his discretion in concluding that the

privacy interests asserted by the litigants justified restricting access. The Supreme Court noted that the trial court had based his decision on three factors; (1) that disclosure could produce theft, exploitation or injury to the heirs; (2) that disclosure would impede settlements in other cases and "thereby foster more and protracted litigation," and (3) that the court would benefit by settlement rather than lengthy trials. 392 N.W.2d at 205.

(b) Rule-making Authority. To the extent that the proposed rule would modify any preexisting rights of private parties to contract to settle cases voluntarily and privately, the question was also raised as to whether such a modification exceeds the rule-making authority of the Court, which is limited by section 22.004(a) of the Government Code to rules that do "not abridge, enlarge, or modify the substantive rights of a litigant." See Jett Hanna letter (11/30/89), Tab "M," item no. 11.

(c) Application to Unfiled Settlement Agreements. The rule's application even to unfiled settlements also drew criticism. Texas Government Code section 22.010, the statute requiring adoption of guidelines concerning sealing, refers to "the records in a civil case, including settlements" Some Subcommittee participants questioned whether an unfiled settlement agreement is ever a "record in a civil case." They asserted that an interpretation that unfiled documents constitute "civil case records" would reverse traditional

notions of the meaning of "court records" and would raise many further questions, such as whether the rule also applies to settlement agreements in "cases" that have not yet been filed. Critics further questioned whether attorneys would now have new responsibilities as "record" custodians, whether counsel would have to retain custody of the originals of such "records," whether counsel would have to provide access in their offices to the public to inspect and/or copy such records and, if so, under what terms and conditions such public access might be required, and whether record retention would be necessary for any particular period of time.

One proposal rejected by the Advisory Committee would have confined application of the rule to settlements actually filed, or for which court approval or enforcement is sought. Charles Babcock letter (12/29/89), Tab "M," item no. 2.

(d) "Matters Concerning Public Health or Safety." The general objections raised to the rule's broad but vague application to settlements restricting access to "matters concerning public health or safety" are discussed in section VIII below.

VI. Public Right of Access

(a) Introduction. The draft rule creates an extremely strict "compelling need" standard that must be met in order to seal "court records." Paragraph (A)(1) requires a showing of a "specific interest" that is "substantial enough to clearly override the presumption that all court records are open to the

general public," and then lists four specific elements that must be shown in order to meet the standard. The required showings include: that a "specific interest" exists that "clearly outweighs" the interest in open court records; that "immediate and irreparable harm" will otherwise result; that "no less restrictive alternative exists"; that sealing will effectively protect the interest without being overbroad; that sealing will not restrict access to information "concerning matters related to public health or safety" or public office.

Debate before the Subcommittee and the Committee touched on several related questions, including: (1) Is the public's right of access to civil court records based upon common law or upon constitutional law? (2) What is the extent and nature of that right of access? (3) What other rights are appropriate to balance against that right and what showing must be made to overcome that right? (5) What are the "court records" to which the right of access applies -- do they include discovery materials that are not filed of record, and do they include settlement agreements, filed or unfiled? (The "court records" issue as it relates to discovery and settlement agreements is discussed in sections IV and V of this memo.)

(b) Constitutional Versus Common Law Right of Access. The question of whether the public's right of access to civil court records is based upon constitutional law, rather than common law, is important. Clearly, if that right of access arises from the constitution (federal or state), a stricter standard

of scrutiny is likely to apply. The extremely strict standard of "compelling need" adopted by the Advisory Committee apparently assumed the existence of such a constitutional basis.

Opponents of the compelling need standard argued that there is no such constitutional right, and that therefore the fundamental premise underlying the standard was erroneous. See David Chamberlain letter (11/17/89), Tab "M," item no. 4.

Indeed, no decision of the United States Supreme Court, the Fifth Circuit Court of Appeals or the Texas Supreme Court has yet held that there is a constitutional right of public access to civil court records. The federal courts of appeals are divided on the issue. Compare In Re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (no constitutional right of access to records in pre-judgment civil actions); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981) (holding no First Amendment right of access to courtroom exhibits), with Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3rd Cir. 1984) (extending First Amendment right of access analysis to civil trials). Cf. Times Herald Printing Co. v. Jones, 717 S.W.2d 933 (Tex. App. -- Dallas 1986), vacated and dismissed per curiam, 730 S.W.2d 648 (Tex. 1987) (holding common law right of access dependent on judge's discretion and absent showing of extraordinary circumstances or compelling need, limited First Amendment rights of access are not implicated). See also Comment, Recent Developments -- Public Access to Civil Court Records: A Common Law Approach, 39 VANDERBILT L. REV. 1465 (1986).

In Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306 (1978), (see Tab "O"), the United States Supreme Court discussed and analyzed at some length the "common-law right of access to judicial records." Broadcasters sought access to "Watergate tapes" that had been admitted into evidence in the criminal trial of John Mitchell; the broadcasters sought to copy the tapes for broadcast and sale. The Supreme Court affirmed Judge Sirica's denial of such access. The Court agreed that a common law right of access to judicial records existed, but also held that the right is not absolute and that courts in the exercise of their "supervisory powers" over their own records could deny access if the records might be used for certain "improper purposes."

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . .

It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of the 'painful and sometimes disgusting details of a divorce case.' . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, . . . or as sources of business information that might harm a litigant's competitive standing

It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."

98 S. Ct. at 1312-13. (emphasis added)

As a consequence of the lack of controlling decisional law regarding the existence or nature of any such constitutional basis, some opponents of the proposed rule argued that the rule should not attempt to specify a precise standard, but rather should allow trial court discretion to follow the evolving course of the law as developed in future appellate court decisions. See Jett Hanna letter (11/30/89), Tab "M," item no. 11; David Chamberlain letter (12/6/89), Tab "M," item no. 4.

(c) Rule-making Limitation. Mr. Hanna also argued that to adopt a standard that altered substantive rights of litigants would exceed the rule-making authority of the Supreme Court under section 22.004(a) of the Texas Government Code. Section 22.004(a) authorizes the Supreme Court to make rules for "practice and procedure" in civil actions, but imposes the limitation that the rules "may not abridge, enlarge, or modify the substantive rights of a litigant." Such a violation of section 22.004(a), he further argued, would "encroach on legislative prerogative." He recommended a standard requiring that the trial court make findings "demonstrating that sealing

is permitted under applicable constitutional, statutory, and common law." See Jett Hanna letter (11/30/89), Tab "M," item no. 11.

(d) Practical Difficulties in Showing "Compelling Need." Other participants argued that the standard would prevent sealing in almost every conceivable case. "Civil cases in which the standard can be met will be extremely rare." David Chamberlain draft article, Tab "G." Some family law practitioners feared that the rule would prevent protection of financial and personal details of the most private sort that are sometimes revealed in bitter divorce suits. Cf. Nixon v. Warner Communications, Inc., supra, 98 S. Ct. at 1312-13 ("[T]he common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of the 'painful and sometimes disgusting details of a divorce case.'"). Similar concerns were expressed concerning whether any protection would be available in business dissolution suits (e.g., physician or lawyer partnership dissolutions) in which private financial information might be revealed.

Objections to the further requirement in paragraph (A)(1)(d) that the movant demonstrate that sealing would not restrict public access to information "concerning matters related to public health or safety" are discussed in section VIII below.

(e) "Immediate and Irreparable Harm." Opponents of the "compelling need" standard in the draft also objected to the "immediate and irreparable harm" requirement in paragraph (A)(1)(a) on the ground that in certain instances -- such as trade secret cases or cases involving sealing of records relating to sexual abuse of infants -- the risk of harm might not necessarily be "immediate." In the case of the abused infant, for example, the harm arguably would not occur until the child reached an age and level of comprehension sufficient to allow reading and understanding of the court records describing the abuse.

VII. Trade Secrets

(a) Introduction. Lengthy discussions before the Subcommittee and the full Advisory Committee focused upon how to treat trade secrets. Members of the Intellectual Property Law Section of the State Bar argued quite strenuously that trade secrets and "other intangible property interests" should be excepted completely from the rule or at least should receive different treatment. See, for example, the letters from Margaret Anderson (1/10/90) Tab "M," item no. 1; Edward G. Fiorito (12/29/89) Tab "M," item no. 8; Jack Goldstein (12/26/89) Tab "M," item no. 9; Jerry R. Selinger (12/29/89) Tab "M," item no. 21.

Gale Peterson, Chairman of the Intellectual Property Law Section, wrote letters and has also prepared a commentary article objecting to the Committee's draft. See Tabs "M,"

items nos. 15 and 16 and Tab "H." The Subcommittee also received correspondence from other intellectual property law practitioners and from business interests concerned about the possible negative effects of the proposed rule upon economic development in Texas, especially in the areas of high-tech and biomedical research.

In summary, the arguments concerning protection of trade secrets are:

(1) The proposed rule would make almost impossible the protection of trade secrets and related property interests. These interests are well-recognized property rights under existing law and therefore merit protection and have heretofore received protection under the law generally and under discovery procedures in particular.

(2) Litigation of trade secret suits inevitably requires presentation of extensive evidence showing the details of the trade secret in issue, measures taken to develop the secret, security measures, financial information, etc.

(3) As written, the rule would mean that protection of these existing property rights would be eliminated. Filing suit to protect a trade secret would mean loss of the trade secret.

(4) Because the stringent standards of the rule would make nearly impossible the protection of these property interests, in many instances the rule would effect a taking of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Cf. Ruckelshaus v. Monsanto Company, 467 U.S. 986, 104 S. Ct. 2862 (1984). In some instances the rule would also violate privacy interests protected by the Fourth and Fourteenth Amendments.

(5) The proposed rule conflicts with federal and state laws that already recognize that vested property interests in trade secrets and sensitive commercial information, by definition, carry a "compelling need" not to be disclosed.

(6) The rule would produce a revolutionary change in the practice of intellectual property law in Texas, creating endless discovery and sealing hearings, and effectively requiring multiple mini-trials in each case. This will result in sky-rocketing litigation costs, which in turn will severely discourage high-tech and other companies from locating their operations in Texas.

(7) This rule sends exactly the wrong message at exactly the wrong time. At the same time that Texas is desparately attempting to attract and develop businesses based upon new technologies, including computer operations, information services, biotechnology, medical advances, etc. -- this rule will signal that Texas is making nearly impossible the protection of such advances and that protection through the Texas court system will be extremely expensive and risky.

Despite those arguments, the Advisory Committee's draft does not provide for any exception or different treatment for trade secrets. Some of the proposals providing such exceptions are under Tab "I." See also Gale Peterson's letters under Tab "M," items nos. 15 and 16.

In addition to the objections concerning inclusion of trade secrets within the general scope of the sealing rule, the intellectual property Bar participants also strenuously objected to the draft's treatment of settlement agreements and discovery (through the companion amendment to Rule 166b(5)), arguing that trade secrets litigation would be particularly hard hit because of the complexity and enormity of discovery in such litigation. The result would be even more discovery mini-trials -- with the potentially apocalyptic result that losing the sealing motion would mean losing the trade secret.

(b) Definition of Trade Secrets and Other Intangible Property Rights. The intellectual property lawyers who provided input to the Subcommittee and Advisory Committee argued that the rule should provide protection for both trade secrets, as traditionally defined, and for other "intangible property interests" more recently recognized by law and technology. See the discussion in Gale Peterson's letter of 2/15/90, Tab "M," item 16.

In Hyde Corporation v. Huffines, 314 S.W.2d 763 (Tex. 1958), the Texas Supreme Court defined "trade secret," adopting section 757 of the Restatement (First) of Torts:

"Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. * * * A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article."

See also American Precision Vibrator Co. v. National Air Vibrator Co., 764 S.W.2d 274, 276 (Tex. App. -- Houston [1st Dist.] 1989, no writ); Bertotti v. C.E. Shepherd Co., Inc., 752 S.W.2d 648 (Tex. App. -- Houston [14th Dist.] 1988, no writ); Alan J. Richardson & Assoc. Inc. v. Andrews, 718 S.W.2d 833 (Tex. App. -- Houston [14th Dist.] 1986, no writ).

As Peterson pointed out in his February 15 letter, time and technology have passed beyond the 1939 Restatement (First) of

Torts definition. The Restatement (Second) of Torts excluded trade secrets law entirely, preferring to treat that area in the separate Restatement dealing with unfair competition, which has not yet been published.

Much of modern technology relates to "information," rather than the heavy industry that the Restatement (First) authors were familiar with. As Peterson characterized some of the new categories of information developed, protected and even bought and sold by modern businesses:

"In addition to the traditional concept of 'trade secrets,' companies today typically count as assets somewhat generic categories of information now commonly known as 'know-how' and 'show-how.' 'Know-how' generally refers to a company's particular knowledge in a specified field, while 'show-how' generally refers to technical or managerial assistance. 'Know-how' (and to a lesser extent 'show-how') are becoming international terms of art -- e.g., the European Economic Commission recently promulgated Know-How Licensing Regulations Under the Rome Treaty. 'Know-how' is frequently licensed in conjunction with a patent for separate consideration and sometimes by itself."

See Tab "M," item no. 16.

Additionally, in Carpenter v. United States, 484 U.S. 19, 108 S. Ct. 316 (1987), the Supreme Court recognized that "confidential information" could constitute "property" under federal law. "Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy."

108 S. Ct. at 320. In Nixon v. Warner Communications, Inc., 435 U.S. 588, 98 S. Ct. 1306, 1312 (1978), in analyzing the "common-law right of access," the court also noted that courts had properly denied access to judicial records that could be used as "sources of business information that might harm a litigant's competitive standing" Similarly, federal Rule 26(c)(7) also allows for protection of "confidential" information, even if such information does not rise to the level of a trade secret.

Thus, Peterson recommended that protection be accorded both "trade secrets" and "other intangible property rights."

"The phrase 'intangible property right' is intended to make clear that the subject information protected from forced disclosure under the proposed rules is not limited to technical types of information, but includes the type of information which has been recognized both in the marketplace and in the courts as both valuable and protectable, namely know-how, show-how, and the types of information covered by § 769 of the Restatement (First). 'Property right' is also the phrase used in Rule 166b(5), TRCP. On the other hand, the phrase used in Rule 26(c), Fed. R. Civ. P., namely 'trade secret or other confidential research, development, or commercial information' would also be acceptable. Overall, the phrase 'trade secret or other intangible property right' (or the phrase used in Rule 26(c)) is intended to cover truly valuable, commercial-type information and materials. It is not intended as a general phrase to permit secreting information which the court would otherwise not treat as a property right. It is believed that referring to this information as a 'property' interest meets that objective."

See Tab "M," item no. 16.

(c) Rule 507 and Trade Secrets Privilege. Rule 507, Texas Rules of Civil Evidence, specifically creates a privilege for trade secrets.

"A person has a privilege . . . to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require."

Even prior to the adoption of Rule 507, the Texas Supreme Court had held that disclosure of trade secrets should not be required except when "indispensable to the ascertainment of truth." Automatic Drilling Machines, Inc. v. Miller, 515 S.W.2d 256, 259 (Tex. 1974). More recently, in Garcia v. Peeples, 734 S.W.2d 343, 346 (Tex. 1987), the Court reiterated the importance of protecting trade secrets, observing that for thirty years the rules of civil procedure have included provisions "specifically tailored to prevent dissemination of trade secrets"

The intellectual property lawyer participants argued that by excluding any such provisions "specifically tailored to prevent dissemination of trade secrets," proposed Rule 76a would represent a radical and fundamental change in the manner in which the Supreme Court and the rules have treated trade secrets in the past.

(d) Procedural Timetable and Special Litigation Concerns. The intellectual property lawyers viewed the procedural timetable established by the rule as particularly threatening to the substantive rights in issue in their litigation. Because the rule would require a hearing within fourteen days

or less, as a practical matter that might mean that the trade secret litigant would have to be prepared for a mini-trial within fourteen days of filing suit or filing an answer. Loss of the mini-trial battle on sealing could mean loss of the war to protect the substantive right.

Often trade secrets litigation arises rapidly in the context of a former employee or other person in a confidential relationship allegedly stealing or misappropriating the trade secret. This results in a race to the courthouse and expedited discovery. Rule 76a could require that within fourteen days either a plaintiff or defendant or both could be compelled to establish "clearly" the "specific interest sought to be protected," that is, the trade secret. Moreover, that showing must be by "a preponderance of the evidence." That showing in effect is the same showing that otherwise would be required to be made at trial on the merits. The rule thus requires being prepared for trial on the merits within fourteen days.

Loss on the sealing issue could mean loss on the merits, for cases have held that filing documents of record without protection by a sealing order makes the documents public, no longer private or secret. See, e.g., M.R.S. Datascope, Inc. v. Exchange Corporation, Inc., 745 S.W.2d 542 (Tex. App. -- Houston [1st Dist.] 1988, no writ). Or as one court more colorfully phrased the point, "Proprietary information, in the trade secret category, is not unlike the status of virginity. Once taken without consent, whether by seduction or rape, it is

gone forever." Wearly v. FTC, 462 F. Supp. 589, 600 (D.N.J. 1978), vacated on other grounds, 616 F.2d 662 (3d Cir. 1980).

Comment b to section 757 of the Restatement (First) of Torts set out several factors to be considered in determining the existence of a trade secret:

- (1) the extent to which the information is known outside the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken to protect the secret;
- (4) the value of the information to its owner or the owner's competitors;
- (5) the effort and cost of developing the information; and
- (6) the ease or difficulty with which others could acquire or duplicate the information.

Plainly, full preparation of a trade secrets lawsuit for trial on the merits in order to present the evidence as to each of those items may well take months or even years -- far more than fourteen days.

(e) "Taking" and Privacy Issues; Constitutional and Statutory Restraints on Rule-Making. As noted above, a number of intellectual property lawyers argued that adoption of the current draft of Rule 76a would result, at least in some cases, in an unconstitutional "taking" of property interests. Because the burdens that must be met under the rule in order to protect confidential information are so stringent, and because the

timetable is so short, protection of such property interests would be impossible.

The result, they argued, would be an unconstitutional "taking" in violation of the Fifth and Fourteenth Amendments. In Ruckelshaus v. Monsanto Company, 467 U.S. 986, 104 S. Ct. 2862 (1984), the Supreme Court considered a law that required Monsanto to disclose trade secrets information concerning pesticide to the EPA and allowed the EPA to reveal the information to the public. The Court concluded that under certain circumstances the law could result in a violation of the Taking Clause by taking Monsanto's "property" without just compensation. Gale Peterson also quoted the conclusion from Jager's treatise on trade secrets law: "In view of Monsanto . . . the states under the Fourteenth Amendment should be precluded from enacting laws or regulations that take trade secrets for public use without just compensation, or destroy or transfer them for private use at all." M. JAGER, TRADE SECRETS LAW HANDBOOK § 4.01[3] (1989). See also Wearly v. FTC, 462 F. Supp. 589, 598 (D.N.J. 1978), vacated on other grounds, 616 F.2d 662 (3d Cir. 1980) ("Failure to provide adequate protection to assure confidentiality, when disclosure is compelled by the government, amounts to an unconstitutional 'taking' of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors. The constitutional limitation cannot be altered

by any branch of government."); South Florida Growers Association v. United States Department of Labor, 554 F. Supp. 633 (S.D. Fla. 1982) ("Failure to provide adequate protection when property is placed in jeopardy by governmental action can amount to an unconstitutional 'taking' of property by destroying it or by exposing it to the risk of destruction."); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1374 (9th Cir. 1980).

Gale Peterson further raised a constitutional privacy argument, contending that "forced disclosure of commercial information disclosed during discovery and not used at trial" would be unconstitutional, citing Tavoulaareas v. The Washington Post, 724 F.2d 1010 (D.C. Cir 1984), reh'g granted and vacated. See his letter (2/15/90), Tab "M," item no. 16. In Tavoulaareas the court held that the right of privacy secured by the Fourth Amendment protected confidential business information in depositions. The court reasoned in part that "[i]f the purpose of the common law right of access is to check judicial abuses, then that right should only extend to materials upon which a judicial decision is based."

Louis Scofield also objected to the devaluation of the right of privacy that he perceived would result from the proposed rule:

"It would be a hollow right indeed if the valuable right to privacy can be stripped away through the filing of a lawsuit and payment of a \$135 filing and service fee, regardless of the merit of the claim."

Scofield letter (2/19/90), Tab M, item no, 19.

A related statutory argument asserted that Congress and the Texas Legislature have already evaluated and balanced trade secrets and other confidential business information in a variety of contexts and that proposed Rule 76a would conflict with those legislative judgments. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(b)(4) (specifically exempting trade secrets and confidential commercial and financial information); Privacy Act of 1974, 5 U.S.C. § 552a(b) (generally prohibiting disclosure of personal information without consent); Internal Revenue Code, 26 U.S.C. § 6103 (concerning disclosure of business information given for purposes of tax collection); Texas Open Records Act, article 6252-17a (exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision"). Peterson argued that the common feature in "all of those laws is the virtually universal recognition that the need to protect trade secret and commercial information from disclosure out-balances any competing need for disclosure." Peterson letter (2/15/90), Tab "M," item no. 16.

Therefore, Peterson argued, with respect to trade secrets and related information, the issue of sealing must begin with the presumption that there is an "overriding or compelling need not to force a public disclosure. That fundamental difference in the rights at issue distinguishes trade secrets and commercial information from the other types of information considered by the subcommittee." Id.

Jett Hanna's statutory argument under the Texas Government Code, section 22.004(a), also applied to any possible constitutional violations. Since section 22.004 prohibits the Supreme Court from making any rule that would "abridge, enlarge, or modify the substantive rights of a litigant," to the extent that the rule would diminish litigants' rights under the Fourth, Fifth and Fourteenth Amendments, the rule would exceed the Court's rule-making authority. See Jett Hanna's letter (11/30/89), Tab "M," item no. 11.

(f) In Camera Proceedings. Paragraph (B)(1) of the Advisory Committee's draft of Rule 76a allows the trial court to conduct an in camera examination inspection of "records where necessary to prevent disclosure of records sought to be protected." Some participants argued that the rule should expressly allow for additional in camera proceedings, including the taking of testimony in camera when necessary to protect the information sought to be disclosed. This was particularly important, they argued, since the rule allows intervention by anyone, regardless of their motives and regardless of whether they represent a litigant's competitors.

One draft rejected by the Advisory Committee, for example, contained the following language: "the hearing may be conducted in camera upon request by any party if the court finds from affidavits or other evidence that an open hearing would reveal the information sought to be protected."

The argument in support of that language was that a completely public trial or hearing cannot be conducted in all trade secrets cases -- to do so would automatically result in loss of the trade secrets sought to be protected if the public and all potential competitors could be present at the proceeding to see and hear the details of the trade secret in issue.

Trade secret decisions in other jurisdictions have recognized the propriety of in camera or limited-attendance proceedings. See, e.g., Air Products & Chemicals, Inc. v. Johnson, 296 Pa. Super. 405, 215 U.S.P.Q. 547 (1982) (suit by former employer against former employee and his current employer seeking injunctive relief; during a hearing concerning trade secrets, the trial court excluded representatives of the defendant employer other than counsel during testimony of plaintiff's witnesses, and prohibited persons present at the closed portions of the hearing from disclosing the evidence presented; the appellate court approved the trial court's action, noting that a public hearing would have destroyed the value of the trade secrets and would have confronted plaintiff with a "Hobson's choice" of either disclosing and losing its trade secrets or abandoning its judicial efforts to protect the secrets); Gai Audio of New York, Inc. v. Columbia Broadcasting System, Inc., 27 Md. App. 172, 340 A.2d 736, 188 U.S.P.Q. 75 (1975) (affirming trial court's action in taking testimony in camera concerning royalties, income and cost information

claimed to be trade secrets); Space Aero Products Co., Inc. v. R. E. Darling Co., Inc., 238 Md. 93, 208 A.2d 74, 145 U.S.P.Q. 356, 62 A.L.R.2d 509 (1958), cert. denied, 382 U.S. 843 (1965) (upheld trial court's action in excluding defendant's expert witnesses unless they took an oath of secrecy as to all matters testified to at hearing in trade secrets case).

(g) Public Policy: Economic Development. As noted above, several participants lamented the potential effect on economic development in Texas from adoption of the proposed rule. Multiple, time-consuming, expensive mini-trials on sealing issues in trade secret cases, they argued, would deter research and technology companies from locating or developing in Texas. Representative comments included:

"There would be a most chilling effect on 'high-tech' companies if their competitors were allowed to intervene for the purpose of seeking access to litigated trade secrets. Such a 'side-show' would significantly increase the cost of litigation and misdirect focus from the primary dispute between the party litigants. Exploitation and utilization of valuable trade secrets could also be unduly limited out of fear of potential loss. This might result in economic detriment to our state."

Jerry R. Selinger letter (12/29/89), Tab "M," item no. 21.

"As a matter of public policy, if the Texas courts do not provide 'reasonable access to' protective orders for trade secrets and confidential information, legitimate businesses -- which make significant investments in developing trade secrets and confidential information -- will locate outside Texas, thereby hurting the Texas economy; and trade secret and confidential information thieves and pirates will look to Texas for 'political asylum' from traditional principles of business ethics and morality."

Jack C. Goldstein letter (12/26/89), Tab "M," item no. 9.

"I believe that, in the absence of an amendment as proposed by Mr. Peterson, the proposed new rule, while directed to a worthwhile general goal, would have a stifling and detrimental effect on the creative efforts necessary for our state and country to remain in the ranks of the innovators, and reverse the current trend toward becoming a consumer nation."

Margaret E. Anderson letter (1/10/90), Tab "M," item no. 1.

(h) Trade Secrets -- Alternative Versions. Collected under Tab "I" are the alternative drafts dealing with trade secrets that were presented by various intellectual property lawyers.

Testimony before the Subcommittee focused on trade secrets in two contexts: (1) substantive trade secrets litigation in which a trade secret forms the basis of an affirmative claim for relief, (2) other litigation, primarily products liability cases, in which a claim of discovery privilege is asserted based upon alleged trade secrets. (Obviously trade secret claims can arise in a wide variety of other litigation, particularly in commercial suits.)

Concerning the cases in which a trade secret privilege is asserted during discovery in a products liability suit, the Subcommittee received testimony from some plaintiffs' attorneys about cases in which agreed confidentiality orders were entered and then a "Confidential -- Trade Secrets" stamp appeared on all documents produced, including such obviously public matters as newspaper articles. Those attorneys argued that the term trade secret is used too loosely and indefinitely, resulting in shielding information which is already public.

The intellectual property lawyers' response was two-fold. First, they argued that if there are abuses in particular cases, the solution is to seek a remedy from the court before whom the matter is pending -- not to use the occasional abuse as an excuse to abolish the property rights of innocent trade secret owners. Second, they responded that the definition of trade secret has been known in Texas for over thirty years, ever since the Supreme Court adopted the definition of section 757 of the Restatement (First) of Torts in Hyde Corporation v. Huffines, as discussed above; allowing newspaper articles to be classed as trade secrets is simply weak advocacy, not a problem with the existing law.

In any event, these two different contexts in which trade secrets were discussed resulted in two different approaches to drafting a trade secrets exception. The first would except trade secrets from the operation of the rule in all litigation, either by a blanket exception for all trade secrets claims or by creating a different standard applicable to all claims of trade secrets. The second would except trade secrets from the operation of the rule only in cases in which the trade secret itself formed the basis of an affirmative claim for relief. Examples of both approaches appear under Tab "I."

VIII. "Public Health or Safety" Provisions

(a) Introduction. The proposed rules contain three references to "public health or safety":

(1) paragraph (A)(1)(d) of Rule 76a provides as one of the requirements that must be met in order to establish the "compelling need" that "sealing will not restrict public access to information concerning matters related to public health or safety, or to the administration of public office or the operation of government";

(2) paragraph (A)(2) of Rule 76a includes within the definition of "court records" to which the rule applies "settlement agreements . . . which restrict public access to matters concerning public health or safety or to information concerning the administration of public office or the operation of government";

(3) amended Rule 166b(5) would prohibit orders or agreements relating to "protecting [sic] disclosure of information concerning matters of public health or safety or information concerning the administration of public office or the operation of government" unless the party seeking discovery files the discovery and complies with Rule 76a.

In each of these three contexts -- defining compelling need, settlements, and discovery -- the same objections were raised: the language used is vague, ambiguous and overbroad; the result will be cumbersome and costly, both in terms of legal fees and costs and in terms of court time and resources.

(b) "Relating to" or "Concerning" "Public Health or Safety." The references to "relating to" and "concerning" public health and safety are about as broad and vague as possible. Arguably all lawsuits involving physicians, nurses, psychologists, or health care providers of any type "relate to" or "concern" public health -- after all, those persons treat the public's health. Even routine business litigation involving those persons appears to fit within the all-encompassing literal sweep of the "relate to" or "concern"

standard. That would include partnership dissolution suits, employment disputes, and commercial litigation of any type. Similarly, the language evidently reaches all lawsuits involving hospitals, treatment centers, biomedical facilities, medical research centers, and medical schools.

Opponents of these provisions argued that the scope of this language is vastly overbroad and unfairly and indiscriminately attacks entire segments of the economy. The unwarranted assault on all physicians and hospitals, for example, will ultimately merely increase health care costs, without serving any public interest.

The same argument was made about the potential deterrent effect on biotechnical, biomedical, medical research, etc. -- industries and companies that Texas is otherwise attempting to attract and develop would receive a very negative message about the costs of doing business in this State.

Likewise, the rule would apparently apply to almost all products liability and personal injury suits, regardless of whether or not such a suit actually involved a threat or hazard to the public.

The language is so broad, in fact, that arguably it even extends to what were generally considered to be the most compelling examples of the need to seal court records: cases involving sexual abuse of infants. Unanimously the participants who spoke before the Subcommittee and the Advisory Committee agreed that when an infant has been sexually abused

at an age before the child can possibly comprehend the nature or significance of the action, an extremely compelling argument can be made that court records should not be left unsealed and potentially available to traumatize the young victim in later life. Yet such an incident "relates" to public health of the society or community in which the conduct occurs, and hence perhaps cannot be sealed under paragraph (A)(1)(d).

(c) "Detrimental" Limitation. Various participants suggested, but a majority of the Committee rejected, a change in the related-to-public-health-or-safety standard that would have limited application to instances in which the information was actually in some way "detrimental" to public health or safety. Such a limitation, proponents argued, would eliminate the unjustifiable, broadside attack on all physicians, hospitals, medical research facilities, product manufacturers, etc. in all cases "relating to" health or safety.

IX. Appeals

The major reason for the rule's very liberal policy toward intervention, continuing jurisdiction, and appeal was the view expressed by media representatives that too often in the past members of the press have been unable to challenge sealing orders because they have learned of the orders after the fact and after expiration of the trial court's plenary jurisdiction. See, e.g., Times Herald Printing Co., supra, 730 S.W.2d at 649 (holding that newspaper was not a party or intervenor because motion to unseal was filed after the trial

court lost plenary power over its judgment); Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. App. -- San Antonio 1989, no writ) (holding that a plea of intervention was untimely where filed after judgment had been entered in the case).

Opponents of those provisions, however, argued that they go too far. Under the draft rule, anyone can intervene in any lawsuit that involves a sealing motion or order, and the rule also permits immediate appeals. The result may be multiple interventions, multiple hearings on motions to seal or unseal, perhaps even multiple hearings on the identical records or issues, and multiple, simultaneous appeals. Opponents suggested that in a document-intensive, high-profile suit, this could produce enormous delay and expense and that, therefore, the appeal rights should be narrowed, perhaps to a single, final appeal, with pre-judgment appellate review limited to the mandamus remedy. See David Chamberlain draft article, Tab "G."

X. Conclusion

The issues of whether and how to seal court records are complex and evoke strong and varied opinions from many different perspectives. Proposed rule 76a, together with the companion amendments to Rule 166b(5), creates a veritable thicket of constitutional, statutory, common law and procedural issues. The many public and private interests affected by the rule are exceedingly difficult to reconcile, and that difficulty is compounded by the diverse contexts in which sealing orders arise, including family law, trade secrets, products liability, commercial litigation.

My advice to the Court -- after distilling all of the knowledge and wisdom I have acquired during many, many hours of listening and reading and studying about these issues -- is simple: good luck. Good luck, and may you have the patience and insight to develop a reasonable, workable rule.

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TRCP 76a. Sealing Court Records

A. Definitions.

1. Compelling Need. "Compelling Need" means the existence of a specific interest which, in the administration of justice, is substantial enough to clearly override the presumption that all court records are open to the general public. Specifically, a moving party must establish by a preponderance of the evidence all of the following:

- (a) a specific interest of the person or entity sought to be protected by the sealing of the court records clearly outweighs the interest in open court records and will suffer immediate and irreparable harm if the court records are not sealed;
- (b) no less restrictive alternative will adequately protect the specific interest of the person or entity sought to be protected;
- (c) sealing will effectively protect the specific interest of the person or entity sought to be protected without being overbroad; and
- (d) sealing will not restrict public access to information concerning matters related to public health or safety, or to the administration of public office or the operation of government.

2. Court Records. For purposes of this rule, the term "court records" shall include all documents and records of any nature filed in connection with any matter before any civil court in the State of Texas. This rule shall not apply to materials simply exchanged between the parties or to discovery made by a party pursuant to a discovery request and not filed with a court, or to documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents. The term "court records" also includes settlement agreements, whether or not filed of record, which restrict public access to matters concerning public health or safety or to information concerning the administration of public office or the operation of government; otherwise, the term "court records" does not include settlement agreements whether or not filed of record.

B. All orders of any nature and all opinions made in the adjudication of cases are specifically made public information and shall never be sealed. Unless provided to the contrary by statute, before a judge may seal any other court records, the following prerequisites must be satisfied:

1. Hearing. A hearing shall be held in open court, open to the public, at which any party, including any intervenor, may support or oppose the sealing of court records. Non-parties may intervene for the limited purpose of participating in the hearing. The court may conduct an in camera inspection of records where necessary to prevent disclosure of records sought to be protected. At the hearing, the court must consider all evidence presented, which may include affidavit evidence if the affiant is present and available for cross examination.

2. Notice. The party seeking sealing shall file a written motion in support of the sealing request, which motion shall be open to public inspection. The moving party shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating that a hearing will be held in open court on a motion to seal court records in the specific case, stating that any person has an opportunity to intervene and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the style of the case, and the case number. The notice shall also describe the type of case and the specific court records which are sought to be sealed. The written motion in support of the sealing request shall be filed and the public notice shall be posted at least fourteen days prior to the hearing. Immediately after posting such notice, the moving party shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas, stating that notice under this rule has been provided. The Clerk of the Supreme Court of Texas shall post the notice in a public place. The notice shall not be sealed, but shall remain open to public inspection.

3. Temporary Sealing Order. A temporary sealing order may be entered upon motion and notice to the other parties in the case pursuant to Rules 21 and 21a, but without holding a hearing or requiring public notice as provided for in paragraphs (B)(1) and (B)(2) above, upon a showing of compelling need from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing can be held as otherwise provided herein. Every temporary sealing order granted without posted notice or public hearing shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, shall contain the findings required by paragraph (B)(4) and state why the order was granted without notice, and shall expire by its terms, not to exceed fourteen days after signing, as the the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the parties consent that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions

are unopposed. If a temporary sealing order is granted without public notice and hearing, a motion for sealing order shall be filed, notice provided and a hearing set as elsewhere provided in these rules. On two days' notice to the party who obtained the temporary sealing order or on such shorter notice to that party as the court may prescribe, any person, whether or not a party to the lawsuit, may appear or intervene and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. When the motion for sealing or the motion to dissolve or modify a temporary sealing order comes on for hearing, the party who obtained the temporary sealing order shall proceed with the motion and, if he does not do so, the court shall dissolve the temporary sealing order. At any hearing on a sealing order held after the grant of a temporary sealing order, the burden of proof shall be upon the party requesting sealing to prove said party's right to the sealing order as fully and completely as if no temporary sealing order had been sought or entered.

4. Sealing Order. If, after considering all the evidence concerning sealing court records, the judge concludes that a Compelling Need as defined herein has been shown, the judge shall within three days sign a written order dividing the court records into two files: one kept open to public inspection and the other containing only those limited portions of the court records for which a Compelling Need for sealing exists. Such order, if granted, shall be specific, stating the case number, the style of the case, the specific findings demonstrating that a Compelling Need has been shown, made at or after the hearing, the conclusions of law, the specific portions of the court records which are to be sealed, and the time period for which the sealed portions of the court records are to be sealed. Under no circumstances may the written motion to seal or the sealing order be sealed; both must remain in the open, public portion of the file.

C. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to request the court to seal or to unseal court records. The court has continuing jurisdiction before or after judgment to determine claims of access to court records, to seal court records and to enforce the Court's orders.

D. Appeal. Any sealing order, any sealing provision contained in any judgment, and any order granting or overruling a motion to seal, or to alter, vacate, or enforce a sealing order shall be deemed severed and a final appealable judgment, which may be appealed by any party or intervenor who has requested, supported, or opposed any sealing order. Upon any such appeal, the trial court's failure to make the specific findings required in paragraph (B)(4) shall never be harmless

error and shall be reversible error. The trial court's failure to comply with the notice and hearing requirements in paragraphs (B)(1) - (B)(3) shall render any sealing order void and of no force and effect.

E. No court records shall be withdrawn from the public file except as expressly permitted by specific statute or rule.

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TRCP 166b(5). [Addition]

No protective order or agreement relating to protecting disclosure of information concerning matters of public health or safety or information concerning the administration of public office or the operation of government shall be valid unless the party seeking protection files the discovery or results of discovery with the clerk of the court and complies with Rule 76a.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

RULE 506. POLITICAL VOTE

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

RULE 508. IDENTITY OF INFORMER

(a) **Rule of Privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions.

(1) **Voluntary Disclosure; Informer a Witness.** No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who could have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) **Testimony on Merits.** If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of a material issue on the merits in a civil case to which the public entity is a party, and the public entity invokes the privilege, the judge shall give the public entity an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be

in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera*, at which no counsel or party shall be permitted to be present.

(3) **Legality of Obtaining Evidence.** If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the public entity, direct that the disclosure be made *in camera*. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure *in camera*, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made *in camera*, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

RULE 509. PHYSICIAN/PATIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

(1) A "patient" means any person who consults or is seen by a physician to receive medical care.

(2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family:

(b) **General Rule of Privilege.**

(1) Confidential communications between a physician and a patient, relative to or in connection with

§ 22.004. Rules of Civil Procedure

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

§ 22.010. Sealing of Court Records

The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

**A
PROPOSAL**

**FOR A RULE
ESTABLISHING GUIDELINES
FOR DETERMINING
WHETHER AND HOW TEXAS CIVIL COURT
RECORDS SHOULD BE SEALED**

PRESENTED TO

THE SUPREME COURT RULES ADVISORY COMMITTEE

November 18, 1989

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I.

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 76a:
SEALING COURT RECORDS

Before a judge may seal any civil court record, the following prerequisites must be satisfied:

a. Hearing: A hearing must be held in open court, open to the public, at which any person desiring to oppose the closing of court records, whether or not a party to the suit, may appear and have an opportunity to be heard.

b. Notice: At least seventy-two (72) hours prior to such hearing, the party seeking sealing must file a written motion in support of the sealing request, which motion shall be open to public inspection. Either the moving party or the clerk of the district or county court shall post a public notice at the courthouse where foreclosure notices are posted, stating that a hearing will be held in open court on a motion to seal court records in the specific case, stating that any person has an opportunity to appear and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the names of the parties, and the cause number. Immediately after posting such notice, the moving party or the clerk of the district or county court shall file a verified copy of the notice, as posted, with the clerk of the court in which the case is pending, stating that notice under this rule has been provided. Such notice shall not be sealed, but shall remain open to public inspection.

c. Findings: In order to seal court records, the court must make specific, on-the-record findings of fact demonstrating that a Compelling Need as defined herein for sealing has been shown. Specifically, the court must affirmatively find that, without sealing, there is an imminent threat to the administration of justice, that there is a substantial probability that a specific interest greater than the fundamental interest in open court records will be prejudiced, that sealing the court record will adequately protect such greater interest, and that no less restrictive alternative can adequately protect the greater interest, and the reasons for each of such findings.

d. Sealing Order: If, after hearing all the testimony concerning sealing of court records, the judge concludes that a Compelling Need as defined herein has been shown, the judge may grant an order dividing the court records into two files: one kept open to public inspection and the other sealing only those limited portions of the court record for which a Compelling Need exists. Such order, if granted, shall be specific, stating the cause number, the parties to the action, the specific findings made at or after the hearing, the conclusions of law, the specific limited portions of the court record which are to be sealed, and the time period for which the sealed portion of the court record is

to be sealed. Under no circumstances may the sealing order be sealed; it must remain in the open public portion of the file.

e. Compelling Need: "Compelling Need" means the existence of a specific compelling interest which, in the administration of justice, is substantial enough clearly to override the presumption that all court records are open to the general public. Specifically, in order to overcome the presumption of openness, a moving party must meet all of the following elements:

(i) Closure must be necessary to protect an interest greater than the fundamental interest in open court records, and the sacrifice of openness must be necessary to prevent a serious and imminent threat to the administration of justice. A person's sensitivity, embarrassment, or desire to conceal the details of litigation is not a greater interest which overcomes the presumption of openness; and

(ii) No less restrictive alternative would protect the greater interest and the interest in the administration of justice; and

(iii) Closure would effectively protect the greater interest and the compelling interest in the administration of justice without being overbroad.

f. Court Records: For purpose of this rule, the term "court records" shall include all documents and records of any nature filed in connection with any matter before a district or county court in any jurisdiction in the State of Texas. This rule shall not apply to discovery materials simply exchanged between the parties and not filed with a court, or to documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents.

g. Continuing Jurisdiction: A trial court that enters a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order until such order expires by its own terms or is vacated by such court.

h. Appeal: Any person who has requested or objected to a sealing order, whether or not a party to the original suit, may appeal a sealing order or any order granting or overruling a motion to dissolve a sealing order from any district or county court pursuant to Tex. Civ. Prac. & Remedies Code § 51.014(4). Upon any such appeal the trial court's failure to make the specific findings required in paragraph c shall never be harmless error and shall be reversible error.

II.

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IV.

INTRODUCTION

Since 1980, we believe the practice of sealing non-child-related civil court records has increased dramatically across the State of Texas. For example, between 1920 and 1980, approximately 80 civil court records, in cases not involving adoption, juvenile delinquency, or other child-related suits, were sealed and removed from public inspection in Dallas County. Since 1980, over 200 non-child-related cases have been partially or totally sealed in Dallas County alone.¹ While no figures are available to show the precise number of case files sealed on a state-wide basis, we believe that the Dallas County Courts' practice is indicative of the need for a uniform rule regulating the sealing of civil court records throughout the state.

At least in Dallas County, district court judges have sealed court records at the mere request of one or both of the parties to the suit, without prior notice to the public or the press, without any opportunity for the public or press to be heard, without a hearing, and without the required showing of proper and constitutionally permissible grounds for sealing.

In many instances, Dallas County judges have entered sealing orders that are overbroad in scope, sealing the entire file rather than only the material shown to justify sealing. Furthermore, the judges' sealing orders explaining the reasons, if any, for sealing the record, are often sealed as well. In those instances when the sealing order is not

¹ See Appendix A, newspaper articles regarding the practice of sealing court records.

sealed, most sealing orders contain inadequate reasons or no reasons at all to justify sealing. In these instances, the public is denied the crucial information explaining the justification for sealing the court record.

Finally, at least in Dallas County, many court records are improperly treated as sealed in perpetuity because the sealing orders do not state a length of time for which records are to remain sealed and because the Texas Supreme Court has held that a judge who signs the sealing order loses jurisdiction over the case and the record when the judgment become final. *See Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex. 1987).

Currently, there is no uniform state-wide rule or guideline for whether and how a court record may be sealed. In fact, an informal survey of various counties' local rules shows that a vast majority of counties have established no rules at all regarding the substantive or procedural requirements for sealing court records. Of the counties containing large cities, only Dallas and Bexar Counties have promulgated disparate rules regulating sealing court records.² The Dallas County and Bexar County local rules are unconstitutional both on their face and as applied for failing to adhere to the state and federal common law and constitutional prerequisites for properly sealing a court record.

In order to provide a uniform procedure for the proposed sealing of civil court records throughout the state and to insure that constitutional and common law requirements are met prior to any sealing, Texas courts require a comprehensive rule

² Compare Appendix B, Dallas County's local rules on sealing court records, with Appendix C, Bexar County's local rules on sealing court records.

which will establish specific procedural and substantive requirements that courts must follow before sealing civil, non-child-related court records.

V.

ENABLING LEGISLATION

On June 14, 1989, Governor Clements signed into law House Bill 1637, adding Section 22.010 to the Texas Government Code.³ Effective September 1, 1989, this legislation requires the Texas Supreme Court to adopt a state-wide rule regulating the propriety and requirements for sealing court records. Section 22.010 of the Texas Government Code reads as follows:

SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state

³ House Bill 1637 reads:

*A BILL TO BE ENTITLED
AN ACT*

relating to the supreme court adopting rules relating to sealing of court records.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 22, Government Code, is amended by adding Section 22.010 to read as follows:

Sec. 22.010. SEALING OF COURT RECORDS. The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

SECTION 2. This Act takes effect September 1, 1989.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

VI.

THE CONSTITUTIONAL AND COMMON LAW STANDARD FOR SEALING COURT RECORDS

A. THE CONSTITUTIONAL AND COMMON LAW RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS AND JUDICIAL RECORDS

1. Federal Constitutional Authority.

Both the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution guarantee access to public court records. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court recognized the First Amendment right to attend criminal trials.⁴ Then, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Supreme Court struck down a Massachusetts law which automatically closed court proceedings concerning sex offenses against minors, requiring instead a case-by-case analysis to justify closure. *Id.* at 608.

In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press Enterprise I*), the Court held that the closure of all but three days of a six week voir dire proceeding and subsequent denial of a transcript of such proceeding violated the First Amendment. In so ruling, the Supreme Court stated that privacy interests giving rise to closure must

⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (Burger, C.J.) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."); *id.* at 599 (Stewart, J., concurring) ("First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."). See *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (civil case citing a criminal case as authority for the First Amendment right of access to civil trials).

be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." 464 U.S. at 510.

Finally, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), the Supreme Court reaffirmed that the presumption of openness can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *See also United States v. Criden*, 681 F.2d 919, 921 (3d Cir. 1982) (*Criden III*) (the burden of proof rests on the party who seeks to overcome the presumption of access).

In *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), the Third Circuit ruled that the district court abused its discretion by closing hearings on motions for preliminary injunctions, sealing transcripts of hearings, and ordering counsel not to disclose confidential information that was the subject of the hearing. The Court found that, under the First Amendment, judicial proceedings are presumptively open, and that the parties must articulate important and overriding governmental interests to overcome this presumption and demonstrate that there is no less restrictive way to serve that governmental interest. 733 F.2d at 1067-70.

2. Texas Constitutional Authority.

Article 1, Section 8 of the Texas Constitution guarantees to every person the liberty "to speak, write or publish his opinions on any subject" and commands that "no law shall ever be passed curtailing the liberty of speech or of the press." Although embodying the same ideals as the First Amendment to the United States Constitution, Article 1, Section 8 has been interpreted more broadly in favor of press and speech

freedoms than its federal counterpart. *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring); *Houston Chronicle Publishing Co. v. Shaver*, 630 S.W.2d 927 (Tex. Crim. App. 1982).⁵

The Texas Supreme Court, the Texas Court of Criminal Appeals, and the other state appellate courts have consistently stressed that "there is a strong interest in debate on public issues and about persons who are in a position to influence the resolution of those issues",⁶ freedom of expression is "highly valued in Texas,"⁷ and without freedom of expression, "there would be no democracy."⁸ The operation of the courts with public funds clearly subjects court records to public scrutiny. As the Texas Court of Criminal Appeals has held:

[T]he handling of the public's business in secret and behind closed doors not only causes the public to view the results with distrust, but it deprives the public of sufficient knowledge to make adjustment or reform in the law or the judiciary.

⁵ *In Shaver, the Texas Court of Criminal Appeals held that the press had the right to attend a suppression hearing in a criminal case pursuant to Article I, Section 8, even though the United States Supreme Court precedent under the First Amendment appeared unclear at the time. Before the First Amendment was made applicable to the states through the Fourteenth Amendment (Gitlow v. New York, 268 U.S. 652 (1925)), the Texas Supreme Court developed important case law under Article 1, Section 8. California has a constitutional provision similar to Article 1, Section 8. The Supreme Court of that state held that the state constitutional guarantee of free speech "is broader, and gives . . . greater liberty in the exercise of the right granted" than does the First Amendment. Dailey v. Superior Court, 112 Cal. 94, 98, 44 P. 458, 459 (1896) (en banc). The California Supreme Court reaffirmed that principle in Wilson v. Superior Court, 13 Cal. 3d 652, 532 P.2d 116, 120 (1975) (en banc) (a "protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press.").*

⁶ *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 812 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977).

⁷ *Houston Chronicle Publishing Co. v. Shaver*, 630 S.W.2d at 929.

⁸ *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 77 (Tex. App. -- Ft. Worth 1982, writ ref'd n.r.e.).

Houston Chronicle Publishing Co. v. McMaster, 598 S.W.2d 864, 866-67 (Tex. Crim. App. 1980) (quoting *Shiras v. Britt*, 589 S.W.2d 18, 20 (Ark. 1979)).

3. Federal and State Common Law Authority.

The common law recognizes an indisputable public right of access to judicial proceedings and judicial records. The United States Supreme Court reaffirmed this common law right to access judicial records in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In *Nixon*, the Supreme Court held that there exists a presumption in favor of access "to public records and documents, including judicial records and documents." 435 U.S. at 597. Moreover, in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981) (*Criden I*), the Court of Appeals recognized that the public's right to inspect and copy judicial records antedates the Constitution. *Criden I*, 648 F.2d at 819 (citing *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976)).

In addition to the above-mentioned cases, many other courts have recognized the common law right of access to judicial records. See, e.g., *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339 (3d Cir. 1986), rev'd on other grounds, 844 F.2d 1050 (3d Cir. 1988).

In *Wilson*, the Court of Appeals ruled that the presumption of open court records is based on the need to preserve the public's right to monitor its judicial system. 759 F.2d at 1570. In *Brown & Williamson Tobacco Corp.*, the Sixth Circuit concluded that the common law presumption of openness in our democratic society requires an open

court finding of an overriding governmental interest before records may be sealed. Sealing court records by agreement of the parties violates the common law presumption of openness. 710 F.2d at 1179.

In a Florida case, the Florida Court of Appeals set aside a district court order sealing a settlement agreement in a suit concerning alleged police misconduct. In setting aside the sealing order, the court observed:

A trial is a public event; what transpires in the courthouse is public property; those who see or hear what transpired may report it with impunity; and there is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Miami Herald Publishing Co. v. Collazo, 329 So. 2d 333, 337 (Fla. App. 1976), *cert. denied*, 342 So. 2d 1100 (Fla. 1976).

In a recent Kentucky case, court records in a former police officer's suit against the city for alleged civil rights violations were sealed pursuant to the joint motion of counsel. *Courier-Journal and Louisville Times Co. v. Peers*, No. 87-CA-492-OA, slip op. at 2 (Ky. App. -- June 12, 1987). The records were sealed without notice or an opportunity for the public to object to the sealing. The Kentucky Court of Appeals held that the trial court had no authority to seal the records without a showing of a compelling need. "To do otherwise, the public's right to know is held hostage to the caprice or whim of an individual trial judge." *Id.* Thus, both federal and state case law now recognize the First Amendment right of public access to court records.

B. RIGHT OF ACCESS TO COURT RECORDS APPLIES TO CIVIL CASES

The public's right of access to civil trials and records is as well-established as the right of access to criminal proceedings and records. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Supreme Court acknowledged that the historical support for public proceedings is "equally applicable to civil and criminal cases. . . ." 443 U.S. at 386 n.15.

The Supreme Court explained:

For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawkes commented that open proceedings were necessary so "that truth may be discovered in civil as well as criminal matters" English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two.

443 U.S. at 386 n.15 (original emphasis).

Justice Stewart's concurrence in *Richmond Newspapers* states emphatically the "1st and 14th Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." 448 U.S. at 599. *See also Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

In *Publicker*, the Third Circuit performed an exhaustive analysis, comparing the criminal justice system to the civil, and concluded that the First Amendment right of access applies to civil proceedings. 733 F.2d at 1066-67. In *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984), the Seventh Circuit conducted a similar analysis and concluded as follows:

Continental does not argue, and at this late date could not argue, that the long-recognized presumption in favor of public

access to judicial records does not exist. The public's right of access to judicial records has been characterized as "fundamental to a democratic stat[e]." . . . Most of the cases recognizing the presumption of access relate to the right of the public (and press) to attend criminal proceedings and to obtain documents used in criminal cases. However, we agree with the Sixth Circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well. These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.

732 F.2d at 1308 (citations and footnotes omitted).

C. PROCEDURAL AND SUBSTANTIVE REQUIREMENTS FOR SEALING COURT RECORDS

In those rare instances when civil court records should be sealed, a court must first satisfy certain substantive and procedural due process requirements.

1. Courts must provide the public and the press with adequate notice and opportunity to be heard.

In *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970), the Supreme Court ruled that courts must observe procedural due process requirements before taking away a person's entitlements. In that case, the Court held that the federal agency must post adequate notice and give the person an opportunity to be heard on the issue before the person's welfare benefits may be terminated. The same theory applies before the public and the press may be denied their constitutional and common law rights of access to court records: a court must give notice and an opportunity to be heard before issuing a sealing order suppressing open court records.

In *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984), the Fourth Circuit applied this same notice requirement to a case involving access to a criminal trial and court documents. There, the court held that representatives of the press and public must be given notice and an opportunity to be heard on the question of their exclusion. In fact, the court noted that the trial court erred in giving too little weight to the presumption favoring access and in making its decision to seal the documents without hearing the publishing company's arguments against sealing.

In *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), the Eleventh Circuit reversed the trial court for failing to provide a newspaper with access to certain civil court records. Principal among its reasons for reversing the decision was the trial court's failure to hold a hearing, after proper notice, on the merits of the motion for access. In its decision, the court held that a court should post notice of a hearing and allow the public and the press an opportunity to be heard before deciding whether court records may be suppressed. 696 F.2d at 802, citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

In *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983), the Sixth Circuit enforced the requirement that notice and opportunity to be heard be provided before a sealing order may be entered. In that case, the court had received a request to seal the record from one of the parties. The Sixth Circuit held that "the district court had an obligation to consider the rights of the public and the press before signing the sealing order." The court further declared:

"the failure to invite participation of the party seeking to exercise first amendment [and common law rights] reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the amendment [and the common law] seeks to assure."

723 F.2d at 475, *quoting Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 184 (1968).

The Sixth Circuit went on in *In re Knoxville News-Sentinel* to suggest specific methods of protecting the public's procedural due process rights. The court recommended that motions to seal be docketed with the district court clerk, which docket would be a public record. In addition, the motions should be made sufficiently in advance of the hearing to afford interested members of the public an opportunity to present their views. 723 F.2d at 475-76, *citing United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982); *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring).

2. In order to overcome the presumption of openness, courts must find "most compelling reasons" or "compelling need" to protect a greater interest.

Numerous federal circuit courts and state appellate courts have acknowledged that the Constitution and common law require that courts find "most compelling reasons" or "compelling need" to seal court records. These two terms are used interchangeably by the courts. The United States Supreme Court held in *United States v. O'Brien*, 391 U.S. 367, 377 (1967), that a government regulation limiting the public's First Amendment rights is justified only if it furthers an important and substantial governmental interest and if the restriction is no greater than is essential to further that

interest. See *United States v. Albertini*, 472 U.S. 675, (1985) (applying the *O'Brien* test); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (court must find "compelling interest" before suppressing First Amendment rights); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (state must show "a subordinating interest that is compelling"); *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 410-12 (1st Cir. 1987) ("most compelling reasons" and "exceptional circumstances" test). This "heightened scrutiny" has repeatedly been employed by courts in determining the propriety of sealing orders.

a. Federal Court Authority

In *Federal Trade Commission*, the First Circuit recently followed the general body of common law by adopting the "most compelling reasons" standard for sealing court records. 830 F.2d at 410. This decision is especially telling because the First Circuit distinguished an earlier decision applying only the "good cause" standard and now requires that a party show "most compelling reasons" in order to seal judicial records. In *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir. 1986), the First Circuit had required merely a showing of "good cause" to support the issuance of a protective order preventing the parties from disseminating information gathered during discovery, even though such information was filed with the court in support of a pre-trial discovery motion.

In *Federal Trade Commission*, however, the First Circuit expressly adopted the "most compelling reasons" standard from the Sixth Circuit. 830 F.2d at 410. In *Federal Trade Commission*, the trial court had ordered the unsealing of personal financial

statements which had been filed as part of a settlement agreement. The First Circuit affirmed the order to unseal and held that only exceptional circumstances can overcome the public's rights of access to court records. 830 F.2d at 412. The court then ruled that the private litigant's interest in personal privacy is not a sufficiently compelling reason to justify sealing the record. 830 F.2d at 413. Thus, the First Circuit now requires a showing of most compelling reasons before a court record may be sealed.

In *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), the Second Circuit also adopted the most compelling reasons standard. In *North*, the court was faced with the issue of whether Fed. R. Civ. P. 26(c), which authorizes the issuance of a protective order during discovery on a showing of good cause, applies to documents filed by parties in support of their summary judgment motions. The Second Circuit held that this discovery material became part of the judicial record when it was filed with the court. Once on file, only a showing of most compelling reasons can justify sealing the document from public inspection. 692 F.2d at 894. Therefore, even though a showing of good cause is sufficient to limit the dissemination of private information discovered in a lawsuit, once this information is filed with the court, it becomes part of the judicial record, open to public inspection unless a party shows most compelling reasons to justify a sealing order.

In *Application of CBS, Inc.*, 828 F.2d 958, 960 (2d Cir. 1987), the Second Circuit enforced the "most extraordinary circumstances" or the "most compelling circumstances" standard by reversing a trial court ruling which had prevented CBS from inspecting and copying a person's videotaped testimony on file as part of the judicial record. Drawing

from a criminal case based upon the common law presumption of openness, the court ruled that "the presumption in favor of the public right to inspect and copy judicial records was so strong that only the most extraordinary circumstances or the most compelling reasons would justify restricting that right." 828 F.2d at 960, *citing Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980).

In *In re Knoxville News-Sentinel Co.*, the Sixth Circuit followed its leading criminal case on access to records by ruling that only the most compelling reasons can justify non-disclosure of court records. 723 F.2d at 476, *citing and following Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179-80. Even though the Sixth Circuit upheld the trial court's sealing order, the appeals court was careful to insure that the most compelling reasons standard had been applied to justify the sealing order.

The Eleventh Circuit has affirmed the "compelling governmental interest" standard before allowing court records to be sealed. In *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), the court acknowledged the First Amendment right to open civil court records, which may be overcome only if "necessitated by a compelling governmental interest. . . ." 696 F.2d at 802, *citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). Then, in *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985), the Eleventh Circuit recognized the common law right of access to civil court records and expressly adopted the "compelling governmental interest" test from *Newman* and two criminal cases from other circuits.⁹ Through these cases, the Eleventh

⁹ In *Wilson*, the court followed *Application of National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981), and *Application of National Broadcasting Co.*, 635 F.2d at 952.

Circuit has firmly established the constitutional and common law requirement that court records may be sealed only under extraordinary circumstances.

b. State Court Authority

Numerous state appellate court cases have followed the federal case law in applying the constitutional and common law standards for sealing court records. In *Goldberg v. Johnson*, 485 So. 2d 1386, 1389 (Fla. App. 1986), the Florida Court of Appeals followed a long line of state supreme court decisions in holding that a court must determine that most compelling reasons exist before sealing a court record. See *Bundy v. State*, 455 So. 2d 330 (Fla. 1984), *cert. denied*, 476 U.S. 1109 (1986) (criminal case upholding denial of access to court records only after showing of necessity to prevent serious and imminent threat to the administration of justice; no less restrictive alternative available; and that sealing order will in fact achieve the court's protective purpose); see also *State ex rel. Gore Newspaper Co. v. Tyson*, 313 So. 2d 777, 784 (Fla. App. 1975) (litigant's preference for secret resolution of disputes not sufficient reason to exclude public and press).

Also, in *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983), a California court of appeals addressed the propriety of a trial court's order sealing the court record. In directing the trial court to reexamine its sealing order, the appellate court recognized that the burden rests with the party seeking the sealing order to establish compelling reasons why the records should remain sealed. 196 Cal. Rptr. at 876. See also *Estate of Hearst*, 67 Cal. App. 3d 777, 784-85, 136 Cal. Rptr. 821 (1977) (courts must be careful to limit denial of access by narrow and well-defined orders).

3. Courts must determine that sealing is the least restrictive method available to protect the compelling governmental interest.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), the United States Supreme Court stated that a court must find suppression is the least restrictive alternative to serve the compelling governmental interest before it can enter a closure order denying access to a criminal proceeding. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979); *NAACP v. Button*, 371 U.S. 415, 438 (1963). While *Globe Newspaper* concerned access to criminal trials, the same concept governs access to civil court records.¹⁰ In either case, once a movant has shown that most compelling reasons exist for sealing the proceedings or the records, the court must find that there is no other way to protect the compelling interest which would infringe less on the public's presumptive right of access to judicial proceedings and records.

Numerous federal and state appellate courts have recognized this requirement of the "least restrictive alternative" in civil cases. In *Newman v. Graddick*, the Eleventh Circuit reversed a trial court's denial of access to court records. In so doing, the court noted that the least restrictive alternative requirement was a prerequisite to the issuance of a sealing order. 696 F.2d at 802, citing *Globe Newspaper Co. v. Superior Court*, *supra*. See *Nebraska Press Association v. Stuart*, 427 U.S. 539, 562 (1976).

In *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), the Third Circuit required that the trial court consider whether a less restrictive means of serving

¹⁰ See footnote 4, *supra*.

important governmental interests exists before sealing the court record. 733 F.2d at 1070, citing *Globe Newspaper Co. v. Superior Court*, *supra*, and *Brown & Williamson Tobacco Corp.*, *supra*. See also *Application of National Broadcasting Co.*, 828 F.2d 340, 347 (6th Cir. 1987) (sealing orders must be based upon a finding that no alternative can adequately protect the right to fair trial and that closure will effectively achieve this protection).

4. A sealing order must state the specific portion of the record to be sealed and that the remainder of the court record, including the sealing order, shall remain open to public inspection.

For a sealing order to conform to the "least restrictive alternative" requirement, the order must state the specific portion of the record to be sealed and the length of time the records are to remain sealed. In *Mary R. v. B. & R. Corp.*, the appellate court overturned the trial court's sealing order because the order purported to seal records permanently. The appellate court noted that a temporary sealing would have been less restrictive, while still protecting the higher interest. In order to satisfy these requirements, a sealing order should state the duration of the order and that the remainder of the records are open to inspection. 196 Cal. Rptr. 871.

In *Globe Newspaper Co. v. Pokaski*, 684 F. Supp. 1132 (D. Mass. 1988), the court required sealing orders to remain unsealed so that a reviewing court may examine the propriety of the orders. In order for a reviewing court to examine such an order, the sealing order must state the specific portion of the records to be sealed and that the remainder of the record, including the actual sealing order, shall remain open to public inspection.

D. PRIVACY INTERESTS AND SETTLEMENT INDUCEMENT ARE INSUFFICIENT INTERESTS TO OVERCOME THE PRESUMPTION OF ACCESS TO COURT RECORDS

Several courts have determined that certain privacy interests are not sufficient to justify the sealing of court records. In *Mary R. v. B. & R. Corp.*, the court held that a settlement stipulation agreeing to seal the court records is not, by itself, sufficient to justify sealing. In addition, in *State ex rel. Gore Newspaper Co. v. Tyson*, the Florida court held that the fact that the litigants preferred to have their marriage dissolution conducted in private is not sufficient reason to exclude the public and press completely. In *Tyson*, the court wrote that the courts "are not to be considered as the private domain of any person or group." 313 So. 2d at 784.

In *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339 (3d Cir. 1986), *rev'd on other grounds*, 844 F.2d 1050 (3d Cir. 1988), the Court of Appeals ruled that the importance of settlement to the overburdened court system is not a sufficiently compelling interest to satisfy the constitutional requirements for sealing records. It stated:

In the name of encouraging settlements, [the dissenting judge] would have us countenance what are essentially secret judicial proceedings. We cannot permit the expediency of the moment to overturn centuries of tradition to open access to court documents and orders.

Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the

district court, it becomes a judicial record, and subject to the access accorded such records.

800 F.2d at 345. *See also Atlanta Journal v. Long*, 369 S.E.2d 755 (Ga. 1988); *Federal Trade Commission*, 830 F.2d at 412 (private litigant's privacy interest is not compelling reason sufficient to justify sealing court record).

Likewise, a litigant's claim that the information contained in the sealed document would harm his or her reputation is not sufficient to overcome the strong common law presumption in favor of public access to court records. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179-80. Also, sealing an entire file because of a defendant's desire to prevent the use of the trial record in another proceeding has been determined to be an inadequate justification for sealing court records. *Wilson v. American Motors Corp.*, 759 F.2d at 1571.

Finally, fear of public knowledge of a settlement agreement is not a compelling reason for sealing court records. In *Miami Herald Publishing Co. v. Collazo*, 329 So. 2d 333 (Fla. App. 1976), *cert. denied*, 342 So. 2d 1100 (Fla. 1976), the Court held that a party's fear of the possibility that public knowledge of the settlement terms might affect other pending litigation is "not a cogent reason for sealing the terms of the settlement agreement. . . ." 329 So. 2d at 338.

As stated in *State ex rel. Gore Newspaper Co. v. Tyson*:

History past and present has poignantly demonstrated the destructive effect of secrecy on our society--sowing seeds of suspicion and distrust between government and the governed. It would seem somewhat paradoxical for the very institution which has fostered a recognition of government in the sunshine and whose pronouncements are concerned with the

administration of justice to take a backward step by enshrouding its own proceedings in secrecy solely to accommodate litigants.

313 So. 2d at 787.

E. COURT RECORDS DEFINED

For the purpose of this rule, the term "court records" shall include all documents and records of any nature filed in connection with any matter before a district or county court in any jurisdiction in the State of Texas. *See Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339, 343-44 (3d Cir. 1986) (motion or a settlement agreement filed with the court is a "public component" of a civil trial); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-09 (7th Cir. 1983) (presumption of access applies to hearings held and evidence introduced in connection with pretrial motions); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (drawing distinction between discovery material and documents filed with court); *Mokhiber v. Davis*, 14 Media L. Rep. 2313, 2316-17 (D.C. Cir. 1988) (documents filed in support of motions and settlement agreements are public court records); *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 118 (Fla. 1988) (divorce proceedings and filed medical records are public records).

The term "court records" does not include discovery material simply exchanged between the parties and not filed with a court, or documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents. *See Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th

Cir. 1988), quoting *In re "Agent Orange" Product Liability Litigation*, 98 F.R.D. 539, 544-45 (E.D.N.Y. 1983) (once documents are made part of a dispositive motion, such as a summary judgment motion, they "lose their status of being 'raw fruits of discovery'").

F. A TRIAL COURT SHOULD RETAIN JURISDICTION OVER ITS OWN SEALING ORDERS

In *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987), the Texas Supreme Court dismissed a newspaper's motion for access to sealed records. In so ruling, the Supreme Court held that the trial court and the court of appeals lacked jurisdiction to hear the newspaper's motion because the trial court judgment had become final in all respects. The Supreme Court reasoned that the trial court loses plenary power over its own ongoing sealing orders once the judgment becomes final. See also *Express-News Corp. v. Spears*, 766 S.W.2d 885 (Tex. App. -- San Antonio 1989, no writ).

However, a sealing order is similar to an injunction. Both restrict certain conduct for a period of time. As with injunctions and other judgments, trial courts must retain power to enforce, modify, or vacate their own sealing orders. *Tyler v. St. Louis Southwestern Railway Co. of Texas*, 405 S.W.2d 330, 332 (Tex. 1966) ("jurisdiction [to modify judgment] lies with the trial court in which the case was pending when final judgment was rendered."); *State v. Associated Metals & Minerals Corp.*, 616 S.W.2d 305, 310 (Tex. App. -- Houston [14th Dist.] 1981), *rev'd on other grounds*, 635 S.W.2d 407 (Tex. 1982) ("courts undoubtedly have jurisdiction to modify their own injunctions"); *Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971) ("issuing court has

continuing power to supervise and modify its injunctions in accordance with changed circumstances").

If a trial court loses jurisdiction over an operative sealing order, interested third parties are prevented from attacking the validity, length, or scope of the order. All sealing orders would exist in perpetuity, never allowing for the possibility that, at some future date, the compelling interests sought to be protected by sealing may have dissipated. In short, such a ruling places all sealing orders in a jurisdictional vacuum thirty days after judgment is entered, making them completely free from attack or examination. Given the public's fundamental interest in open court proceedings, such a legal rule is unacceptable. A trial court must maintain the power to enforce, alter, or vacate their sealing orders until such orders expire by their own terms or are vacated by the court.

G. APPEALS FROM SEALING ORDERS SHOULD BE GOVERNED BY THE LAWS APPLICABLE TO TEMPORARY INJUNCTION APPEALS

A sealing order is a form of temporary injunction: it restricts certain conduct for a period of time. *Mickle v. Garrett*, 110 S.W.2d 1235, 1237 (Tex. Civ. App. -- Eastland 1937, no writ) (the true character of an injunction is determined by its function and effect, not its name). The Texas Legislature has expressly provided for the interlocutory appeal of temporary injunctions. Tex. Civ. Prac. & Remedies Code § 51.014(4) (Vernon 1988); *Fleming Companies, Inc. v. Due*, 715 S.W.2d 855, 856 (Tex. App. -- Beaumont 1986, no writ) ("The appeal of a district court order, either granting or denying a

temporary injunction, is an appeal from an interlocutory order which is authorized by law.""). Sealing orders should be appealable as temporary injunctions.

In addition, any order granting or overruling a motion to dissolve a sealing order should be appealable in the same manner as a temporary injunction. In *Tober v. Turner of Texas, Inc.*, 668 S.W.2d 831, 834 (Tex. App. -- Austin 1984, no writ), the court of appeals noted that an order overruling a motion to dissolve a temporary injunction is an appealable interlocutory order. 668 S.W.2d at 834. Any sealing order or an order granting or overruling a motion to dissolve a sealing order should be appealable by any person under Tex. Civ. Prac. & Remedies Code § 51.014(4) (Vernon 1988).

VII.

CONCLUSION

In light of the overwhelming authority requiring courts to satisfy the constitutional and common law requirements for sealing court records, the following is a proposed Texas Rule of Civil Procedure 76a for sealing court records, complete with annotations to supporting case law.

The Proposed Rule On Sealing Court Records

By John H. McElhaney
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Background

The operation of the courts with public funds clearly subjects court records to public scrutiny. As the Seventh Circuit has held:

The public's right of access to judicial records has been characterized as "fundamental to the democratic stat[e]." . . . The policy reasons for granting public access to criminal proceedings apply to civil cases as well. These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.¹

Unfortunately, not all Texas civil courts have given proper weight to the public's right of access to court records and the policy considerations underlying this right. In November 1987, The Dallas Morning News published a series of articles on the practice of sealing civil court records in Dallas County. During its investigation, The Dallas Morning News found that, since 1980, over 200 non-child-related cases had been partially or totally sealed. District judges had sealed court records at the mere request of one or more of the parties to the suit, without prior notice to the public, without any opportunity for the public to be heard, without any hearing, and without the required showing of proper and constitutionally permissible grounds for sealing. In many instances, Dallas County judges had entered sealing orders that were overbroad, sealing the entire file rather than only the material shown to justify sealing. Furthermore, the judges' sealing orders explaining the reasons, if any, for sealing the

records, had often been sealed as well. In those instances when the sealing order had not been sealed, most of the sealing orders contained inadequate reasons or no reasons at all to justify sealing. Finally, many court records had been improperly treated as sealed in perpetuity because the sealing orders did not state a length of time for which the records were to remain sealed.² There is no reason to believe that the Dallas County experience was unique or substantially different than that in other parts of the State. These practices and the disparate standards for sealing contained in various local rules throughout the State clearly indicated the need for a comprehensive, uniform rule governing the sealing of civil court records.

On June 14, 1989, Governor Clements signed into law House Bill 1637, which had been introduced and sponsored by Representative Orlando Garcia of San Antonio, enacting Section 22.010 of the Texas Government Code. Effective September 1, 1989, this legislation provides:

SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

The Texas Supreme Court submitted the issue to its Rules Advisory Committee for recommendation, and Chairman Luther H. Soules, III appointed a subcommittee to propose a draft rule. The subcommittee, co-chaired by Charles M. Herring, Jr. and Charles "Lefty" Morris, conducted public hearings on November 18, 1989 and

December 15, 1989 and also received substantial input at the Texas Supreme Court's public hearing on November 30, 1989. More than twenty-five participants, including defense lawyers, plaintiffs' lawyers, and representatives of public interest and citizens' groups, attended and provided valuable information at the hearings. The subcommittee accumulated several hundred pages of draft proposals, court decisions, law review commentaries, and position statements from many diverse sources. The proposed rule is, of course, the product of the discussion, the debate, and the necessary compromises which are endemic to the open discussion and consideration of the sealing issue.

The Compelling Need Standard

The proposed rule begins with the indisputable presumption that all civil court records are open to the public.³ In those rare instances when civil court records should be sealed, the court must first satisfy certain substantive and procedural due process requirements. In paragraph (A)(1), the proposed rule defines the "compelling need" standard which the party seeking sealing must meet to obtain an order sealing "court records." The compelling need test has been recognized and applied by numerous federal circuit courts and state appellate courts as the appropriate standard in cases involving claims of access to court records.⁴

In order to establish that a compelling need for sealing exists, the movant must establish all of the following by a preponderance of the evidence:

a) a specific interest sought to be protected by sealing clearly outweighs the interest in open court records and will suffer immediate and irreparable harm if the court records are not sealed;⁵

b) no less restrictive alternative will adequately protect the specific interest sought to be protected;⁶

c) sealing will effectively protect the specific interest sought to be protected without being overbroad; and

d) sealing will not restrict public access to information concerning matters related to public health or safety,⁷ or to the administration of public office or the operation of government.⁸

Definition Of Court Records

The definition of "court records" contained in paragraph (A)(2) was one of the most thoroughly discussed and debated provisions of this proposed rule. For the purpose of this proposed rule, the term "court records" includes "all documents and records of any nature filed in connection with any matter before a district or county court in any jurisdiction in the State of Texas," except for filed settlement agreements which do not "restrict public access to matters concerning public health or safety or to information concerning the administration of public office or the operation of government."⁹ The term "court records" does not include discovery material simply exchanged between the parties and not filed with a court, or documents filed with a court in camera,

solely for the purpose of obtaining a ruling on the discoverability of such documents.¹⁰

Notice And Hearing Provisions

The notice and hearing provisions contained in paragraphs (B)(1) and (2) are designed to ensure that the public does not lose its right of access to civil court records without proper procedural safeguards.¹¹

The proposed rule requires the party seeking sealing to file a written motion in support of the sealing request, to obtain a hearing on the motion, and to post notice of the requested sealing at the place where notices for meetings of county governmental bodies are required to be posted. The rule details the specific information that must be contained in the notice and provides that the notice shall be posted at least fourteen days prior to the hearing on the motion to seal. The movant must also file a verified copy of the posted notice with the Clerk of the Supreme Court of Texas who, in turn, shall post the notice in a public place.

The rule further provides for a hearing in open court on the motion to seal and specifically provides that non-parties may intervene for the limited purpose of participating in this hearing. The proposed rule provides the court with discretion to conduct an in camera inspection of specific records "where necessary to prevent disclosure of records sought to be protected." Finally,

the court may consider affidavit evidence at the hearing if the affiant is present and available for cross-examination.

Temporary Sealing Orders

Paragraph (B)(3) of the proposed rule provides for temporary sealing orders when a specific interest of the party seeking sealing will suffer immediate and irreparable injury before the party can comply with the notice and hearing provisions contained in paragraphs (B)(1) and (2). The temporary sealing order procedures draw upon the procedures used in obtaining temporary restraining orders under Tex. R. Civ. P. 680. After obtaining a temporary sealing order, the party seeking sealing must post notice and comply with the hearing provisions contained in the proposed rule. The proposed rule further provides that a party, including an intervenor, may seek a prompt dissolution or modification of any temporary sealing order.

Requirements For Sealing Orders

The proposed rule specifies the prerequisites of any sealing order in paragraph (B)(4) and prohibits the sealing of any sealing order or motion to seal.¹² It is axiomatic that, for a sealing order to conform to the "least restrictive alternative" requirement, the order must contain the specific portions of the court records to be sealed, the specific findings of fact and conclusions of law, and the length of time the records are to remain sealed.¹³

Continuing Jurisdiction

The provision concerning continuing jurisdiction in paragraph (C) of the proposed rule acknowledges and affirms the trial court's power to enforce, to modify, or to vacate its sealing orders.¹⁴ This provision also affirmatively recognizes the public's right to intervene before or after judgment in connection with sealing orders. If a trial court lost jurisdiction over an operative sealing order, interested third parties would be prevented from attacking the validity, length, or scope of the order, and all sealing orders would exist in perpetuity, never allowing for the possibility that, at some future date, the compelling need for sealing may have dissipated. Given the public's fundamental interest in open court proceedings, such a legal rule is unacceptable. The public must have the right to intervene before or after judgment, and a trial court must maintain the power to enforce, alter, or vacate its sealing orders until such orders expire by their own terms or are vacated by the court.¹⁵

Appeal Rights

Because of the importance of plenary appellate review of trial court rulings concerning motions to seal, paragraph (D) of the proposed rule provides that such rulings shall be deemed severed and a final, appealable judgment. The appeal provisions reinforce the notice and hearing provisions and the trial court's obligation to make specific findings in sealing any court records by providing

that the trial court's failure to comply with the notice and hearing provisions renders any sealing order void and of no force and effect and that the trial court's failure to make specific findings in the sealing order shall never be harmless error and shall be reversible error.

No Withdrawal Of Court Records

Paragraph (E) of the proposed rule anticipates the possibility that a litigant would attempt to circumvent the strictures of this rule by simply withdrawing pleadings or other court records. The proposed rule prohibits the withdrawal of any court records "except as expressly permitted by specific statute or rule."¹⁶

FOOTNOTES

1. Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984) (citations and footnotes omitted); accord, Houston Chronicle Publishing Co. v. McMaster, 598 S.W.2d 864, 866-67 (Tex. Crim. App. 1980) (quoting Shiras v. Britt, 589 S.W.2d 18, 20 (Ark. 1979) ("the handling of the public's business in secret and behind closed doors not only causes the public to view the results with distrust, but it deprives the public of sufficient knowledge to make adjustment or reform in the law or the judiciary").
2. Additionally, in the two reported Texas cases involving post-judgment attacks on sealing orders, the courts had held that intervention was not proper after judgment and that the court which entered the sealing order lost jurisdiction over the case and the record when the judgment became final. See Times Herald Printing Co. v. Jones, 730 S.W.2d 648 (Tex. 1987); Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. App. -- San Antonio 1989, no writ).
3. Paragraph (B) of the proposed rule provides that "[a]ll orders of any nature and all opinions made in the adjudication of cases are specifically made public information and shall never be sealed." See Tex. Rev. Civ. Stat. Ann. art. 6252-17a § 6(12) (Vernon Supp. 1990). The presumption of access to other civil court records rests most squarely on the common law, see Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Asso., 800 F.2d 339 (3d Cir. 1986), later appeal, 844 F.2d 1050 (3d Cir. 1988); Wilson v. American Motors Corp., 759 F.2d 1568 (12th Cir. 1985); Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). The presumption of access also draws upon the First Amendment to the United States Constitution, see Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984), and Article I, § 8 of the Texas Constitution. Cf. Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring) (the free speech and free press clauses of Article I, § 8 are even broader than those contained in the First Amendment); Houston Chronicle Publishing Co. v. Shaver, 630 S.W.2d 927 (Tex. Crim. App. 1982) (Article I, § 8 guaranteed public's right to attend suppression hearing in criminal case even though precedent under First Amendment appeared unclear at the time). The proposed rule exempts from this presumption of access civil court records which are sealed by reason of specific statutes.

4. Fed. Trade Comm'n v. Standard Fin. Management Corp., 830 F.2d 404, 410-12 (1st Cir. 1987); Application of CBS, Inc., 828 F.2d 958, 960 (2d Cir. 1987); Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985); In re Knoxville News-Sentinel, 723 F.2d 470 (6th Cir. 1983); Joy v. North, 692 F.2d 880 (2d Cir. 1982), cert. denied sub nom. Citytrust v. Joy, 460 U.S. 1051 (1983); Goldberg v. Johnson, 485 So. 2d 1386 (Fla. App. 1986); Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).
5. The proposed rule does not specify or define the interests which may, in exceptional circumstances, overcome the presumption of openness. Rather, the proposed rule is broad enough to encompass legitimate trade secrets, private sexual or medical matters, and other protectible interests established on a case-by-case basis. However, it is axiomatic that the parties' desire to have their lawsuit conducted in private does not suffice to seal the records. See, e.g., Fed. Trade Comm'n v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987); Atlanta Journal v. Long, 369 S.E.2d 755 (Ga. 1988). Moreover, a settlement stipulation to seal the court records does not justify sealing. Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985); Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).
6. Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983); see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-03 (1979); Application of National Broadcasting Co., 828 F.2d 340, 347 (6th Cir. 1987).
7. In re "Agent Orange" Product Liability Litigation, 98 F.R.D. 539, 547 (E.D.N.Y. 1983).
8. Miami Herald Publishing Co. v. Collazo, 329 So. 2d 333 (Fla. App.), cert. denied, 342 So. 2d 1100 (Fla. 1976).
9. But see Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Asso., 800 F.2d 339 (3d Cir. 1986), later appeal, 844 F.2d 1050 (3d Cir. 1988) (settlement agreement filed in connection with motion to enforce is "public component" of civil trial).

10. See Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249, 253-54 (4th Cir. 1988), quoting In re "Agent Orange" Product Liability Litigation, 98 F.R.D. 539, 544-45 (E.D.N.Y. 1983).
11. In re Knoxville News-Sentinel Co., 723 F.2d 470 (6th Cir. 1983); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); In re Knight Publishing Co., 743 F.2d 231 (4th Cir. 1984) (criminal case); see generally Goldberg v. Kelly, 397 U.S. 254 (1970).
12. See, e.g., Globe Newspaper Co. v. Pokaski, 684 F. Supp. 1132 (D. Mass. 1988), aff'd in pertinent part, 868 F.2d 497 (1st Cir. 1989).
13. See, e.g., Atlanta Journal v. Long, 369 S.E.2d 755 (Ga. 1988); Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).
14. Tyler v. St. Louis Southwestern Railway Co. of Texas, 405 S.W.2d 330, 332 (Tex. 1966) ("jurisdiction [to modify judgment] lies with the trial court in which the case was pending when final judgment was rendered"); State v. Associated Metals & Minerals Corp., 616 S.W.2d 305, 310 (Tex. App. -- Houston [14th Dist.] 1981), rev'd on other grounds, 635 S.W.2d 407 (Tex. 1982) ("courts undoubtedly have jurisdiction to modify their own injunctions"); see also Mann Manufacturing, Inc. v. Hortex, Inc., 439 F.2d 403 (5th Cir. 1971) ("issuing court has continuing power to supervise and modify its injunctions in accordance with changed circumstances").
15. This provision overcomes the holdings in Times Herald Printing Co. v. Jones, 730 S.W.2d 648 (Tex. 1987), and Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. App. -- San Antonio 1989, no writ).
16. See, e.g., Tex. R. Civ. P. 75 and 75b.

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I oppose the current draft of proposed Rule 76a together with the companion amendment to Rule 166b(5). While discouraging settlement, the proposals encourage the addition of intervening parties, the filing of motions, the mandatory setting of hearings and the filing of appeals.

These rules would produce radical changes in pretrial and trial practice for lawyers attempting to protect confidential and proprietary information of clients involved in most types of litigation, including personal injury suits, commercial litigation, family law and trade secrets litigation. In its present form, the draft rule would make virtually impossible the protection of valuable or highly sensitive confidential information even when there is no, or very little, public interest in disclosure, and would increase dramatically the amount of litigation time, delay and expense associated with efforts to protect confidential information. Proposed Rule 76a would also seriously impede the settlement of many lawsuits, thereby undermining the strong public policy in Texas law in favor of settlements.

The version of Rule 76a proposed by the Texas Supreme Court Advisory Committee would create an elaborate, time-consuming and cumbersome procedure applicable to the sealing of "court records." Essentially, the procedure requires a motion and fourteen days' public notice before any "court records" may be protected from disclosure. The term "court records" includes discovery documents relating in any way to "public health or safety" and settlement agreements (whether or not filed of record) that "restrict public access" to "public health or safety" matters. One or more public hearings must be held in which anyone can intervene and from which any intervenor can appeal. At the hearing an extremely strict, and as a practical matter nearly impossible, standard of "compelling need" must be met in order to protect confidential information from disclosure. Several problems are evident in this procedure.

"Compelling Need." Rule 76a creates an extraordinarily stringent and difficult standard of "compelling need" that must be shown in order to protect from public disclosure any "court records" including most discovery and settlement agreements in

most personal injury cases. Civil cases in which the standard can be met will be extremely rare.

The rule will prevent protection of sensitive confidential information in many cases in which courts have traditionally and sensibly recognized that such non-disclosure is entirely appropriate to protect important privacy or property interests, such as divorce suits, cases involving sexual abuse of children and cases involving valuable trade secrets and other proprietary information.

The mandatory "compelling need" showing includes the following requirements: a "specific interest" that "clearly overrides" the "presumption that all court records are open to the general public"; that such interest will suffer "immediate and irreparable harm"; that no less restrictive alternative will adequately protect the specific interest; that sealing will effectively protect the specific interest without being overbroad; and that sealing records will not restrict public access concerning matters related to "public health or safety" or the operation of government.

Apparently that strict standard of "compelling need" resulted from the view that any restriction of access to court records involves First Amendment rights and requires a standard of strict scrutiny. In fact, that view is simply incorrect.

No decision from the United States Supreme Court, the Texas Supreme Court or the Fifth Circuit Court of Appeals has ever held that there is a First Amendment right of access to civil court records, much less to unfiled discovery materials or settlement agreements. Indeed, several federal appellate courts have held that there is no such constitutional right of access.¹

A more appropriate standard should provide for an even-handed balancing of competing interests, recognizing the unique role that trial courts play in controlling their own records, as well as the common law presumption of access to records. The United States Supreme Court recognized this balance in Nixon v. Warner Communications, Inc.² The Court stated:

"It is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example,

1. See, e.g., Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); In Re Reporters Committee, 773 F.2d 1325 (D.C. Cir. 1985); Bellow Broadcasting Corp. v. Clark, 774 F.2d 423 (5th Cir. 1981).
2. 435 U.S. 589, 598 (1978).

the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.' . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, . . . or as sources of business information that might harm a litigant's competitive standing The few cases that have recognized such a [common law right of access] do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."³

Discovery. The practical effect of Rule 76a and the proposed corresponding amendment to Rule 166b(5) would be to subject many pretrial discovery materials to the cumbersome and time-consuming procedures of 76a. Specifically, the amendment to Rule 166b(5) provides that no protective order or agreement relating to "protecting [sic] disclosure of information concerning matters of public health or safety or information concerning the administration of public office or the operation of government" shall be valid unless the party seeking protection files the discovery and complies with Rule 76a.

The application of Rule 76a to discovery materials is a dramatic reversal of law and public policy throughout the United States. Historically, courts have treated the results of discovery differently from the public parts of a civil trial. The United States Supreme Court expressly recognized this distinction in Seattle Times Company v. Rhinehart,⁴ in holding that a trial court had properly issued an order protecting from disclosure the results of certain discovery and that the "strict scrutiny" standard of the First Amendment did not apply:

3. 435 U.S. at 598-99.

4. 467 U.S. 20 104 S.Ct. 2199 (1984). See also, C. R. Anderson v. Cryovac, Inc., 805 F.2d 1,13 (1st Cir. 1986) ("[D]iscovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process."); In Re Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987) ("appellant's common law right of access does not extend to information collected through discovery which is not a matter of public record"); F.T.C. v. Standard Financial Management Corp., 830 F.2d 404, 409 (1st Cir. 1987).

"Moreover, pretrial depositions and interrogatories are not public components of civil trial.

19. Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. See Fed. Rule Civ. Proc. 5(d). Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. See *ibid*; Wash. Super. Ct. Civil Rule 26(c). Federal district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. See, *e.g.*, C.D. Cal. Rule 8.3; S.D.N.Y. Civ. Rule 19. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

Such proceedings were not open to the public at common law, . . . and, in general, they are conducted in private as a matter of modern practice. . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information. Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny."⁵

The rule's inclusion of all "matters of public health or safety" is vague and ambiguous, but appears sufficiently overbroad to embrace almost all products liability, premises liability and other personal injury suits, not to mention business litigation involving physicians or medical care providers. By the same token, a personal injury plaintiff will find it difficult to conceal the results of a court ordered physical or psychiatric examination.

It is distressing that the Advisory Committee has proposed such a stringent and unwieldy rule that literally binds the wrists of our trial judges. It assumes, without any basis

5. 467 U.S. at 33, 104 S.Ct. at 2207-08.

whatsoever, that our courts and litigants have based current rules. I submit that the procedure authorized by current Rule 166b(5)(c), allowing sealing and other protective orders upon a showing of "good cause" more properly vests in the trial court the discretion to deal with the many and varied discovery disputes that can arise involving the disclosure of confidential information.

Applying Rule 76a to discovery guarantees an increase in pretrial motions and hearings, further burdening our already over-worked trial judges and congested trial court dockets.

Settlements. Proposed Rule 76a would apply to "settlement agreements, whether or not filed of record, which restrict public access to matters concerning public health or safety or to information concerning the administration office or the operation of government." One should question whose interests are being served by this proposed change.

Applying the public notice/public hearing procedure even to unfiled settlement agreements represents a radical departure from existing law and would undermine the strong traditional public policy in Texas favoring settlements.⁶ Settlement considerations are even more important today with the overwhelming dockets of some of our courts. Furthermore, in certain instances parties simply cannot afford to settle even frivolous lawsuits by means of public settlement, for to do so would open the floodgates to an endless series of additional frivolous claims. Simply stated, if plaintiff and defendant cannot settle a case on their own terms, they may choose to forego settlement altogether. The proposed rule would effectively abolish the right to enter into such confidential settlements of products liability and personal injury cases, as well as cases involving physicians or hospitals.

Appeal. The provisions of proposed Rule 76a dealing with continuing jurisdiction and appeal allow any person to intervene at any time to attempt to seal or unseal court records and allow any such intervenor ~~but not a party~~ to take an immediate appeal from any order sealing court records. Moreover, the rule in no way limits intervention or hearings to a single resolution of the merits. This raises the possibility of multiple interventions at different times by different parties with multiple interlocutory appeals. In cases involving substantial document production, the potential for ever-increasing delay and expense is obvious.

Conclusion. The important considerations in favor of open access to court records need be balanced to some extent against

6. See, e.g., Fernandez v. Tellez, 663 S.W.2d 91 (Tex. App. -- El Paso 1983, no writ) (even the strong policy of DTPA statute to protect consumers does not override the stronger policy of the law favoring settlements); Bass v. Phoenix Seadrill/78 Ltd., 749 F.2d 1154 (5th Cir. 1985).

the fundamental interests of our citizens in the rights of privacy⁷ and property. A reasonable rule concerning the disclosure of confidential information is needed. Unfortunately, proposed Rule 76a is one-sided, makes impossible the protection of legitimate confidential information, and would result in expensive and unnecessary pretrial delay, motions, hearings, and interlocutory appeals.

I urge each member of the Bar to review the proposed rule carefully and to analyze the practical difficulties that the rule would create for pretrial discovery, trial and settlement, in addition to the very real threat to litigants' privacy and property rights.

7. Both the United States Supreme Court and the Texas Supreme Court have recognized the right of privacy. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

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PROPOSED RULE 76a: A RADICAL TURNING
POINT FOR TRADE SECRETS

By: Gale R. Peterson, Esq.¹

Proposed Rule 76a represents a revolutionary and radical change in the practice of trade secret and related intellectual property law litigation in the state courts of Texas. Adopting the proposed rule without explicit safeguards for trade secrets and sensitive commercial information will make it unusually difficult, and perhaps impossible, to properly protect and preserve valuable vested property rights. The rule, as presently drafted, will not only encourage but mandate costly battles far in advance of trial over whether there are protectable property interests at stake. The rule further raises the spectre that third parties, as well as litigants, will face court orders forcing the disclosure of valuable trade secret and commercial information under a pretext of public health or safety.

As Texas moves into a new decade of economic development by attempting to foster and attract new businesses devoted to commercialization of technologies, adopting such a rule is both ill-advised and poorly timed. The reputation the State of Texas currently enjoys in the technology community of effective, efficient protection for intellectual property rights will be tarnished, perhaps irreparably. Perhaps most troubling and saddening is that this importunate rule could be readily and easily revised to accommodate the justified needs of Texas intellectual property owners.

Elsewhere in this issue of the Journal are articles advocating the urgent need for a rule which would have the effect of curing abuses of sealing orders. There can be little doubt that abuses exist and create a rational basis for adopting a rule limiting unfettered use of sealing orders. But a rule that goes too far will have the equally abusive effect of causing our Texas citizens to lose valuable rights for no just purpose. Such a result does not meet a public need and, in fact, can have far-reaching, unanticipated effects.

Although intangible property interests,² such as trade secrets, confidential and proprietary information, know-how, and show-how have long been important,³ our current age of technology has created an even greater emphasis on protecting and preserving those rights. Tens of billions of dollars are spent each year on research and development. The federal government alone annually spends in excess of \$60 billion funding research and development. Developments created under those R&D investments are protected under both state and federal statutes, as well as the common law.

The feature common to all of those laws is the creation of a property interest. The creation of a property interest, in fact, lies at the very core of our system for protecting and preserving those interests. Property interests in tangible personal property are relatively easy to recognize and, to some extent, relatively easy enforce. Misappropriating a new semiconductor chip or the

designs for a new blowout preventor is not materially different than stealing other items of personal property, for example, one's automobile. Because such items are tangible, they can be protected by physical means such as keeping them under lock and key.

Intangible property interest^s, on the other hand, are, by definition, more abstract and thus more difficult to preserve and protect. But they are no less property interests. And therein lies the crux of the problem with Rule 76a as presently proposed. The rule stems from a premise that there is an overriding, all-inclusive public right to access information subject to disclosure during litigation. But civil litigation is primarily intended to resolve a dispute between the litigating parties. Simply because two or more parties have a litigated dispute does not create a public right to have access to all information related to that dispute. Furthermore, neither the rule nor its premise distinguishes between public and private information. The companion amendment to Rule 166b (5), indeed, would preclude the entry of protective orders, now common in trade secret and intellectual property law litigation, unless the procedure dictated by proposed Rule 76a is followed. Thus, the premise of an overriding public right of access would apply to otherwise private information produced during discovery as well as that information made part of "Court Records" under the proposed rule's sweeping definition.

In analyzing the true effect of this rule, it is important to recognize that our rules on discovery, as well as our other procedural rules, apply not only to the parties, but to third parties as well who may have information or materials relevant to the dispute. Our current liberal discovery rules were intended for the sole purpose of assisting the parties in the preparation and trial, or the settlement, of litigated disputes. They were not intended as a vehicle to force disclosure of otherwise private information, or to, in effect, provide "free" discovery of a company's business, products, or finances. That is even more true with respect to third parties.

It is further important to recognized that these disclosures are forced under the power of the court. Absent litigation, there would be no right of public access to an individual's or a company's internal records, information and files. Nowhere in the history of the development of our substantive or procedural law is there any indication that our rules on liberal discovery were intended to serve a broader public purpose of forcing disclosure of otherwise private, privileged, or confidential information. Indeed, Justice Berger wrote in his concurring opinion in Gannatt Co., Inc. v. DePasquale:⁴

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pre-trial deposition or pre-trial interrogatories were other than wholly private to the litigants.

It is clear, moreover, from experience, that our liberal rules of discovery have themselves lead to a significant potential for abuse. That abuse is not limited to matters of delay and expense. Discovery has every potential for seriously invading the privacy interests of both the litigants as well as third parties brought into the litigation simply because they possess relevant information. But those privacy interests have been weighed secondary to the interests of obtaining justice in litigation. Nevertheless, those broad rules mandating discovery of otherwise private information have always carried the procedural and substantive safeguard of protective and sealing orders. Although the courts could and would force disclosure of otherwise private information, that disclosure would be subject to the power of the court to limit the use and further dissemination of such information. There is the opportunity, now that those safeguards are stringently limited by proposed Rule 76a, for litigants (and under the proposed rule, others) to obtain, incidentally or by design, information that not only is irrelevant or marginally relevant to the issues being litigated, but information which could be irreparably damaging if publicly disclosed.

As a general rule, a defendant in litigation faced with allegations involving a misappropriation of an intangible property interest is entitled to be informed of the property interest at issue. Relief, in fact, has been denied where a plaintiff has failed or refused to identify the asserted trade secrets or other

information allegedly misappropriated.⁵ Also, in defending against such allegations, such defendants are frequently placed in the position of having to disclose their own valuable trade secret or confidential information.⁶ Such requirements coupled with liberal discovery rules frequently have led experienced litigators to agree to a form of protective order which secured both information produced during discovery and information which was required to be disclosed in pleadings and other court records. Such orders typically precluded further dissemination and improper use. Agreeing to such a protective order permitted discovery to continue with minimal court involvement and generally advanced the litigation to the advantage of both parties. Discovery disputes, however, periodically required the filing of motions and briefs that disclosed all or a portion of the information covered by such protective orders. Protective orders have frequently covered that possibility by requiring that such information be filed with the court under seal. Further, when the litigation required that trade secret or confidential information be disclosed in court records, orders sealing that limited information from public view were necessary. If such a sealing order were not entered, the valuable property rights in that information would be irreparably lost.⁷ Forcing parties in such litigation to go through the procedures mandated by currently proposed Rule 76a will stall and add delay to such litigation, with no appreciable benefit to the parties or the public at large. Indeed, the proposed rule will

likely spawn mini-trials well in advance of trial on whether any protectable information is at issue. Perhaps most importantly, the proposed rule will add substantially to the already high litigation costs for intellectual property disputes. Not only will the procedures mandated by Rule 76a create that additional expense, but parties now will have additional incentives to resist discovery leading inevitably to protracted discovery battles.

The proposed rule creates those problems by failing to recognize that the vested property interest of an intangible property right, by definition, carries a "compelling need" not to be disclosed to the public because that disclosure would cause an immediate loss (or at least an impairment of) that property right. The very reason that such property rights are recognized is because the information is not public. Even matters of public policy do not create a carte blanche for disclosure of such information. For example, in Ruckelshaus v. Monsanto Company,⁸ the Supreme Court reviewed a federal law covering the registration of pesticides. That law required that Monsanto disclose information regarding the pesticide to the Environmental Protection Agency ("EPA") in order to obtain a registration to market the pesticide. That law, based on a public policy rationale, permitted the EPA to disclose that information to Monsanto's competitors and the public. The district court held the statute constituted a taking of Monsanto's "property" without just compensation in violation of the due process requirements of

the Fifth Amendment of the U.S. Constitution.⁹ The Supreme Court agreed that Monsanto's property interest was protected by the Fifth Amendment:

This general perception of trade secrets as property is consonant with a notion of "property" that extends beyond land and tangible goods and includes the products of an individual's "labor and invention."

* * * *

That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of the Courts * * * .
[Emphasis added.]¹⁰

A major treatise in the field of trade secret law states: "In view of Monsanto, supra, the federal government under the Fifth Amendment and the states under the Fourteenth Amendment should be precluded from enacting laws or regulations that take trade secrets for public use without just compensation, or destroy or transfer them for private use at all."¹¹ Moreover, those property interests at stake extend well-beyond technical-type data or information traditionally viewed as a "trade secret". Confidential business information is likewise property as recognized by the Supreme Court in Carpenter v. United States,¹² finding that information gathered for the Wall Street Journal constituted "money or property" for purposes of the federal mail and wire fraud statutes¹³ prior to publication. The Court wrote: "Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and

benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy."¹⁴ Additionally, the courts have recognized a right of privacy, secured by the Fourth Amendment to the U.S. Constitution, in confidential business information produced during discovery, but not used at trial.¹⁵ Indeed, the D.C. Circuit has noted that the drafters of the Federal Rules of Civil Procedure specifically provided that the presumption of openness was outweighed by a litigant's privacy interests in sensitive commercial information.

Rule 76a, and the accompanying amendment to Rule 166b, furthermore represent a dramatic and radical departure from a long list of both federal and state laws which recognize that the vested property interests in trade secret and sensitive commercial information, by definition, carry a "compelling need" that such information not be disclosed. For example, the Federal Freedom of Information Act,¹⁶ specifically exempts trade secrets and confidential commercial and financial information from disclosure. The Privacy Act of 1974¹⁷ prohibits, subject to exemptions, disclosure of personal information without consent. The Internal Revenue Code¹⁸ prohibits disclosure of information regarding business affairs given for purposes of tax collection. The Texas Open Records Act¹⁹ exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Indeed, the Act provides that it is misdemeanor to distribute such

In the same vein, the proposed rule forces the disclosure of settlement agreements if they are broadly related to public health or safety, or to information concerning the administration of public office or the operation of government. Intellectual property litigation frequently involves businesses which choose to settle their dispute on a commercial basis. Settlement agreements are many times similar to a commercial contract the parties would have negotiated outside of litigation. Non-public entities have an expected right of privacy in those commercial agreements when they contain provisions imposing obligations of confidentiality. Under the proposed rule, however, those expectations of privacy would be utterly extinguished if the subject matter broadly concerned public health or safety.

The protected property interests of trade secrets, confidential and proprietary information, know-how, and show-how are frequently and widely used by competing companies in our modern competitive economy to create and offer improved goods and services. Those intangible property rights are many-times the sole competitive edge a company uses to compete effectively. Of equal importance is the fact that such intangible property interests are widely bought, sold and traded under domestic and international licenses, and create a commercial economy quite apart from the tangible products those rights relate to. But, such intangible property interests are somewhat more fragile and more difficult to protect than tangible property interests.

Available technology today permits far more extensive duplication and dissemination of information than was possible even a few short years ago. Nevertheless, the law imposes an obligation on proprietors of such intangible property interests to take adequate measures to protect against such dissemination. For if they do not, the property interest is lost.

Adequate laws, both substantive and procedural, for protecting those property interests are essential to modern day businesses. Further, it is essential that such businesses have continued access to and use of our courts to protect and preserve those property interests. Until the advent of proposed Rule 76a, Texas offered both substantive and procedural safeguards for protecting and preserving valuable property interests. If passed in the form proposed, without specific safeguards for trade secret and sensitive commercial information, however, Rule 76a holds the potential for radically changing both our law and our image. The need to correct abuses does not carry with it any right to run roughshod over vested property interests. Nor does it carry the need to creative procedural rules that will destroy valuable substantive rights.

FOOTNOTES

1 Gale Peterson practices intellectual property law litigation with Cox & Smith in San Antonio. He holds a L.L.M. in trade regulation law, with highest honors, from George Washington University and a degree in electrical engineering from the University of Nebraska. He is chairman of the Intellectual Property Law Section of the State Bar of Texas, and is also an active member of the Virginia and the District of Columbia bars.

2 Courts in both England and the U.S., in the late 1800's and early 1900's, struggled with finding an acceptable, universal definition for a "trade secret". The problem has been that other types of intellectual property rights, such as patents, trademarks, and copyrights, were defined and governed by statutes. But, there was, unfortunately, no cogent definition of a "trade secret" until publication of the Restatement (First) of Torts in 1939. Comment (b) of §757 of the Restatement sets out a definition for a "trade secret". Texas, as well as a number of other states, have adopted that definition of a "trade secret" in numerous cases. That, indeed, was the definition adopted by the Texas Supreme Court in Hyde Corporation v. Huffines, 158 Tex. 566, 314 S.W. 2d 763 (Tex. 1958), cert. denied 358 U.S. 898 (1958) and in the companion case, K&G Oil Tools and Service Co. v. G&G Fishing Tool Service, 314 S.W. 2d 782 (Tex. 1958), cert. denied 358 U.S. 898 (1958). But the Restatement (First) of Torts was written quite early in the development of trade secret law, and was written in a radically different age of technology. Technology today centers largely on "information" and the ability to gather, assimilate, store, and process that information. As a result, in addition to the traditional concept of "trade secrets," companies today typically count as assets somewhat more generic categories of information now commonly known as "know-how" and "show-how". The phrase "intangible property rights" is generally used as an all-inclusive phrase to refer to truly valuable, commercial information and materials in which a property interest has been recognized.

3 The concept of protecting such information, indeed, dates from Roman times. Schiller, Trade Secrets and the Roman Law: The Actio Cervi Corrupti, 30 Colum. L. Rev. 837 (1930).

FOOTNOTES
Continued

4 443 U.S. 368, 396, 99 S. Ct. 2898, 2914 (1979). See also, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199 (1984).

5 See e.g. Litton Systems, Inc. v. Sunstrand Corp., 750 F.2d 952, 224 U.S.P.Q. 252 (Fed. Cir. 1984).

6 See Aerosonic Corporation v. Trodyne Corporation, 402 F.2d 223, 228 (5th Cir. 1968).

7 M.R.S. Datascope, Inc. v. Exchange Date Corporation, Inc., 745 S.W. 2d 542 (Tex. App. - Hou. [1st Dis.] 1988, no writ)(a customer list filed with the court not under a sealing order made that list public).

8 467 U.S. 986 (1984).

9 The district court wrote:

Therefore, the Court finds that Monsanto possessed a cognizable property right in the data submitted to EPA * * *. The property rights Monsanto possesses in its intellectual property (data) are the right to exclude others from the enjoyment of such data, in particular, the right to prevent the unauthorized use and the right to prohibit disclosure of its data.

564 ^{F.} Fed. Supp. 552, 565-566 (1983).

10 467 U.S. at 1004. Indeed, Justice Blackmun wrote:

With respect to a trade secret, the right to exclude others is essential to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.

467 U.S. at 1011.

11 Jager, Trade Secrets Law §4.01[3](1989).

12 108 S. Ct. 316 (1987).

FOOTNOTES
Continued

13 18 U.S.C. §1431, 1443.

14 108 S. Ct. at 320. See also, Zotos International, Inc. v. Young, 830 F.2d 350 (D.C. Cir. 1987)(holding that the Food and Drug Administration acted arbitrarily and capriciously in denying trade secret status to an ingredient in a cosmetic simply because it could be identified by reverse engineering); National Surety Corp. v. Applied Systems, 418 So.2d 847 (Ala. 1982)(computer programs constitute property permitting a cause of action for conversion to accrue against former employees who "misappropriate" the programs).

15 Travoulares v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984). The D.C. Circuit noted that, "[i]f the purpose of the common law right of access is to check judicial abuses, then that right should only extend to materials upon which a judicial decision is based," quoting from Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1980).

16 5 U.S.C. §552(b)(4).

17 ² U.S.C. §552a(b).

18 26 U.S.C. §6101.

19 Tex. Rev. Civ. Stat. Ann. art. 6252 - 17a (Supp. 1990).

E. Trade Secrets. The foregoing provisions of this rule shall not apply in cases in which a party asserts a claim seeking affirmative relief based upon an alleged trade secret or intangible property right that would be lost or impaired in the absence of an order protecting and preserving the same. In such cases, on the motion of any party, the court shall make such orders as are necessary to protect and preserve such trade secret or intangible property right, including ordering that such information be sealed or otherwise adequately protected from disclosure. The party in whose favor a sealing order is entered shall post a copy of the order at the place where notices for meetings of county government bodies are required to be posted, and shall serve a copy of the order on the clerk of the Texas Supreme Court, who shall post the notice in a public place.

Before or after entry of any such sealing order, any person may intervene for the limited purpose of opposing the motion or requesting modification or dissolution of such order. In a hearing on the motion or order, it shall not be necessary for the claimant to prove the merits of the trade secret or intangible property right. The existence of a trade secret or intangible property right shall be taken as established as alleged by the pleadings; but when such pleadings are specifically denied, the claimant is required to support such pleadings by prima facie proof by affidavits on personal knowledge, setting forth specific facts that would be admissible in evidence and would show affirmatively that the affiant is competent to testify.

In the event that, after trial on the merits and completion of any appeals, it is determined that materials subject to an order entered under this section do not contain or reveal trade secrets or intangible property right, the court shall amend or vacate such order on such terms as the interests of justice require.

F. Trade Secrets. (1) The foregoing provisions of this rule shall not apply in cases [Alternative #1: in which a party asserts a claim seeking affirmative relief based upon] [Alternative #2: involving] an alleged trade secret or intangible property right that would be lost or impaired in the absence of an order protecting and preserving the same. In such cases, on the motion of any party, and upon good cause shown, the court shall make such orders as are necessary to protect and preserve such trade secret or intangible property right, including ordering that such information be sealed or otherwise adequately protected from disclosure. The party in whose favor a sealing order is entered shall post a copy of the order at the place where notices for meetings of county governmental bodies are required to be posted, and shall serve a verified copy of the order on the clerk of the Texas Supreme Court.

(2) Before or after entry of any such sealing order, any person may intervene for the limited purposes of participating in the hearing to oppose the motion, or of requesting modification or dissolution of such order.

(3) The court may conduct an in camera inspection of records where necessary to prevent disclosure of records sought to be protected. At the hearing, the court must consider all evidence presented, which may include affidavit evidence if the affiant is present and available for cross examination.

(4) In the event that, after trial on the merits and completion of any appeals, it is determined that materials subject to an order entered under this section do not contain or reveal trade secrets or intangible property right, the court shall amend or vacate such order on such terms as the interests of justice require.

Add at the end:

-e. Trade Secrets. This rule shall not apply in cases involving trade secrets, confidential or proprietary information, or other intangible property rights that would be lost or impaired in the absence of an order protecting and preserving the same. In such cases, on the motion of either party, the court shall make such orders as are necessary in the administration of justice to protect and preserve such trade secret, confidential or proprietary information, or intangible property right including:

(1) ordering that such information not be disclosed in court records;

(2) ordering that such information be disclosed only in court records that are sealed or otherwise adequately protected from disclosure; or

(3) ordering that access to court records containing such information be restricted or conditioned on terms that would preserve and protect such trade secret, confidential or proprietary information, or other intangible property right.

An order entered under this section shall not be sealed and shall contain a sufficient enough description of the subject matter, without revealing any trade secret, or confidential or proprietary information, to permit the general public to determine whether or not to challenge the terms of such order. Such order shall be posted for public inspection at the courthouse where public notices are posted for 7 days following the date of such order. During that 7 day period, any member of the public may file a motion with the court challenging the terms of such order. The provisions of section b. (1) if this rule shall apply to such a hearing. The movant shall have the burden of proof on any such motion.

In the event that, after trial on the merits and exhaustion of any appeals, it is determined that information subject to an order entered under this section does not contain or reveal trade secrets, or confidential or proprietary information, or information that would compromise or impair an intangible property right by disclosure, the court shall amend or vacate such order on such terms as the interests of justice require.

-f. This rule shall not apply to protective orders entered under Rule 166b or to hearings concerning discovery covered by such protective orders. -

PROPOSED AMENDMENT TO PARAGRAPH a.2

This rule shall not apply to any material for which a good faith claim is made that the material constitutes a trade secret. In the event the parties, including affected third parties, cannot agree that alleged trade secret material should be exempt from this Rule, then a party or affected third party may apply to the court for a determination that the claim for trade secret status has been made in good faith and such material is exempt from this Rule. Agreement that the material should be exempt from this Rule shall not be treated as an admission and is not admissible into evidence. Material filed with the court for inspection in camera is exempt from this Rule. The party asserting that alleged trade secret material should not be exempt from this Rule shall ordinarily be awarded its attorneys fees and costs if it prevails.

ALTERNATIVE ATRADE SECRETS

The foregoing provisions of this Rule shall not apply in cases where an alleged trade secret or intangible property right would be lost or impaired in the absence of an order protecting or preserving the same. In such cases, on the motion of any party, the court shall make such orders as are necessary to protect and preserve such trade secret or intangible property right, including ordering that such information be sealed or otherwise adequately protected from disclosure. Joining in on failing to oppose such motion shall not constitute an express or implied admission that a trade secret or intangible property right exists, nor shall the same estop any party from later challenging that a trade secret or intangible property right exists. The party making such motion shall post a copy of the order at the place where notices for meetings of county government bodies are required to be posted, and shall serve a copy of the order on the clerk of the Texas Supreme Court, who shall post the notice in a public place.

Before or after entry of such sealing order, any person may intervene for the limited purpose of opposing the motion or requesting modification or dissolution of such order. In a hearing on such motion or order, the existence of a trade secret or intangible property right shall be taken as established by the pleadings unless specifically denied. If denied, the claimant shall be required to make a prima facie showing that trade secrets or intangible property rights would be lost or impaired in the absence of the order. The showing may be made through affidavits or otherwise. Once a prima facie case is established, the burden of proof and the burden of persuasion shall be on the intervening party to show that a trade secret or intangible property interest would not be lost or impaired in the absence of a sealing order.

In the event that, after trial on the merits and completion of any appeals, it is determined that materials subject to an order entered under this section do not contain or reveal trade secrets or intangible property rights, the court shall amend or vacate such order on such terms as the interest of justice require.

ALTERNATIVE B

TRADE SECRETS

The provisions of this rule shall not apply to cases involving trade secrets, or other confidential commercial or financial information. In such cases, the court may make such orders as are necessary to protect and preserve such information from public disclosure subject to the right of any person to intervene and request a modification or revision of such order.

I.

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 76a:
SEALING COURT RECORDS

Before a judge may seal any civil court record, the following prerequisites must be satisfied:

a. Hearing: A hearing must be held in open court, open to the public, at which any person desiring to oppose the closing of court records, whether or not a party to the suit, may appear and have an opportunity to be heard.

b. Notice: At least seventy-two (72) hours prior to such hearing, the party seeking sealing must file a written motion in support of the sealing request, which motion shall be open to public inspection. Either the moving party or the clerk of the district or county court shall post a public notice at the courthouse where foreclosure notices are posted, stating that a hearing will be held in open court on a motion to seal court records in the specific case, stating that any person has an opportunity to appear and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the names of the parties, and the cause number. Immediately after posting such notice, the moving party or the clerk of the district or county court shall file a verified copy of the notice, as posted, with the clerk of the court in which the case is pending, stating that notice under this rule has been provided. Such notice shall not be sealed, but shall remain open to public inspection.

c. Findings: In order to seal court records, the court must make specific, on-the-record findings of fact demonstrating that a Compelling Need as defined herein for sealing has been shown. Specifically, the court must affirmatively find that, without sealing, there is an imminent threat to the administration of justice, that there is a substantial probability that a specific interest greater than the fundamental interest in open court records will be prejudiced, that sealing the court record will adequately protect such greater interest, and that no less restrictive alternative can adequately protect the greater interest, and the reasons for each of such findings.

d. Sealing Order: If, after hearing all the testimony concerning sealing of court records, the judge concludes that a Compelling Need as defined herein has been shown, the judge may grant an order dividing the court records into two files: one kept open to public inspection and the other sealing only those limited portions of the court record for which a Compelling Need exists. Such order, if granted, shall be specific, stating the cause number, the parties to the action, the specific findings made at or after the hearing, the conclusions of law, the specific limited portions of the court record which are to be sealed, and the time period for which the sealed portion of the court record is

to be sealed. Under no circumstances may the sealing order be sealed; it must remain in the open public portion of the file.

e. Compelling Need: "Compelling Need" means the existence of a specific compelling interest which, in the administration of justice, is substantial enough clearly to override the presumption that all court records are open to the general public. Specifically, in order to overcome the presumption of openness, a moving party must meet all of the following elements:

(i) Closure must be necessary to protect an interest greater than the fundamental interest in open court records, and the sacrifice of openness must be necessary to prevent a serious and imminent threat to the administration of justice. A person's sensitivity, embarrassment, or desire to conceal the details of litigation is not a greater interest which overcomes the presumption of openness; and

(ii) No less restrictive alternative would protect the greater interest and the interest in the administration of justice; and

(iii) Closure would effectively protect the greater interest and the compelling interest in the administration of justice without being overbroad.

f. Court Records: For purpose of this rule, the term "court records" shall include all documents and records of any nature filed in connection with any matter before a district or county court in any jurisdiction in the State of Texas. This rule shall not apply to discovery materials simply exchanged between the parties and not filed with a court, or to documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents.

g. Continuing Jurisdiction: A trial court that enters a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order until such order expires by its own terms or is vacated by such court.

h. Appeal: Any person who has requested or objected to a sealing order, whether or not a party to the original suit, may appeal a sealing order or any order granting or overruling a motion to dissolve a sealing order from any district or county court pursuant to Tex. Civ. Prac. & Remedies Code § 51.014(4). Upon any such appeal the trial court's failure to make the specific findings required in paragraph c shall never be harmless error and shall be reversible error.

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 76a:
SEALING COURT RECORDS

a. Definitions:

1. Compelling Need: "Compelling Need" means the existence of a specific interest which overrides the presumption that all court records are open to the public. The burden of proof is on the moving party to show by a preponderance of the evidence that:

- (a) sealing is necessary to protect those matters privileged under Article V of the Texas Rules of Civil Evidence or under other statute or law; or
- (b) sealing is necessary to protect specific constitutional or property rights; or
- (c) sealing is necessary to protect the identity or privacy of an individual who has been the subject of a sexually related assault or injury; or
- (d) a specific interest of the person or entity sought to be protected by sealing of the court records outweighs the public interest in open court records; and
- (e) no less restrictive alternative will adequately protect the specific interests of the person or entity sought to be protected; and
- (f) sealing will adequately protect the specific interest of the person or entity sought to be protected without being overly broad.

2. Court Records: For the purposes of this rule, the term "Court Records" shall include all documents and records of any nature filed with the clerk of the court in connection with any civil matter before any court of record in any jurisdiction in the State of Texas. This rule shall not apply to discovery materials not filed with the court or to documents filed with the court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents.

b. Unless provided to the contrary by statute or other law, before a judge may seal any civil Court Records, the following prerequisites must be satisfied:

1. Hearing: A hearing must be held in open court, open to the public, at which time any person desiring to oppose the sealing of Court Records, whether or not a party to the suit, may appear and have an opportunity to be heard. Affidavits may be received into evidence if the affiant is present and available for cross examination. The court shall conduct an in camera inspection of the court records sought to be sealed before ruling on the motion.

2. Notice: The party seeking sealing must file a written motion in support of the sealing request, which motion shall be open to public inspection. The moving party shall post a public notice at the place where the notices for meetings of county governmental bodies are required to be posted, stating that a hearing will be held in open court on a motion to seal Court Records in the specific case, stating that any person has an opportunity to appear and be heard concerning the sealing of Court Records, and stating the specific time and place of the hearing, the style of the case, and the case number. The written motion in support of the sealing request shall be filed and the public notice shall be posted at least fourteen working days prior to the hearing. Immediately after posting such notice, the moving party shall file a verified copy of the notice, as posted, with the clerk of the court in which the case is pending, stating that notice under this rule has been provided. Such notice shall not be sealed, but shall remain open to public inspection.

3. Ex Parte Sealing Order: Upon a finding of compelling need, a district or county court may issue an ex parte order sealing Court Records without holding a hearing or requiring notice as provided in paragraphs (b)(1) and (b)(2) above. Such an ex parte order shall expire upon fifteen working days after its issuance and shall be void unless it has been reissued following the hearing and notice provided for in paragraphs (b)(1) and (b)(2) above. An ex parte order sealing Court Records must contain the findings required by paragraph (b)(5) and must be open to public inspection as required by paragraph (b)(6). Any party or other interested person may file a motion to dissolve the ex parte sealing order with three working days' notice to all parties of record.

4. Findings: In order to seal Court Records, the court must make specific findings that a Compelling Need as defined herein for sealing has been shown.

5. Sealing Order: If, after hearing all the evidence concerning sealing Court Records, the judge concludes that a Compelling Need as defined herein has been shown, the judge may grant an order dividing the Court Records into two files: one kept open to public inspection and the other containing only those limited portions of the Court Records for which a Compelling Needs for sealing exists. Such order, if granted, shall be specific, stating the case number, the style of the case, the specific findings made at or after the hearing, the

conclusions of law, the specific limited portions of the Court Records which are to be sealed, and the time period for which the sealed portion of the Court Records is to be sealed. The sealing order shall remain in the portion of the file open to public inspection.

c. Continuing Jurisdiction: A trial court that enters a sealing order maintains continuing jurisdiction to enforce, alter, vacate, or reinstate that order.

d. Appeal: Any person who has requested or objected to a sealing order, whether or not a party to the original suit, may appeal a sealing order or any other order granting or overruling a motion to dissolve a sealing order from any district or county court pursuant to Tex. Civ. Prac. & Remedies Code § 51.014(4).

DLP:jb 12/18/89
RULE.T [55,1]

PROPOSED
TEXAS RULE OF CIVIL PROCEDURE 76a:
RESTRICTING PUBLIC ACCESS TO COURT RECORDS

No court shall make or enforce any order or agreement, including settlement agreements, restricting public access to the records of civil court proceedings except in accordance with this rule. Any settlement agreement which contains provisions restricting public access to the record of civil court proceedings, or requiring the return or destruction of such records, is null and void, and of no force and effect, unless such settlement agreement has been approved in accordance with this rule. No attorney practicing before the courts of this state shall take, or offer, demand, or agree to take, any action designed to circumvent this rule.

(A) Prerequisites for Order: A moving party must establish by clear and convincing evidence a compelling need based on a specific interest which is substantial enough clearly to override the presumption that all court records are open to the general public. A moving party must further establish by clear and convincing evidence all of the following:

(1) The order would not prevent public access to information concerning the public health or safety or the administration of any public office, or employment or governmental function or operation.

(2) If public access is not restricted, the proponent of the motion, or the administration of justice, would suffer immediate, specific, serious and irreparable harm; and

(3) No less restrictive alternative would adequately protect the person or entity sought to be protected; and

(4) Restriction would effectively protect the person or entity sought to be protected without being overly broad; and

(B) Protectible Interests: Specific interests which may be the basis of an order under this rule include, but are not limited to, the following:

(1) A right of privacy or privilege established by statute or other law, including privileges established by Article V of the Texas Rules of Civil Evidence;

(2) The protection of bona fide trade secrets;

(3) The protection of the identity or privacy of an individual who has been the subject of a sexually related assault or injury;

A person's or entity's sensitivity, embarrassment, or desire to conceal the details of litigation, without more, does not constitute a protectible "specific interest."

(C) Court Records and Records of Court Proceedings:
For the purposes of this Rule, the term "court records" and "records of court proceedings" shall include all documents and records of any nature filed with the Clerk of the Court in connection with any civil matter before any Court of record in any jurisdiction in the State of Texas. The term also includes those records of court proceedings such as interrogatories and

answers thereto, requests for production and responses and production made pursuant thereto, deposition transcripts, and similar records which record action taken pursuant to court authority although the documentation may remain in the custody of counsel. This term does not apply to documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents, unless and until the documents have been released to discovering counsel.

(D) Procedure:

(1) Motion: An order must be based upon a motion filed at least fifteen (15) days prior to the date set for hearing, which shall describe, with reasonable particularity, the basis upon which the order is sought.

(2) Notice: The movant shall prepare a notice which shall give the style and cause number of the case, the time and date set for hearing, the nature of the case, and shall describe with reasonable particularity the nature and basis of the motion. Movant shall serve copies of the motion and notice upon all parties to the action, shall cause copies of the notice to be posted at the place where notices for meetings of county governmental bodies are required to be posted, and shall serve a copy of the notice upon the Clerk of the Supreme Court of Texas, who shall post the notice in a public place.

(3) Hearing and Finding: A hearing on such motion must be held in open court. The burden of proof shall be upon

the party seeking an order restricting access to prove entitlement to such restriction pursuant to the provisions of this Rule by clear and convincing evidence pursuant to the Texas Rules of Civil Evidence, provided, however, that affidavits may be received into evidence as proof of specific facts over objection if, and only if, the affiant is present and available for cross-examination.

(4) Intervention: Any member of the public desiring to oppose the entry of the order restricting access shall have standing to intervene for the limited purpose of opposing such order by the filing of an intervention not later than two (2) days prior to the date set for hearing.

(5) Order Restricting Access: Any order restricting access shall be specific, stating the cause number, the parties to the action and the intervenors, the specific findings made at or after the hearing, the conclusions of law, the specific limited portions of the court records and records of court proceedings which are to be restricted, and the time period for which the restriction order is to remain effective. Under no circumstances may the restriction order be sealed; it must remain in the open portion of the file. An order restricting access must be based upon specific, on-the-record findings of fact demonstrating that the movant has fulfilled the burden of proof provided in this Rule restricting access to those specific portions of the court records, or to records of court

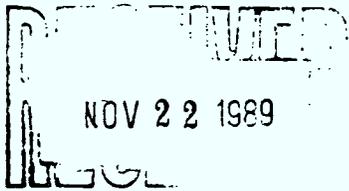
proceedings, with respect to which the court finds that access should be restricted and affirmatively finding that no less restrictive alternative can adequately protect the interests of the movant, and setting forth specifically the reasons for such findings. All remaining portions of the records shall remain unrestricted and open to public inspection.

(6) Temporary Orders: A temporary order may be entered upon motion and notice to other parties in the case pursuant to Rules 21 and 21a, but without notice to the public and an opportunity to intervene as provided in subparts (2) and (4) of this paragraph, upon a showing from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing may be had as otherwise provided herein. Every temporary order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the Clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice to the public, and shall expire by its terms within such time after signing, not to exceed fifteen (15) days after the date of the order, unless within the time so fixed the order, for good cause shown, is extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are

unopposed. In case a temporary sealing order is granted without notice, the application for a permanent order shall be set down for hearing as elsewhere provided in these rules, and when the application comes on for hearing, the party who obtained the temporary order shall proceed with the application for a permanent order and, if he does not do so, the court shall dissolve the temporary order. At a hearing on an application for a permanent order held after the grant of a temporary order, the burden of proof shall be upon the applicant for the order to prove said party's right to the order as fully and completely as if no temporary order had been sought or entered.

(7) Jurisdiction: A trial court that enters an order restricting access maintains continuing jurisdiction to enforce, alter, or vacate that order until such order expires by its own terms or is vacated by such court.

(8) Appeal: Any party (including an intervenor) who has requested or objected to an order requesting access, whether or not a party to the original suit, may appeal an order on a motion to restrict access, or any order granting or overruling a motion to dissolve an order restricting access from any district or county court. Upon such appeal, the trial court's failure to make the specific findings required in Paragraphs (3) and (5) shall never be harmless error, but shall be reversible error.



11/20 Check & Lefty,
Here is my "cut" toward
a balanced rule.

Juke

TRCP 76a: Sealing Court Records

Before a judge may seal any civil court record [other than discovery products which have not been presented in open court and except as otherwise provided by law], the following prerequisites must be satisfied:

a. Hearing: A hearing must be held in open court, open to the public, at which any person desiring to [support or] oppose the closing of court records, whether or not a party to the suit, may appear and have an opportunity to be heard [intervene for the limited purpose of participating in the hearing].

b. Notice: At least seventy-two (72) hours prior to such hearing // the [A] party seeking sealing must file a written motion in support of the sealing request, which motion shall be open to public inspection. Either // [T]he moving party or // the clerk of the district or county court shall post a public notice at the courthouse where foreclosure [public] notices are posted, stating that a hearing will be held in open court on a motion to seal court records in the specific case, stating that any person has an opportunity to appear [intervene] and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the names of the parties, and the cause number. Immediately after posting such notice, the moving party or // the clerk of the district or county court shall file a verified copy of the [posted] notice // as posted, with the clerk of the court in

which the case is pending, stating that notice under this rule has been provided. Such notice shall not be sealed, but shall remain open to public inspection.

[c. Proof: A party seeking sealing shall have the burden of proof by clear and convincing evidence except in cases adjudicating matters involving minors; parties resisting sealing shall have the burdeon of proof by preponderance of the evidence in cases adjudicating matters involving minors. At the hearing, the court must consider all evidence presented, which may include competent affidavits, provided, however, that the court may require that any affiants be available for cross-examination.]

¶[d]. Findings: In order to seal court records, the court must make specific, on-the-record findings of fact demonstrating that a Compelling Need as defined herein for sealing has been shown. Specifically, the court must affirmatively find that, without sealing, there is ~~an imminent threat to the administration of justice,~~ that there is a substantial probability that a specific interest greater than the fundamental interest in open court records will be prejudiced, that sealing the court record will adequately protect such greater interest, and that no less restrictive alternative can adequately protect the greater interest ~~// and the reasons for each of such findings.~~

¶[e]. Sealing Order: If, after hearing [considering] all the ~~testimony~~ [evidence] concerning sealing of court records,

the judge concludes that a Compelling Need as defined herein has been shown, the judge may grant an order dividing the court records into two files: one kept open to public inspection and the other sealing only those limited portions of the court record for which a Compelling Need exists. Such order, if granted, shall be specific, stating the cause number, the parties to the action, the specific findings made at or after the hearing, the conclusions of law, [and] the specific limited portions of the court record which are to be sealed, /and/the/time/period/for which/the/sealed/portion/of/the/court/record/is/to/be/sealed. Under no circumstances may the [written motion to seal or the] sealing order be sealed; it [both] must remain in the open public portion of the file.

¶[f]. Compelling Need: "Compelling Need" means the existence of a specific compelling interest which, in the administration of justice, is substantial enough clearly to override the presumption that all court records are open to the general public. Specifically, in order to overcome the presumption of openness, a moving party must meet all of the following elements:

(i) Closure must be necessary to protect an interest greater than the fundamental interest in open court records [and that not sealing would cause irreparable harm] //and/the sacrifice/of/openness/must/be/necessary/to/prevent/a/serious and/imminent/threat/to/the/administration/of/justice//a person/s/sensitivity/embarrassment/or/desire/to/conceal

~~the details of litigation is not a greater interest which overcomes the presumption of openness; and~~

(ii) No less restrictive alternative would protect the greater interest and the interest in the administration of justice; and

(iii) Closure would effectively protect the greater interest and the compelling interest in the administration of justice without being overbroad.

f[g]. Court Records: For purpose of this rule, the term "court records" shall include all documents and records of any nature filed in connection with any matter before [any civil] ~~a~~ district or county court in any jurisdiction in the State of Texas. This rule shall not apply to discovery materials simply exchanged between the parties and not filed with a court, or to documents filed with a court in camera, solely for the purposes of obtaining a ruling on the discoverability of such documents.

g[h]. Continuing Jurisdiction: A ~~trial~~ court that ~~enters~~ [renders] a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order until such order expires by its own terms or is vacated by such court. [Any person, whether or not a party or intervenor at the hearing, may at any time after the order, move to dissolve, alter, vacate or enforce the order.]

h. Appeal: Any person who has requested or objected to a sealing order whether or not a party to the original suit [party or intervenor] may appeal a sealing order or any order granting or overruling a motion to dissolve[, alter, vacate, or enforce] a sealing order from any district or county [civil] court pursuant to Tex. Civ. Prac. & Remedies Code § 51.014(4). Upon any such appeal the trial court's failure to make the specific findings required in paragraph c shall never be harmless error and shall be reversible error.

The purpose of these tentative recommendations is to stimulate debate and comment before final resolution of Committee recommendations. Thus, this tentative listing does not reflect unanimity of opinion among Committee members on each and every recommendation.

Tentative Recommendations For Public Comment

THE FEDERAL COURTS STUDY COMMITTEE

December 22, 1989

Comments should be directed
by January 31, 1990 to:

Federal Courts Study Committee
22716 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106-1722

(215) 597-3320

THE FEDERAL COURTS STUDY COMMITTEE

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the provision to defeated attempts, often after complex argument in federal district or even appellate court before remand to state court, appears to be distressingly low. "[T]he statute's utility is greatly outweighed by the confusion it has engendered." C. Wright, *The Law of Federal Courts* 39, at 225 (4th ed. 1983).

(d) Confidentiality of Discovery Materials

- ▶ Federal courts should continue to use protective orders to preserve the confidentiality of sensitive materials in order to expedite discovery. In order to avoid duplicative discovery, however, courts that enter such orders should freely modify them to permit access to discovered information by litigants in other cases unless such information would not be discoverable in those cases. Access for other litigants to relevant, otherwise discoverable information should be denied only for especially good cause (e.g., protection of confidentiality of settlement discussions or statements made in voluntary alternative dispute resolution proceedings), but may be limited (as by requiring specific requests rather than opening files to later litigants) when all parties to the first litigation oppose access or confidentiality was a condition of settlement.

Particularly in complex litigation, confidentiality of materials produced through discovery can assume substantial importance. First, when (as is often true) litigation makes inquiry into sensitive materials, assuring confidentiality by using protective orders may facilitate the discovery process by reducing concern for publicity as a possible reason to resist discovery. Second, when the same issues arise in several related cases, sharing of information can make litigation more accurate and less expensive by avoiding need for duplication of effort -- unless defendants feel a need to resist the sharing. In some cases, such as those involving product safety, there is also a public interest in availability of information.

It is not easy to generalize about how to strike appropriate balances in the many different kinds of situations in which there will arise questions of confidentiality of sensitive discovery information that could be of value to other litigants, regulatory authorities, and the public. Denial of general access by protective orders can serve legitimate interests, such as the protection of trade secrets, as well as easing the

discovery process. It is, of course, basic that confidentiality orders in one litigation cannot deny to different litigants information that they would otherwise have been able to obtain by regular discovery processes. But there are public as well as private interests in expediting proceedings and settlement; consequently, not all information revealed in the course of one litigation should automatically be open to the public or to other litigants who might find it useful. Such legitimate reasons for confidentiality raise concern about some aspects of H.R. 129, proposed legislation that would limit protective orders in product liability cases; the supporting memorandum by Associate Reporter Marcus discusses the bill and recommends against changing legislatively, for one class of cases, present general practice -- which does often permit access already.⁷⁵

(e) Case Management

- ▶ The Committee encourages (a) the "tracking" of cases by level of complexity, (b) early judicial involvement to control the pace and cost of complex cases, (c) staged discovery, and (d) the training of judges in appropriate techniques of case management.

Over the past 10 to 15 years, district courts have expedited litigation by taking an increasingly active role in the management of litigation. These efforts were facilitated by the 1983 amendment to Federal Rule of Civil Procedure 16, and should be continued.

More specifically, a recently issued report by a task force of the Brookings Institution and the Foundation for Change extensively studied means of reducing delay and cost in civil litigation. Among the most promising measures identified was "tracking" or "differentiated case management," like that successfully used in New Jersey to classify cases as simple, standard, or complex. Depending on the classification, different time limits for discovery and trial can apply; and complex or hotly contested cases can call for judicial management measures such as early status conferences, targets for completion of various pretrial stages, and close supervision of discovery, including prompt decisions on discovery issues by one judicial officer primarily responsible for discovery

75. For a general discussion of this area, see Marcus, *Myth and Reality in Protective Order Litigation*, 69 *Cornell L. Rev.* 1 (1983).

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RESTATEMENT OF TORTS

DIVISION NINE

INTERFERENCE WITH BUSINESS RELATIONS (continued)

PART 1. BY TRADE PRACTICES (continued)

Chapter 36

MISCELLANEOUS TRADE PRACTICES

Section

757. Liability for disclosure or use of another's trade secret—General principle
758. Innocent discovery of secret—Effect of subsequent notice or change of position
759. Procuring information by improper means
760. Misrepresentation in marketing goods of which another is the commercial source—Liability to the other
761. False advertising—Liability to competitor

§ 757. LIABILITY FOR DISCLOSURE OR USE OF ANOTHER'S TRADE SECRET—GENERAL PRINCIPLE.

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if

- (a) he discovered the secret by improper means, or
- (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
- (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
- (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

Comment:

a. Rationale. The privilege to compete with others (see § 708, vol. III) includes a privilege to adopt their business methods, ideas or processes of manufacture. Were it otherwise, the first person in the field with a new process or idea would have a monopoly which would tend to prevent competition. This privilege has some limitations, however. In the first place, in order to promote the progress of science and the useful arts, patent and copyright laws provide protection to the originator. The patent laws prohibit the witting or unwitting manufacture, sale or use by any person of a device, process or article which infringes a patent granted to another. The copyright laws prohibit the plagiarism of a work copyrighted by another. The protection afforded by both types of legislation is limited to a fixed number of years. Both types of legislation establish a monopoly for the purpose of encouraging invention and

art. In the second place, the law of torts prohibits copying in a manner which creates in the market avoidable confusion of commercial source. The privilege to copy is not a privilege to palm off one's goods as those of another. Thus, when the physical appearance of one's goods has acquired in the market a significance as identifying the goods of which he is the commercial source, another may not copy that appearance if it is non-functional, and if it is functional, he may copy it only upon taking reasonable precaution to avoid confusion (see § 741, vol. III). The rule stated in this Section is a further limitation on the privilege to copy when the thing copied is a trade secret. This limitation is not imposed because of any difference in function or value between trade secrets and other devices or processes. A formula for a medicinal compound or a process of manufacture is equally effective in making its product when the formula or process is generally known as when it is secret. Its original discovery may require equal ingenuity and labor when it must necessarily be disclosed by the product which results from it as when it can be kept secret. Exclusion of others from the privilege of using it will give it the same value to the originator in the one case as in the other. Indeed, a patent monopoly is granted only upon full disclosure of the subject matter of the patent. The significant difference of fact between trade secrets and processes or devices which are not secret is that knowledge of the latter is available to the copier without the use of improper means to procure it, while knowledge of the former is ordinarily available to him only by the use of such means. It is the employment of improper means to procure the trade secret, rather than the

mere copying or use, which is the basis of the liability under the rule stated in this Section.

There is considerable discussion in judicial opinions as to the basis of liability for the disclosure or use of another's trade secrets. Analogy is sometimes found in the law of "literary property," copyright, patents, trade-marks and unfair competition. The suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected. The theory that has prevailed is that the protection is afforded only by a general duty of good faith and that the liability rests upon breach of this duty; that is, breach of contract, abuse of confidence or impropriety in the method of ascertaining the secret. Apart from breach of contract, abuse of confidence or impropriety in the means of procurement, trade secrets may be copied as freely as devices or processes which are not secret. One who discovers another's trade secret properly, as, for example, by inspection or analysis of the commercial product embodying the secret, or by independent invention, or by gift or purchase from the owner, is free to disclose it or use it in his own business without liability to the owner. As to the liability of one who procures the secret from a third person without notice of any impropriety in the third person's disclosure of it, see § 758. As to the procurement of information other than trade secrets, see § 759. For a definition of trade secrets, see Comment *b*.

The protection afforded by the rule stated in this Section is in some respects greater and in some respects less than that afforded by the patent law. It is greater in that it is not limited to a fixed number of

years and does not require novelty and invention as in the case of patents (see Comment *b*). It is less in that secrecy of the process and impropriety in the method of procuring the secret are requisite here but not in the case of patents.

b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appro-

propriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Novelty and prior art. A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a

trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability. The nature of the secret is, however, an important factor in determining the kind of relief that is appropriate against one who is subject to liability under the rule stated in this Section. Thus, if the secret consists of a device or process which is a novel invention, one who acquires the secret wrongfully is ordinarily enjoined from further use of it and is required to account for the profits derived from his past use. If, on the other hand, the secret consists of mechanical improvements that a good mechanic can make without resort to the secret, the wrongdoer's liability may be limited to damages, and an injunction against future use of the improvements made with the aid of the secret may be inappropriate.

Information not a trade secret. Although given information is not a trade secret, one who receives the information in a confidential relation or discovers it by improper means may be under some duty not to disclose or use that information. Because of the confidential relation or the impropriety of the means of

discovery, he may be compelled to go to other sources for the information. As stated in Comment *a*, even the rule stated in this Section rests not upon a view of trade secrets as physical objects of property but rather upon abuse of confidence or impropriety in learning the secret. Such abuse or impropriety may exist also where the information is not a trade secret and may be equally a basis for liability. The rules relating to the liability for duties arising from confidential relationships generally are not within the scope of the Restatement of this Subject. As to the use of improper means to acquire information, see § 759.

c. Disclosure or use. One who has a trade secret may be harmed merely by the disclosure of his secret to others as well as by the use of his secret in competition with him. A mere disclosure enhances the possibilities of adverse use. The persons to whom the disclosure is made may or may not be liable under Clause (c) for the subsequent use (see also § 758). Since a trade secret is vendible and since its sale value depends in part upon its secrecy, a mere disclosure may reduce the vendibility or sale value of the secret. The rule stated in this Section protects the interest in a trade secret against both disclosure and adverse use.

The duties not to disclose and not to use another's trade secret are not, however, necessarily concomitant, though they are frequently found together. Thus, a former employee to whom the secret was communicated in the course of his employment may be under both duties (see Restatement of Agency, §§ 395 and 396). On the other hand, a manufacturer who is permitted by the owner of the secret to use it in his manufacturing may be subject only to a duty

not to disclose the secret to third persons. Or the manufacturer may be permitted to use the secret only in the manufacture of products for the owner, with a duty not to disclose the secret or use it in the manufacture of products on his own account or for others.

Modification or improvement of the secret by the actor. To subject a person to liability, under the rule stated in this Section, for the use of another's trade secret, there is no requirement that he use it in exactly the form in which he received it. He may be liable even if he uses it with modifications or improvements upon it effected by his own efforts. Differences in detail do not preclude liability if, substantially, the process used by the actor is derived from the other's secret in the manner stated in this Section. The liability is avoided only when the contribution by the other's secret is so slight that the actor's process can be said to be derived from other sources; although even in such a case the actor is still subject to liability for harm caused by his disclosure or possession of the secret, under the rules stated in §§ 757-759. The extent of the modifications or improvements made by the actor upon the other's secret may, however, affect the computation of damages or profits for which he is liable to the other.

d. Privilege. A privilege to disclose or use another's trade secret may arise from the other's consent or from other conduct on his part by which he is estopped from complaining. A privilege to disclose may also be given by the law, independently of the other's consent, in order to promote some public interest. Thus, a witness who is compelled by law to answer a question which calls for a disclosure of the secret is not liable for making the disclosure in his

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January 10, 1990

Charles Herring, Jr., Esq.
Jones, Day, Reavis & Pogue
301 Congress Avenue
Austin, TX 78701

Re: Proposed Rule 76A

Dear Mr. Herring:

I am writing to endorse the comments of Gale R. Peterson in his letter dated December 19, 1989. I feel very strongly that an amendment such as that attached to Mr. Peterson's letter is imperative if extremely unfortunate, and probably unintended, ancillary results of the new rule are to be avoided.

Mr. Peterson made some excellent points in his letter. I would only like to add an emphasis on the fact that the ability to protect the investment of time and capital which is involved in developing new technology and other valuable information is a strong stimulus to our society and its economy. It makes researchers, entrepreneurs and others willing and able to spend such time and capital without fear of undercutting by those who would not have to price so as to recoup research costs. The ability to protect such information by means of confidentiality has become increasingly important in recent years, during which new kinds of technology, difficult to really adequately protect by traditional means, such as patents, have been developed.

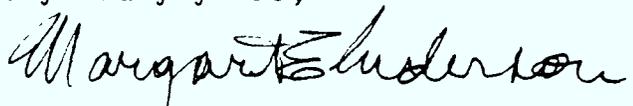
I believe that, in the absence of an amendment as proposed by Mr. Peterson, the proposed new rule, while directed to a worthwhile general goal, would have a stifling and detrimental effect on the creative efforts necessary for our state and country to remain in the ranks of the innovators, and reverse the current trend toward becoming a consumer nation.

As Mr. Peterson has mentioned, the Intellectual Property Law Section is precluded by State Bar regulations from lobbying as a body. There is, however, no doubt in my mind that

Charles Herring, Jr., Esq.
January 10, 1990
Page 2

the vast majority of our members would agree with the position expressed by Mr. Peterson.

Very truly yours,


Margaret E. Anderson

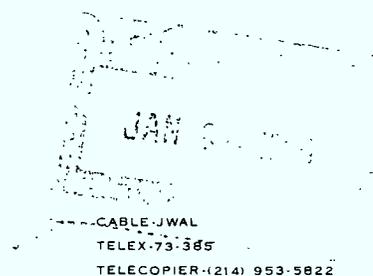
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cc: IPLS Council Members

JACKSON & WALKER
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WRITER'S DIRECT DIAL NO.:

214/953-6030



December 29, 1989

Mr. Charles M. Herring, Jr.
Jones, Day, Reavis & Pogue
301 Congress Avenue, Suite 1200
Austin, TX 78701

Mr. Charles E. Morris
Morris, Craven & Sulak
600 Congress Avenue, No. 2350
Austin, TX 78701

Re: Proposed Rule on Court Records

Dear Chuck and Lefty:

At the risk of further burdening your task and the record, I think the proposed rules should perhaps say something about settlements since that was specifically addressed in the statute passed by the legislature.

My thought was expressed at our December 15, 1989 meeting. That is, that a settlement agreement should be part of the public record if (1) the settlement agreement is filed; (2) any person seeks to enforce the agreement in a judicial proceeding; or (3) court approval of the settlement agreement is sought by any person. As I recall, there was also some comment made about providing in the rule that a settlement agreement is unenforceable to the extent that it prohibits parties or their attorneys from discussing the facts of a case or sharing documents exchanged during discovery which were not the subject of a protective order.

The specific language I would propose is:

(f) A settlement agreement is public information if (a) it is filed in connection with any matter before any civil court in the State of Texas; (b) court approval or disapproval of the settlement agreement is sought by any person; and (c) any person seeks to enforce any provision of the settlement agreement.

Mr. Charles M. Herring, Jr.
Mr. Charles E. Morris
December 29, 1989
Page Two

I have not attempted to draft language regarding the public policy issue of enforcing secrecy agreements contained in settlement documents. I know others of our group are interested in that issue and I would leave it to them to propose specific language.

Thanks again for all your consideration and if I may provide any further information, please do not hesitate to contact me.

Very truly yours,



Charles L. Babcock

CLB/den2109

cc: Justice Lloyd Doggett
Justice Nathan L. Hecht
Justice David Peeples
Judge Solomon Casseb, Jr.
Mr. Luther H. Soules
Mr. David Perry
Mr. David Chamberlain
Mr. David H. Donaldson, Jr.
Mr. Kenneth Fuller
Mr. Brian Webb
Mr. Thomas Leatherbury
Representative Orlando Garcia

February 20, 1990

FEB 23 1990



Mr. Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 1200
301 Congress
Austin, TX 78701

Dear Sir:

Sherwood Medical Company is located in Commerce and as employees of the company, we have an ongoing and vital interest in matters which might well adversely affect our business. We have been informed that the Supreme Court Advisory Committee is in the process of formulating guidelines for determining the rules which apply to the sealing of court records relating to settlement agreements. We believe that the outcome of the Advisory Committee deliberations regarding changes in rules and procedures could significantly influence the climate in which we manufacture and sell our products. For this reason, we are writing to ask that our concerns be given your closest attention.

We urge the Advisory Committee to be sure that the final rules are drawn so as to protect trade secrets and other sensitive information which, if disclosed, would be detrimental to the conduct of legitimate business in Texas. We also point out that courts have long recognized the utility of sealing records as an incentive to the parties to settle out of court.

We urge you to take into consideration the need for limiting disclosure of discovery materials and trust you will agree that any right of public access ought not to apply to the data yielded by the discovery process.

Please be good enough to keep us advised of developments, and we thank you in advance for your consideration of our concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jesse I. Buker".

Jesse I. Buker
Plant Manager

JIB/sf

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November 17, 1989

Charles Herring, Jr.
JONES, DAY, REAVIS & POGUE
301 Congress, Suite 1200
Austin, Texas 78701

Re: Proposed Supreme Court Rule Regarding Sealed Court
Records

Dear Chuck:

Thank you for sending us the materials in connection with the Supreme Court Ad Hoc Committee on sealing court records. As you know, the Texas Association of Defense Counsel has asked that we monitor the Committee's work and to the extent that the Committee will consider our input, participate in the Committee's work in connection with drafting the new rule.

Having just received the voluminous materials you sent us, we have not yet had an opportunity to digest all of this information. We would additionally like to circulate this information to interested members of the TADC for their input in formulating a new rule. Accordingly, we certainly hope that the Committee will have one or more additional public hearings beyond the initially scheduled session on November 18 in order to allow us the opportunity to present another view on the new rule. Nevertheless, individually and not on behalf of the TADC or any other organization, we would like to offer a few preliminary observations and thoughts for your consideration.

First, while it is apparent that there are important considerations in favor of open access to court records, we would hope that the Committee would also recognize that there are some important countervailing considerations in many cases. While John McElhaney's materials are well presented from an advocate's point of view, there are other points that should be considered.

The fundamental interest of our citizens in the right of privacy has been recognized by the United States Supreme Court and the Texas Supreme Court. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973). The fact that one party has decided to sue another and make scandalous or frivolous allegations in the public record should not mean that the person wrongfully attacked should forever lose his or her right of privacy associated with the matter. It is generally accepted that suing for defamation as to remarks made in connection with court proceedings is almost impossible. Accordingly, if a court ultimately concludes that false, deliberately scandalous and injurious accusations have been made and papers filed of record, it would seem that arguably some remedy should be preserved to protect the aggrieved party whose right of privacy has been violated from having such scandalous remarks preserved in the public record forever.

Second is the compelling interest in encouraging settlements. Various decisions have addressed the court's legitimate interest in encouraging settlement of lawsuits. Fernandez v. Telles, 663 S.W.2d 91 (Tex. App. - El Paso 1983, no writ) (even the strong policy of DTPA statute to protect consumers does not overrule stronger policy of the law favoring settlements); Bass v. Phoenix Seadrill/78 Ltd., 749 F.2d 1154 (5th Cir. 1985) (public policy favors voluntary settlements which obviate the need for expensive and time consuming litigation). Settlement considerations are even more important today with the overwhelming dockets of some of our courts. In certain instances, a party cannot settle a matter by means of a public settlement even though the claim may be wholly frivolous without opening the floodgates to an endless series of additional frivolous claims. As to the language of the proposed statute - which refers to court "records" - the proposed rule should not address settlements or any other documents that are not filed of record.

Thirdly, consideration should be given to those situations traditionally involving sealed records. If the Committee chooses to consider eliminating sealing in those cases or changing the law applicable to those situations, I would think that the decision should be made only after allowing several other segments of the Bar actively involved in such litigation to have full input into the rule drafting process.

Charles Herring, Jr.
November 17, 1989
Page Three

For example, the area of trade secrets is an area of much concern involving the formulation of this new rule. Texas law recognizes the existence of and the right to protect legitimate trade secrets. See, e.g., Hyde Corp. v. Huffheinz, 314 S.W.2d 763 (Tex. 1958). Compare Automatic Drilling Machines, Inc. v. Miller, 515 S.W.2d 256 (Tex. 1974) (public disclosure of trade secrets should be prohibited except where indispensable for the ascertainment of truth). This is one example of where sealed documents may be absolutely essential. However, under Mr. McElhaney's proposal, it is unclear whether such an example would meet the compelling need test he proposes. A rule precluding sealing of appropriate documents in trade secret litigation could well eliminate the possibility of any party successfully suing to protect the property rights if the owner of the trade secret knows that the very act of suing would risk public disclosure of the matter sought to be protected. Texas law currently recognizes this need in Rule 507 of the Texas Rules of Civil Evidence wherein courts are allowed to take appropriate protective measures in trade secret cases. Tex. R. Civ. P. 166b(4) expressly authorizes trial courts to issue "any order in the interest of justice to protect . . . property rights" and further provides that the trial court may limit the distribution and disclosure of discovered documents. Presumably, such measures would, and should, include sealing records and conducting in camera proceedings.

It seems to me that the Texas Supreme Court has already provided guidance in the trade secrets area and has reaffirmed a litigant's right to a protective order in this regard. Garcia v. Peeples, 734 S.W.2d 343 (1987) ("Such an order would guard GMC's proprietary information, while promoting efficiency in the trial process").

Along these lines are the areas of family law wherein records are sealed for the protection of parties, especially children in divorce and adoption matters. See, e.g., Texas Family Code § 51.14, § 51.16 (Vernon's Supp. 1989); Local Rules of Civil Procedure and Rules of Decorum, District Courts of Travis County, Rule 14.01. Considerations of such matters must be incorporated into drafting of the new rule.

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Page Four

Moreover, the proposed rule should recognize the unique role the trial court plays in controlling their own records. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); In Re Reporters Committee, 773 F.2d 1325 (D.C. Cir. 1985). As with many other trial matters, substantial discretion should be vested in the trial court. Such will insure that the trial judge will have the particular facts of each case in order to make a proper decision. It is doubtful the Committee will be able to consider the diverse and unusual factual settings that the trial courts of Texas will likely encounter. I rather think at this point that it may be unwise to tie the trial judge's hands.

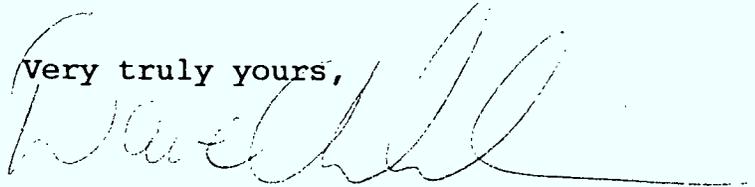
Even John McElhaney's brief makes clear that the United States Supreme Court has not yet decided whether there is a constitutional right of access to civil court records. Neither has the Texas Supreme Court decided such issue. Accordingly, because of the many undecided issues in this area of the law, the rule should not tie the hands of the trial court by codifying a particular interpretation of the law which is unclear at this time. For example, although Mr. McElhaney cites a number of cases holding or suggesting that there is a First Amendment right of access to civil court records, other cases have reached the opposite conclusion. See, e.g., Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); In Re Reporters Committee, 773 F.2d 1325 (D.C. Cir. 1985); Bellow Broadcasting Corp. v. Clark, 754 F.2d 423 (5th Cir. 1981).

With respect to the proposed text of the rule submitted by John McElhaney, several concerns come to mind. However, please realize a full opportunity to analyze the rule and its ramifications has not been made. A provision for an in camera presentation of at least certain materials should be provided instead of the proposal that the motion, hearing and order all remain public. Otherwise, the purpose for the hearing would be self defeating through public disclosure at the hearing. There further may be times when the 72 hour notice requirement would be impractical. Accordingly, a provision should be added for avoiding this notice requirement upon appropriate showing. And most importantly, "the compelling need" test would appear as a practical matter impossible to meet. A showing of "serious and imminent threat to the administration of justice" is not the proper standard by which trial courts should address the sealing of records issue inasmuch as such standard is too stringent.

Charles Herring, Jr.
November 17, 1989
Page Five

Thank you again for the short opportunity to review the materials the Committee has accumulated to date. I hope that you and the Committee will consider the enclosed preliminary observations. The TADC is certainly interested in analyzing this issue in detail and would like an opportunity to present a thorough evaluation of the proposal. Feel free to call our office if we can provide any additional information or assistance.

Very truly yours,



David E. Chamberlain



J. Gordon McHaney

DEC/JGM/bes

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ATTORNEYS & COUNSELORS AT LAW

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DAVID E. CHAMBERLAIN

(512) 474-9124

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December 6, 1989

VIA HAND DELIVERY

Charles Herring
JONES, DAY, REAVIS & POGUE
301 Congress Avenue, Suite 1200
Austin, Texas 78701

Re: Proposed Rule 76a

Dear Chuck:

Enclosed please find my proposed Texas Rule of Civil Procedure 76a: Sealing Court Records.

I have thoroughly reviewed the drafts of David Perry and Luke Soules and the revised draft of John McElhaney. I find good things in each of them.

My proposed draft generally tracks John McElhaney's. In fact, I do not have a whole lot of changes to that draft, but I do have some important ones.

First, I believe that sealing of court records should be within the discretion of the court subject to the guidelines specifically set forth in Rule 76a. There is no possible way that this committee or the Supreme Court can anticipate the myriad of situations that trial judges will be confronted with over the coming years. I do not believe that tying the hands of our trial judges to deal with these situations will serve the administration of justice. My paragraph a.1. reflects that consideration.

Second, I do not believe that the moving party should be required to prove a compelling need by clear and convincing evidence. Clear and convincing evidence is a standard inconsistent with all general notions that a civil court balances the respective interests of the parties and the general public in every case. To require a showing by clear and convincing evidence tends to downplay the interests of individuals who bring

Charles Herring
December 6, 1989
Page Two

or defend litigation. My paragraph a.1. reflects that consideration.

My clients and colleagues are also concerned that proprietary information has not been adequately considered in proposed drafts to date. Therefore, I have added a specific subparagraph in this regard, and I believe that it is consistent with the Texas Rules of Civil Evidence. You will note that the protection of trade secrets, intellectual property and other proprietary information can be sealed only if sealing does not pose an immediate and identifiable threat to the public health, safety and welfare of the general public. I believe that should cover the concerns expressed by David Perry and others.

I also believe that the rule should be consistent with the entirety of Article 5 of the Texas Rules of Civil Evidence which covers privileges. If Rule 76a and the civil evidence rules are inconsistent, it can only lead to confusion and consternation of litigants, the practicing bar and the trial and appellate courts. My paragraph a. reflects that consideration.

I agree with David Perry that some special consideration should be given to persons who are victims of sexual assault or sexually related offenses. My paragraph a. also reflects that.

My paragraph a. also recognizes that neither this committee nor the Supreme Court can possibly anticipate every situation that may be confronted by the trial bench. This rule should reflect confidence in the trial bench to properly weigh the interests of the public versus individual litigants. I sincerely believe that if we cannot trust our trial judges in this regard, all is lost anyway.

I have retained John McElhaney's other provisions regarding "no less restrictive alternative" and "sealing will adequately protect the specific interests without being overly broad."

I agree with David Perry's definition of "Court Records." I think the purpose of the rule will be defeated if the court can only seal what's actually at the courthouse as opposed to what is still in the possession of counsel. As you know, the court may decide early in the case to require the defendant manufacturer to reveal its trade secrets to the injured plaintiff. This may be proprietary information that does not pose a threat to the general public. If the court can only seal its own records and not seal the discovery, then our rule does not accomplish anything. My paragraph 2. reflects that consideration.

Charles Herring
December 6, 1989
Page Three

I have made two other changes to John McElhaney's provision regarding the "hearing." I believe David Perry and Luke Soules' suggestion that the hearing may be conducted on affidavits if the affiant is present and available for cross examination. I have also added the provision that, during this hearing, the court records should be examined by the court in camera. I say this for the reason that if the inspection is not done in camera, then any person opposing sealing will have full access to the records during the hearing. My paragraph b.1. reflects that consideration.

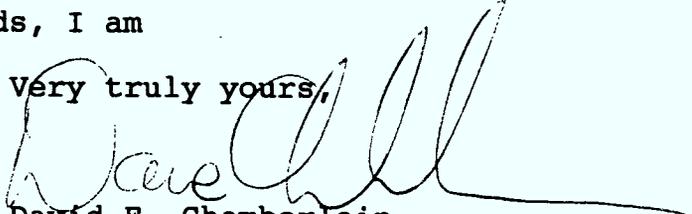
I have made no other significant changes to the McElhaney revised draft.

On a final note, I would urge the committee to carefully consider this state's legitimate economic interests and the protection of proprietary information. I do not believe this state wants to be the first to go on record stating that trade secrets are not trade secrets. As you know, we have too many new industries that are attracted to this state, and we should not do anything to impede the progress of rational economic development.

I ask that you please distribute this letter and the proposed rule as soon as possible to all members of the committee and other interested parties.

With best personal regards, I am

Very truly yours,


David E. Chamberlain

DEC/bes
Enclosure

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 76a:
SEALING COURT RECORDS

a. Definitions:

1. Compelling Need: "Compelling Need" means the existence of a specific interest which, in the discretion of the court, overrides the presumption that all court records are open to the general public. The burden of proof is on the moving party to show by a preponderance of the evidence that:

- (a) sealing is necessary to protect those matters privileged under Article V of the Texas Rules of Civil Evidence or under other statute or law; or
- (b) sealing is necessary to protect specific property interests, including trade secrets and intellectual property; or
- (c) sealing is necessary to protect the identity or privacy of an individual who has been the subject of a sexually related assault or injury; or
- (d) a specific interest of the person or entity sought to be protected by sealing of the court records outweighs the public interest in open court records; and
- (e) no less restrictive alternative will adequately protect the specific interests of the person or entity sought to be protected; and
- (f) sealing will adequately protect the specific interest of the person or entity sought to be protected without being overly broad.

2. Court Records: For the purposes of this rule, the term "Court Records" shall include all documents and records of any nature filed with the clerk of the court in connection with any civil matter before any court of record in any jurisdiction in the State of Texas. The term also includes those records of court proceedings such as interrogatories and answers thereto, requests for admissions and responses thereto, requests for production and responses and production made pursuant thereto, deposition transcripts, and similar records which record any matter taken pursuant to court authority although the documentation may remain in the custody of counsel. The term does not apply to documents filed in court in camera solely for the purpose of obtaining a ruling on the discovery of such matters.

b. Unless provided to the contrary by statute or other law, before a judge may seal any civil Court Records, the following prerequisites must be satisfied:

1. Hearing: A hearing must be held in open court, open to the public, at which time any person desiring to oppose the sealing of Court Records, whether or not a party to the suit, may appear and have an opportunity to be heard. Affidavits may be received into evidence if the affiant is present and available for cross examination. The court shall conduct an in camera inspection of the court records sought to be sealed before ruling on the motion.

2. Notice: The party seeking sealing must file a written motion in support of the sealing request, which motion shall be open to public inspection. The moving party shall post a public notice at the place where the notices for meetings of county governmental bodies are required to be posted, stating that a hearing will be held in open court on a motion to seal Court Records in the specific case, stating that any person has an opportunity to appear and be heard concerning the sealing of Court Records, and stating the specific time and place of the hearing, the style of the case, and the case number. The written motion in support of the sealing request shall be filed and the public notice shall be posted at least three working days prior to the hearing. Immediately after posting such notice, the moving party shall file a verified copy of the notice, as posted, with the clerk of the court in which the case is pending, stating that notice under this rule has been provided. Such notice shall not be sealed, but shall remain open to public inspection.

3. Ex Parte Sealing Order: Upon a finding of compelling need, a district or county court may issue an ex parte order sealing Court Records without holding a hearing or requiring notice as provided in paragraphs (b)(1) and (b)(2) above. Such an ex parte order shall expire no more than three working days after its issuance and shall be void and of no force and effect unless it has been reissued following the hearing and notice provided for in paragraphs (b)(1) and (b)(2) above. An ex parte order sealing Court Records must contain the findings required by paragraph (b)(5) and must be open to public inspection as required by paragraph (b)(6).

4. Findings: In order to seal Court Records, the court must make specific findings that a Compelling Need as defined herein for sealing has been shown.

5. Sealing Order: If, after hearing all the evidence concerning sealing Court Records, the judge concludes that a Compelling Need as defined herein has been shown, the judge may grant an order dividing the Court Records into two files: one kept open to public inspection and the other containing only those limited portions of the Court Records for which a

Compelling Needs for sealing exists. Such order, if granted, shall be specific, stating the case number, the style of the case, the specific findings made at or after the hearing, the conclusions of law, the specific limited portions of the Court Records which are to be sealed, and the time period for which the sealed portion of the Court Records is to be sealed. Under no circumstances may the sealing order be sealed; it must remain in the open, public portion of the file.

c. Continuing Jurisdiction: A trial court that enters a sealing order maintains continuing jurisdiction to enforce, alter, vacate, or reinstate that order.

d. Appeal: Any person who has requested or objected to a sealing order, whether or not a party to the original suit, may appeal a sealing order or any other order granting or overruling a motion to dissolve a sealing order from any district or county court pursuant to Tex. Civ. Prac. & Remedies Code § 51.014(4). Upon such appeal, the trial court's failure to make the specific findings required in paragraph (b)(4) shall never be harmless error and shall be reversible error.



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DOUGLAS G. CORDERMAN
DIRECTOR
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January 19, 1990

Mr. Charles J. Herring, Jr.
Co-Chairman
Texas Supreme Court Advisory Committee
Jones, Day, Reavis & Pogue
Suite 1200, 301 Congress
Austin, TX 78701

Dear Mr. Herring:

I am writing to you in your capacity as co-chairman of the Texas Supreme Court Advisory Committee on protective orders to express our company's views on this important subject.

Emerson Electric Co. is a major American electrical and electronic manufacturing company with annual sales of \$7 billion, 70,000 employees and hundreds of plant and office locations throughout the United States. Two of our plants are in Texas, our Appleton Electric Co. unit in Stephenville and our Therm-O-Disc unit in El Paso, as well as more than 25 branch offices and service centers scattered throughout the state.

A significant portion of our sales are made in Texas since we sell to the oil field, construction and chemical industries. We also sell a wide variety of consumer products in Texas, including brand names like Sears Craftsman Power Tools, Skil Tools and In-Sink-Erator garbage disposals.

We understand that your committee is working to develop a new rule governing the sealing of court records in Texas civil courts. Emerson urges that any changes to the existing practice be as minimal as possible, particularly with regard to the definition of "court records". We understand the committee has been given proposals to expand the definition of "court records" to include discovery documents and settlement agreements within the scope of any new rule. Emerson strongly opposes such expansion as an infringement on constitutionally protected privacy rights, because of the impropriety of treating private discovery materials as public records and for all the policy reasons for maintaining the confidentiality of settlement agreements. Most of all we oppose expansion of the definition of "court records" because it is counterproductive to the whole idea of settlements.

Mr. Charles J. Herring, Jr.
January 19, 1990
Page 2

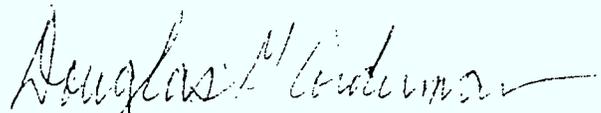
Courts historically favor settlements between the parties. Settlements ease their case loads, provide for a speedier resolution to disputes, and frequently reduce the total cost to the parties by minimizing legal expenses and avoiding excessive verdicts. One of the principle reasons parties are willing to settle is because the settlement terms remain private. If this condition were to change, companies such as Emerson would be much more reluctant to settle. Privacy and the protection of trade secrets are worth something. If we do not get these in a settlement, settlement is much less attractive. Courts have long recognized this point.

Another point of great concern to our company is that open-ended access to information is an invitation to plaintiff's attorneys to market and exchange confidential documents for monetary gain.

At the federal level a Federal Court Study Committee has recently recommended that protective orders and sealing of settlements are essential to the effective functioning of the judicial process. We believe this is equally true in Texas.

Thank you for this opportunity to comment. I hope and trust your committee will consider Emerson's views in its deliberations. Please contact me if you wish additional information.

Sincerely,



Douglas G. Corderman

DGC:pb

American Home Food Products, Inc.

P. O. BOX 1867 FORT WORTH, TX 76101 • (817) 336-5581 --

RECEIVED
FEB 22 1990

February 20, 1990

Mr. Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 1200
301 Congress
Austin, TX 78701

Dear Sir:

American Home Food Products, Inc. is located in Ft. Worth and as the Manager of this facility, both I and my company have an ongoing and vital interest in matters which might well adversely affect our business. We have been informed that the Supreme Court Advisory Committee is in the process of formulating guidelines for determining the rules which apply to the sealing of court records relating to settlement agreements. We believe that the outcome of the Advisory Committee deliberations regarding changes in rules and procedures could significantly influence the climate in which we manufacture and sell our products. For this reason, we are writing to ask that our concerns be given your closet attention.

We urge the Advisory Committee to be sure that the final rules are drawn so as to protect trade secrets and other sensitive information which, if disclosed, would be detrimental to the conduct of legitimate business in Texas. We also point out that courts have long recognized the utility of sealing records as an incentive to the parties to settle out of court.

We urge you to take into consideration the need for limiting disclosure of discovery materials and trust you will agree that any right of public access ought not to apply to the data yielded by the discovery process.

Please be good enough to keep me advised of developments, and we thank you in advance for your consideration of my companys concerns.

Very truly yours,



Ronald D. DeVoe
Vice President
Plant Manager

RDD/lbj

Mr. Charles J. Herring, Jr.
February 20, 1990
Page Two

particular suit, and not for general dissemination to the public at large.

Unfortunately, some attorneys are motivated to exchange this data among themselves, and to take advantage of lawsuit disclosures by trading in that information for personal monetary gain.

As I am sure you know, the Federal Court Study Committee, created by Congress, recently recommended that protective order and sealing of settlements are essential to the effective functioning of the judicial process. I would urge your committee to adopt the same view, and that the committee do what it can to encourage the Supreme Court to recognize the need to protect confidentiality through protective orders and the sealing of documents.

Very truly yours,

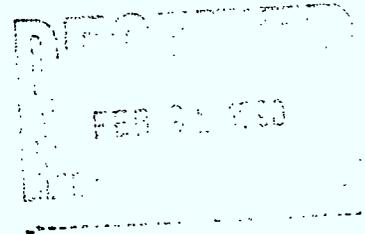


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February 20, 1990

BALLINGER MILLS
OF COUNSEL

Re: Protective Orders and Settlement Agreements

Mr. Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 1200
301 Congress
Austin, Texas 78701

Dear Mr. Herring:

I am writing you in your capacity as cochairman of the Advisory Committee to the Texas Supreme Court. The state court discovery process in Texas is currently limited only by the "relevancy" standard of Rule 166b, and miscellaneous privileges recognized by that rule. Parties on either side of the docket often are obliged to produce and divulge data and documents which most lay people consider highly sensitive, such as income tax records, financial records, and proprietary information of a business. If a business has to reveal how much it costs to make a given product, its competitors may gain an unfair advantage in the market place. A manufacturer's ability to compete may be severely compromised by disclosure of its trade secrets and other technical production data. A student suing a public university and its faculty in civil rights on a disciplinary problem may want a settlement which requires all parties to keep the settlement terms confidential, and protect the student's standing. Any number of scenarios occur in which confidentiality is critical.

For a variety of reasons, protective orders and settlement agreements often protect trade secrets and other sensitive data. On the other side of the coin, there is really no overriding public purpose to be served by compromising this confidentiality.

The courts have for many years recognized the need to protect the parties by sealing documents and honoring confidentiality orders and agreements. The courts have in essence recognized that this information could harm privacy and reputation, on one hand, while on the other the data is not public data. That is, it would not have been disclosed but for litigation, and the disclosure was made only for the purpose of a

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INTELLECTUAL PROPERTY LAW SECTION

December 29, 1989

Mr. Charles Herring, Jr.
Jones, Day, Reavis & Pogue
301 Congress Avenue
Suite 1200
Austin, TX 78701

RE: Revised Proposed Texas Rule of
Civil Procedure 76a

Dear Mr. Herring:

Mr. Gale R. Peterson has written to you on
December 19 concerning the Proposed Texas Rule of
Civil Procedure 76a: Sealing Court Records. He has
expressed his concerns about the loss of valuable
trade secret rights, a concern which I share.

An exception to this rule for trade secrets
would be appropriate. However, if an exception is
not possible at this time, then the amendment
proposed in Mr. Peterson's letter to you of December
19 should be given every possible favorable
consideration.

Thank you.

Very truly yours,

Edward G. Fiorito

EGF:deh

cc: Officers and Council Members

ARNOLD, WHITE & DURKEE

A PROFESSIONAL CORPORATION

Attorneys at Law

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OF COUNSEL
JAMES A. RELLY
JOHN G. GRAHAM

FILE:

December 26, 1989

Charles Herring, Jr., Esq.
Jones, Day, Reavis & Pogue
301 Congress Avenue
Austin, TX 78701

Re: Proposed Rule 76a

Dear Mr. Herring:

I wish to endorse fully the comments of Gale R. Peterson in his letter to you dated December 19, 1989, as well as Mr. Peterson's proposal amendment of David Chamberlain's draft of proposed Rule 76a -- regarding trade secrets, confidential and other proprietary information, or other intangible property rights that would be lost or impaired in the absence of an order protecting or preserving same.

If proposed Rule 76a does not provide "reasonable access to" protective orders for trade secrets and confidential information, then that rule might very well be an unconstitutional taking of private property without just compensation. See U.S. Const. amend. V and XIV, § 1.

As a matter of public policy, if the Texas courts do not provide "reasonable access to" protective orders for trade secrets and confidential information, legitimate businesses -- which make significant investments in developing trade secrets and confidential information -- will locate outside Texas, thereby hurting the Texas economy; and trade secret and confidential information thieves and pirates will look to Texas

Charles Herring, Jr., Esq.
Jones, Day, Reavis & Pogue
December 26, 1989
Page 2

for "political asylum" from traditional principles of business ethics and morality.

If you have any doubt about the need for "reasonable access to" protective orders for trade secrets and confidential information, I suggest that you discuss the matter with your own law partners who do intellectual property law work.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jack C. Goldstein". The signature is written in a cursive style with a large, looping initial "J".

Jack C. Goldstein

JCG:jbm

cc: Lefty Morris, Esq.
John McElhaney, Esq.
Kenneth D. Fuller, Esq.
David E. Chamberlain, Esq.
David L. Perry, Esq.
Gale R. Peterson, Esq.
Chief Justice Thomas R. Phillips
Justice Oscar H. Manzy
Justice Eugen A. Cook
Justice Nathan L. Hecht
Justice Lloyd Doggett

I:±LAB2±02.JGO

Statutory Probate Courts

State of Texas



November 14, 1989

Presiding Judge

Hon. Kenneth Pat Gregory
Probate Court No. 2
506 Family Law Center
1115 Congress Ave.
Houston, Texas 77002
(713) 221-6090

Anita Rodeheaver
County Clerk
P. O. Box 1525
Houston, Texas 77251-1524

Assistant Presiding Judge

Hon. Patrick Ferchill
Probate Court No. 2
Tarrant County Courthouse
100 East Weatherford
Fort Worth, Texas 76102
(817) 334-1415

Re: Proposed Rule 76a
Sealing Court Records

Statutory Probate Judges

Hon. T. Armour Ball
Probate Court No. 1
Main Plaza
Bexar County Courthouse
San Antonio, Texas 78285
(512) 220-2678

Dear Anita:

I have had an opportunity to review the proposed rule and it leaves much to be desired when viewed in light of our needs in the Probate area. The proposed rule fails to grasp the present day procedures for processing of records in an urban county.

Hon. Bill Bedard
Probate Court No. 3
Dallas County Courthouse
209 Records Bldg. Annex
Dallas, Texas 75202
(214) 653-6166

Some of my own cogent comments and observations are:

1. The proposed rule fails to understand and take into consideration the practical problems and logistics in handling documents. The proposed rule needs to address two separate issues in sealing records, i.e. (1) records already on file in the courts system and (2) records to be filed where the sealing order is sought at the time of filing. The practical actions in handling the sealing of these records differ considerably. A record which has been filed and then sealed requires acts of removing and expunging them from existing film records leaving gaps in sequencing and controls. This rule would not be a problem where only paper records are in existence. Where records have not been previously filed, the process can be made easier by having the records submitted in a sealed container for the Court's in-camera review and entry of an order opening or allowing them to remain sealed.

Hon. Robert Burnett
Probate Court No. 1
Tarrant County Courthouse
100 East Weatherford
Fort Worth, Texas 76102
(817) 334-1200

Hon. Keith Burris
Probate Court No. 2
Main Plaza
Bexar County Courthouse
San Antonio, Texas 78285
(512) 220-2546

Hon. Nikki DeShazo
Probate Court No. 1
Dallas County Courthouse
218 Records Bldg. Annex
Dallas, Texas 75202
(214) 653-7236

Hon. Guy Herman
Probate Court No. 1
Travis County Courthouse
Room 217 - P.O. Box 1748
Austin, Texas 78767
(512) 473-9258

Hon. John A. Hutchison, III
Probate Court No. 1
6th Floor, Family Law Center Bldg.
1115 Congress Ave.
Houston, Texas 77002
(713) 221-6084

Hon. Jerome Jones
Probate Court
Galveston County Courthouse
722 21st St.
Galveston, Texas 76550
(409) 766-2251

Hon. William C. McCulloch
Probate Court No. 4
501 Family Law Center Bldg.
1115 Congress Ave.
Houston, Texas 77002
(713) 221-5959

2. The proposed rule fails to assure that proper notice is obtained and does not furnish ample time to obtain such notice. It would seem more appropriate to have notice of the application to seal posted as in other Probate matters. Persons desiring to object would then file an opposition to the sealing. A hearing should not be set until at least 5 days following the return date of the posted notice. The movant, or objecting party, would set the hearing directly with the Court permitting the Court at its discretion and availability to consider the matter.

Hon. Robert E. Price
Probate Court No. 2
Dallas County Courthouse
211 Records Bldg.
Dallas, Texas 75202
(214) 653-7138

Hon. Jim Scanlan
Probate Court No. 3
6th Floor, Family Law Center Bldg.
1115 Congress Ave.
Houston, Texas 77002
(713) 221-6953

3. The proposed rule fails to recognize the present existence of special sealed records, i.e. mental health proceedings as well as other areas which prohibit disclosure of public records. Under the rule as written, particularly the compelling need test, these records would not be entitled to seal as they could not pass this test for sealing.

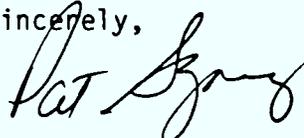
4. The proposed rule involving continuing jurisdiction appears to contemplate that a Court will set a specific time limit on the seal. This then places an additional burden upon the clerk to maintain the timing sequence and then timely unseal. When records are to be unsealed no consideration has been given as to how these records get into the system. Again where only paper records exist, it does not raise a significant problem, but filmed records and the large volumes in urban counties do present a significant problem that has not been considered.

5. The proposed rule fails to provide a method for unsealing records and sets no provisions as to what, when, or how it can be done. Again when dealing with only paper records, this presents no problem. The rule, while providing specific methods for determining the need to seal, fails to set guidelines as to the basis and time frames for unsealing.

6. The proposed rule, while attempting to set out specific requirements for proof in order to seal and definitions of these elements and bases, appears, however, to be both vague and ambiguous. No writing exists to instruct or provide guidance as to what the Courts must find under what appears to be non sequitur and ambiguous bases. The wording under section (c) and (e) appears to be astute, but what does it really mean? Does it not now permit access to records which were allowed to remain under seal when they were gauged against the common law right to privacy or access? The very bases for sealing a record that has been used in the past would now appear to be insufficient under the proposed rule.

I hope that those comments will be of some use to you.

Sincerely,



Hon. Kenneth Pat Gregory
Presiding State Statutory
Probate Judge
506 Family Law Center
1115 Congress Ave.

PG/mg

**Jett Hanna
Attorney at Law
1601 Rio Grande, Suite 415
Austin, Texas 78701**

November 30, 1989.

Mr. Charles F. Herring, Jr.
Jones, Day, Reavis & Pogue
301 Congress Avenue, Suite 1200
Austin, Texas 78701

Dear Chuck:

I am writing to set forth an alternative to the "standard" that might be enunciated under the new rules. My suggestion is that the new rules simply focus on the procedural reforms needed to allow members of the press and other interested parties to make their arguments as to why a record should be unsealed. The thrust of my proposal would leave the resolution of the exact standard for sealing or unsealing to currently existing statutes, common law, and constitutional law. I believe that this proposal is more in harmony with the constitutional and statutory duties of the Supreme Court in developing rules of procedure. I also believe that using this "standardless standard" will permit a rational and considered determination of when the sealing of records is appropriate and when it is not.

I want to go through a brief history of the Supreme Court's rule making power and the ways that power has been exercised. Prior to 1939, rules of procedure in Texas were a jumble of legislative enactments. Braden, et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, 471 (1977). Art. V §25 of the Texas Constitution gave the Supreme Court authority to promulgate rule of procedure "not inconsistent with the laws of the State." In 1939, the Legislature passed a statute conferring general rule making authority on the Supreme Court. *Tex. Rev. Civ. Stat. Ann. art 1731a*. Despite the passage of this statute, the Supreme Court was not able to override legislation that conflicted with a rule of procedure since such rules were deemed to be "inconsistent with the laws of the State." E.g., Few v. Charter Oak Fire Ins. Co., 463 S.W.2d 424 (Tex. 1971).

This system of rule making worked relatively well, but still did not vest complete authority over rules in the Supreme Court. In 1985, Article V, §25 of the Texas Constitution was repealed and, simultaneously, the legislature passed a new rule making act for the Supreme Court. *Tex. Gov't. Code Ann. §22.004* (attached). This Act permits the Supreme Court to make all rules of procedure, and provides that Supreme Court made rules of

procedure override legislative enactments to the extent of conflict. The rule making Act goes on to require that the Supreme Court not enlarge or diminish any substantive rights through the rule making authority delegated to the Supreme Court. In sum, it is clear that under Texas constitutional law, the legislature has the power to make rules of procedure for the courts, and the legislature has chosen to delegate that rule making authority to the Supreme Court insofar as the matters do not affect substantive rights of litigants.

Enter the new legislative enactment Tex. Gov't. Code Ann. §22.010, which requires the Supreme Court to "adopt rules establishing guidelines . . . to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." While on first blush it may appear that the Supreme Court has been delegated the ability to create standards which could affect substantive rights, I would submit that the wording of this statute and of §22.004 suggest that the true legislative intent is for the legislature to mandate that the Court adopt some rule of procedure clearly addressing and providing for sealing of records. To interpret the statute as requiring the Supreme Court to make rules which would affect the substantive rights of the litigants would call into question the entire scheme of rule making authority created by the 1985 enactments. I believe that the Court can make a more constrained interpretation that the "guidelines . . . in the interest of justice" that need to be set are procedural. The fact that very few Texas cases have ever even reached the merits of the claims by parties seeking unsealing of records gives further credence to this interpretation.

It is my understanding that various bills were introduced, but not passed, in the legislature this past session which specifically attempted to set standards for sealing in specific types of products liability cases. Numerous statutes focus on the substantive issue, i.e., whether a court record should be sealed in a particular case. If the Court adopts a broad standard which challenges the substantive rights already dictated by the legislature, I believe that there would be a substantial risk that the judicial standard would encroach on legislative prerogative. For example, if the standard enunciated failed to specifically take into account adoption records, and a court later ruled in a particular case that the unsealing of an adoption record was appropriate under the rule of procedure standard, then substantive rights created by the legislature protecting the privacy of certain individuals would have been overridden by a Supreme Court created rule. Note, too, that an explicit listing of all statutes repealed may be required under §22.004(c) if the Supreme Court adopts a comprehensive standard.

Mr. Herring
November 30, 1989
Page 3

There will be justifiable confusion over the status of statutes mandating sealing of adoption, juvenile, mental health, and other similar records if a comprehensive standard is enunciated under the rules of procedure without addressing what happens to current statutes.

The only sections of Mr. McElhaney's proposal which I feel go to a substantive right rather than a procedural right are §(c) and §(e) of proposed Rule 76(a). Rather than go through such specificity as to the Court's finding, I would propose a very short §(c):

"Findings: In order to seal court records, the Court must make specific, on the record findings of fact demonstrating that sealing is permitted under applicable constitutional, statutory, and common law, that sealing the court record will adequately protect any interest served by sealing, and that no less restrictive alternative can adequately protect the interest served by sealing."

I would strike §(e) in its entirety.

There has been much discussion of the abuses that have occurred in sealing records, and certainly the persons who have been aggrieved in this process can make the argument that there is some need for the Supreme Court to "lay down the law" as to when a record should or should not be sealed. I would submit, however, that the primary problem at this time is that members of the press and other interested parties have simply been unable to make their common law and/or constitutional law arguments before the Texas courts. If the lower courts are specifically required to make findings of fact and to state their reasons for closing records, I believe that Mr. McElhaney's briefs have amply documented that a significant body of law already exists that arguably sets forth necessary standards. Allowing the common law/ constitutional law to develop through cases will allow the Court in its traditional judicial role to fully consider claims based on the First Amendment, on rights of privacy, and on property rights. If the Supreme Court decides once and for all the standard right now without having hard cases in front of it, it may be locking into a system which would trample on the substantive rights of parties.

Mr. Herring
November 30, 1989
Page 4

I appreciate your consideration of my proposal. If anyone has any comments, I would be glad to discuss my ideas with them.

Sincerely,



Jett Hanna

JH/kg
kgnov/jh.2

Attachments

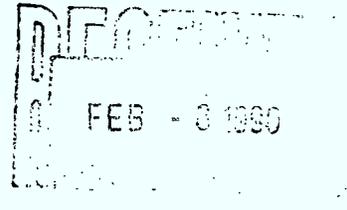
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February 7, 1990

VIA FEDERAL EXPRESS

Charles Herring, Jr., Esq.
Jones, Day, Reavis & Pogue
301 Congress Avenue, Suite 1200
Austin, Texas 78701

Re: Texas Supreme Court Advisory Committee

Dear Mr. Herring:

I have followed with interest the efforts of the Texas Supreme Court Advisory Committee to develop a proposed rule on sealing court records. I understand that there have been proposals to expand the definition of "court records" in the original proposal -- which expressly excluded "discovery materials simply exchanged between the parties and not filed with a court" -- to include discovery documents. These proposals would have a court apply the same "compelling need" standard in deciding whether to protect discovery documents from public scrutiny as it would in deciding whether to deny public access to core public documents such as trial transcripts, evidence presented to the court, and briefs filed on the court docket.

I believe these proposals are seriously misguided. In a variety of contexts, American courts have recognized that discovery documents are fundamentally different from materials placed in the public record at trial or in pre-trial briefing. Principles of public access applying to the latter materials simply do not apply to discovery materials. Granting a right of public access to discovery materials would threaten both constitutionally protected privacy interests and the efficient functioning of the judicial system. There is thus no justification for applying the "compelling need" standard to these materials.

In considering claims of a presumptive public right of access to court materials, the Supreme Court has clearly drawn the line at discovery documents. The Court has recognized a first amendment right of access to actual court proceedings in a

variety of contexts,¹ and has recognized a common law right to inspect judicial records and documents,² but has refused to extend that right of access to pretrial discovery materials. Thus, in Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the Court stated that "pretrial depositions and interrogatories are not public components of a civil trial" and that "restrictions placed on discovered, but not yet admitted, information are not a restriction on traditionally public source of information." Id. at 33. It follows, said the Court, that a protective order prohibiting the public dissemination of material produced in discovery "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," and that it is enough that the protective order be based on a finding of good cause. Id. at 33, 37.

The lower courts too have overwhelmingly found discovery materials to be outside the public's presumptive right of access to judicial records. Thus, while the courts have recognized a right of access to civil court proceedings,³ and have recognized that materials produced in discovery may become available to the public when used at trial⁴ or when relied on in

¹ See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right to attend criminal trial); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (right to attend voir dire examination of jurors in criminal trial); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (right to attend preliminary hearings in criminal trial). These cases all involved criminal trials; the Supreme Court has never found a first amendment right to attend civil trials.

² See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978) (common law right of access to court documents exists but can be overcome by a sufficient showing of need for confidentiality.)

³ See, e.g., Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1066-71 (3d Cir. 1984) (right of access to pretrial hearing transcripts); Wilson v. American Motors Corp., 759 F.2d 1568, 1569 (11th Cir. 1985) (right of access to trial transcript and documents filed in the case).

⁴ See, e.g., In re CBS, 828 F.2d 958, 959 (2d Cir. 1987) (right of access to evidence presented in open court).

ruling on dispositive pretrial motions,⁵ it is generally agreed that there is no public right of access to purely pretrial discovery materials. As the First Circuit stated after a detailed review of the prior cases:

[D]iscovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process. In view of these conclusions, we decline to extend to materials used only in discovery the common law presumption that the public may inspect judicial records.

Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).⁶

It is immaterial in this regard whether the applicable local rules do or do not require the filing of discovery materials with the court -- in either event the materials are still "fundamentally different." As the Supreme Court noted in Seattle Times, even in those jurisdictions that require the filing of

⁵ See, e.g., In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1308-09 (7th Cir. 1984) (right of access to documents relied on in granting motion to dismiss claims); Joy v. North, 692 F.2d 880, 893-94 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983) (right of access to documents submitted in support of summary judgment motion). But see In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1338 (D.C. Cir. 1985) (rejecting these cases as inconsistent with Seattle Times' reference to the admission of evidence as the "touchstone" of a constitutional right of access).

⁶ See also In re Alexander Grant & Co. Litigation, 820 F.2d 352, 355 (11th Cir. 1987) ("appellants' common law right of access does not extend to information collected through discovery which is not a matter of public record"); F.T.C. v. Standard Financial Management Corp., 830 F.2d 404, 408 (1st Cir. 1987) (documents "used only in discovery" and having "no role in the adjudicatory process" are outside the presumption of public access); Joy v. North, 692 F.2d at 893 ("very different considerations apply" to discovery documents and documents relied on in adjudicating a case).

discovery materials, the trial court has the authority to control public access to the documents by issuance of a "good cause" protective order. 467 U.S. at 33 n.19. No court has held that the mere fact that discovery materials must be filed in a particular jurisdiction means that they are public records and a court must find a "compelling need" to bar their disclosure. To the contrary, it is precisely because the public filing of discovery materials threatens litigants' legitimate privacy interests that courts must safeguard those interests through the entry of effective protective orders.⁷

Pretrial discovery materials are treated differently from other court records for two fundamental reasons: litigants have a legitimate expectation of confidentiality for materials disclosed to an opponent in litigation, and discovery can proceed efficiently only if the parties know that confidential materials will be protected from public disclosure.

As to the former, the Supreme Court has noted that the "sole purpose" of discovery lies in "assisting in the preparation and trial, or the settlement, of litigated disputes." Seattle Times, 467 U.S. at 34. A court must therefore have the ability to protect against public disclosure of discovery materials in order to prevent confidential and potentially damaging information from being used for improper purposes.⁸ Various courts, in fact, have noted that if confidential material disclosed to an opponent cannot be protected by a court order, it might be necessary to limit the scope of discovery allowed. See, e.g., In re Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) ("A protective order pursuant to Rule 26(c) may be the least intrusive means of achieving the goals of protecting the fairness of the judicial process and preserving the discovery system. . . . The only

⁷ Thus, Texas R. Civ. P. 166b(5) authorizes a court, upon a showing of "good cause," to issue a protective order restricting the disclosure of discovery materials in order to prevent the "invasion of personal, constitutional, or property rights." Including discovery materials within the scope of "court records" covered by the new rule, thus applying a "compelling need" standard, would be in direct conflict with this Rule.

⁸ See In re Alexander Grant, 820 F.2d at 355 ("Although information exchanged in pretrial discovery would often generate considerable public interest if publicly disseminated, private litigants have protectable privacy interests in confidential information disclosed through discovery.").

plausible alternative to a protective order may be the denial of discovery altogether.").

Quite apart from this, the public's interest in expediting litigation also requires that the courts be able to guarantee the confidentiality of discovery materials. As the D.C. Circuit said in In re Halkin:

A smoothly operating system of liberal discovery is in the interests of litigants and society as a whole, for it contributes to a full and fair airing of all material facts in controversy. If parties are to be forthcoming in responding to requests for discovery, they must have fair assurance that legitimate countervailing interests will be protected, if necessary by a restraining order.

598 F.2d at 195. In the absence of such protection, disputes over discovery requests are likely to be even more bitter and protracted than they ordinarily are and litigation will become even more expensive and time-consuming for plaintiffs and defendants alike. Such a result would benefit neither the parties, the courts, nor the public in general.⁹

In light of this case law and these policy concerns, the attempt to include discovery materials within the scope of the new "compelling need" standard should be rejected. To do

⁹ See Anderson, 805 F.2d at 12 ("The public's interest is in seeing that the [discovery] process works and the parties are able to explore the issues fully without excessive delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this in turn could lead to lengthy and expensive interlocutory appeals . . ."); Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866, 869 (E.D. Pa. 1981) ("The propriety and desirability of protective orders preserving the confidentiality of documents containing sensitive commercial information that are subject to discovery in complex cases is too well established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.").

Charles Herring, Jr.
February 7, 1990
Page 6

KIRKLAND & ELLIS

otherwise would be contrary to long-settled principles of law permitting a trial court to protect confidential discovery materials upon a showing of "good cause" and would seriously impede the efficient litigation of cases in the Texas civil courts.

Sincerely,

A handwritten signature in cursive script, reading "Lester Houtz". The signature is written in dark ink and is positioned above the typed name.

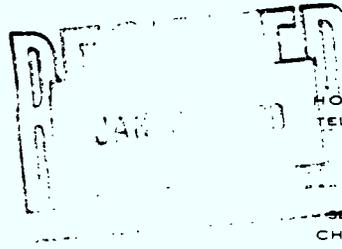
Lester C. Houtz

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CABLE ARNWHITE AGTN

December 30, 1989

FILE:

Lefty Morris, Esq.
MORRIS, CRAVEN & SULAK
2350 One American Center
600 Congress Avenue
Austin, Texas 78701

Re: Proposed Texas Rule of Civil Procedure 76a:
Sealing Court Records

Dear Lefty:

I am troubled by the proposals for sealing court records to the extent they mandate the public disclosure of a bonafide trade secret. Trade secrets are valuable property rights which are destroyed upon public disclosure, and are increasingly important as Texas develops and attracts technology oriented businesses.

In my view, any procedure which would presumptively require public disclosure of a bonafide trade secret would be an unconstitutional taking of property. Many of the proposals that I have seen for Rule 76a may be unconstitutional. I do recognize the evil posed by the many over reaching claims of trade secret status during litigation, but presumptively requiring disclosure of bonafide trade secrets is perhaps a greater evil.

Attached is a proposal which I believe might be added to the draft under Paragraph a.2. I expect that in many cases the parties would agree to treat certain material as a trade secret. In the event that the parties cannot agree, the proposal allows for a court determination and for the award of attorney's fees to the party challenging trade secret status if it prevails (as a deterrent). Of course, a defendant in a trade secret case usually denies that anything constitutes a trade secret.

ARNOLD, WHITE & DURKEE

Lefty Morris, Esq.

December 30, 1989

Page 2

Because I have not devoted much time to the enclosed proposal, the language is rough. On the other hand, I believe any rule which would presumptively make available to the public trade secrets may be unconstitutional, and in practical terms, it would surely significantly impede the progress of any litigation involving trade secrets.

Very truly yours,



Charles D. Huston

CDH/rh

cc: Gale Peterson, Esq.

Charles Herring, Esq.

PROPOSED AMENDMENT TO PARAGRAPH a.2

This rule shall not apply to any material for which a good faith claim is made that the material constitutes a trade secret. In the event the parties, including affected third parties, cannot agree that alleged trade secret material should be exempt from this Rule, then a party or affected third party may apply to the court for a determination that the claim for trade secret status has been made in good faith and such material is exempt from this Rule. Agreement that the material should be exempt from this Rule shall not be treated as an admission and is not admissible into evidence. Material filed with the court for inspection in camera is exempt from this Rule. The party asserting that alleged trade secret material should not be exempt from this Rule shall ordinarily be awarded its attorneys fees and costs if it prevails.

INTERNATIONAL PAPER

JAN 24 1990

WOODLANDS AND WOOD PRODUCTS
LEGAL DEPARTMENT

January 24, 1990

PHONE (214) 934-6000

Mr. Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 1200
301 Congress Street
Austin, TX 78701

Re: Texas Supreme Court Advisory Committee - Promulgation of Rules
Governing Protective Orders

Dear Mr. Herring:

I am an Associate Counsel for International Paper Company. International Paper has extensive property holdings and business activity in Texas. Because of the magnitude of business International Paper performs in Texas, we are often subject to suit in Texas courts. As such, we are extremely interested in your committee's efforts and urge you to maintain, if not strengthen, the use of protective orders and settlement agreements as procedural tools.

Much, if not most, of the information disclosed during a lawsuit is not available to the public. Its disclosure is only mandated due to a judicial determination that the information could be relevant to the facts involved in a particular matter. Thus, the use of protective orders and sealed settlement agreements provides a means by which such information can be kept private while at the same time accomplishing the goal of allowing litigants full access to each others information.

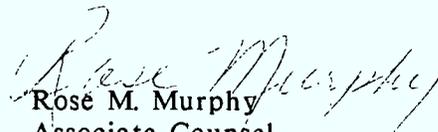
As a committee reviewing the United States Federal Court system recently determined, protective orders and sealing of settlements are essential to the effective and efficient functioning of the judicial process. In my experience, once a protective order is in place, International Paper has voluntarily responded to otherwise objectionable discovery requests. This is an example of how protective orders encourage parties to exchange confidential information without wasting judicial time. Similarly, sealed settlement agreements encourage resolution of disputes without the need for extensive judicial effort.

The plaintiffs' bar is lobbying for the elimination of the use of protective orders and sealed settlement agreements. The reason for their position is quite apparent. Through open-ended access to information, plaintiffs' attorneys and others could aggressively market and exchange sensitive or confidential information for monetary or other gain. This would result in a perversion of the legal system and the discovery rules. In our opinion, the Texas Supreme Court should not condone such use.

Mr. Charles J. Herring, Jr.
January 24, 1990
Page 2

If you have any questions or if I could be of assistance to you, please let me know.

Very truly yours,


Rose M. Murphy
Associate Counsel
Land & Timber Group

dvs/31.17

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December 19, 1989

Writer's Direct Number

Mr. Charles Herring, Jr.
Jones, Day, Reavis & Pogue
301 Congress Avenue, Suite 1200
Austin, Texas 78701

VIA FEDERAL EXPRESS

Re: Proposed Rule 76a

Dear Chuck:

As your secretary may have advised, I was unable to attend the rescheduled subcommittee meeting. However, Chad Huston attended and has given me an update.

Although guidelines of the State Bar limit the action the Intellectual Property Law Section can take on this issue, as Chairman of the Intellectual Property Law Section I have spoken to a number of our members about the impact these proposals will have on state court commercial litigation. Those I have spoken with recognize the need for a rule which would have the effect of curing abuses of sealing orders. But a rule that goes too far will have the equally abusive effect of causing our Texas citizens to lose valuable rights for no just purpose. Such a result does not meet a public need and, in fact, can have far-reaching, unanticipated effects.

Although intangible property interests such as trade secrets, confidential and proprietary information, know-how, and show-how have long been important, our current age of technology has created an even greater emphasis on protecting and preserving those rights. Tens of billions of dollars are spent each year on research and development. The federal government alone annually spends in excess of \$60 billion funding research and development. Developments created from those R&D investments are protected under both state and federal statutes, as well as the common law.

The feature common to all of those laws is the creation of a property interest. The creation of a property interest, in fact, lies at the very core of our system for protecting and preserving these interests. In general terms, property interests in tangible

COX & SMITH
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ATTORNEYS COUNSELORS

-2-

December 19, 1989

personal property are easy to recognize and, to some extent, easy to enforce. Stealing or misappropriating a new semiconductor chip or the designs for a new blowout preventor is not materially different than stealing other items of personal property, for example one's automobile. Because such items are tangible, they can be protected by physical means such as keeping them under lock and key.

Intangible property interests, on the other hand, are, by definition, more abstract and thus more difficult to preserve and protect. But they are no less property interests. As protected property interests, trade secrets, confidential and proprietary information, know-how, and show-how are frequently and widely used by competing companies in our competitive economy to create and offer improved goods and services. These intangible property rights are many times the sole competitive edge a company uses to compete effectively. It is equally important to recognize that such intangible property interests are widely bought, sold and traded under domestic and international licenses, and create a commercial economy quite apart from the tangible products those rights generally relate to. You are no doubt aware of the recent news articles dealing with the tens of millions of dollars Texas Instruments alone has enjoyed and anticipates to receive in the future from royalty income and licensing.

Intangible property interests are somewhat more fragile and more difficult to protect than tangible property interests. Available technology permits far more extensive duplication and dissemination of information than was possible even a few short years ago. Nevertheless, the law imposes an obligation on proprietors of such intangible property interests to take adequate measures to protect against such dissemination for if they do not, the property interest is lost. It is thus essential to permit the continued use of our courts to protect and preserve those property interests.

As a general rule, a defendant in litigation faced with allegations that he or she appropriated or misappropriated an intangible property interest is entitled to be informed of the property interest at issue. In some cases that can be done without revealing the most sensitive of the information. But in many cases it cannot be. From first-hand experience, defendants have successfully urged special exceptions forcing plaintiffs to reveal highly sensitive information. Indeed, you may be familiar with the case in which a Coca-Cola bottling company was successful

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in obtaining an initial court order ordering the disclosure of the secret formula for the Coca-Cola syrup. Although the parties in that case ultimately reached a compromise, that remains an illustration of the vital need for court rules and procedures that permit parties in litigation to adequately safeguard this type of information. Indeed, that need is even greater for less celebrated but nevertheless important proprietary information.

Of equal importance is the information typically disclosed during discovery. It is frequently necessary, as you are aware, for parties to disclose sensitive business and technical information during discovery. My experience has been that experienced litigators agree to a form of protective order which secures such information and precludes its dissemination and improper use. Agreeing to such a protective order permits discovery to continue with minimal court involvement and generally advances the litigation to the advantage of both parties. Discovery disputes, however, periodically require the filing of motions and briefs that disclose all or a portion of the information covered by such protective orders. Protective orders frequently cover that possibility by requiring that such information be filed with the court under seal. Forcing the parties to go through the process envisioned by the current proposals will stall and add delay to such litigation, with no appreciable benefit to the parties.

With that background, I hope you and your subcommittee will appreciate the significant concerns raised by the current proposals. The checks and balances served by our historic and fundamental insistence on open court records is of indisputable importance to our free society. Of equal importance, however, is our citizens' fundamental right to free and open access to the court system itself to protect their property -- be it tangible or intangible. If one of the current proposals calling variously for the showing of a "compelling need" or worse yet a requirement to show a compelling need by clear and convincing evidence were adopted, the doors of our state courts would be effectively closed to a significant segment of our citizens. Furthermore, our state laws currently enjoying a reputation in the technology community for offering protection for intangible property interests exceeding those of our sister states, would be put in doubt. Adopting one of these proposals would signal that our state truly does not understand or appreciate the interests at stake.

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The vested property interest of an intangible property right, by definition, carries a "compelling need" not to be disclosed to the public because that disclosure would cause an immediate loss (or at least an impairment of) that property right. The very reason that property right is recognized is because the information is not public. The issue of sealing, as it relates to intangible property interests, must thus begin with the presumption that there is an overriding or "compelling need" not to force a public disclosure. That fundamental difference in the very rights at issue distinguish intangible property rights from some of the other matters considered by the subcommittee. There are many matters that come out in litigation that a party might consider embarrassing or would rather the world would not know. Such human sensibilities are important to be sure, but they are not vested property interests. They are additionally not interests historically protected from disclosure.

David Chamberlain's proposal comes the closest to addressing the intangible property interest issue. Even that proposal, however, would require the parties to litigate the issue of whether a protectable property interest existed well in advance of trial on the merits. A defendant in such a case would now vigorously challenge a sealing order at an early stage in the litigation. A plaintiff could not afford to lose a motion to seal the records for two reasons. First, the lack of a sealing order would mean that any property rights in information disclosed in court records would automatically be lost. Secondly, the court's decision finding that a sealing order was not appropriate, by itself would indicate that no trade secret or like property interest was at stake. Such results, I suggest, are not conducive to the efficient or just administration of justice, nor are they necessary to preserve the checks and balances offered by open court records.

I therefore propose the attached amendment to David Chamberlain's proposal. I frankly would prefer covering this issue as part of the body of the rule rather than as an exception. However, all of the current proposals start with the premise of showing a "compelling need" to seal. In the case of intangible property interests, there is not currently, (nor historically has there ever been) any overriding public interest in forcing a public disclosure of such information. Rather, the law, by creating a property interest, recognizes that such property interests by their very nature must remain exempt from public disclosure. The "compelling need" is implicit in the

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property interest itself. Thus, under the current proposals, the amendment must be cast as an exception. Further, an exception perhaps is warranted because the abuses addressed by these proposals are quite distinct from the question of protecting property interests. Even the most ardent of the supporters for a broad rule on open court records would not argue, I believe, that there is an overriding public interest requiring that a company or individual must disclose trade secrets and like information in order to bring or defend an action in this state. But, as already noted, that would be the result if the present proposals are adopted without specific treatment for intangible property interests.

Any rule can be abused. This draft incorporates what is intended to be a safeguard against such abuse. An order entered under this section must be posted and contain a sufficient enough description of the subject matter to permit a challenge. Also, if it is determined, after trial on the merits and any appeals, that information covered by a sealing order does not contain or reveal trade secrets, or confidential or proprietary information, the court may amend or vacate such order on such terms as required.

Lastly, this proposal makes clear that the rule is not intended to cover protective orders entered under Rule 166b or discovery disputes concerning matters covered by such protective orders.

Any rule which permits information to be closed from public view is naturally suspect, particularly in light of the abuses that caused this subcommittee to be formed. But that should not serve as a vehicle to throw the pendulum too far to the other extreme either. The information intended to be covered by this draft has little, if any, public interest. It is doubtful there would be many, if any, challenges raised by third parties under the proposed procedure and even fewer justified challenges. In all events, however, the nature of the property interests at issue require that the proponent of disclosure show that there is, in fact, no property interest at stake rather than vice versa.

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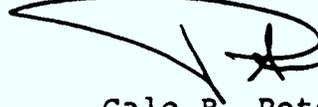
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December 19, 1989

I would urge your subcommittee to consider and incorporate this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gale R. Peterson', enclosed within a large, hand-drawn oval shape.

Gale R. Peterson

GRP:fg/4224K
Enclosure

cc: David Chamberlain
cc: Lou Pirkey
cc: Chad Huston

Amendment of David Chamberlain's Draft of Proposed Rule 76a

Add at the end:

-e. Trade Secrets. This rule shall not apply in cases involving trade secrets, confidential or proprietary information, or other intangible property rights that would be lost or impaired in the absence of an order protecting and preserving the same. In such cases, on the motion of either party, the court shall make such orders as are necessary in the administration of justice to protect and preserve such trade secret, confidential or proprietary information, or intangible property right including:

(1) ordering that such information not be disclosed in court records;

(2) ordering that such information be disclosed only in court records that are sealed or otherwise adequately protected from disclosure; or

(3) ordering that access to court records containing such information be restricted or conditioned on terms that would preserve and protect such trade secret, confidential or proprietary information, or other intangible property right.

An order entered under this section shall not be sealed and shall contain a sufficient enough description of the subject matter, without revealing any trade secret, or confidential or proprietary information, to permit the general public to determine whether or not to challenge the terms of such order. Such order shall be posted for public inspection at the courthouse where public notices are posted for 7 days following the date of such order. During that 7 day period, any member of the public may file a motion with the court challenging the terms of such order. The provisions of section b. (1) if this rule shall apply to such a hearing. The movant shall have the burden of proof on any such motion.

In the event that, after trial on the merits and exhaustion of any appeals, it is determined that information subject to an order entered under this section does not contain or reveal trade secrets, or confidential or proprietary information, or information that would compromise or impair an intangible property right by disclosure, the court shall amend or vacate such order on such terms as the interests of justice require.

-f. This rule shall not apply to protective orders entered under Rule 166b or to hearings concerning discovery covered by such protective orders. -

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February 15, 1990

VIA TELECOPY

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Charles Herring, Jr., Esq.
Jones, Day, Reavis & Poag
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Re: Proposed Rule on Sealing Court Records

Dear Luke and Chuck:

Let me apologize in advance for the length of this letter, but the rule at issue is of utmost concern to the intellectual property law bar, and some background on "trade secrets" is, I believe, imperative.

In prior correspondence (attached) urging an exception to the proposed rule, I referred to "trade secrets or other intangible property rights." The question was then raised whether that was a redundant phrase and, if not, what was "an intangible property right" that was not a "trade secret" under the definition adopted in Hyde Corporation v. Huffines, 158 Tex. 566, 314 S.W.2d 763 (Tex. 1958), cert. denied 358 U.S. 898 (1958). I will explain.

Although the concept of protecting "trade secrets" dates from Roman times, Schiller, Trade Secrets and the Roman Law: The Actio Cervi Corrupti, 30 Colum. L. Rev. 837 (1930), courts in both England and the U.S., in the late 1800's and early 1900's, struggled with an acceptable, universal definition for a "trade secret". Courts debated, for example, whether "secret" should mean "absolute secrecy" (i.e. a requirement that the information not be known at all other than to the owner) or whether it should mean "relative secrecy" (i.e. the information must not be generally known in the trade or business but absolute secrecy was not required). Other debates centered on whether rights in a "trade secret" could be preserved after the "secret" became known - a debate exemplified in the Hyde case. The problem has been that

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other types of intellectual property rights, such as patents, trademarks, and copyrights, were defined and governed by statutes. But, there was, unfortunately, no cogent definition of a "trade secret" until the publication of the Restatement (First) of Torts in 1939. Comment (b) of §757 of the Restatement sets out a definition for a "trade secret". Texas, as well as a number of other states, have adopted that definition of a "trade secret" in numerous cases. That, indeed, was the definition adopted by the Texas Supreme Court in Hyde and in the companion case, K & C Oil Tool & Service Co. v. G & G Fishing Tool Service, 314 S.W.2d 782 (Tex. 1958), cert. denied 358 U.S. 898 (1958).

But the Restatement (First) of Torts was written quite early in the development of trade secret law. Further, of course, the Restatement (First) was written in a radically different age of technology. In the 1930's and '40's, technology development was largely centered on heavy industries. Technology today centers largely on "information" and the ability to gather, assimilate, store, and process that information for business development and expansion. Even small businesses today devote significant dollars to gathering and using information on markets, customers and competitors. Customer contact information and "customer lists" are no longer Rolodex cards in a salesman's briefcase, or scattered in the back seat of a worn-out Chevrolet. Customer information, including decision makers, buying cycles, product mix, anticipated volumes [etc.], is highly prized, valuable information. That type of sensitive commercial information has been recognized as a protectable interest apart from its status, *vel non*, as a "trade secret." Restatement (First) of Torts § 759 (1939).

The Restatement (Second) of Torts, unfortunately, did not treat the law of trade secrets under the belief that trade secrets should be treated under a separate Restatement dealing with unfair competition and trade regulation which, of course, has not yet emerged. As a result, courts in the ensuing fifty years since the Restatement (First) have struggled with applying a somewhat antiquated "definition" to modern business practices and requirements. As a result, some courts have taken a broad view using Comment (b) of §757 more in the nature of an example of what material may be considered as a "trade secret", while other courts have taken a narrower view and have construed the Comment more in the nature of a statutory definition.

That disparity led the National Conference of Commissioners on Uniform State Laws to approve a Uniform Trade Secrets Act in 1979. The Commissioners wrote:

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The contribution of the Uniform Act is substitution of unitary definitions of trade secret and trade secret misappropriations; and a single statute of limitations for the various property, quasi-contractual and violation of fiduciary relationship theories of non-contractual liability utilized at common law.

The Uniform Trade Secrets Act has not been adopted in Texas. But it has been adopted with various state modifications in 28 states. Many of those modifications were adopted for the same reason I used the phrase "trade secrets or other intangible property rights."

In its early history, a "trade secret" was mostly technical-type data or information. In Hyde, for example, the trade secrets at issue dealt with a compressor mechanism for refuse trucks. In K & G, the trade secrets dealt with the details of a magnetic fishing tool. Although subsequent Texas cases (and cases in other states as well) have included non-technical information within the ambit of trade secret protection, there is a technical connotation to "trade secrets." As a result, there is a continuing predilection to view a "trade secret" as primarily limited to technical or technical-like information. The Illinois legislature, in enacting a revised form of the Uniform Trade Secrets Act in 1988, recognized the difficulty courts faced in dealing with modern, valuable business information. The Illinois legislature thus revised the Uniform Act's definition to specifically include both technical and non-technical information. One feature left unchanged, however, was that the generic name for trade secret subject matter in the Uniform Act is "information," recognizing that in modern business practice "business information", whether technical or not, is both valuable and vital to a company's competitive position. The Uniform Act also uses terms such as "method" "program," and "technique" as part of a laundry list of appropriate subjects to emphasize that point and also to cover the concept of "know-how".

In addition to the traditional concept of "trade secrets," companies today typically count as assets somewhat generic categories of information now commonly known as "know-how" and "show-how". "Know-how" generally refers to a company's particular knowledge in a specified field, while "show-how" generally refers to technical or managerial assistance. "Know-how" (and to a lesser extent "show-how") are becoming international terms of art -- e.g. the European Economic Commission recently promulgated Know-How Licensing Regulations Under the Rome Treaty. "Know-how" is frequently licensed in conjunction with a patent for separate consideration and sometimes by itself.

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The phrase "intangible property right" is intended to make clear that the subject information protected from forced disclosure under the proposed rules is not limited to technical types of information, but includes the type of information which has been recognized both in the marketplace and in the courts as both valuable and protectable, namely know-how, show-how, and the types of information covered by § 759 of the Restatement (First). "Property right" is also the phrase used in Rule 166b(5), TRCP. On the other hand, the phrase used in Rule 26(c), Fed. R. Civ. P., namely "trade secret or other confidential research, development, or commercial information" would also be acceptable. Overall, the phrase "trade secret or other intangible property right" (or the phrase used in Rule 26(c)) is intended to cover truly valuable, commercial-type information and materials. It is not intended as a general phrase to permit secreting information which the court would otherwise not treat as a property right. It is believed that referring to this information as a "property" interest meets that objective.

The need to protect sensitive commercial information and trade secrets when obtained through compulsory processes has long been recognized. For example, the Freedom of Information Act, 5 U.S.C. § 552 (b)(4), specifically exempts trade secrets and confidential commercial and financial information. The Privacy Act of 1974, 5 U.S.C. § 552a(b), prohibits disclosure of personal information without consent subject to exceptions. The Internal Revenue Code, 26 U.S.C. § 6103, prohibits disclosure of information regarding business affairs given for purposes of tax collection. The Texas Open Records Act, art. 6252-17a, exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The feature common to all of those laws is the virtually universal recognition that the need to protect trade secret and commercial information from disclosure out-balances any competing need for disclosure. The vested property interest in such information, by definition, carries a "compelling need" that such information not be disclosed because such disclosure would cause an immediate loss or impairment of that property interest. The issue of sealing, as it relates to trade secret and commercial information, must thus begin with the presumption that there is an overriding or compelling need not to force a public disclosure. That fundamental difference in the rights at issue distinguish trade secrets and commercial information from the other types of information considered by the subcommittee.

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That, in fact, is one of the reasons why we urge an exemption to the Rule. In Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984), the Supreme Court reviewed a federal law covering the registration of pesticides. Briefly, the law required Monsanto to disclose information regarding a pesticide to the Environmental Protection Agency ("EPA") in order to obtain a registration to market the pesticide. That law, based on a public policy rationale, permitted EPA to disclose that information to Monsanto's competitors and the public. The district court held the statute constituted a taking of Monsanto's "property" without just compensation in violation of the due process requirements of the Fifth Amendment of the U.S. Constitution:

Therefore, the Court finds that Monsanto possessed a recognizable property right in the data submitted to EPA * * *. The property rights Monsanto possesses in its intellectual property (data) are the right to exclude others from the enjoyment of such data, in particular, the right to prevent the unauthorized use and the right to prohibit disclosure of its data.

The Supreme Court agreed that property interest was protected by the Fifth Amendment:

This general perception of trade secrets as property is consonant with a notion of "property" that extends beyond land and tangible goods and includes the products of an individual's "labor and invention."

* * * *

That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of the Court * * *.
[Emphasis added.]

The extent of that property right, according to Justice Blackmun, is "defined by the extent to which the owner of the secret protects his interest from disclosure to others." And the nature of that property right is the right to exclude others from knowing or using the information. Indeed, Justice Blackmun wrote:

With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.

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A major treatise in the field of trade secrets states: "In view of Monsanto, supra, the federal government under the Fifth Amendment and the states under the Fourteenth Amendment should be precluded from enacting laws or regulations that take trade secrets for public use without just compensation, or destroy or transfer them for private use at all." Jager, Trade Secrets Law, §4.01[3] (1989).

Confidential business information was also deemed to constitute "property" in the Supreme Court's decision in Carpenter v. United States, 108 S. Ct. 316 (1987), finding that information gathered for the Wall Street Journal constituted "money or property" for purposes of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, prior to publication. With respect to such information, the Court wrote: "Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy." 108 S.Ct. at 320. See also, Zotos International, Inc. v. Young, 830 F.2d 350 (D.C. Cir. 1987) (holding that the Food and Drug Administration acted arbitrarily and capriciously in denying trade secret status to an ingredient in a cosmetic simply because it could be identified by reverse engineering); National Surety Corp. v. Applied Systems, 418 S.2d 847 (Al 1982) (computer programs constitute "property" permitting a cause of action for conversion to accrue against former employees who "misappropriated" the programs).

In short, we believe that a rule that did not exempt from disclosure commercial information would be contrary to decades of developed law, would be contrary to accepted practice, and would, most likely, be unconstitutional. We also believe that the forced disclosure of commercial information disclosed during discovery and not used at trial would be contrary to established law and would be unconstitutional. See Tavoulares v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984) (holding that confidential business information contained in depositions was protected under the right of privacy secured by the Fourth Amendment). As the D.C. Circuit pointed out, "[i]f the purpose of the common law right of access is to check judicial abuses, then that right should only extend to materials upon which a judicial decision is based," quoting from Wilk v. American Medical Ass'n, 635 F.2d 1295 (7th Cir. 1980). Indeed, the Tavoulares court noted that the drafters of the Federal Rules specifically provided that the presumption of openness was outweighed by a litigant's privacy interests in sensitive commercial information.

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I enclose two proposed drafts of an exclusion for trade secrets. These drafts are not limited to cases in which a party asserts a claim seeking affirmative relief based upon trade secrets or an intangible property right because the need to protect trade secrets or other intangible property rights is not so limited. For example, we were recently involved in a lawsuit concerning the construction of a refinery. The case was primarily a breach of contract case, but the "court records" naturally contained trade secrets and confidential information which were central to the suit, but which were not the direct subject matter. Also, suits for patent infringement or breach of a know-how license frequently and typically involve the disclosure of valuable business information, but they are not a "trade secret" suit in the traditional sense of the term.

One of the real dangers of an "exception" is that it has the possibility of creating a mini-trial on the issue of whether a trade secret or intangible property interest exists well in advance of trial on the merits. There is a danger that defendants in such actions would feel compelled to strenuously oppose a sealing order on the assumption or belief that not doing so would result in an implied admission that a trade secret or intangible property interest actually exists. Such mini-trials are believed to be wasteful of judicial resources and would do little to reach the objectives sought by the rule amendments. Therefore, the enclosed draft (Alternative A) includes a provision that joining or failing to oppose such a motion would not constitute an express or implied admission that a trade secret or intangible property right exists, nor would joining such a motion or failing to oppose such a motion estop a party from later challenging if such a right exists.

We recognize that any rule can be abused. Therefore, requiring a prima facie showing that a trade secret or intangible property right exists is not objectionable. However, once that prima facie case is established, we feel strongly that the burden of proof and the burden of persuasion should fall on the intervening party to show that a trade secret or intangible property interest is not at stake. The enclosed draft includes such a provision.

Although rules can be abused and information closed from public view is, perhaps, naturally suspect, we believe there are sufficient safeguards built into the rule to protect against such abuses. The information intended to be protected by this type of exception, frankly, has little, if any, public interest. It is doubtful that there would be many, if any, challenges raised by

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third parties under the proposed procedure and even fewer justified challenges. In view of the significant and valuable interests at stake which would be lost immediately upon public disclosure, however, if an error is made that error should fall on the side of non-disclosure.

In closing, let me emphasize again the point I tried to make in my letter of December 19, 1989. The checks and balances served by our historic and fundamental insistence on open court records is of indisputable importance to our free society. But, our citizen's fundamental right to free and open access to the court system to protect their property, be it tangible or intangible, is of equal importance. Adopting a rule which would have the effect of forcing a disclosure of this type of information would effectively close the doors of our state courts to a significant segment of our citizens. Indeed, adopting one of the presently proposed rules would create the untenable result that litigants could be assured of appropriate protection for sensitive commercial information in the federal courts, but not the state courts. The reputation the State of Texas currently enjoys in the technology community for offering effective protection for intangible property interests would be put in doubt. Adopting one of the proposals without an exception recognizing these important property interests would signal that our state truly does not understand or appreciate these property interests or their importance to business.

I urge that your subcommittee consider the enclosed drafts.

Thank you.

Sincerely,



Gale R. Peterson

GRF/lo:4410K
Enclosure

cc: Officers and Counsel
Intellectual Property Law Section

ALTERNATIVE ATRADE SECRETS

The foregoing provisions of this Rule shall not apply in cases where an alleged trade secret or intangible property right would be lost or impaired in the absence of an order protecting or preserving the same. In such cases, on the motion of any party, the court shall make such orders as are necessary to protect and preserve such trade secret or intangible property right, including ordering that such information be sealed or otherwise adequately protected from disclosure. Joining in on failing to oppose such motion shall not constitute an express or implied admission that a trade secret or intangible property right exists, nor shall the same estop any party from later challenging that a trade secret or intangible property right exists. The party making such motion shall post a copy of the order at the place where notices for meetings of county government bodies are required to be posted, and shall serve a copy of the order on the clerk of the Texas Supreme Court, who shall post the notice in a public place.

Before or after entry of such sealing order, any person may intervene for the limited purpose of opposing the motion or requesting modification or dissolution of such order. In a hearing on such motion or order, the existence of a trade secret or intangible property right shall be taken as established by the pleadings unless specifically denied. If denied, the claimant shall be required to make a prima facie showing that trade secrets or intangible property rights would be lost or impaired in the absence of the order. The showing may be made through affidavits or otherwise. Once a prima facie case is established, the burden of proof and the burden of persuasion shall be on the intervening party to show that a trade secret or intangible property interest would not be lost or impaired in the absence of a sealing order.

In the event that, after trial on the merits and completion of any appeals, it is determined that materials subject to an order entered under this section do not contain or reveal trade secrets or intangible property rights, the court shall amend or vacate such order on such terms as the interest of justice require.

ALTERNATIVE B

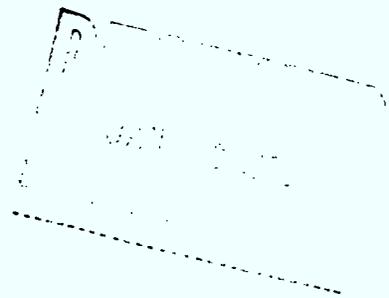
TRADE SECRETS

The provisions of this rule shall not apply to cases involving trade secrets, or other confidential commercial or financial information. In such cases, the court may make such orders as are necessary to protect and preserve such information from public disclosure subject to the right of any person to intervene and request a modification or revision of such order.



January 24, 1990

Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
301 Congress, Suite 1200
Austin, TX 78701



Re: Texas Supreme Court Advisory Committee Proposed
Guidelines for Protective Orders

Dear Mr. Herring:

I direct this letter to you in your capacity as co-chairman of the Rules Advisory Committee. It is my understanding that the Committee is considering a new rule dealing with (1) the procedural steps necessary for sealing settlement agreements, (2) a standard for judges to apply for sealing court records, and (3) the portion of a court record subject to sealing. As to the standard for sealing court records, it is reported that the current draft establishes a "compelling need" standard which requires a party to show among other things that sealing is "necessary to prevent a serious and imminent threat to the administration of justice". I further understand that amendments will be under consideration at your next meeting which would expand the "court records" subject to the rule to include discovery materials and settlement agreements.

I urge the Committee to adopt a substantially more moderate standard than one of "compelling need" for a party in satisfying the court to seal court records. Further, the Committee would be committing a grave error if it were to include either discovery documents or settlement agreements within the scope of the new rules. Among the reasons you should follow these recommendations are the following:

1. Information produced in civil litigation frequently would not otherwise have been disclosed, and would properly have been kept private, but for the litigation. It would be grossly unfair to first require an unwilling litigant to disclose such information

on the grounds of necessity in order to achieve justice as to the litigants and thereupon to conclude that by making the disclosure in the litigation the information's secrecy became unprotectible by the judiciary.

2. Protective orders and settlement agreements often protect sensitive trade secrets and other sensitive information, the disclosure of which would be extremely detrimental to one or more parties to the litigation.
3. Information produced subject to civil litigation in compliance with applicable local discovery rules is frequently not public information, but if released could be damaging to reputation and privacy.
4. Courts have recognized the necessity of sealing documents as an essential ingredient in prompting settlement and have recognized that parties in many instances might not have settled had the records not been sealed.
5. The Federal Court Study Committee, created by Congress, has recently recommended that protective orders and sealing of settlements are essential to the effective functioning of the judicial process.

I hope that these comments prove helpful to the Committee and I look forward to learning that you have made recommendations to the Court consistent with these thoughts.

Very truly yours,



Alan E. Riedel

MEETING NOVEMBER 18, 1989
AUSTIN, TEXAS

RE: SEALED DOCUMENTS

SUGGESTIONS:

1. Under existing Civil Laws the clerk cannot expunge records. The problem is not being able to remove records from source film as well as indexing film when the records are previously filed. This definitely will need to be addressed. On the other hand, if the record is sealed prior to filing and recording it will not pose a problem.
2. All motions to seal records should require a mandatory posting asking that records be sealed, as in other probate matters. In order to set out the date of hearing within the posted citation there will need to be an order setting the hearing, at time of filing. The posted citation should be posted, where other probate citations are posted, not where foreclosures are posted.
3. This rule should exclude all Mental Health records filed prior to and after this rule takes effect. Also, any other records that prohibit disclosure by existing laws.
4. Setting out a specific time within the order that instruments may be sealed will definitely cause a problem for the clerks. A system would have to be setup to track the time on each sealed instrument. It will also pose the question as to when the unsealed instrument would be time stamped. Would it show the date that it was received by the clerk sealed or the date it is unsealed? If the instrument was already filed prior to sealing, would it be re-filed stamped when it is unsealed? In Harris County all instruments are filed stamped each time they go through the system for whatever reason.
5. There will definitely need to be methods set out for the clerk to go by for unsealing the records.
6. The order sealing will also need to set out that sealed records can only be viewed and/or copied by court order.

SOLUTION:

All instruments ordered to be sealed in Harris County are filed and filmed under separate filing from the original cause, after a hearing (without notice). They are maintained by the supervisor of the Probate Department, separate from original file. The order sealing is filed and filmed under the original file; open to the public.

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SANDRA F. CLARK
MILTON G. SHUFFIELD

February 19, 1990

Re: Guidelines Concerning Sealing of Settlement Agreements and
Court Records

Mr. Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 1200
301 Congress
Austin, Texas 78701

Dear Mr. Herring:

I am writing you in your capacity as co-chairman of the Supreme Court Advisory Committee tasked with considering guidelines for sealing of settlement agreements and court records. It is my view, based upon my experience in the practice of law, that any guidelines relating to the sealing of court records should preserve the rights of citizens to contract freely (whether inside or outside the litigation context). The right to contract with terms containing confidentiality agreements should not be arbitrarily infringed upon for the benefit of a narrow group of interests.

For example, it is perceived, rightfully or wrongfully, that those in the business of prosecuting civil lawsuits are pressing for guidelines which would substantially restrict the ability of litigants to agree on confidentiality and the sealing of records. This perceived effort, clothed in the general argument that the people have a "right to know", is, unfortunately, short-sighted at best, and deceptive in motive, and effect, at worst.

It is difficult to see the "public good" being served by free access to child custody records.

Mr. Charles J. Herring, Jr.
February 19, 1990

6277S
Page 2

It is difficult to see the public good being served by free access to sensitive records involving adoption, juveniles, and psychiatric records and treatment.

It is difficult to see the public good being served by free access to the terms of a settlement agreement between civil litigants, whether such agreement involves paltry sums (which, in effect, put the lie to the plaintiff's claim to start with), or huge sums (which frequently are more a reflection of potential damages than real fault or liability).

The vast bulk of my practice is on the defense side of the docket, but I have, on occasion represented plaintiffs in rather substantial cases. In those instances where I have represented plaintiffs I have insisted upon confidentiality agreements and have requested the sealing of records (quickly agreed to by the defense, I might add) because such agreements offered protection to my plaintiff-clients from those who would approach them with the knowledge that they had received substantial sums of money, and with the knowledge that they were either physically impaired, brain-damaged, or grieving from the death of a close family member. In my view, an attorney representing an injured person who resists a confidentiality agreement and the sealing of the record has only one person's interest in mind, and it is not that of his client. It is unfortunate that some members of my profession feel that it is necessary to parade a large settlement before the newsmedia (risking their clients' privacy and security in the process). Actually, it's a little distasteful as well. I have even seen lawyers "decorate" their offices with newspaper clippings on large settlements. Although such conduct is arguably a form of "free speech", I have real doubts that such counsel give objective advice to their clients, advising the wisdom of secrecy.

The effectiveness of civil suits as policing industry to assure safety and responsibility on its part is not hindered by the ability of parties to contract for confidentiality and seal records in a litigation context. Suits have their effect, and discovery is generally open in virtually every jurisdiction in the United States. What is left, then, of the general cry for the "public's right to know" falls into the existing tension that has always existed between the rights of the individual and individual companies, and the rights of the "general public." This tension is, of course, heightened by today's degree and intensity of news coverage, but the relative rights should not have changed.

Mr. Charles J. Herring, Jr.
February 19, 1990

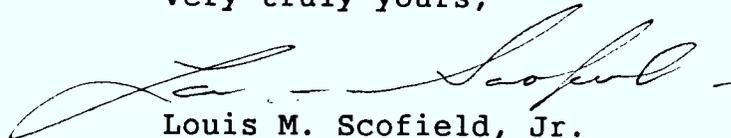
6277S
Page 3

Perhaps a reflection of this is the fact that the Federal Court Study Committee created by Congress, has recently recommended that protective orders and sealing of settlements are essential to the effective functioning of the judicial process. The reasons are obvious to those familiar with the process: Settlements are facilitated; the interests of the individual plaintiffs are protected from the unscrupulous; the interests of adopted children, minors, juveniles, and those under psychiatric care are protected; trade secrets and sensitive business information can be disclosed to the litigants without fear of disclosure to competition; the right to contract freely is protected; and the right to privacy, so precious to us in today'age, is protected.

It would be a hollow right indeed if the valuable right to privacy can be stripped away through the filing of a lawsuit and payment of a \$135.00 filing and service fee, regardless of the merit of the claim. Such is certainly a lower price tag on the right of privacy than I had imagined.

Mr. Herring, I certainly appreciate your indulgence in reading this. If this letter contains nothing new then please accept it as bolstering of that which has been expressed by others. If it provides some new insight then it was certainly worthwhile preparing. Thank you for your attention.

Very truly yours,



Louis M. Scofield, Jr.

LMS/jp
6277S

cc: Mr. Howard Waldrop,
Atchley, Russell, Waldrop & Hlavinka
P. O. Box 5517
1710 Moore's Lane
Texarkana, Texas 75505



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

December 13, 1989

Mr. Chuck Herring
Jones, Day, Reavis & Pogue
301 Congress, Suite 1200
Austin, Texas 78701

Mr. Charles Lefty Morris
Morris, Cravens & Sulak
2350 One American Center
Austin, Texas 78701

Dear Mr. Herring and Mr. Morris:

I am writing regarding the proposal to adopt rules restricting the use of sealing orders. In my practice, and that of several of my colleagues, we have encountered problems with use of sealing orders.

For example, in one case, due to a very restrictive sealing order, we were precluded from showing key financial information to our own expert witnesses for a period of over six months. Because the order permitted only attorneys to view documents under seal, including references in depositions to the those documents, only attorneys could summarize depositions, and even copying was restricted to attorneys. Over a period of months, this amounted to a substantial waste of attorney time.

In addition, in the particular litigation described above, the defendants used the sealing order as an offensive weapon to deflect attention from proceeding with trial on the merits. Several times, accusations of violations of the sealing order were made, which then had to be answered.

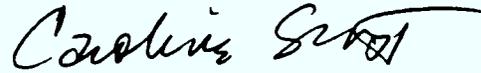
In the particular case in question, it also appears that the primary purpose of the sealing order was to make it as difficult as possible for individuals and other regulatory agencies to obtain crucial information about

Mr. Chuck Herring
Mr. Charles Lefty Morris
December 13, 1989
Page 2

fraudulent or deceptive activities. This is a particularly offensive situation when the State or another government entity is paying for the litigation through tax dollars, but citizens of the State are unable to obtain the information discovered, even though there is a legitimate public interest involved.

I wish you and your committee success in your efforts.

Sincerely,



Caroline Scott
Assistant Attorney General
IBS Section
(512) 463-2018

CS:pg

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*ADMITTED ONLY IN STATE
OTHER THAN TEXAS

FEDERAL EXPRESS

Charles Herring, Jr., Esq.
Jones Day Reavis & Pogue
301 Congress Avenue, Suite 1200
Austin, Texas 78701

Re: Proposed Rule 76a

Dear Mr. Herring:

I am writing to you as an intellectual property practitioner to express my concern about proposed Rule 76a, a concern which Pete Peterson delineated in great detail in his letter of December 19, 1989. I will not here repeat what you already understand.

I would like to emphasize, however, that over the years Texas has been able to provide a fair environment for businesses to develop, nurture and utilize trade secrets and related proprietary information. This type of property can be lost by public disclosure, even through inadvertence. At times, however, disputes arise as to whether someone has improperly obtained a trade secret. Obviously, in such a situation it is necessary for the two parties to the dispute to make available the relevant information, while limiting dissemination to prevent loss of valuable property rights. It is almost inevitable in such litigation that a protective order is entered which limits the scope of disclosure. (Often only an independent expert has access to it.) In this way, the interests of the litigants are protected, while ensuring that the trade secret is not dissipated through public disclosure or other property right.

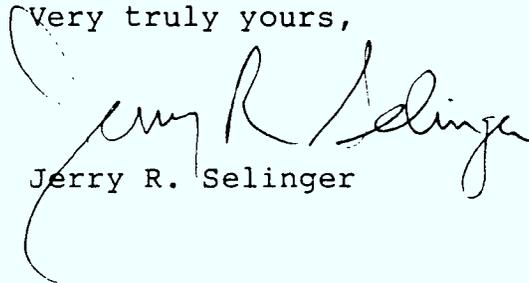
Charles Herring, Esq.
December 29, 1989
Page Two

There would be a most chilling effect on "high-tech" companies if their competitors were allowed to intervene for the purpose of seeking access to litigated trade secrets. Such a "side-show" would significantly increase the cost of litigation and misdirect focus from the primary dispute between the party litigants. Exploitation and utilization of valuable trade secrets could also be unduly limited out of fear of potential loss. This might result in economic detriment to our state.

I also urge that your subcommittee carefully consider the unique nature of intellectual property rights and continue to provide appropriate protection for these valuable intangible assets.

Thank you in advance for your consideration.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jerry R. Selinger". The signature is written in dark ink and is positioned above the typed name.

Jerry R. Selinger

JRS/gp

cc: Gale Peterson, Esq.
Louis T. Pirkey, Esq.

PROPOSAL FOR STRENGTHENING RULES ON CLOSURE OF COURT RECORDS

1. PROHIBIT BLANKET GAG AND PROTECTIVE ORDERS AS A CONDITION OF SETTLEMENT. Settlements now occur in 97% (all but 15 of 457 cases concluded in 1988) of all product liability cases filed in Texas.
2. REQUIRE ATTORNEYS, AS OFFICERS OF THE COURT, TO MAINTAIN AND ALLOW REASONABLE ACCESS TO ALL DISCOVERY, WHETHER OR NOT USED IN TRIAL. The trial court should retain continuing jurisdiction over discovery issues.
3. REQUIRE ATTORNEYS AND JUDGES TO REPORT ANY APPARENT VIOLATIONS OF FEDERAL OR STATE SAFETY OR PROFESSIONAL LICENSURE CONDITIONS TO THE APPROPRIATE REGULATORY BODY.
4. ENCOURAGE JUDGES TO APPOINT SPECIAL MASTERS TO HEAR CLOSURE ARGUMENTS, SUCH AS TRADE SECRETS OR CLAIMS THAT A PERSON WOULD BE PERSONALLY DAMAGED UNNECESSARILY BY REVEALING UNRELATED PSYCHIATRIC PROBLEMS.
5. REQUIRE HEARINGS AND EFFECTIVE NOTICE TO ALL INTERESTED PARTIES BEFORE A RECORD IS SEALED. REQUIRE AN ADEQUATE DESCRIPTION OF THE DOCUMENTS BEING SEALED TO BE DRAFTED AND APPROVED BY THE COURT. ALLOW GROUPS LIKE REGULATORS, THE MEDIA, OR OTHER INTERESTED PARTIES TO NOTIFY THE CLERK OF THEIR INTEREST IN A CATEGORY OF CASE, AND THEN REQUIRE THE MOVANT TO NOTIFY ALL PARTIES WHO ARE LISTED.
6. DRAW THE EXEMPTIONS TO THE CLOSURE RULES TIGHTLY, CLOSE THE TRADE SECRET EXEMPTION

LAW OFFICES

SOULES & WALLACE

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REPUBLIC OF TEXAS PLAZA

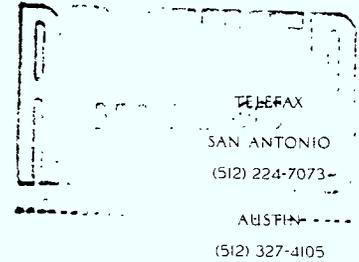
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WRITER'S DIRECT DIAL NUMBER:

December 6, 1989

Mr. Charles F. Herring
Co-Chair
Supreme Court Advisory Committee
Ad Hoc Subcommittee on Sealing of
Court Records
Small, Craig & Werkenthin
P. O. Box 2023
Austin, Texas 78768

Mr. Charles (Lefty) Morris
Co-Chair
Supreme Court Advisory Committee
Ad Hoc Subcommittee on Sealing of
Court Records
Morris, Craven & Sulak
600 Congress Avenue, Suite 2350
Austin, Texas 78701-3234

RE: Sealing Court Records

Dear Chuck and Lefty:

Please review the enclosed opinion in Houston Chronicle v. Hardy, and particularly the appendix which sets forth a "real-life" and important order relating to sealed discovery. The case demonstrates that at the pretrial stage, a different constitutional question can be present, i.e. the Fair Trial v. Free Press question. Judge Hardy concluded that, given the available juror population in Matagorda County, if the press reported ongoing about discovery in the case it would not be possible to get a fair trial. This, with other considerations, make the question of sealing discovery a different question than that of sealing court records used in the conduct of trials or hearings or other open court proceedings. If your subcommittee undertakes to write a rule relating to sealing, or unsealing, trial discovery, I suggest considering that the procedures in Rule 166b(5) be reviewed for adequacy, and that perhaps a new paragraph be written in that rule for the unsealing of discovery materials on motion of parties or of outsiders or even on the court's own motion regardless of whether the plenary power of the trial court has expired. The Supreme Court of Texas has the unqualified authority to extend the plenary

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TEXAS BOARD OF LEGAL SPECIALIZATION
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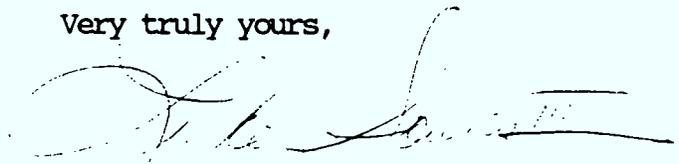
Mr. Charles F. Herring
Mr. Charles (Lefty) Morris
December 6, 1989
Page 2

power of trial courts. Cf. T.R.A.P. 47 and 49. The plenary power of trial courts is virtually all contained in rules anyway.

The current "good cause" standard for sealing discovery may be adequate, or close to it, but there likely is a deficiency in that the records, under some recent rulings, cannot be reopened after the trial court's plenary power has expired. If a provision was made for that, when products defendants strong arm an agreement out of products plaintiffs to seal discovery in a case, that agreement would always be subject to rules that would provide for reopening, and the products plaintiffs in a particular case could not control future events over discovery sealed in that case.

The products plaintiffs may prefer to have a single rule that covers sealing and unsealing records throughout the trial process without viewing discovery as a different problem. I believe that discovery is a different problem, although I do not suggest that I know whether it is a small, medium, or large different problem. It was thought in the Hardy case to be a large problem, and I suppose could be of Constitutional dimension in future litigation as well. However, that is something for your committee to consider and resolve.

Very truly yours,



Luther H. Soules III

LHSIII:gc
Enclosure

C:/DW4/LHS/LETTERS/427.DOC

cc: Representative Orlando Garcia
Chief Justice Thomas R. Phillips
Justice Franklin S. Spears
Justice C. L. Ray
Justice Raul A. Gonzalez
Justice Oscar H. Mauzy
Justice Eugene A. Cook
Justice Jack Hightower
Justice Nathan L. Hecht
Justice Lloyd Doggett
Mr. William O. Whitehurst, Jr.
Mr. Mack Kidd
Mr. Howard L. Nations
Mr. Tommy Jacks
Mr. Kenneth Fuller
Mr. John H. McElhaney
Mr. David H. Donaldson, Jr.

GENERAL MILLS, INC. • EXECUTIVE OFFICES

Number One General Mills Boulevard • Minneapolis, Minnesota

JAN 22 1990

January 17, 1990

C. L. WHITEHILL
Senior Vice President
General Counsel and Secretary
Tel. (612) 540-3862

Charles J. Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 1200
301 Congress
Austin, TX 78701

RE: Lawyers for Civil Justice/Proposed Rule on Sealing Court Records

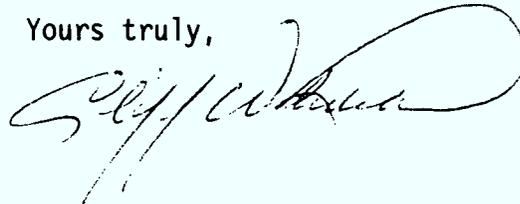
Dear Mr. Herring:

Although I reside in Minnesota and have the responsibility of being general counsel of General Mills, I would like to express my views to you on the proposed guidelines for the sealing of court records for Texas state courts. I am a graduate of the University of Texas Law School, and I do maintain my membership in the Texas Bar Association.

Because my practice as general counsel for a major corporation requires negotiation of settlement agreements in many states, it is important that the sealing of court records and the issuing of protective orders be available to litigants as part of their settlement agreements. While General Mills does not routinely request a protective order in a settlement, I have on many occasions found that such an order was a crucial part of the settlement, and that without such protective order the settlement would not have been accomplished.

For these reasons, I strongly support the proposal being advanced by the Lawyers for Civil Justice.

Yours truly,



CLW/do

RECEIVED
FEB 13 1990

Paul E. Yestrumskas
Assistant General Counsel

Hubbell Incorporated
584 Derby Milford Road
PO. Box 549
Orange, CT 06477-4024
203 799-4100

February 13, 1990

Charles Herring, Jr.
Jones, Day, Reavis & Pogue
Suite 300
301 Congress Street
Austin, TX 78701

Dear Mr. Herring,

I am writing to you in your capacity as Co-Chair of the Advisory Committee studying the draft guidelines for the sealing of court records and the issuing of protective orders.

Hubbell Incorporated is a national manufacturer of quality electrical and electronic products for commercial, industrial, utility and telecommunications applications.

It is our view that protective orders and settlement agreements protect important trade secrets, the potential disclosure of which would inhibit settlements.

We hope you will consider our views in evaluating the important role of protective orders to potential litigants in Texas.

Very truly yours,

Paul E. Yestrumskas

PEY:dr/WPPC667

cc: Dale R. Schmidt
Manager of Legal Services
NEMA
2101 L Street, N.W.
Suite 300
Washington, DC 20037-1581

HYDE CORPORATION, Petitioner,

v.

James Donle HUFFINES, Respondent.

No. A-6486.

Supreme Court of Texas.

March 12, 1958.

Rehearing Denied June 4, 1958.

Further Rehearing Denied July 16, 1958.

Suit by a licensor to restrain a licensee from manufacturing a garbage compressing device made substantially in accordance with any feature of a mechanism described in the licensor's patent application and in his patent issued during pendency of the action. From a judgment of the District Court, Tarrant County, Harold Craik, J., for the plaintiff, defendant appealed to the Court of Civil Appeals, Boyd, J., which reformed and affirmed the judgment, 303 S.W. 2d 865, and the licensee brings error. The Supreme Court, Norvell, J., held that where licensee after contracting with inventor for use of invention upon which an application for patent was pending repudiated the licensing agreement and insisted upon utilizing the invention, despite the fact that it secured information which enabled it to manufacture the device through the licensing agreement and negotiations relating thereto, licensee gained knowledge of the licensor's trade secrets without a privilege to do so and was liable in damages for an unauthorized use thereof. The Court further held, on motion for rehearing, that relief by way of injunction should not arbitrarily be denied because trade secrets contained in an application for a patent had been made public and whether an injunction should issue and if so the particular type of decree depends upon the facts of each particular case.

Motion for rehearing overruled and judgment of the Court of Civil Appeals affirmed.

Walker, J., dissented.

1. Injunction ⇨56

Where plaintiff constructed a mechanism which compressed the garbage collected by Sanitation Department so that garbage trucks employed in hauling the refuse could carry substantially larger loads, mechanism was of a type that is subject to protection in equity as a "trade secret".

See publication Words and Phrases, for other judicial constructions and definitions of "Trade Secret".

2. Patents ⇨214

Where licensee after contracting with an inventor of a garbage compressor for use of the invention upon which an application for patent was pending, repudiated the licensing agreement and insisted upon utilizing the invention despite the fact that it secured information which enabled it to manufacture the device through the licensing agreement and negotiations relating thereto, licensee gained knowledge of the licensor's trade secrets without a privilege to do so and was liable in damages for an unauthorized use thereof.

3. Contracts ⇨4

In the area of confidential relationships, an injured party is not required to rely upon an express agreement to hold a trade secret in confidence, nor should he be deprived of relief because the offending person may have originally entered into the particular relationship unaffected by then existing improper motive.

4. Courts ⇨489(3)

Licensor's action to restrain licensee which terminated agreement for manufacture of garbage compressors similar to those described in the licensor's original patent application and patent issued during litigation, did not involve a "patent case", although "patent questions" may be involved therein, so as to confer exclusive jurisdiction on a federal court where the gravamen of the suit was breach of confidence.

5. Courts ⇨489(4)

Trade secrets as distinguished from patents are subject to protection under the

equitable jurisdiction of state courts. 28 U.S.C.A. § 1338(b).

6. Abatement and Revival ⇨12

In licensor's action to restrain licensee terminating agreement for manufacturing garbage compressors, similar to those described in licensor's original patent application, where after licensee entered into contract with licensor, it purchased a patent covering a compressing device and instituted suit against the licensor in the federal court asserting priority of such patent over that issued to the licensor, state court action was not abated by the federal court proceeding. 28 U.S.C.A. § 1338(b).

7. Patents ⇨182

In licensor's action to restrain licensee terminating agreement from manufacturing garbage compressors similar to those described in licensor's original patent application, decree was not objectionable on the ground that it enjoined the use of a device that had been patented subsequent to the institution of the suit, where injunctive relief was not based upon the patent, but fact that the licensee gained knowledge of such device at a time prior to its being patented through the abuse of a confidential relationship.

8. Patents ⇨1

Upon the granting of a patent upon any of the claims contained in an application, file is no longer held in confidence by the patent office but the contents thereof become public property.

9. Injunction ⇨56

Equitable remedy of injunction to prevent one person from damaging another through an abuse of confidence in wrongfully appropriating trade secrets is a separate remedy, and incident to a different right, than that secured by a patent.

10. Patents ⇨182

In licensor's action to restrain licensee terminating agreement from manufacturing

garbage compressors similar to those described in licensor's original patent application, which patent issued during the litigation, injunctive protection of the trade secret of the invention as against licensee should not necessarily cease upon issuance of the patent, since it may not afford the same protection as a trade secret and since an award of damages for patent infringement might prove inadequate.

11. Injunction ⇨4

An injunction should ordinarily operate as a corrective rather than a punitive measure, but when, through inadequacies in the law, a choice must be made between possible punitive operation of the writ and failure to provide adequate protection of a recognized legal right, tendency is to recognize and enforce higher standards of commercial morality in the business world.

12. Patents ⇨182

Issuance of an injunction, extending beyond date of a patent, even though there be no express covenant between the parties enjoining secrecy after the issuance of the patent, is proper.

13. Injunction ⇨190

When a plaintiff makes out a case for injunctive relief, duty devolves upon the opponent to show by competent evidence that an order of less duration than a permanent order will afford the injured party adequate protection.

14. Amicus Curiae ⇨3

Amicus curiae does not occupy the position of an attorney for a party and is not vested with the management of the case.

On Motion for Rehearing.

15. Injunction ⇨56

A "trade secret" entitled to protection by injunction may consist of any formula, pattern, device or compilation of information used in one's business and which gives

him an opportunity to obtain an advantage over competitors who do not know or use it and generally relates to the production of goods though it may be a formula or a pattern.

See publication Words and Phrases, for other judicial constructions and definitions of "Trade Secret".

16. Patents ⇨182

Where inventor had developed a device and applied for a patent thereon and details thereof were unknown to corporation until disclosed to its representatives during negotiations culminating in a licensing agreement details of construction were "trade secrets" belonging to the inventor and if received by the corporation in confidence and it later attempted to exploit them to the inventor's injury an action would lie and it was immaterial whether the suit be designated as "trade secret" case or as a suit for breach of confidence.

17. Patents ⇨211(1)

Existence of a confidential relationship between a licensor and licensee of patent is determined in each case and does not result merely because the parties occupy the position of licensor and licensee.

18. Patents ⇨182

All trade secrets are not patentable and where one has gained knowledge of trade secrets in confidence he cannot exploit the economic advantage gained thereby to the detriment of the opponent simply because of the public disclosure of the claims contained in the patent application.

19. Patents ⇨182

Relief by way of injunction against exploitation of trade secrets gained in confidence should not arbitrarily be denied because the trade secrets contained in an application for patent have been made public and whether an injunction should issue and if so the particular type of decree depends upon the facts of each particular case.

20. Injunction ⇨190

The issuance of a perpetual injunction is a common remedy afforded in trade secret cases.

Christopher & Bailey, Ft. Worth, for petitioner.

Thompson, Walker, Smith & Shannon, Paul C. Cook, Fort Worth, for respondent.

NORVELL, Justice.

This is a "trade secret" case in which the Court of Civil Appeals, after eliminating a recovery for attorneys' fees, has affirmed both a money judgment for \$17,520 in favor of James Donle Huffines against Hyde Corporation and a perpetual decree of injunction restraining Hyde Corporation from manufacturing or selling any device made substantially in accordance with any feature of a garbage compressor described in Huffines' original application for a patent and the patent thereafter issued to him. Hyde Corporation v. Huffines, Tex. Civ.App., 303 S.W.2d 865.

Petitioner, Hyde Corporation, presents the case here upon eighteen assignments of error; some of which are closely related and grouped for purposes of argument. It is unnecessary to discuss these assignments or points seriatim in order to dispose of the case. When the writ was granted, we had some doubt of the propriety as to the injunctive relief granted and one of the justices of the Court of Civil Appeals was of the opinion that the injunction was erroneously issued. However, upon further consideration, we have reached the conclusion that none of petitioner's assignments point out an error in the judgment of the Court of Civil Appeals. Such judgment will accordingly be affirmed.

Petitioner's assignments in the main present three major contentions: (a) That the pleadings, the evidence and the jury's findings do not support a recovery for Huff-

finer upon the theory that Hyde Corporation had through violation of a confidential relationship, secured and wrongfully exploited Huffines' "trade secrets." (b) That Huffines' remedy, if any, lay in the federal courts as the suit is essentially one of patent infringement. (c) That the injunction was wrongfully issued, particularly in view of the fact that a patent had been issued to Huffines covering a part of the claims contended in his patent application.

Certain other assignments raise contentions that various portions of the jury's findings are without support in the evidence, but we find that these matters were correctly decided in the lower appellate court and hence need not be discussed here.

The statement of the Court of Civil Appeals is essentially correct. However, in view of petitioner's first major contention, we will enlarge thereon by quoting from the patent application made by Huffines and the licensing agreement executed by the contending parties.

[1] The respondent Huffines (plaintiff below) is the director of the Sanitation Department of the City of Wichita Falls, Texas. He constructed a mechanism which compressed the trash and garbage collected by the Sanitation Department so that the garbage trucks employed in hauling this refuse could carry substantially larger loads. He applied for a patent upon this device and in his application described it as a "Compressor Mechanism for Refuse Truck." It was stated in the application that:

"This invention relates to improvements in garbage and trash hauling trucks and more particularly to garbage or trash hauling trucks that utilize a compressor mechanism to compress the refuse for transportation.

"Various trucks of this character have been proposed heretofore, but these for the most part, were complex in construction, relatively easy to get

out of order, and presented certain difficulties in loading and unloading the refuse, once it had been compressed into the carrying body of the truck.

"An object of this invention is to provide a garbage truck unit wherein the compressor will compact the refuse to enable a greater load to be transported to the place of disposal.

"Another object of this invention is to provide a compressor mechanism for a garbage or trash hauling truck that has a minimum of working parts to perform the compressing operation.

"A still further object of the invention is to provide a compressing mechanism for a truck of the character specified that is hydraulically operated, both to compress the refuse and to elevate the body of the truck into dumping position.

"Yet another object of the invention is to provide a truck body of the character specified, that is simple in construction, efficient in operation, the compressing and dumping mechanism of which is simple to operate, and which is relatively inexpensive to manufacture."

The application contained seventeen claims of novelty and invention and it conclusively appears that the mechanism was of a type that is subject to protection in equity as a trade secret. See, *K & G Oil Tool and Service Co., Inc., v. G & G Fishing Tool Service, Tex.*, 314 S.W.2d 782.

It appears that E. E. Maxson, Vice President of Hyde Corporation, became interested in the device through the offices of a friend of Huffines. Maxson originally talked with Huffines about manufacturing the device for Huffines. Eventually, however, it was agreed that Hyde Corporation should manufacture and sell the device and pay a royalty to Huffines. On January 8, 1954 a licensing agreement was executed which became effective three months later, that is, on April 8, 1954.

This agreement refers to Huffines as "Licensor" and to Hyde Corporation as "Licensee." It recites the fact that Licensor had invented certain new and useful improvements in a refuse compressor mechanism for vehicles and had made application for letters patent in the United States Patent Office, bearing Serial No. 400,236 and filing date of December 24, 1953 covering such device, and that Licensee was desirous of acquiring an exclusive license to make, use and sell the said invention in the territory of the United States of America and its possessions, and in all foreign countries.

The contract then provided that:

"The Licensor hereby grants to the Licensee, under the terms and conditions hereinafter set forth, an Exclusive License to make, use and sell said aforementioned device in accordance with said patent application, or under any patent or patents that may issue therefrom, or any application or applications filed on improvements on said device conveyed to the Licensor by the Licensee, and under any patent or patents that may issue therefrom. Licensor agrees to use due diligence in protecting such improvements and to continue the agreement under the present application and applications for improvements that may be filed thereon, as long as such agreements and conditions set forth herein are fulfilled. * * *

"The Licensee agrees to pay Licensor the sum of one hundred twenty dollars (\$120.00) per unit, and warrants and binds itself and its assigns to produce, sell and pay Licensor for a minimum of one hundred (100) units the first years. * * *

"Any litigation for infringement involving said application for patent, or involving an application or applications for patent on any improvements on said device, or involving any patents that may issue therefrom, wheth-

er offensive or defensive, but not connected with any Patent Office proceedings, shall be paid for by the parties hereto in proportion to the monies received from the manufacture and sale of said devices. However, if either of the parties hereto fails to bear his proportionate part of any such litigation, as aforesaid, the other party shall have the right, upon the expiration of thirty (30) days written notice to the party in default of his intention to bear the full expense of such litigation, but the party bearing such expense shall receive in full any damages that may be collected as a result of such litigation, otherwise monies collected as damages, or any expenses thereof, shall be shared proportionately.

"The effective date of this contract shall be the date on which the Licensee presents a finished pilot model of said device manufactured in accordance with the disclosure of said patent application, and when such pilot model is accepted by Licensor as a proper and salable article of manufacture within the scope of the claims of said application Licensee warrants and binds itself and its assigns to build and complete said pilot model within Ninety (90) days from date of this contract.

"The Licensee agrees not to question the validity of any application or applications, or any patent or patents issued as result of said application, or applications filed on improvements on said device, relative to the said Refuse Compressor Mechanism for Vehicles.

"This agreement may be automatically renewed at the end of the first year, so long as the agreements and conditions set forth herein are being fulfilled, and the same may apply to each succeeding year for the pendency of said patent application or applications, and for the life of any patent or

patents that may issue therefrom. Failure to fulfill the conditions herein set out shall be considered as terminating this contract agreement, but either party hereto who considers such conditions are not being met, shall notify the other party in writing to that effect, setting out the particular deficiencies, and the party receiving such notice shall have thirty (30) days in which to remedy such deficiencies, before the contract agreement shall become null and void. Sixty (60) days notice to terminate this contract shall be given by Licensee. If more than one hundred (100) units are manufactured and sold in any one year, the additional amount so sold that year shall be credited to the amount to be sold the next ensuing year.

"The expense of the prosecution of said application or applications for patent or patents shall be at the expense of the Licensor, and he agrees to use due diligence in prosecuting said application or applications for patent or patents in an effort to bring same to a successful conclusion.

"Licensee agrees to convey to Licensor any improvements made by Licensee or its employees upon the machine involved herein, and agrees that such assignment may be made to Licensor or to any designated agent, at Licensor's expense, and Licensee may use the improvement during the term of this contract, without additional royalty."

It conclusively appears that as a result of this agreement and the negotiations preceding its execution, Hyde Corporation gained full knowledge of the Huffines device not only from the application for patent but from scale models, blue prints, and actual construction of the device. On May 31, 1955, when the parties were in the second year of operations under the contract, Hyde Corporation repudiated the

licensing agreement by giving the sixty-day notice provided for in the contract. However, according to the jury's findings, said defendant did not cease to manufacture the Huffines' device but on the contrary continued to produce the same substantially in accordance with the description of the mechanism contained in Huffines' patent application.

Shortly before the trial was concluded a patent was received by Huffines and introduced in evidence. Some ten claims are listed in the patent instead of seventeen as set out in the original application. In the course of the prosecution of the patent application it appears that certain claims were cancelled by Huffines, others amended and additional ones added before the patent was finally issued.

Against this factual background Hyde Corporation contends that it cannot be held in damages or restrained in equity from further manufacturing the mechanism because they did not gain knowledge of the device through fraud, deceit or any inequitable practice.

Special Issues Nos. 1 and 2 and the jury's answers thereto bear upon this contention and are as follows:

"Special Issue No. 1: Do you find from a preponderance of the evidence that J. D. Huffines disclosed his refuse compressor mechanism to Hyde Corporation because some officer or agent of Hyde Corporation represented to him that they were interested in manufacturing and selling said refuse compressor mechanism? Answer: Yes.

"Special Issue No. 2: Do you find from a preponderance of the evidence that the defendant, Hyde Corporation, acted in good faith in acquiring knowledge of the design and novel features, if any, of the garbage disposal body in question? Answer: Yes."

Petitioner contends that there is no evidence supporting the jury's answer to

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Special Issue No. 1 and insists that if any issue of breach of confidence be raised by the evidence, the trial court should have submitted its requested special issue inquiring if the details, plans and specifications of Huffines' refuse compressor mechanism were disclosed by Huffines to Hyde Corporation or its representative *in confidence*.

[2] Petitioner's arguments as to the pleadings and evidence seem to run counter to the realities of the case as fixed by the written licensing agreement. It is true that there is no explicit written covenant contained in the contract which precludes petitioner from making use of information granted as a result of contract negotiations and disclosures by Huffines *after* the cancellation of the licensing agreement. It is also true that respondent's pleadings do not use the words "in confidence" by way of stating a conclusion. The picture presented by the pleadings and the evidence both undisputed and as interpreted by the jury is that of a licensee after contracting with an inventor (in good faith according to the jury's answer to Special Issue No. 2) for the use of an invention upon which an application for patent was pending, repudiating the licensing agreement and insisting upon utilizing the device despite the fact that he secured information which enabled him to manufacture the device through the licensing agreement and the negotiations relating thereto. To say that petitioner did not gain knowledge of the device in this manner is to deny the stated purpose of the licensing agreement. While in the briefs and oral argument some concern was expressed that the Court of Civil Appeals' opinion would permit unscrupulous claimants to delve into the pockets of business firms through spurious claims for compensation for the use of ideas, *Matarese v. Moore-McCormack Lines, Inc.*, 2 Cir., 158 F.2d 631, 170 A.L.R. 440, that danger is hardly presented here. We are not called upon to consider at what period in the course of negotiations petitioner's actions may have ceased to be ethically per-

missible. We here have business relations culminating in a licensing agreement. The case seems to come squarely within the rule of the American Law Institute's Restatement of the Law that:

"One who discloses or uses another's trade secrets, without a privilege to do so, is liable to the other if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. * * *." 4 Restatement of Torts § 757.

The jury evidently believed that at the time the licensing agreement was entered into, Hyde Corporation was acting in good faith, but thereafter decided to use respondent's device without accounting to him. If so, it might be absolved under clause (a) of the rule but would be held liable under clause (b) thereof. In the present case, the parties occupied the position of licensor and licensee. They were in a sense co-adventurers. There existed between them a confidential relationship as a matter of law and there was no need to submit these incidents of legal status to a jury for its determination. In commenting upon clause (b) of the rule above stated, it is said in the Restatement that:

"A breach of confidence under the rule stated in this Clause may also be a breach of contract which subjects the actor to liability under the rules stated in the Restatement of Contracts. But whether or not there is a breach of contract, the rule stated in this Section subjects the actor to liability if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him. The chief example of a confidential relationship under this rule is the relationship of principal and agent (see Restatement of Agency, §§ 395 and 396). Such is also the relationship between partners or other joint adventurers. But this

confidence may exist also in other situations. For example, A has a trade secret which he wishes to sell with or without his business. B is a prospective purchaser. In the course of negotiations, A discloses the secret to B solely for the purpose of enabling him to appraise its value. Or, A requests a loan from B, a banker, for the purpose of aiding the manufacture of a product by A's secret process. In order to assure B about the soundness of the loan, A discloses the secret to him in confidence. In both cases B is under a duty not to disclose the secret or use it adversely to A. * * *

4 Restatement of Torts, § 757, Comment on Clause (b) p. 13.

[3] While there may be some distinction in the theory of recovery under clauses (a) and (b), that is whether in tort or contract, *Aktiebolaget Bofors v. United States*, 90 U.S.App.D.C. 92, 194 F.2d 145, that point is not involved here. In the area of confidential relationships between partners, employers and employees, licensors and licensees, and the like, the injured party is not required to rely upon an express agreement to hold the trade secret in confidence, *Schreyer v. Casco Products Corp.*, 2 Cir., 190 F.2d 921, *Smith v. Dravo Corporation*, 7 Cir., 203 F.2d 369, nor should he be deprived of all relief because the offending person may have originally entered into the particular relationship unaffected by a then existing ulterior or improper motive.

Petitioner's contention that respondent's remedy, if any, rests in the federal courts is founded upon the premise that this is essentially a patent infringement suit. After petitioner had entered into the licensing contract with respondent, it purchased Patent No. 2,487,412 issued to Valentine O. Balbi covering a compressing device and instituted suit against Huffines in the United States District Court for the Northern District of Texas asserting the priority of the Balbi patent over that issued to Huffines and contending that the latter patent was invalid for a number of reasons.

[4, 5] We agree with the holding of the Court of Civil Appeals that this is not a "patent case", although "patent questions" may be involved herein. The gravamen of the present suit is breach of confidence. Trade secrets as distinguished from patents are subject to protection under the equitable jurisdiction of the state courts. In *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 37 S.Ct. 575, 576, 61 L.Ed. 1016, Mr. Justice Holmes stated the basis of the "trade secret" case, viz.:

"The word 'property' as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good."

In the later case of *Becher v. Contoure Laboratories*, 279 U.S. 388, 49 S.Ct. 356, 357, 73 L.Ed. 752, Mr. Justice Holmes in distinguishing between the patent and trade secret suits said:

"It is not denied that the jurisdiction of the Courts of the United States is exclusive in the case of suits arising under the patent laws, but it was held below that the suit in the State Court did not arise under those laws. It is plain that that suit had for its cause

of action the breach of a contract or wrongful disregard of confidential relations, both matters independent of the patent law, and that the subject matter of Oppenheimer's claim was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust. *Irving Iron Works v. Kerlow Steel Flooring Co.*, 96 N.J.Eq. 702, 126 A. 291; *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 37 S.Ct. 575, 61 L.Ed. 1016, Oppenheimer's right was independent of and prior to any arising out of the patent law, and it seems a strange suggestion that the assertion of that right can be removed from the cognizance of the tribunals established to protect it by its opponent going into the patent office for a later title. It is said that to establish Oppenheimer's claim is to invalidate Becher's patent. But, even if mistakenly, the attempt was not to invalidate that patent but to get an assignment of it, and an assignment was decreed. Suits against one who has received a patent of land to make him a trustee for the plaintiff on the ground of some paramount equity are well known. Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment."

[6] The federal courts have original jurisdiction, absent a diversity of citizenship of causes of action, which assert "a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws." 28 U.S.C.A. § 1338(b). Huffines might have maintained this character of suit in the federal court in connection with a claimed infringement of his patent, but he was not required to do so as the way to relief in the state courts was open to him. Hyde Corporation has no claim of unfair competition based upon an alleged violation of confidence by Huffines which is in any way

related to its claim under the Balbi patent. However that may be, it seems clear that the action taken by Hyde Corporation in the federal court could not operate to abate this proceeding. The distinction between the trade secret cases and those involving the validity of or infringement of patents is pointed up by the trade secret cases tried in the federal courts because of diversity of citizenships in which the law of the state of the forum is regarded as controlling under the rule of *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487. See, *Franke v. Wiltschek*, 2 Cir., 209 F.2d 493, *Smith v. Dravo Corporation*, 7 Cir., 203 F.2d 369, 380. The latter case affords an example of one cause of action for wrongful appropriation of trade secrets, controlled by the law of Illinois and the law of Pennsylvania under the Illinois doctrine of conflict of laws, being joined with an action for patent infringement which is controlled by Acts of Congress. This was not a case of a claim of unfair competition joined with a related claim under the patent laws within the meaning of the federal statute. The Court characterized the trade secret cause of action as being entirely separate from that relating to a claimed patent infringement and repudiated the patent claim while recognizing the validity of the trade secret. The Court said:

" * * * But the delver in the art was bound to know all the teachings of that art. When he attempted to improve upon the things taught by others, if he was to achieve patentable invention, he was under the necessity of doing more than merely adapting the teaching to a device as a skilled mechanic would do. After careful consideration, we agree with the District Court that the patentee did no more than adapt what he had been taught to an improved container and that his accomplishment did not rise to the height of patentable invention as that term has been defined by the Supreme Court.

* * *"

"Plaintiffs assert that if defendant is liable for breach of confidential relations, it is estopped to plead invalidity of the patents. The decisions cited in support, we think, do not sustain the argument. The two causes of action are entirely separate; finding of guilt upon the first two counts can in no wise affect the question of validity of the patents under counts 3 and 4. In *Booth v. Stutz Motor Car Co.*, 7 Cir., 56 F.2d 962, we held the patent invalid but nevertheless defendant was liable for breach of a confidential relationship. Similar was the ruling in *Schreyer v. Casco Products Corp.*, 2 Cir., 190 F.2d 921. * * *"

[7] Nor is it a valid objection to the decree that it enjoins the use of a process or device that has been patented subsequent to the institution of this suit. Injunctive relief is not based upon the patent but the circumstance that the petitioner gained knowledge of such device at a time prior to its being patented through an abuse of a confidential relationship. See Comment Note—"Right and remedies (independently of patent laws) of one who makes an invention or discovery, or conceives an idea or plan, as against one who utilizes it industrially or commercially, or discloses it, or threatens to do so." 170 A.L.R. 449 et seq. As above pointed out, a patent was issued upon certain claims of Huffines contained in his original application and amendments thereto. Despite this circumstance, the Court of Civil Appeals, with one justice dissenting, awarded the respondent Huffines a perpetual injunction against Hyde Corporation restraining it from making use of any of the claims or devices contained in the original application for patent or the patent itself. This holding is in direct conflict with the holding of the Texarkana Court of Civil Appeals in *G & G Fishing Tools Service v. K & G Oil Tool & Service Co.*, 305 S.W.2d 637 (this day reversed sub nomine, *K & G Oil Tool & Service Co. v. G & G Fishing Tools Service*) wherein the Court

followed *Conmar Products Corporation v. Universal Slide Fastener Co.*, 2 Cir., 172 F.2d 150, 155, in which it was held that an injunction would not issue to protect "trade secrets" against one who had obtained them through a breach of confidence *after* such trade secrets had been made public through the grant of a patent. Chief Judge Learned Hand writing for the Circuit Court of Appeals said:

"Since the specifications of the patents in suit disclosed the first six secrets and part of the seventh, that much of the secrets upon issue of the patents fell into the public demesne; and, prima facie, the defendants were free to use them. The Seventh Circuit (*Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104), and apparently the Sixth as well, (*A. O. Smith Corporation v. Petroleum Iron Works Co.*, 74 F.2d 934) have, however, held that if before issue one has unlawfully obtained and used information which the specifications later disclose, he will not be free to continue to do after issue; his wrong deprives him of the right which he would otherwise have had as a member of the public. We have twice refused to follow this doctrine; (*Picard v. United Aircraft Corporation*, 2 Cir., 128 F.2d 632; *Pennington Engineering Co. v. Houde Engineering Corp.*, 2 Cir., 136 F.2d 210) and we adhere to our decisions. Conceivably an employer might exact from his employees a contract not to disclose the information even after the patent issued. Of what possible value such a contract could be, we find it hard to conceive; but, if an employer did exact it, others would perhaps be obliged to turn to the specifications, if they would use the information. Be that as it may, we should not so construe any secrecy contract unless the intent were put in the most inescapable terms; and the plaintiff's contract had none such. In their absence we do not see why a wrongful induce-

ment to divulge the disclosure before issue should deprive the wrongdoer of his right to avail himself of the patentee's dedication; for, as we have just said, the contract is to be construed as imposing secrecy only until issue. The doctrine must rest upon the theory that it is a proper penalty for the original wrong to deny the wrongdoer resort to the patent; and for that we can find no support in principle."

[8] Upon the granting of a patent upon any of the claims contained in the application, the file is no longer held in confidence by the patent office but the contents thereof become public property. *Grant v. Raymond*, 6 Pet. 218, 8 L.Ed. 376; *Sandlin v. Johnson*, 8 Cir., 141 F.2d 660; *A. O. Smith Corp. v. Petroleum Iron Works Co. of Ohio*, 6 Cir., 73 F.2d 531; 74 F.2d 934, *Callman*, *The Law of Unfair Competition and Trademarks* (2d Ed.) § 533, *Patents*. Consequently, the secrets disclosed by the application and its amendments are available to all the world and the trial court's decree makes an exception of the petitioner, *Hyde Corporation*. It is argued that such injunction is punitive as to petitioner rather than protective to respondent.

[9,10] If, as has been said in numerous cases, the equitable remedy of injunction to prevent one person from damaging another through an abuse of confidence in wrongfully appropriating trade secrets is a separate remedy and incident to a different right than that secured by a patent, it would seem that injunctive protection of the trade secret as against a licensee should not necessarily cease upon the issuance of a patent. The patent may not afford the same protection as the trade secret and while, with reference to the

public generally, it may be said that the inventor has elected to surrender the protection of secrecy in return for a patent, the same can hardly be said in behalf of a licensee or other person who has wrongfully used information obtained through a breach of confidence. The record here indicates that at the time of trial petitioner was tooled up and producing the refuse compressor which was the result of respondent's inventive genius or mechanical skill. Undoubtedly if an injunction were lifted upon the issuance of a patent (which may or may not afford protection for all the trade secrets contained in the original application or amendments thereto), the licensee who had abused a confidence would thus obtain a marketing advantage or head start as compared to the patentee or any manufacturer or processor licensed by him after the issuance of the patent. An award of damages for patent infringement might well prove inadequate to fully protect the one whose confidence had been violated.

[11] The injunction should ordinarily operate as a corrective rather than a punitive measure, but when, through inadequacies in the processes and methods of the law, a choice must be made between the possible punitive operation of the writ and the failure to provide adequate protection of a recognized legal right, the latter course seems indicated and the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world.¹ In all cases, injunctive relief extending beyond the issuance of patent may not be essential to afford adequate relief to the injured party,² but the disclosure attendant upon the disclosure of the patent filed should not of itself preclude such relief.³

1. For contrary view, see John T. Kipp, Note, 36 Texas Law Review 384.
2. See, *Brown & Root, Inc. v. Jaques*, Tex. Civ.App., 98 S.W.2d 257, no writ history, in which the Jaques saw was duplicated by defendant for its own use but not for sale to others.
3. See discussions in both majority and dissenting opinions in *Franke v. Wiltsehck*, 2 Cir., 209 F.2d 493. In connec-

tion with this case, it should be noted that the federal court's jurisdiction was based upon a diversity of citizenship in which the law of the State of New York was involved. *Conmar Products Corporation v. Universal Slide Fastener Co.*, 2 Cir., 172 F.2d 150 was apparently a combination patent infringement and unfair competition case. 23 U.S.C.A. § 1338.

[12] We are not unmindful of the fact that cogent arguments may be marshalled upon both sides of the existing controversy which has resulted in a conflict of decisions among our own Courts of Civil Appeals, as well as the federal Circuit Courts of Appeals. We are, however, of the opinion that the better doctrine as well as the one supported by the weight of American authority is the rule which permits the issuance of an injunction extending beyond the date of patent, even though there be no express covenant between the parties enjoining secrecy after the issuance of a patent.

As this matter has not heretofore been passed upon by this Court we quote somewhat at length from the opinion of the Supreme Court of New Jersey in *Adolph Gottscho, Inc. v. American Marking Corporation*, 18 N.J. 467, 114 A.2d 438, 440, which contains numerous citations of authorities and to our minds represents the majority rule in this country and the one which should be followed by us:

The New Jersey Court said:

"While its action was pending in the Chancery Division the United States Patent Office issued several patents to the plaintiff. These disclosed some of the plaintiff's secrets though not all nor most of them. Jackson did not learn any of the secrets from the patents; he learned them in confidence while in the plaintiff's employ and improperly disclosed and used them long before the patents were issued. He contends, nevertheless, that the patents constituted public disclosures which automatically terminated the plaintiff's pre-existing cause of action against him and the Marking Corporation to the extent that it related to secrets disclosed by the patents. Although there are decisions which suggests support for his position, we believe that reason and the weight of the authority are to the contrary. See *Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104, 109 (7 Cir.,

1937), certiorari denied 301 U.S. 695, 57 S.Ct. 923, 81 L.Ed. 1350 (1937); *A. O. Smith Corp. v. Petroleum Iron Works*, 74 F.2d 934, 935 (6 Cir., 1935); *Franke v. Wiltschek*, 209 F.2d 493, 495 (2 Cir., 1953); *Thiberg v. Bach*, 107 F. Supp. 639, 642 (D.C.D.N.J.1952), affirmed 203 F.2d 956 (3 Cir., 1953); *International Industries v. Warren Petroleum Corp.*, 99 F.Supp. 907, 913 (D.C. D.Del.1951); *McKinzie v. Cline*, 197 Or. 184, 252 P.2d 564, 569 (1953); *Julius Hyman & Co. v. Velsicol Corp.*, 123 Colo. 563, 233 P.2d 977, 999 (1951), certiorari denied 342 U.S. 870, 72 S.Ct. 113, 96 L.Ed. 654 (1951). But cf. *Commar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150 (2 Cir., 1949); *Picard v. United Aircraft Corp.*, 128 F.2d 632 (2 Cir., 1942), certiorari denied 317 U.S. 651, 63 S.Ct. 46, 87 L.Ed. 524 (1942); *Darsyn Laboratories v. Lenox Laboratories*, 120 F. Supp. 42 (D.C.D.N.J.1954), affirmed 217 F.2d 648 (3 Cir., 1954).

"In the *Franke* case the plaintiff sought an injunction and accounting from the defendants who misappropriated trade secrets which they had learned in confidence; in response to the contention that the secrets had been revealed by an expired patent, the court said [209 F.2d 495]:

"Defendants argue that the heart of plaintiffs' process was revealed by an expired patent, and that the improvements thereon were unpatentable applications of mechanical skill. This totally misconceives the nature of plaintiff's right. Plaintiffs do not assert, indeed cannot assert, a property right in their development such as would entitle them to exclusive enjoyment against the world. Theirs is not a patent, but a trade secret. The essence of their action is not infringement, but breach of faith. It matters not that defendants could have gained their knowledge from a study of the expired patent and plaintiffs' publicly marketed

product. The fact is that they did not. Instead they gained it from plaintiffs via their confidential relationship, and in so doing incurred a duty not to use it to plaintiffs' detriment. This duty they have breached.' (Citing authorities.)

"In the Hyman case the court held that disclosures in patent applications did not bar the plaintiff's action to restrain the defendants from appropriating its trade secrets; in the course of its opinion it said [123 Colo. 563, 233 P.2d 999]:

"It is our conclusion that the composition of matter embraced in applications for United States Letters Patent Serial Nos. 581172 and 639416, 607078 and 643759 were plaintiff's trade secrets and defendants' betrayal of these trade secrets may not be countenanced by a court of equity. Assuming that the applications for patents in Great Britain and other foreign countries amounted to a disclosure of plaintiff's trade secrets, nevertheless it did not relieve the individual defendants here from their contractual and fiduciary obligation. The determination of what, if any, rights the public may have respecting the use of plaintiff's trade secrets by reason of the application for letters patent in Great Britain or elsewhere, we will leave for decision where that question is presented.

"The knowledge of chlordane and the construction and equipment of the plant in which the same was manufactured—for which it had expended several hundred thousands of dollars—were, as we have said, plaintiff's trade secrets. Any knowledge which defendants acquired respecting those secrets was obtained while they were plaintiff's employees, and under a contractual obligation, as evidenced by their employment agreements, and in addition thereto this knowledge of plaintiff's trade secrets was acquired by them in confidence and while they were occupy-

ing a fiduciary relationship. They now seek to appropriate these trade secrets to their own use and profit by a violation of their contractual agreements and a betrayal of the confidence reposed in them by plaintiff. This they may not do; such conduct is abhorrent to our conception of ordinary honesty.' (Citing authorities.)

"We are not here concerned with any claim of patent infringement nor are we concerned with the rights of the public generally. Jackson learned the plaintiff's trade secrets in confidence, and in violation of his fiduciary obligations, he disclosed and used them for purposes other than his employer's benefit. See *Sun Dial Corp. v. Rideout*, supra, 16 N.J. [252] at page 259, 108 A.2d 442; *Vulcan Detinning Co. v. American Can Co.*, 72 N.J.Eq. 387, 395, 67 A. 339, 12 L.R.A.,N.S., 102 (E. & A.1907). His conduct was grossly improper and gave rise to the plaintiff's cause of action, based on long-settled equitable principles and supported by the marked changes in the attitude of the law towards the need for commercial morality. *Sun Dial Corp. v. Rideout*, supra, 16 N.J. at page 261, 108 A.2d 442; *Franke v. Wiltschek*, supra, 209 F.2d at page 499. Cf. 3 Restatement, Torts, 540 (1938): 'the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade.' We know of no persuasive reason for depriving the plaintiff of the benefits of its accrued cause of action because some of its secrets were later disclosed by the issuance of protective patents during the pendency of its action. Surely the defendants are in no just position to seek this result and the plaintiff should not be subjected to the burden and jeopardy of additional or divided proceedings to obtain the complete relief to which it is here fairly entitled as against the defaultant

fiduciary Jackson and his company the American Marking Corporation."

[13, 14] We are of the opinion that the Court of Civil Appeals was correct in affirming the trial court's injunction. The petitioner throughout this litigation has taken the position that no injunction should issue. It has not raised an alternative contention that an injunction, if issued, should be of limited duration, such as two or three years after the issuance of patent, rather than being perpetual in nature. No proper predicate by alternative pleadings and supporting evidence was laid for limiting the effect of the injunction to a certain period of time after the issuance of the patent. We think that when a plaintiff makes out a case for injunctive relief, the duty devolves upon the opposing party to show by competent evidence that an order of less duration than a permanent order will afford the injured party adequate protection. We make this statement in deference to a suggestion contained in an *amicus curiæ* brief filed herein and to point out that as an *amicus curiæ* does not occupy the position of an attorney for a party and is not vested with the management of the case, 2 Am.Jur. 682, *Amicus Curiae*, § 7, the authority to and the propriety of issuing the suggested type of injunctive order is not before us.

We find no assigned error in the trial court's manner of submitting the case to the jury which would necessitate a new trial, nor is a valid objection made to the method employed in assessing damages.

Petitioner's assignments of error are overruled and the judgment of the Court of Civil Appeals is affirmed.

On Motion for Rehearing

While petitioner's motion for rehearing presents nothing that was not passed upon in the original opinion, there are certain matters which may be clarified by further statement.

[15] Petitioner seems to have some objection to the use of the term "trade secrets" in describing this case. The generally accepted definition of a "trade secret" is that contained in the Restatement of Torts. In *Extrin Foods, Inc., v. Leighton*, 202 Misc. 592, 115 N.Y.S.2d 429, 433, the Court said:

"In resolving this issue the Court is first required to define the term 'secret' as applied to a formula. The term 'trade secret' is defined in the Restatement of Torts, § 757, p. 5, as follows:

"'b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. * * * A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.'

"See also Nims on Unfair Competition and Trade Marks (4th Ed.), page 403; *Kaumagraph Co. v. Stampagraph Co.*, 235 N.Y. 1, 7, 138 N.E. 485, 487; *Fairchild Engine & Airplane Corp. v. Cox*, Sup., 50 N.Y.S.2d 643, 656."

To the authorities cited, we may add the following: *Sun Dial Corporation v. Rideout*, 29 N.J.Super. 361, 102 A.2d 90, affirmed 16 N.J. 252, 108 A.2d 442; *B. F. Gladding & Co., Inc., v. Scientific Anglers, Inc.*, 6 Cir., 245 F.2d 722; *Schreyer v. Casco Products Corp.*, D.C., 97 F.Supp. 159, reversed in part, 2 Cir., 190 F.2d 921; 87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 122, p. 413.

[16] It appears from the record before us that Huffines had conceived and developed a device which he called a "Compressor Mechanism for Refuse Truck", and had applied for a patent thereon. The details of this device were unknown to Hyde Corporation until disclosed to its representatives during negotiations which culminated in a licensing agreement. Such details of construction were "trade secrets" belonging to Huffines, *Smith v. Dravo Corp.*, 7 Cir., 203 F.2d 369, and were fully disclosed by his patent application, the details of which were made available to Hyde Corporation, together with blueprints, etc., long before the application was made public by the Patent Office when a patent was granted covering some of the claims contained in the original application. If these details as to construction were received by Hyde Corporation in confidence and that company later attempted to exploit them to Huffines' injury through a breach of confidence, an action lies, and it matters not whether the suit be designated as a "trade secret" case or as a suit for breach of confidence, which is a term commonly used by Huffines in describing his claim for relief. See *Becher v. Contoure Laboratories*, 279 U.S. 388, 49 S.Ct. 356, 73 L.Ed. 752.

[17] We have not held as a matter of law that the relationship of licensor and licensee in itself created a confidential relationship between the parties. It is undoubtedly true, as stated in one of the briefs filed herein, that, "The existence of a confidential relationship between a Licensor and Licensee is to be determined in each case [and] it does not follow that merely because the parties occupy a position of Licensor and Licensee a confidential relationship results as a matter of law." The trial judge was evidently of the opinion that the Hyde Corporation obtained its knowledge of the device involved through its dealings with Huffines while the parties were attempting to work out a contract for their mutual benefit. As a result of these negotiations, they entered into an agreeable arrangement which ac-

tually had the effect of putting the Hyde Corporation into the garbage disposal body business. "Viewing the picture as a whole," the conclusion was reached that a confidential relationship existed between the parties which entitled Huffines to relief by way of injunction. The picture as a whole encompasses the contract of the parties, the facts shown by the undisputed evidence as well as those established by the jury's verdict. The holding of the trial court on the point was affirmed by the Court of Civil Appeals and also by this Court upon authority of the decisions set forth in the original opinion.

The all-important question in this litigation is whether the injunction should extend beyond the date of the issuance of patent. Upon this point there is an admitted conflict of authority. On rehearing, petitioners adopt some change of approach or emphasis in argument. The trial judge in the present case rendered an extremely detailed decree as compared with the one entered in *K & G Oil Tool & Service Co., Inc., v. G & G Fishing Tool Service, Tex.Sup.*, 314 S.W.2d 782, which was attacked for indefiniteness of term. The descriptions of the claims in the patent application and the patent itself were incorporated in the decree, not as patent claims, but as descriptions of the features of the Huffines device which should be protected by injunction as so-called "trade secrets". While there is a suggestion that certain of these descriptions or claims may relate to matters well within the realm of public knowledge long before Huffines held any negotiations with a representative of Hyde Corporation, that is hardly the gravamen of the argument nor can it reasonably be supported by the grounds set forth in the motion for new trial filed in the trial court (even considering a "motion to amend and correct judgment" as a part of the motion for new trial), or the points urged in the Court of Civil Appeals, and the assignments contained in the original and amended applications for writ of error.

[18, 19] It is contended that upon the issuance of the patent, the claims contained in the application for the patent as distinguished from the claims of the patent itself became public property. This of course is true. The effect of the injunction is to deprive Hyde Corporation of the right to do that which every other person could do, e. g., make full use of the disclosures of the claims contained in the patent application which were not carried forward and protected by the patent. This situation was recognized in the original opinion. We again encounter the conflict between *Conmar Products Corporation v. Universal Slide Fastner Co.*, 2 Cir., 172 F.2d 150 and *Adolph Gottscho, Inc., v. American Marking Corporation*, 18 N.J. 467, 114 A.2d 438, and similar cases. We have chosen to follow the rule of the New Jersey case. All trade secrets are not patentable and it seems that where one has gained knowledge of trade secrets in confidence, he should not be permitted to exploit the economic advantage gained thereby to the detriment of the opposing party simply because of the public disclosure of the claims contained in the patent application. One who has obtained prior knowledge of a device in confidence may well establish a manufacturing head start, so to speak. He may not and often does not stand on the basis of economic equality with competing manufacturers or the public at large at the date of the public disclosure of the claims in the patent application. For this reason relief by way of injunction should not arbitrarily be denied because the trade secrets contained in an application for a patent have been made public. Whether an injunction should issue and if so the particular type of decree that should be rendered must, to a large degree, depend upon the facts of each particular case. *Schreyer v. Casco Products Corp.*, 2 Cir., 190 F.2d 921; *Franke v. Wiltschek*, 2 Cir., 209 F.2d 493, 495.

In view of the dissenting opinion filed by Judge Jerome Frank in the latter case, we may comment on the holding thereof

in some detail as the dissent raises a point similar to that suggested by amicus curiae in the case now before us. *Franke v. Wiltschek* was strictly a trade secrets case. The federal jurisdiction was based upon a diversity of citizenship of the parties. 28 U.S.C.A. § 1332, and the law of the State of New York was applicable. It was urged that the heart of plaintiffs' process (alleged to be a trade secret) "was revealed by an expired patent, and that the improvements thereon were unpatentable applications of mechanical skill." The Court of Appeals said that,

" * * * This totally misconceives the nature of plaintiffs' right. Plaintiffs do not assert, indeed cannot assert, a property right in their development such as would entitle them to exclusive enjoyment against the world. Theirs is not a patent, but a trade secret. The essence of their action is not infringement, but breach of faith. It matters not that defendants could have gained their knowledge from a study of the expired patent and plaintiffs' publicly marketed product. The fact is that they did not. Instead they gained it from plaintiffs via their confidential relationship, and in so doing incurred a duty not to use it to plaintiffs' detriment. This duty they have breached. *Junker v. Plummer*, 320 Mass. 76, 67 N.E.2d 667, 165 A.L.R. 1449, citing 4 Restatement, Torts § 757 and comment a (1939); *Peabody v. Norfolk*, 98 Mass. 452; *Vulcan Detinning Co. v. American Can Co.*, 72 N.J.Eq. 387, 67 A. 339, 12 L.R.A., N.S., 102; *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12, 16 Am.St.Rep. 740; *Spiselman v. Rabinowitz*, 270 App. Div. 548, 61 N.Y.S.2d 138, appeal denied 270 App.Div. 921, 62 N.Y.S.2d 608; *Extrin Foods, Inc., v. Leighton*, 202 Misc. 592, 115 N.Y.S.2d 429. See also *Smith v. Dravo Corp.*, supra, 7 Cir., 203 F.2d 369; *Schreyer v. Casco Products Corp.*, 2 Cir., 190 F.2d 921, certiorari denied 342 U.S. 913, 72 S.

Ct. 360, 96 L.Ed. 683; 4 Restatement, Torts § 757 and comment a (1939); Nims, *The Law of Unfair Competition and Trade-Marks* §§ 141, 143a, 148 (4th Ed. 1947); Note, *Protection and Use of Trade Secrets*, 64 *Harv.L.Rev.* 976, 979, 982; cases collected in annotated note 170 *A.L.R.* 449, 488-490."

The Court divided upon the propriety of awarding injunctive relief. The majority in an opinion by Judge Clark upheld the action of the district judge in granting a perpetual injunction. It was said:

"It would appear, therefore, that New York law governs on this point. But the question remains largely academic; for the only way in which New York law seems at all unique is in the number and force of the pertinent decisions. The leading case not only for that jurisdiction, but—in view of its extensive citation—for the country, is still *Tabor v. Hoffman*, supra, 118 N.Y. 30, 37, 23 N.E. 12, 13, 16 Am. St.Rep. 740, where the court held a plaintiff 'entitled to the preventive remedies of the court,' without respect to whether 'one secret can be discovered more easily than another' or that a defendant's resort to the secret 'was more of a convenience than a necessity.' That decision is particularly in point because there defendant's counsel and a dissenting opinion took special exception to the grant of an injunction, as distinguished from the award of damages at law. See 118 N.Y. 30, 32, 33, 38, 23 N.E. 12. Among recent cases which follow and apply it the following may be cited: *Spiselman v. Rabinowitz*, supra, 270 App.Div. 548, 61 N.Y.S.2d 138, appeal denied 270 App. Div. 921, 62 N.Y.S.2d 608; *Biltmore Pub. Co. v. Grayson Pub. Corp.*, 272 App.Div. 504, 71 N.Y.S.2d 337; *Petnel v. American Tel. & Tel. Co.*, 280 App.Div. 706, 117 N.Y.S.2d 294, 295; *Sachs v. Cluett, Peabody & Co.*, 177

Misc. 695, 31 N.Y.S.2d 718, per Shientag, J.; *Smith v. Dravo Corp.*, supra, 7 Cir., 203 F.2d 369; *Schreyer v. Casco Products Corp.*, D.C.Conn., 97 F.Supp. 159, 168, affirmed on this issue, 2 Cir., 190 F.2d 921, certiorari denied 342 U.S. 913, 72 S.Ct. 360, 96 L.Ed. 683; *International Industries, Inc., v. Warren Petroleum Corp.*, D.C.Del., 99 F. Supp. 907, 914; *Schavoir v. American Re-Bonded Leather Co.*, 104 Conn. 472, 133 A. 582, 583; and see also Nims, *The Law of Unfair Competition and Trade-Marks* §§ 141, 143a, 148 (4th Ed. 1947); Note, *Protection and Use of Trade Secrets*, 64 *Harv.L.Rev.* 976, 982. Thus apt in its facts and citation of authorities is the late case of *Extrin Foods, Inc., v. Leighton*, supra, 202 Misc. 592, 115 N.Y.S.2d 429, where Justice Hart enjoined the use of a discoverable formula for the preparation of certain flavoring products and ordered an accounting of profits.

"As the several cases cited earlier in this opinion show, there is nothing singular in this aspect of New York law. In citing a multitude of cases to the point that an inventor or discoverer 'will ordinarily be granted an injunction' against use of a formula or trade secret, the editors of a lengthy annotation of cases in 170 *A.L.R.* 449, 488-490, say that in fact 'most of the cases are injunction cases' and cite only two insignificant or inapposite cases to the contrary. See to like effect *Spiselman v. Rabinowitz*, supra, 270 App.Div. 548, 61 N.Y.S.2d 138, appeal denied 270 App.Div. 921, 62 N.Y.S.2d 608. We have found no case authority to throw doubt on this law. So, indeed, if a search be made for 'federal law' so-called, the result must be the same on existing authorities, as we have pointed out above; see, for example, the discussion below and in our court in *Schreyer v. Casco Products Corp.*, supra."

[20] While Judge Frank was of the opinion that an award of damages would do complete justice under the facts of the case, his argument raises the question of an injunction of limited duration. In the dissenting opinion reference was made to a differentiation as to remedies suggested in the Restatement of the Law of Torts. In support of such differentiation, Judge Frank submitted the following argument:

* * * (a) The harm done by a defendant's breach of a plaintiff's confidence is the use of the secret to the plaintiff's 'loss' or 'detriment.' (b) By defendant's wrong he deprives plaintiff of a trade secret defined as something which gives plaintiff 'an opportunity to obtain an advantage over competitors.' (c) Where the device or process consists of a 'novel invention,' the plaintiff may have chosen not to patent it—which would limit the period of his monopoly—but to keep the invention to himself with the expectation that no one, except those in his confidence will discover the secret, so that his monopoly will endure for an unlimited time. If the defendant comes to know the secret of such an invention by improper means his use of this knowledge will cause a loss to plaintiff for an indefinite future period during which plaintiff will lose his 'opportunity to obtain an advantage over competitors.' Wherefore a perpetual injunction affords a proper protection—a protection as enduring as the monopoly grounded on the secret invention. (d) But where the secret involves only a slight, non-patentable and easily-discoverable improvement, competitors will soon, in all probability, legitimately learn how to contrive this improvement. Consequently, defendant's wrong has caused a loss of plaintiff's 'advantage over competitors' which, at most, would not have lasted long. Perpetually to enjoin defendant in such circumstances would be to harm

him without regard to the loss or detriment suffered by plaintiff.

"In short, such an injunction—continued beyond the time when, in all likelihood, the trade, by legitimate means will catch up with the plaintiff—is sheer punishment, nothing else.

* * *

"The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." * * *

By way of illustration of the Frank argument, it might be said that the "secrets" of the magnetic fishing tool involved in *K & G Oil Tool & Service Co., Inc., v. G & G Fishing Tool Service, Tex.*, 314 S. W.2d 782 may be more readily ascertained from the publicized patent application or from a legitimate examination of the tool itself than could the "secrets" of the "Compressor Mechanism for Refuse Truck" here involved. If so, a fair competitive balance could be attained by a restraint of lesser duration in one case than in the other. Of course, as is indeed probable, the matter may be academic. With the loss of the trade advantage, the duration of the restraint may be wholly immaterial to a defendant. However that may be, as pointed out in the original opinion, the question of an injunction of limited duration is not before us. The issuance of a perpetual injunction is a common remedy afforded in trade secret cases. The authorities cited by the majority in *Franke v. Wiltschek*, cannot be lightly brushed aside. Nor are we disposed to destroy "the carefully built law of trade secrets", so that as a practical matter "such business assets (may) be left open to high-jacking from all sides." The trial judge upon proper findings has correctly determined that this is a case for injunctive relief. He has

ordered that the usual equitable order issue, e. g. the perpetual injunction. It would seem to follow that if an injunction of limited duration be substituted therefor as suggested by Judge Frank's argument, an abuse of discretion in issuing the perpetual injunction would have to be shown. *Franke v. Wiltschek*, 2 Cir., 209 F.2d 493, loc. cit. 499. No such showing was made in this case. As heretofore stated, the question of a limited duration injunction as opposed to a perpetual injunction is not raised by a party hereto. The matter is not before us.

Petitioner's motion for rehearing is overruled.

WALKER, Justice (dissenting).

After further consideration, I have concluded that our decision in this case is unsound. Since the entire patent file becomes public property when the patent issues, the information contained therein can no longer constitute a trade secret. When the parties made their license agreement, respondent had filed his original patent application containing seventeen separate and distinct claims of novelty and invention. Thirteen of these claims were rejected by the Patent Office because of lack of invention or conflicts with prior patents and were cancelled by respondent in subsequent amendments to his application. While the patent as issued lists ten claims, these embody only four of those which were listed in the original application with some additions and refinements mentioned in additional claims asserted in the amended applications.

The entire world now has access to the file and is free to manufacture and sell devices incorporating the features of the thirteen rejected and cancelled claims except as the same may be protected by other patents, but petitioner has been perpetually enjoined from doing so. The net result is that petitioner is prevented from ever hereafter doing that which everyone else is free to do. Since respondent

can be adequately protected by damages or by an injunction of limited duration the trial court's judgment is clearly more punitive than remedial.

This action cannot be justified by saying that a patent may not afford the same protection as a trade secret or that an award for damages for patent infringement may not fully protect respondent. Respondent testified that his patent application was made as broad as possible, because the Patent Office would "kick back" all he couldn't use. Although it was thus contemplated that some of the claims might be rejected and have no protection either from the patent or as trade secrets after the patent issued, the contract does not bind petitioner never to use any of the information disclosed to it. By applying for and accepting his patent, respondent elected to look to it for protection and broadcast his secrets to the world. He chose disclosure and patent protection in preference to a trade secret. The narrow question is whether under all these circumstances petitioner is under a legal duty never to use any of the information obtained from respondent, and in my opinion it is not.

Our original opinion apparently recognizes that the trial court's judgment goes too far. It suggests that respondent might have been entitled only to an injunction of limited duration if petitioner had laid a proper predicate by alternative pleadings and supporting evidence showing that the same would afford respondent adequate protection. This does not comport with my idea of the burden resting upon the moving party in an equitable proceeding. It should not be said that he can simply establish his right to some sort of relief and then be granted much more than is actually required for his protection unless the defendant proves that he is entitled to less.

While petitioner does not here argue that the injunction should have been limited to a period of years, it has vigorously contended from the beginning that the per-

manent injunction should not have been granted and that the rule of *Conmar Products Corporation v. Universal Slide Fastener Co.*, 2 Cir., 172 F.2d 150, should be applied in this case. It is my opinion that the burden was upon respondent to establish his right to the relief granted, i. e., a perpetual injunction. This he has not done. In a case where there are no pleadings or evidence justifying the issuance of an injunction of limited duration, we should follow the rule of the *Conmar* case and deny injunctive relief after the trade secrets have been made public through the issuance of a patent. See 36 Tex.Law Rev. 384.

I would reverse and render the judgments of the courts below in so far as petitioner has been permanently enjoined from manufacturing or selling any device embodying features described in the original patent application which were not carried forward and reserved in the patent.



K & G OIL TOOL & SERVICE CO., Inc.
et al., Petitioners,

v.

G & G FISHING TOOL SERVICE et al.,
Respondents.

No. A-6577.

Supreme Court of Texas.

March 12, 1958.

On Motion for Rehearing June 4, 1958.

Further Rehearing Denied July 16, 1958.

Action for damages for alleged theft of a trade secret and for an injunction permanently enjoining the defendants from use thereof. The District Court, Harris County, Phil D. Woodruff, J., entered judgment adverse to certain defendants

and they appealed to the Court of Civil Appeals, Davis, J., which reversed and rendered, 305 S.W.2d 637, and the plaintiffs bring error. The Supreme Court, Norvell, J., held that the "magnetic fishing tool" of the plaintiffs was entitled to protection as a trade secret, that relief was not barred by laches and that the decree was sufficiently definite to be enforced.

The Supreme Court further held on motion for rehearing, Norvell, J., that the evidence did not justify an award of damages against an individual defendant.

Respondents' motion for rehearing granted in part and the judgment of the Court of Civil Appeals reversed and the judgment of the trial court as reformed affirmed.

Smith and Walker, JJ., dissented on rehearing.

1. Injunction ⇨56

The basis of a "trade secret" case and protection by injunction is a breach of contract or wrongful disregard of confidential relationships.

2. Patents ⇨182

A "trade secret" may be a device or process which is patentable, but it need not be that, and it may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make and novelty and invention are not requisite.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Trade Secret".

3. Torts ⇨10(5)

A "magnetic fishing tool" for use in removing metallic objects from oil wells, was entitled to protection as a "trade secret" notwithstanding testimony that witnesses could reconstruct it without first disassembling it and the owners thereof

would hold, as a matter of law, that it is the owner.

I therefore respectfully dissent.



435 U.S. 589, 55 L.Ed.2d 570

Richard NIXON, Petitioner,

v.

WARNER COMMUNICATIONS, INC.,
et al.

No. 76-944.

Argued Nov. 8, 1977.

Decided April 18, 1978.

Television networks and others appealed from an order of the District Court for the District of Columbia, 397 F.Supp. 186, which held that networks could not make copies of tape recordings which had been introduced at a criminal trial, at least until appeals from the convictions obtained in that criminal trial were decided. The Court of Appeals reversed and remanded, 179 U.S. App.D.C. 293, 551 F.2d 1252. Following grant of certiorari, the Supreme Court, Mr. Justice Powell, held that: (1) the court, as custodian of tape recordings obtained by subpoena over opposition of the sitting President of the United States, solely to satisfy fundamental demands of due process of law in fair administration of criminal justice, had responsibility to exercise an informed discretion as to release of the tapes, with sensitive appreciation of circumstances which had led to their production, and such responsibility did not permit copying upon demand; (2) by means of the Presidential Recordings Act, Congress created administrative procedure for processing and releasing to the public, on terms meeting with

congressional approval, all of the sitting President's materials of historical interest, including the tape recordings at issue; (3) the common-law right of access to judicial records did not authorize release of the tapes in question from the custody of the district court, and (4) release was not required by the First Amendment guarantee freedom of the press nor by the Sixth Amendment guarantee of public trial.

Case remanded with directions to deny application with prejudice.

Mr. Justice White dissented in part and filed opinion in which Mr. Justice Brennan joined.

Mr. Justice Marshall dissented and filed opinion.

Mr. Justice Stevens dissented and filed opinion.

1. Records ⇐ 14, 15

American courts recognize general right to inspect and copy public records and documents, including judicial records and documents, and such common-law right has been recognized in courts of District of Columbia. Presidential Recordings and Materials Preservation Act, § 101, 44 U.S.C.A. § 2107 note.

2. Records ⇐ 14

Every court has supervisory power over its own records and files, and access has been denied where court files might have become vehicle for improper purposes.

3. Records ⇐ 14

Party from whom original tape recordings had been subpoenaed, and who was one of persons whose conversations were recorded, had standing to object to release of tapes by court for publication, in view of his allegations of further embarrassment, unfair appropriation of his voice and additional exploitation of materials originally thought to be confidential. Presidential Recordings and Materials Preservation Act, § 101, 44 U.S.C.A. § 2107 note.

Cite as 98 S.Ct. 1306 (1978)

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4. Records ⇌ 15

Court, as custodian of tape recordings obtained by subpoena over opposition of sitting President of the United States, solely to satisfy fundamental demands of due process of law in fair administration of criminal justice, had responsibility to exercise informed discretion as to release of the tapes, with sensitive appreciation of circumstances which had led to their production, and such responsibility did not permit copying upon demand. Presidential Recordings and Materials Preservation Act, § 101, 44 U.S.C.A. § 2107 note.

5. Records ⇌ 14

By means of Presidential Recordings Act, Congress created administrative procedure for processing and releasing to public, on terms meeting with congressional approval, all of sitting President's materials of historical interest, including tape recordings of conversations at issue. Presidential Recordings and Materials Preservation Act, § 101, 44 U.S.C.A. § 2107 note.

6. Records ⇌ 14

Existence of alternative means of public access to presidential tape records, under Presidential Recordings and Materials Preservation Act, tipped scales in favor of court's denying release, on ground of common-law right of access to judicial records, of tape recordings of which court had custody by reason of subpoena executed over opposition of sitting President. Presidential Recordings and Materials Preservation Act, §§ 101, 101(a, b), 104, 44 U.S.C.A. § 2107 note; 44 U.S.C.A. § 2101.

7. Constitutional Law ⇌ 90.1(1)

First Amendment generally grants press no right to information about trial superior to that of general public. U.S.C.A. Const. Amends. 1, 6; Presidential Recordings and Materials Preservation Act, §§ 104(a)(5, 7), 105(a, c), 44 U.S.C.A. § 2107 note.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

8. Constitutional Law ⇌ 90.1(1) Criminal Law ⇌ 635

Court's release of tape recordings obtained by subpoena over opposition of sitting President was not required by First Amendment guarantee of freedom of the press, where wide publicity had already been given to contents of tapes by all news media elements, nor was such release required by Sixth Amendment guarantee of public trial. U.S.C.A. Const. Amends. 1, 6; Presidential Recordings and Materials Preservation Act, §§ 104(a)(5, 7), 105(a, c), 44 U.S.C.A. § 2107 note.

9. Criminal Law ⇌ 635

Sixth Amendment does not require that trial, or any part of it, be broadcast live or on tape to public; requirement of public trial is set aside by opportunity of members of public and press to attend trial and to report what they have observed. U.S.C.A. Const. Amends. 1, 6.

10. Federal Courts ⇌ 462

Remand for doing of what the court below should have undertaken in first instance was not required where outcome was readily apparent.

Syllabus *

During the criminal trial of several of petitioner ex-President's former advisers on charges, *inter alia*, of conspiring to obstruct justice in connection with the so-called Watergate investigation, some 22 hours of tape recordings made of conversations in petitioner's offices in the White House and Executive Office Building were played to the jury and the public in the courtroom, and the reels of the tapes were admitted into evidence. The District Court furnished the jurors, reporters, and members of the public in attendance with transcripts, which were not admitted as evidence but were widely reprinted in the press. At the close of the trial, in which four of the defendants were convicted, and after an earlier unsuc-

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

cessful attempt over petitioner's objections to obtain court permission to copy, broadcast, and sell to the public portions of the tapes, respondent broadcasters petitioned for immediate access to the tapes. The District Court denied the petitions on the grounds that since the convicted defendants had filed notices of appeal, their rights would be prejudiced if respondents' petitions were granted, and that since the transcripts had apprised the public of the tapes' contents, the public's "right to know" did not overcome the need to safeguard the defendants' rights on appeal. The Court of Appeals reversed, holding that the mere possibility of prejudice to defendants' rights did not out-weigh the public's right of access, that the common-law right of access to judicial records required the District Court to release the tapes in its custody, and that therefore the District Court abused its discretion in refusing immediate access. *Held:*

1. Considering all the circumstances, the common-law right of access to judicial records does not authorize release of the tapes in question from the District Court's custody. Pp. 1311-1317.

(a) The common-law right to inspect and copy judicial records is not absolute, but the decision whether to permit access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case. Pp. 1311-1312.

(b) Because of the congressionally prescribed avenue of public access to the tapes provided by the Presidential Recordings and ¹⁵⁹⁰ Materials Preservation Act, whose existence is a decisive element in the proper exercise of discretion with respect to release of the tapes, it is not necessary to weigh the parties' competing arguments for and against release as though the District Court were the only potential source of information regarding these historical materials, and the presence of an alternative means of public access tips the scales in favor of denying release. Pp. 1313-1317.

2. The release of the tapes is not required by the First Amendment guarantee

of freedom of the press. The question here is not whether the press must be permitted access to public information to which the public generally has access, but whether the tapes, to which the public has never had *physical* access, must be made available for copying. There is in this case no question of a truncated flow of information to the public, as the contents of the tapes were given wide publicity by all elements of the media, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, distinguished, and under the First Amendment the press has no right to information about a trial superior to that of the general public. Pp. 1317-1318.

3. Nor is release of the tapes required by the Sixth Amendment guarantee of a public trial. While public understanding of the highly publicized trial may remain incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning, the same could be said of a live witness' testimony, yet there is no constitutional right to have such testimony recorded and broadcast. The guarantee of a public trial confers no special benefit on the press nor does it require that the trial, or any part of it, be broadcast live or on tape to the public, but such guarantee is satisfied by the opportunity of the public and the press to attend the trial and to report what they have observed. P. 1318.

179 U.S.App.D.C. 293, 551 F.2d 1252, reversed and remanded.

William H. Jeffress, Jr., Washington, D. C., for petitioner.

Floyd Abrams, New York City, and Edward Bennett Williams, Washington, D. C., for respondents.

¹⁵⁹¹ Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether the District Court for the District of Columbia should release to respondents certain tapes admitted into evidence in the trial of petitioner's former advisers. Respondents

Cite as 98 S.Ct. 1306 (1978)

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wish to copy the tapes for broadcasting and sale to the public. The Court of Appeals for the District of Columbia Circuit held that the District Court's refusal to permit immediate copying of the tapes was an abuse of discretion. *United States v. Mitchell*, 179 U.S.App.D.C. 293, 551 F.2d 1252 (1976). We granted certiorari, 430 U.S. 944, 97 S.Ct. 1578, 51 L.Ed.2d 791 (1977), and for the reasons that follow, we reverse.

I

On July 16, 1973, testimony before the Senate Select Committee on Presidential Campaign Activities revealed that petitioner, then President of the United States, had maintained a system for tape recording conversations in the White House Oval Office and in his private office in the Executive Office Building. Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess., 2074-2076 (1973). A week later, the Watergate Special Prosecutor issued a subpoena *duces tecum* directing petitioner to produce before a federal grand jury tape recordings of eight meetings and one telephone conversation recorded in petitioner's offices. When petitioner refused to comply with the subpoena, the District Court for the District of Columbia ordered production of the recordings.

1. The seven defendants were as follows: John N. Mitchell, former Attorney General and head of the Committee for the Re-election of the President; H. R. Haldeman, former Assistant to the President, serving as White House Chief of Staff; John D. Ehrlichman, former Assistant to the President for Domestic Affairs; Charles W. Colson, former Special Counsel to the President; Robert C. Mardian, former Assistant Attorney General and official of the Committee for the Re-election of the President; Kenneth W. Parkinson, hired as the Committee's counsel in June 1972; and Gordon Strachan, staff assistant to Haldeman.

2. Crim. No 74-110 (D.C.1974). Defendant Colson pleaded guilty to other charges before trial, and the case against him was dismissed. Strachan's case was severed and ultimately dismissed. The jury acquitted Parkinson and found Mardian guilty of conspiracy. Mitchell,

In re Subpoena to Nixon, 360 F.Supp. 1, aff'd *sub nom. Nixon v. Sirica*, 159 U.S.App. D.C. 58, 487 F.2d 700 (1973). In November 1973, petitioner submitted seven of the nine subpoenaed recordings and informed the Office of the Special Prosecutor that the other two were missing.

On March 1, 1974, the grand jury indicted seven individuals¹ for, among other things, conspiring to obstruct justice in connection with the investigation of the 1972 burglary of the Democratic National Committee headquarters. In preparation for this trial, styled *United States v. Mitchell*,² the Special Prosecutor, on April 18, 1974, issued a second subpoena *duces tecum*, directing petitioner to produce tape recordings and documents relating to some 64 additional Presidential meetings and conversations. The District Court denied petitioner's motions to quash. *United States v. Mitchell*, 377 F.Supp. 1326 (1974). This Court granted certiorari before judgment in the Court of Appeals and affirmed. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). In accordance with our decision, the subpoenaed tapes were turned over to the District Court for *in camera* inspection. The court arranged to have copies made of the relevant and admissible portions. It retained one copy and gave the other to the Special Prosecutor.³

Haldeman, and Ehrlichman were convicted of conspiracy, obstruction of justice, and perjury.

The convictions of Mitchell, Haldeman, and Ehrlichman were affirmed. *United States v. Haldeman*, 181 U.S.App.D.C. 254, 559 F.2d 31 (1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). Mardian's conviction was reversed. *United States v. Mardian*, 178 U.S.App.D.C. 207, 546 F.2d 973 (1976), and no further proceedings were instituted against him.

3. The Clerk of the District Court described the copying procedure:

"White House tape recordings were submitted to the Court pursuant to two separate subpoenas. The first group of tapes were delivered in November 1973 and the second in July and August 1974. In each instance, the Court received what purported to be the entire reel of original recording on which was found any portion of a subpoenaed conversation.

¹⁵⁹⁴ ¶ The trial began on October 1, 1974, before Judge Sirica. During its course, some 22 hours of taped conversations were played for the jury and the public in the courtroom. The reels of tape containing conversations played for the jury were entered into evidence. The District Court furnished the jurors, reporters, and members of the public in attendance with earphones and with transcripts prepared by the Special Prosecutor. The transcripts were not admitted as evidence, but were widely reprinted in the press.

Six weeks after the trial had begun, respondent broadcasters⁴ filed a motion before Judge Sirica, seeking permission to copy, broadcast, and sell to the public the portions of the tapes played at trial. Peti-

"As the time for trial in *U. S. v. Mitchell, et al.*, CR 74-110, approached, the Court reproduced subpoenaed conversations from the original recordings, using technical assistance supplied by the Watergate Special Prosecutor. Portions of conversations and, in some cases, entire conversations which the Court had previously declared to be subject to privilege were not reproduced. Two copies of each conversation were produced simultaneously and were designated Copy A and Copy B. The Copy B series was delivered to the Special Prosecutor pursuant to the subpoenas aforementioned for use in the preparation of transcripts. Copy A series tapes were retained by the Court and later marked for identification as Government Exhibits in CR 74-110. These tapes are contained on about 50 separate reels.

"In the Government's case at trial, some, but not all, of the Copy A series tapes were admitted into evidence. Some, but again not all, of the tape exhibits were published to the jury. Those published were played to the jury either in whole or in part. Where exhibits were not published in their entirety, the deletions had been made either by the Government on its own motion or pursuant to an order of Judge Sirica. Deletions were effected not by modifying the exhibit itself, but by skipping deleted portions on the tape or by interrupting the sound transmission to the jurors' headphones. The exhibits remain as originally constituted.

"The jurors were provided with transcripts of the tape recorded conversations for use as aids in listening to the exhibits. These written transcripts were marked for identification as Government Exhibits, and copies provided to the individual jurors, counsel, and news media representatives at the time the tapes were played. Deletions in the copies of transcripts used by the jurors and others matched precise-

tioner opposed the application. Because *United States v. Mitchell* was consuming all of Judge Sirica's time, this matter was transferred to Judge Gesell.

¹⁵⁹⁵ ¶ On December 5, 1974, Judge Gesell held that a common-law privilege of public access to judicial records permitted respondents to obtain copies of exhibits in the custody of the clerk, including the tapes in question. *United States v. Mitchell*, 386 F.Supp. 639, 641. Judge Gesell minimized petitioner's opposition to respondents' motion, declaring that neither his alleged property interest in the tapes nor his asserted executive privilege sufficed to prevent release of recordings already publicly aired and available, in transcription, to the world at large. *Id.*, at 642. Judge Gesell cau-

ly the deletions in tapes as they were published at trial.

"In many instances the Copy A series tapes introduced as Government Exhibits contain material that has not been published to the jury and others present in the courtroom." Affidavit of James F. Davey, Nov. 26, 1974, pp. 2-3; App. 24-25.

The District Court retains custody of the Copy A tapes, which are at issue here, and of the original recordings, which are not. The Copy B series is in the files of the Office of the Special Prosecutor, stored at the National Archives.

We note that under § 101 of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695, note following 44 U.S.C. § 2107 (1970 ed., Supp. V), the original tape recordings are subject to the control of the Administrator of General Services.

4. On September 17, 1974, representatives of the three commercial television networks had written informally to Judge Sirica, asking permission to copy for broadcasting purposes portions of the tapes played during the course of the trial. Judge Sirica referred this request to Chief Judge Hart, who consulted with other judges of the District Court and advised against permitting such copying. On October 2, 1974, Judge Sirica informed the network representatives that copying would not be allowed.

The three commercial networks and the Radio-Television News Directors Association filed with the District Court this formal application to copy the tapes on November 12, 1974. The Public Broadcasting System joined the application the next day. Warner Communications, Inc., filed a separate application on December 2, 1974.

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tioned, however, against "overcommerciali-
zation of the evidence." *Id.*, at 643. And
because of potential administrative and me-
chanical difficulties, he prohibited copying
until the trial was over. *Ibid.* He request-
ed that the parties submit proposals for
access and copying procedures that would
minimize overcommercialization and admin-
istrative inconvenience at that time. *Ibid.*
In an order of January 8, 1975, Judge Gesell
rejected respondents' joint proposals as in-
sufficient. *Id.*, at 643-644. Noting the
close of the *Mitchell* trial, he transferred
the matter back to Judge Sirica.

On April 4, 1975, Judge Sirica denied
without prejudice respondents' petitions for
immediate access to the tapes. *United*
States v. Mitchell, 397 F.Supp. 186. Ob-
serving that all four men convicted in the
Mitchell trial had filed notices of appeal, he
declared that their rights could be preju-
diced if the petitions were granted. Imme-
diate access to the tapes might "result in
the manufacture of permanent phonograph
records and tape recordings, perhaps with
commentary by journalists or entertainers;
marketing of the tapes would probably in-
volve mass merchandising techniques de-
signed to generate excitement in an air of
ridicule to stimulate sales." *Id.*, at 188.
Since release of the transcripts had apprised
the public of the tapes' contents, the pub-
lic's "right to know" did not, in Judge Sir-
ica's view, overcome the need to safeguard
the defendants' rights on appeal. *Id.*, at
188-189. Judge Sirica also noted the pas-
sage of the Presidential Recordings and Ma-
terials Preservation Act ¹⁵⁹⁶(Presidential Re-
cordings Act), 88 Stat. 1695, note following
44 U.S.C. § 2107 (1970 ed., Supp. V),⁵ and
the duty thereunder of the Administrator
of General Services (Administrator) to sub-
mit to Congress regulations governing ac-
cess to Presidential tapes in general. Un-
der the proposed regulations then before
Congress,⁶ public distribution of copies
would be delayed for 4½ years. Although

5. For a detailed discussion of the terms and
validity of the Act, see *Nixon v. Administrator*
of General Services, 433 U.S. 425, 97 S.Ct.
2777, 53 L.Ed.2d 867 (1977).

Judge Sirica doubted that the Act covered
the copies at issue here, he viewed the pro-
posed regulations as suggesting that imme-
diate release was not of overriding impor-
tance. 397 F.Supp., at 189.

The Court of Appeals reversed. *United*
States v. Mitchell, 179 U.S.App.D.C. 293,
551 F.2d 1252 (1976). It stressed the impor-
tance of the common-law privilege to in-
spect and copy judicial records and assigned
to petitioner the burden of proving that
justice required limitations on the privilege.
In the court's view, the mere possibility of
prejudice to defendants' rights in the event
of a retrial did not outweigh the public's
right of access. *Id.*, at 302-304, 551 F.2d, at
1261-1263. The court concluded that the
District Court had "abused its discretion in
allowing those diminished interests in confi-
dentiality to interfere with the public's
right to inspect and copy the tapes." *Id.*, at
302, 551 F.2d, at 1261. It remanded for the
development of a plan of release, but not-
ed—in apparent contrast to the admonitions
of Judge Gesell—that the "court's power to
control the uses to which the tapes are put
once released . . . is sharply limited
by the First Amendment." *Id.*, at 304 n. 52,
551 F.2d, at 1263 n. 52 (emphasis in origi-
nal). We granted certiorari to review this
holding that the common-law right of ac-
cess to judicial records requires the District
Court to release the tapes in its custody.

II

¹⁵⁹⁷ Both petitioner and respondents acknowl-
edge the existence of a common-law right
of access to judicial records, but they differ
sharply over its scope and the circumstances
warranting restrictions of it. An infre-
quent subject of litigation, its contours have
not been delineated with any precision. In-
deed, no case directly in point—that is, ad-
dressing the applicability of the common-

6. 40 Fed.Reg. 2670 (1975). Those regulations
ultimately were disapproved. S Res. 244, 94th
Cong., 1st Sess. (1975), 121 Cong.Rec. 28609-
28614 (1975). See also n. 16, *infra*.

law right to exhibits subpoenaed from third parties—has been cited or discovered.

A

[1] It is clear that the courts of this country recognize a general right to inspect and copy public records and documents,⁷ including judicial records and documents.⁸ In contrast to the English practice, see, e. g., *Browne v. Cumming*, 10 B. & C. 70, 109 Eng.Rep. 377 (K.B.1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, e. g., *State ex rel. Colscott v. King*, 154 Ind. 621, 621-627, 57 N.E. 535, 536-538 (1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, e. g., *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 677, 137 N.W.2d 470, 472 (1965), modified on other grounds, 28 Wis.2d 685a, 139 N.W.2d 241 (1966). But see *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896).

[2] It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper

purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893). *Accord*, e. g., *C. v. C.*, 320 A.2d 717, 723, 727 (Del.1974). See also *King v. King*, 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N.W. 731, 734-735 (1888); see *Cowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer v. Blaisdell*, 268 App.Div. 9, 11, 48 N.Y.S.2d 355, 356 (1944); see also *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E.2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, see, e. g., *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A.2d 799, 800 (N.J.Ch.1945).

It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the

7. See, e. g., *McCoy v. Providence Journal Co.*, 190 F.2d 760, 765-766 (C.A.1), cert. denied, 342 U.S. 894, 72 S.Ct. 200, 96 L.Ed. 669 (1951); *Fayette County v. Martin*, 279 Ky. 387, 395-396, 130 S.W.2d 838, 843 (1939); *Nowack v. Auditor General*, 243 Mich. 200, 203-205, 219 N.W. 749, 750 (1928); *In re Egan*, 205 N.Y. 147, 154-155, 98 N.E. 467, 469 (1912); *State ex rel. Nevada Title Guaranty & Trust Co. v. Grimes*, 29 Nev. 50, 82-86, 84 P. 1061, 1072-1074 (1906); *Brewer v. Watson*, 71 Ala. 299, 303-306 (1882); *People ex rel. Gibson v. Peller*, 34 Ill.App.2d 372, 374-375, 181 N.E.2d 376, 378 (1962). In many jurisdictions this right has

been recognized or expanded by statute. See, e. g., Ill.Rev.Stat., ch. 116, § 43.7 (1975).

8. See, e. g., *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504 (CC Colo.1902); *In re Sackett*, 30 C.C.P.A. 1214 (Pat.), 136 F.2d 248 (1943); *C. v. C.*, 320 A.2d 717, 724-727 (Del. 1974); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758, 762-763 (N.D. 1967). See also *Ex parte Upperco*, 239 U.S. 435, 36 S.Ct. 140, 60 L.Ed. 368 (1915). This common-law right has been recognized in the courts of the District of Columbia since at least 1894. *Ex parte Drawbaugh*, 2 App.D.C. 404

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particular case.⁹ In any event, we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here.¹⁰

B

[3] Petitioner advances several reasons supporting the exercise of discretion against release of the tapes.¹¹

¹⁶⁰⁰ 1First, petitioner argues that he has a property interest in the sound of his own voice, an interest that respondents intend to appropriate unfairly.¹² In respondents' view, our decision in *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), upholding the constitutionality of the Presidential Recordings Act, divested petitioner of any property rights in the tapes that could be asserted against the general public. Petitioner insists, however, that respondents' point is not fully responsive to his argument. Petitioner is not asserting a proprietary right in the tapes themselves. He

(1894). See also *United States v. Burka*, 289 A.2d 376 (D.C.App.1972).

9. Cf. *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 682, 137 N.W.2d 470, 474-475 (1965), modified on other grounds, 28 Wis.2d 685a, 139 N.W.2d 241 (1966).

10. See n. 11, *infra*.

11. Petitioner also contends that the District Court was totally without discretion to consider release of the tapes at all. He offers three principal arguments in support of that position: (i) exhibit materials subpoenaed from third parties are not "court records" in terms of the common-law right of access; (ii) recorded materials, as opposed to written documents, are not subject to release by the court in custody; and (iii) the assertion of third-party property and privacy interests precludes release of the tapes to the public.

As we assume for the purposes of this case (see text above) that the common-law right of access is applicable, we do not reach or intimate any view as to the merits of these various contentions by petitioner.

Petitioner further argues that this is not a "right of access" case, for the District Court already has permitted considerable public access to the taped conversations through the trial itself and through publication of the print-

likens his interest to that of a third party whose voice is recorded in the course of a lawful wiretap by police officers and introduced into evidence on tape. In petitioner's view, use of one's voice as evidence in a criminal trial does not give rise to a license for commercial exploitation.

Petitioner also maintains that his privacy would be infringed if aural copies of the tapes were distributed to the public.¹³ The Court of Appeals rejected this contention. It reasoned that with the playing of the tapes in the courtroom, the publication of their contents in the form of written transcripts, and the passage of the Presidential Recordings Act—in which Congress contemplated ultimate public distribution of aural copies—any realistic expectation of privacy disappeared. 179 U.S.App.D.C., at 304-305, 551 F.2d, at 1263-1264. 1601 Furthermore, the court ruled that as Presidential documents the tapes were "impressed with the 'public trust'" and not subject to ordinary privacy claims. *Id.*, at 305, 551 F.2d, at 1264. Respondents add that aural reproduction of

ed transcripts. We need not decide whether such facts ever could be decisive. In view of our disposition of this case, the fact that substantial access already has been accorded the press and the public is simply one factor to be weighed.

Whatever the merits of these claims and those considered in the text, petitioner has standing to object to the release of the tapes. As the party from whom the original tapes were subpoenaed, and as one of the persons whose conversations are recorded, his allegations of further embarrassment, unfair appropriation of his voice, and additional exploitation of materials originally thought to be confidential establish injury in fact that would be redressed by a favorable decision of his claim. Thus, the constitutional element of standing is present. See *Warth v. Seldin*, 422 U.S. 490, 498-502, 95 S.Ct. 2197, 2204-2207, 45 L.Ed.2d 343 (1975).

12. Petitioner develops this argument more fully in support of his claim that the District Court lacks power to release these tapes. See n. 11, *supra*. The argument also is relevant, however, in determining whether the discretionary exercise of such power was proper.

13. See n. 12, *supra*.

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actual conversations, reflecting nuances and inflections, is a more accurate means of informing the public about this important historical event than a verbatim written transcript. Petitioner disputes this claim of "accuracy," emphasizing that the tapes required 22 hours to be played. If made available for commercial recordings or broadcast by the electronic media, only fractions of the tapes, necessarily taken out of context, could or would be presented. Nor would there be any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of tapes. There would be strong motivation to titillate as well as to educate listeners. Petitioner insists that this use would infringe his privacy, resulting in embarrassment and anguish to himself and the other persons who participated in private conversations that they had every reason to believe would remain confidential.

Third, petitioner argues that our decision in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), authorized only the most limited use of subpoenaed Presidential conversations consistent with the constitutional duty of the judiciary to ensure justice in criminal prosecutions. The Court of Appeals concluded, however, that the thrust of our decision in that case was to protect the confidentiality of Presidential conversations that were neither relevant nor admissible in the criminal proceeding; it did not relate to uses of conversations actually introduced into evidence. Since these conversations were no longer confidential, 179 U.S.App.D.C., at 305-306, 551 F.2d, at 1264-1265, Presidential privilege no longer afforded any protection.

Finally, petitioner argues that it would be improper for the courts to facilitate the commercialization of these White House tapes. The court below rejected this argument, holding it a "question of taste" that could not take precedence over the public's right of access. *Id.*, at 306, 551 F.2d, at

14. Judge Sirica's principal reason for refusing to release the tapes—fairness to the defendants, who were appealing their convictions—is

1265. Petitioner rejoins that such matters of taste induce courts to deny public access to court files in divorce and libel litigation. See, e. g., *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893); *Munzer v. Blaisdell*, 268 App. Div., at 11, 48 N.Y.S.2d, at 356. Moreover, argues petitioner, widespread publication of the transcripts has satisfied the public's legitimate interests; the marginal gain in information from the broadcast and sale of aural copies is outweighed by the unseemliness of enlisting the court, which obtained these recordings by subpoena for a limited purpose, to serve as the vehicle of their commercial exploitation "at cocktail parties, . . . in comedy acts or dramatic productions, . . . and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies." Brief for Petitioner 30.

C

[4] At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts.¹⁴ On respondents' side of the scales is the incremental gain in public understanding of an immensely important historical occurrence that arguably would flow from the release of aural copies of these tapes, a gain said to be not inconsequential despite the already widespread dissemination of printed transcripts. Also on respondents' side is the presumption—however gauged—in favor of public access to judicial records. On petitioner's side are the arguments identified above, which must be assessed in the context of court custody of the tapes. Underlying each of petitioner's arguments is the crucial fact that respondents require a court's cooperation in furthering their commercial plans. The court—as custodian of tapes obtained by subpoena over the opposition of a sitting President, solely to satisfy "fundamental demands of due process of law in the fair administration of criminal

no longer a consideration. All appeals have been resolved. See n. 2, *supra*.

justice," *United States v. Nixon, supra*, at 713, 94 S.Ct., at 3110—has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material "to gratify private spite or promote public scandal," *In re Caswell, supra*, at 836, 29 A. 259, with no corresponding assurance of public benefit.

[5] We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above. There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below. In the Presidential Recordings Act, Congress directed the Administrator of General Services to take custody of petitioner's Presidential tapes and documents. The materials are to be screened by Government archivists so that those private in nature

15. Both sides insist that the Act does not in terms cover the copies of the tapes involved in this case. Section 101(a) of the Act directs the Administrator to "receive, obtain, or retain, complete possession and control of all *original* tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

"(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

"(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

"(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974." 88 Stat. 1695 (emphasis added).

The tapes at issue here are not "originals." See n. 3, *supra*. Nor were they recorded during the relevant period or in the designated areas.

Mr. Justice WHITE would direct that the copies of the tapes at issue in this case be delivered forthwith to the Administrator. He reaches this result by construing § 101(b) of the Act, in conjunction with 44 U.S.C. § 2101, as

may be returned to petitioner, while those of historical value may be preserved and made available for use in judicial proceedings and, eventually, made accessible to the public. Thus, Congress has created an administrative procedure for processing and releasing to the public, on terms meeting with congressional approval, all of petitioner's Presidential materials of historical interest, including recordings of the conversations at issue here.¹⁵

[6] In *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), we noted two major objects of the Act. First, it created a centralized custodian for the preservation and "orderly processing" of petitioner's historical materials. Second, it mandated protection of the "rights of [petitioner] and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained." *Id.*, at 436, 97 S.Ct., at 2787. To these ends, the Act directed the Administrator to formulate regulations that would permit consideration of a number of different factors.¹⁶

sweeping within the ambit of the Act's provisions copies as well as the originals of the tapes and materials generated by petitioner during the specified period (*i. e.*, Jan. 20, 1969, to Aug. 9, 1974). Apart from the point that these copies were created after the close of that period, it is difficult to believe that § 101(b) was intended to sweep so broadly. In any event, we need not consider in this case what Congress may have intended by § 101(b). That section specifies duties of the Administrator. He is not a party to this case, has made no claim to entitlement to these copies, and the scope of § 101(b) has not been fully briefed and argued.

16. Under § 104 of the Act, the Administrator is to propose regulations governing public access to the Presidential tapes. These regulations must meet with congressional approval. Section 104 provides in pertinent part as follows: "REGULATIONS RELATING TO PUBLIC ACCESS

"Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title [Dec. 19, 1974] submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

¹⁶⁰⁵ Thus, the Act provides for legislative and executive appraisal of the most appropriate means of assuring public access to the material, subject to prescribed safeguards.

¹⁶⁰⁶ Because of this congressionally prescribed avenue of public access we need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release.

Respondents argue that immediate release would serve the policies of the Act. The Executive and Legislative Branches, however, possess superior resources for assessing the proper implementation of public access and the competing rights, if any, of

"(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';

"(2) the need to make such recordings and materials available for use in judicial proceedings;

"(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

"(4) the need to protect every individual's right to a fair and impartial trial;

"(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

"(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

"(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

"(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

"(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by

the persons whose voices are recorded on the tapes. These resources are to be brought to bear under the Act, and court release of copies of materials subject to the Act might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons. Simply stated, the policies of the Act can best be carried out under the Act itself. Indeed, Judge Sirica—as we have noted *supra*, at 1311—referred to the scheme established under the Act in assessing the need for immediate release. 397 F.Supp., at 189; cf. *United States v. Monjar*, 154 F.2d 954 (CA3 1946). But because defendants' appeals were pending, he merely denied respondents' petition without prejudice, contemplating reconsideration after exhaustion of all appeals.¹⁷ Thus, he did not have to

either House of the Congress under this subsection.

"(3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a)." 88 Stat. 1696-1697.

The Administrator's fourth set of proposed regulations has become final. 42 Fed.Reg. 63626 (1977). The first set was disapproved, S.Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong.Rec. 28609-28614 (1975), as was the second, S.Res. 428, 94th Cong., 2d Sess. (1976), 122 Cong.Rec. 10159-10160 (1976). The House rejected six provisions of a third set. H.R.Res. 1505, 94th Cong., 2d Sess. (1976); 122 Cong.Rec. 30251 (1976). See also S.Rep. No. 94-368 (1975); H.R.Rep. No. 94-560 (1975); S.Rep. No. 94-748 (1976).

17. The suggestion of Mr. Justice Stevens, *post*, at 1320, that the trial court has exercised its discretion to permit release of the copies is not supported by the facts. It is true that Judge Gesell declared that respondents eventually should be permitted to copy the tapes at issue here, but he imposed stringent standards to safeguard against overcommercialization and administrative inconvenience. 386 F.Supp., at 643. Respondents failed to satisfy those standards. *Id.*, at 643-644. When the matter returned to Judge Sirica, he framed the crucial issue as that of "the timing of the release, if ever, of certain tapes received in evidence" in the Mitchell trial. 397 F.Supp., at 187 (emphasis added). Thus, even if the defendants' ap-

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confront the question whether the existence of the Act is, as we hold, a decisive element in the proper exercise of discretion with respect to release of the tapes.

We emphasize that we are addressing only the application in this case of the common-law right of access to judicial records. We do not presume to decide any issues as to the proper exercise of the Administrator's independent duty under the statutory standards. He remains free, subject to congressional disapproval, to design such procedures for public access as he believes will advance the policies of the Act.¹⁸ Questions ¹⁶⁰⁸ concerning the constitutionality and statutory validity of any access scheme finally implemented are for future consideration in appropriate proceedings. See *Nixon v. Administrator of General Services*, 433 U.S., at 438-439, 444-446, 450, 455, 462, 464-465, 467, 97 S.Ct., at 2787-2788, 2790-2791, 2793, 2799, 2800-2801, 2802, 2820-2821; *id.*, at 503-504, 97 S.Ct., at 2820-2821 (POWELL, J., concurring).

Considering all the circumstances of this concededly singular case, we hold that the common-law right of access to judicial records does not authorize release of the tapes

peals had not been pending, it is entirely speculative whether Judge Sirica would have exercised his discretion so as to permit release. In light of the appeals, Judge Sirica actually denied respondents' applications without prejudice. Consequently, this case is not correctly characterized as one in which the District Court and the Court of Appeals "have concurred," *post*, at 1321, as to the proper exercise of discretion. Moreover, neither court gave appropriate consideration to the factor we deem controlling—the alternative means of public access provided by the Act.

18. Section 105-63.404(c) of the Administrator's final regulations provides in part that "[r]esearchers may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States v. Mitchell, et al.*; *In re National Broadcasting Company, Inc., et al.*, D.C. Miscellaneous 74-128." 42 Fed.Reg. 63629 (1977). In fact, the District Court has not approved any procedures. Hence, this regulation may reflect the belief that the federal judiciary, in delineating the scope of the common-law right of access to the tapes at issue

in question from the custody of the District Court. We next consider whether, as respondents claim, the Constitution impels us to reach a different result.

III

Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion.

A

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), this Court held that the First Amendment prevented a State from prohibiting the press from publishing the name of a rape victim where that information had been placed "in the public domain on official court records." *Id.*, at 495, 95 S.Ct., at 1046. Respondents claim that *Cox Broad-* ¹⁶⁰⁹ *casting* guarantees the press "access" to—meaning the right to copy and publish—exhibits and materials displayed in open court.

here, would pass on questions of proprietary interest, privacy, and privilege that could affect release under the Act. See §§ 104(a)(5), (7), 105(a), (c). Because we decide that the existence of the Act itself obviates exercise of the common-law right in this case, we have not found it necessary to pass on any such questions.

Moreover, this lawsuit arose independently of the Act, the Administrator is not a party, and any procedures that might have arisen from it would not necessarily have been developed with reference to the statutory standards the Administrator must consider. Further, there may be persons other than petitioner who may wish to assert private or public interests in the tapes themselves or in the manner of dissemination. We cannot accept respondents as necessarily representing the interests of the public generally or of the Administrator.

In sum, this litigation cannot be utilized as a substitute for the procedures and safeguards set forth in the Act, upon which we relied in *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977).

This argument misconceives the holding in *Cox Broadcasting*. Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records open to the public. Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know. *Id.*, at 491-492, 95 S.Ct. at 1044-1045. In the instant case, however, there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions upon press access to, or publication of any information in the public domain. Indeed, the press—including reporters of the electronic media—was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying. Our decision in *Cox Broadcasting* simply is not applicable.

[7, 8] The First Amendment generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public." *Estes v. Texas*, 381 U.S. 532, 589, 85 S.Ct. 1628, 1663,

19. We assume, *arguendo*, that respondents have standing to object to an alleged deprivation of a defendant's right to a public trial. But see *Estes v. Texas*, 381 U.S. 532, 538, 85 S.Ct.

14 L.Ed.2d 543 (1965) (Harlan, J., concurring). Cf. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). See also *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965).

B

Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial.¹⁹ They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis.

[9] In the first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. *Estes v. Texas*, *supra*, 381 U.S., at 539-542, 85 S.Ct., at 1631-1632. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, 506, 92 L.Ed. 682 (1948), it confers no special benefit on the press. *Estes v. Texas*, 381 U.S., at 583, 85 S.Ct., at 1653 (Warren, C. J., concurring); *id.*, at 588-589, 85 S.Ct., at 1662-1663 (Harlan, J., concurring). Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. *Ibid.* That opportunity abundantly existed here.

IV

[10] We hold that the Court of Appeals erred in reversing the District Court's deci-

1628, 1630, 14 L.Ed.2d 543 (1965); *id.*, at 583, 85 S.Ct. at 1653 (Warren, C. J., concurring); *id.*, at 588-589, 85 S.Ct., at 1662-1663 (Harlan, J., concurring).

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[Harlan, J., concurring] ¹⁶¹⁰
Washington Post Co.,
 2811, 41 L.Ed.2d 514
 (1974). See also
 S. Ct. 16-17, 85 S.Ct.
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 1511 (1966). While
 the guarantee of
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 against any attempt
 to seize instruments of per-
 sonal property, 333 U.S. 257, 270, 68
 S.Ct. 382 (1948), it confers
 the press. *Estes v.*
 389, 85 S.Ct., at 1653
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43 (1965); *id.*, at 583,
 (Harlan, C. J., concurring);
 at 1662-1663 (Harlan,

sion not to release the tapes in its custody.
¹⁶¹¹ We remand the case with directions that an
 order be entered denying respondents' ap-
 plication with prejudice.²⁰

So ordered.

Mr. Justice WHITE, with whom Mr. Jus-
 tice BRENNAN joins, dissenting in part.

Although I agree with the Court that the
 Presidential Recordings and Materials Pres-
 ervation Act is dispositive of this case and
 that the judgment of the Court of Appeals
 should be reversed, my reasons are some-
 what different, for I do not agree that the
 Act does not itself reach the tapes at issue
 here. It is true that § 101(a) of the Act
 requires delivery to the Administrator and
 his retention of only original tape record-
 ings and hence does not reach the tapes
 involved here. But § 101(b) is differently
 cast:

“(b)(1) Notwithstanding any other law
 or any agreement or understanding made
 pursuant to section 2107 of title 44, Uni-
 ted States Code, the Administrator shall
 receive, retain, or make reasonable ef-
 forts to obtain, complete possession and
 control of all papers, documents, memo-
 randums, transcripts, and other objects
 and materials which constitute the Presi-
 dential historical materials of Richard M.
 Nixon, covering the period beginning
 January 20, 1969, and ending August 9,
 1974.

¹⁶¹²“(2) For purposes of this subsection,
 the term ‘historical materials’ has the
 meaning given it by section 2101 of title
 44, United States Code.”

“Historical materials” is defined in 44
 U.S.C. § 2101 as “including books, corre-
 spondence, documents, papers, pamphlets,
 works of art, models, pictures, photographs,

²⁰ The task of balancing the various elements
 we have identified as part of the common-law
 right of access to judicial records should have
 been undertaken by the courts below in the
 first instance. “We need not remand for that
 purpose, however, because the outcome is
 readily apparent from what has been said
 above.” *Bigelow v. Virginia*, 421 U.S. 809,
 826-827, 95 S.Ct. 2222, 2235, 44 L.Ed.2d 600
 (1975).

plans, maps, films, motion pictures, sound
 recordings, and other objects or materials
 having historical or commemorative value.”

Obviously, § 101(b) has a far broader
 sweep than § 101(a). It is not limited to
 originals but would reach copies as well.
 Nor is there any question that the tapes
 sought to be released here contain conversa-
 tions that occurred during the critical peri-
 od covered by § 101(b)—January 20, 1969,
 to August 9, 1974. That the tapes at issue
 are copies made at a later time does not
 remove the critical fact that the conversa-
 tions on these copies, like the conversations
 on the originals, occurred during the rele-
 vant period. Furthermore, if the originals
 are of historical value, the copies are of
 equal significance. Otherwise, it is unlikely
 that there would be such an effort to obtain
 them.

Of course, the Administrator under the
 Presidential Recordings Act is not com-
 pelled to seek out every copy of every docu-
 ment or recording that was itself produced
 during the specified period of time. But
 surely he is authorized to receive the tapes
 at issue in this case and to deal with them
 under the terms of the statute.

It is my view, therefore, that the judg-
 ment of the Court of Appeals should be
 reversed, but that the case should be re-
 manded to the District Court with instruc-
 tions to deliver the tapes in question to the
 Administrator forthwith.

Mr. Justice MARSHALL, dissenting.

As the court below found, respondents
 here are “seek[ing] to vindicate a precious
 common law right, one that predates the
 Constitution itself.” *United States v.*

According to the Manual for Clerks of the
 United States District Courts § 207.1 (1966),
 clerks of the District Courts should “obtain a
 direction, standing order or rule that exhibits
 be returned [to their owners] or destroyed
 within a stated time after the time for appeal
 has expired.” Because we have not addressed
 the issue of ownership of the copies at stake in
 this case, we do not speak to the disposition of
 them after remand.

Mitchell, 179 U.S.App.D.C. 293, 301, 551 F.2d 1252, 1260 (1976). The Court today recognizes this right and assumes that it is applicable here. *Ante*, at 1312-1313, and n. 11. It also recognizes that the court with custody of the records must have substantial discretion in making the decision regarding access. *Ante*, at 1312.

The Court nevertheless holds that, contrary to the rulings below, respondents should be denied access to significant materials in which there is wide public interest. The Court finds "decisive" the existence of the Presidential Recordings and Materials Preservation Act. *Ante*, at 1316-1317. The Act, however, by its express terms covers only "original tape recordings," § 101(a), and it is undisputed that the tapes at issue here are copies, see *ante*, at 1309 n. 3, 1315 n. 15. Indeed, in a commendable display of candor, petitioner has conceded that the Act does not apply. Supplemental Brief for Petitioner 2.

Nothing in the Act's history suggests that Congress intended the courts to defer to the Executive Branch with regard to these tapes. To the contrary, the Administrator of General Services had to defer to the District Court's "expertise" in order to secure congressional approval of regulations

1. District Judge Gesell explained the normal practice in the trial court:

"As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, any member of the public has a right to inspect and obtain copies of such judicial records. *Ex parte Drawbaugh*, 2 App.D.C. 404, 407 (1894).

"The Court stated in *Drawbaugh*, [A]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and

promulgated under the Act. See *post*, at 1321-1322, and n. 5 (STEVENS, J., dissenting). It is clear, moreover, that Congress intended the Act to ensure "the American people . . . full access to all facts about the Watergate affair." S.Rep. No. 93-1181, p. 4 (1974).

Hence the Presidential Recordings Act, to the extent that it provides any assistance in deciding this case, strongly indicates that the tapes should be released to the public as directed by the Court of Appeals. While petitioner may well be "a legitimate class of one," *Nixon v. Administrator of General Services*, 433 U.S. 425, 472, 97 S.Ct. 2777, 2805, 53 L.Ed.2d 867 (1977), we are obligated to adhere to the historic role of the Judiciary on this matter that both sides concede should be ours to resolve. I dissent.

Mr. Justice STEVENS, dissenting.

The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; and when the District Court¹ and the Court

to its records, according to long-established usage and practice.

"The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States v. Nixon*, [418 U.S. 683, 715, 94 S.Ct. 3090, 3111, 41 L.Ed.2d 1039 (1974)]. His words cannot be retrieved; they are public property and his opposition is accordingly rejected." *United*

Cite as 98 S.Ct. 1306 (1978)

¹⁶¹⁵ of Appeals² have concurred, the burden of justifying review by this Court should be virtually insurmountable. Today's decision represents a dramatic departure from the practice appellate courts should observe with respect to a trial court's exercise of discretion concerning its own housekeeping practices.

There is, of course, an important and legitimate public interest in protecting the dignity of the Presidency, and petitioner has a real interest in avoiding the harm associated with further publication of his taped conversations. These interests are largely eviscerated, however, by the fact that these trial exhibits are already entirely in the public domain. Moreover, the normal presumption in favor of access is

¹⁶¹⁶ strongly reinforced by the special characteristics of this litigation. The conduct of the trial itself, as well as the conduct disclosed by the evidence, is a subject of great historical interest. Full understanding of this matter may affect the future operation of our institutions. The distinguished trial

States v. Mitchell, 386 F.Supp. 639, 641-642 (D.C.1974).

Like the Court of Appeals, see n. 2, *infra*, and unlike the majority, *ante*, at 1316, n. 17, I read this passage as a discretionary rejection of petitioner's claim that the tapes should be suppressed.

2. Explaining its concurrence in Judge Gesell's views, the Court of Appeals stated:

"Beyond this, there are a number of factors unique to this case that militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency and thus they are both impressed with the 'public trust,' and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it seems likely that as a result of the Presidential [R]ecordings and Material[s] Preservation Act, the words and sounds at issue here will find a further entry way into the public domain. For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy.

"In any event, in light of the strong interests underlying the common law right to inspect judicial records—interests especially important

judge, who was intimately familiar with the ramifications of this case and its place in history, surely struck the correct balance.

Today the Court overturns the decisions of the District Court and the Court of Appeals by giving conclusive weight to the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695.³ That Act, far from requiring the District Court to suppress these tapes, manifests Congress' settled resolve "to provide as much public access to the materials as is physically possible as quickly as possible."⁴ It is therefore not surprising that petitioner responded to the Court's post-argument request for supplemental briefs by expressly disavowing any reliance on the Presidential Recordings Act. Nor is there any reason to require the District Court to defer to the expertise of the Administrator of General Services, for the Administrator gained congressional approval of his regulations only by deferring to the expertise displayed by the District Court in this case.⁵ For this Court now to

here given the national concern over Watergate—we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights." *United States v. Mitchell*, 179 U.S.App.D.C. 293, 305-306, 551 F.2d 1252, 1264-1265 (1976) (footnotes omitted).

It is true that Judge Sirica refused to order release of the tapes before the appeals were concluded, but he expressed no disagreement with any aspect of Judge Gesell's opinion.

It should also be noted that although Circuit Judge MacKinnon dissented from the Court of Appeals decision that the tapes should be released forthwith, he also expressed no disagreement with Judge Gesell's views. *Id.*, at 306-307, 551 F.2d, at 1265-1266.

3. It is, of course, true that the Act's effect on this litigation "was neither advanced by the parties nor given appropriate consideration by the courts below." *Ante*, at 1315. But this is a reason for rejecting, not embracing, petitioner's claim.

4. S.Rep.No.94-368, p. 13 (1975); H.R.Rep.No. 94-560, p. 16 (1975).

5. The Administrator of General Services first planned to forbid private copying of the tapes in his control, but the Senate emphatically re-

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of the statute and then proceeds to speculate about how it might be improperly applied. Unfortunately, such misunderstanding and ungrounded speculation are the natural hazards of overbreadth analysis. When the Court's sights are not focused on the actual application of a statute to a specific set of facts, its vision proves sadly deficient.

I dissent.



467 U.S. 986, 81 L.Ed.2d 815

¹⁹⁸⁶William D. RUCKELSHAUS, Administrator, United States Environmental Protection Agency

v.

MONSANTO COMPANY.

No. 83-196.

Argued Feb. 27, 1984.

Decided June 26, 1984.

Applicant for registration of pesticide brought suit seeking injunctive and declaratory relief from operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act alleging that the challenged provisions effected a "taking" of property without just compensation in violation of Fifth Amendment. The United States District for the Eastern District of Missouri, 564 F.Supp. 552, declared the challenged provisions of the Act unconstitutional and permanently enjoined the EPA from implementing or enforcing them, and appeal was taken. The Supreme Court, Justice Blackmun, held that: (1) to extent that applicant for registration of pesticides had an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri Law, that property right was protected by taking clause of the Fifth Amendment; (2) Environmental Protection Agency's consideration or disclo-

sure of data submitted by applicant to the agency prior to 1972 amendments to Federal Insecticide, Fungicide, and Rodenticide Act or after effective date of 1978 amendments to the Act did not effect a taking; however, EPA consideration or disclosure of health, safety, and environmental data would constitute a taking if applicant submitted the data to the agency between October 22, 1972, and September 30, 1978, under circumstances; and (3) Tucker Act was available as a remedy for any uncompensated taking applicant for registration of pesticide might suffer as result of operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act.

Vacated and remanded.

Justice O'Connor filed separate opinion concurring in part and dissenting in part.

1. Property ⇌1

Property rights are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

2. Torts ⇌10(5)

Extent of property right in a trade secret is defined by extent to which the owner of a secret protects his interest from disclosure to others' information that is public knowledge or that is generally known in an industry could not be a trade secret and if an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.

3. Assignments ⇌5

Trade secret is assignable.

4. Eminent Domain ⇌81

To extent that applicant for registration of pesticides had an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri Law, that property right was

Cite as 104 S.Ct. 2862 (1984)

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protected by taking clause of the Fifth Amendment. U.S.C.A. Const.Amend. 5.

5. Eminent Domain ⇌(1)

Among factors to be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking" are character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. U.S. C.A. Const.Amend. 5.

6. Eminent Domain ⇌(5)

Environmental Protection Agency's consideration or disclosure of data submitted by applicant for registration of pesticide to the agency prior to 1972 amendments to Federal Insecticide, Fungicide, and Rodenticide Act or after effective date of 1978 amendments to the Act did not effect a taking since applicant did not have a reasonable investment-backed expectation that data, which constituted trade secrets under Missouri Law, would not be disclosed to some extent by the agency; however, EPA consideration or disclosure of health, safety, and environmental data would constitute a taking if applicant submitted the data to the agency between October 22, 1972, and September 30, 1978, if applicant had designated the data as trade secret at time of submission but if the use or disclosure conflicted with explicit assurance with confidentiality or exclusive use contained in the statute during that period and if the operation of arbitration provision of statute would not adequately compensate for loss in market value of data which applicant suffered because of agency's use or disclosure of the trade secrets. Federal Insecticide, Fungicide, and Rodenticide Act, § 3(c)(1)(D)(i), as amended, 7 U.S.C.A. § 136a(c)(1)(D)(i).

7. Eminent Domain ⇌(5)

Any taking of private property which occurred in action with Environmental Protection Agency's use or disclosure of data submitted to it by applicant for registration of pesticide between October 22, 1972, and September 30, 1978, was a taking for a

public use. U.S.C.A. Const.Amend. 5; Federal Insecticide, Fungicide, and Rodenticide Act, §§ 2 et seq., 2(t, u), as amended, 7 U.S.C.A. §§ 136 et seq., 136(t, u).

8. Eminent Domain ⇌279(2)

Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. U.S.C.A. Const.Amend. 5.

9. Federal Courts ⇌1072

Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act. 28 U.S.C.A. § 1491.

10. Federal Courts ⇌1072

In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, proper inquiry is not whether the statute expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy, but whether Congress has in the statute withdrawn the Tucker Act grant of jurisdiction to the court of claims to hear a suit involving the statute founded upon the Constitution. 28 U.S.C.A. § 1491.

11. Statutes ⇌223.1

Where two statutes are capable of co-existence, it is duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

12. Federal Courts ⇌1102

Federal Insecticide, Fungicide, and Rodenticide Act does not withdraw possibility of a Tucker Act remedy for a taking, but merely requires that a claimant first seek satisfaction through the statutory procedure. Federal Insecticide, Fungicide, and Rodenticide Act, § 3(c)(1)(D), as amended, 7 U.S.C.A. § 136a(c)(1)(D); 28 U.S.C.A. § 1491.

13. Constitutional Law ⇌46(1)

Federal Courts ⇌1073

Tucker Act was available as a remedy for any uncompensated taking applicant

for registration of pesticide might suffer as result of operation of data-consideration and data-disclosure provisions of Federal Insecticide, Fungicide, and Rodenticide Act; thus, applicant's challenges to constitutionality of arbitration and compensation scheme of the Act were not ripe for resolution. Federal Insecticide, Fungicide, and Rodenticide Act, §§ 2 et seq., 2(t, u), as amended, 7 U.S.C.A. §§ 136 et seq., 136(t, u); 28 U.S.C.A. § 1491.

Syllabus *

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a covered product (hereinafter pesticide) in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data. Under the data-consideration provisions of § 3, as amended in 1978, applicants now are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978, while all other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. If the parties cannot agree on the amount of compensation, either may initiate a binding arbitration proceeding, and if an original submitter refuses to participate in negotiations or arbitration, he forfeits his claim for compensation. Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. Section 10, as amended in 1978, authorizes, in general, public disclosure of all health, safety, and environmental data even though it may result in disclosure of trade secrets. Appellee, a company headquartered in Missouri, is an inventor, producer, and seller of pesticides, and invests sub-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

stantial sums in developing active ingredients for pesticides and in producing end-use products that combine such ingredients with inert ingredients. Appellee brought suit in Federal District Court for injunctive and declaratory relief, alleging, *inter alia*, that the data-consideration and data-disclosure provisions of FIFRA effected a "taking" of property without just compensation, in violation of the Fifth Amendment, and that the data-consideration provisions violated the Amendment because they effected a taking of property for a private, rather than a public, purpose. The District Court held that the challenged provisions of FIFRA are unconstitutional, and permanently enjoined EPA from implementing or enforcing those provisions.

1987 Held:

1. To the extent that appellee has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment. Despite their intangible nature, trade secrets have many of the characteristics of more traditional forms of property. Moreover, this Court has found other kinds of intangible interests to be property for purposes of the Clause. Pp. 2871-2873.

2. EPA's consideration or disclosure of data submitted by appellee prior to October 22, 1972, or after September 30, 1978, does not effect a taking, but EPA's consideration or disclosure of certain health, safety, and environmental data constituting a trade secret under state law and submitted by appellee between those two dates may constitute a taking under certain conditions. Pp. 2873-2878.

(a) A factor for consideration in determining whether a governmental action short of acquisition or destruction of property has gone beyond proper "regulation" and effects a "taking" is whether the action interferes with reasonable investment-

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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backed expectations. With respect to any health, safety, and environmental data that appellee submitted to EPA after the effective date of the 1978 FIFRA amendments (October 1, 1978), appellee could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. As long as appellee is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in exchange for the economic advantages of a registration can hardly be called a taking. Pp. 2874-2875.

(b) Prior to its amendment in 1972 (effective October 22, 1972), FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. Although the Trade Secrets Act provides a criminal penalty for a Government employee who discloses, in a manner not authorized by law, any trade-secret information revealed to him during the course of his official duties, it is not a guarantee of confidentiality to submitters of data, and, absent an express promise, appellee had no reasonable, investment-backed expectation that its information submitted to EPA before October 22, 1972, would remain inviolate in the EPA's hands. The possibility was substantial that the Federal Government at some future time would find disclosure to be in the public interest. *A fortiori*, the Trade Secrets Act, which penalizes only unauthorized disclosure, cannot be construed as any sort of assurance against internal agency use of submitted data during consideration of the application of a subsequent applicant for registration. Pp. 2875-2877.

(c) However, under the statutory scheme in effect between October 22, 1972, and September 30, 1978, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. The explicit governmental guarantee to registration applicants of confiden-

tiality and exclusive use with respect to trade secrets during this period formed the basis of a reasonable investment-backed expectation. If EPA, consistent with current provisions of FIFRA, were now to disclose such trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, its actions would frustrate appellee's reasonable investment-backed expectation. If, however, arbitration pursuant to FIFRA were to yield just compensation for the loss in the market value of appellee's trade-secret data suffered because of EPA's consideration of the data in connection with another application (no arbitration having yet occurred), then appellee would have no claim against the Government for a taking. Pp. 2877-2878.

3. Any taking of private property that may occur in connection with EPA's use of data submitted to it by appellee between October 22, 1972, and September 30, 1978, is a taking for a "public use," rather than for a "private use," even though subsequent applicants may be the most direct beneficiaries. So long as a taking has a conceivable public character, the means by which it will be attained is for Congress to determine. Congress believed that the data-consideration provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Such a procompetitive purpose is within Congress' police power. With regard to FIFRA's data-disclosure provisions, the optimum amount of disclosure to assure the public that a product is safe and effective is to be determined by Congress, not the courts. Pp. 2878-2879.

4. A Tucker Act remedy is available to provide appellee with just compensation for any taking of property that may occur as a result of FIFRA's data-consideration and data-disclosure provisions, and thus the District Court erred in enjoining EPA from

acting under those provisions. Neither FIFRA nor its legislative history discusses the interaction between FIFRA and the Tucker Act, and inferring a withdrawal of Tucker Act jurisdiction would amount to a disfavored partial repeal by implication of the Tucker Act. FIFRA's provision that an original submitter of data forfeits his right to compensation from a later submitter for the use of the original submitter's data if he fails to participate in, or comply with the terms of, a negotiated or arbitrated ¹⁹⁸⁹compensation settlement merely requires a claimant to first seek satisfaction through FIFRA's procedure before asserting a Tucker Act claim. Pp. 2880-2881.

5. Because the Tucker Act is available as a remedy for any uncompensated taking appellee may suffer as a result of the operation of the challenged provisions of FIFRA, appellee's challenges to the constitutionality of the arbitration and compensation scheme of FIFRA are not ripe for resolution. Pp. 2881-2882.

564 F.Supp. 552, vacated and remanded.

Lawrence G. Wallace, Washington, D.C., for appellant.

A. Raymond Randolph, Jr., Washington, D.C., for appellee.

¹⁹⁹⁰Justice BLACKMUN delivered the opinion of the Court.

In this case, we are asked to review a United States District Court's determination that several provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. § 136 *et seq.*, are unconstitutional. The

1. For purposes of our discussion of FIFRA, the term "pesticides" includes herbicides, insecticides, fungicides, rodenticides, and plant regulators. See §§ 2(t) and (u) of FIFRA, as amended, 7 U.S.C. §§ 136(t) and (u).
2. The first federal legislation in this area was the Insecticide Act of 1910, 36 Stat. 331, which made it unlawful to manufacture and sell insecticides that were adulterated or misbranded. In 1947, the 1910 legislation was repealed and replaced with FIFRA. 61 Stat. 172.

provisions at issue authorize the Environmental Protection Agency (EPA) to use data submitted by an applicant for registration of a pesticide¹ in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data.

I

Over the past century, the use of pesticides to control weeds and minimize crop damage caused by insects, disease, and animals has become increasingly more important for American agriculture. See S.Rep. No. 95-334, p. 32 (1977); S.Rep. No. 92-838, pp. 3-4, 6-7 (1972) U.S.Code Cong. & Admin.News 1972, p. 3993; H.R.Rep. No. 92-511, pp. 3-7 (1971). While pesticide use has led to improvements in productivity, it has also led to increased risk of harm to humans and the environment. See S.Rep. No. 92-838, at 3-4, 6-7; H.R.Rep. No. 92-511, at 3-7. Although the Federal Government has regulated pesticide use for nearly 75 years,² FIFRA was first adopted in 1947. 61 Stat. 163.

¹⁹⁹¹As first enacted, FIFRA was primarily a licensing and labeling statute. It required that all pesticides be registered with the Secretary of Agriculture prior to their sale in interstate or foreign commerce. §§ 3(a) and 4(a) of the 1947 Act, 61 Stat. 166-167. The 1947 legislation also contained general standards setting forth the types of information necessary for proper labeling of a registered pesticide, including directions for use; warnings to prevent harm to people, animals, and plants; and claims made about the efficacy of the product. §§ 2(u)(2) and 3(a)(3).

Some States had undertaken to regulate pesticide use before there was federal legislation, and many more continued to do so after federal legislation was enacted. In 1946, the Council of State Governments recommended for adoption a model state statute, the Uniform State Insecticide, Fungicide, and Rodenticide Act. See S.Rep. No. 92-838, p. 7 (1972); H.R.Rep. No. 313, 80th Cong., 1st Sess., 3 (1947).

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Upon request of the Secretary, an applicant was required to submit test data supporting the claims on the label, including the formula for the pesticide. §§ 4(a) and (b). The 1947 version of FIFRA specifically prohibited disclosure of "any information relative to formulas of products," §§ 3(c)(4) and 8(c), but was silent with respect to the disclosure of any of the health and safety data submitted with an application.³

In 1970, the Department of Agriculture's FIFRA responsibilities were transferred to the then newly created Environmental Protection Agency, whose Administrator is the appellant in this case. See Reorganization Plan No. 3 of 1970, 35 Fed.Reg. 15623 (1970), 5 U.S.C.App., p. 1132.

Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, see S.Rep. No. 92-838, at 3-9; S.Rep. No. 92-970, p. 9 (1972); H.R.Rep. No. 92-511, at 5-13, Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973. The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute. H.R.Rep. No. 92-511, at 1. As amended, FIFRA regulated the ¹⁹⁹²use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority. Congress also added a new criterion for registration: that EPA determine that the pesticide will not cause "unreasonable adverse effects on the environment." §§ 3(c)(5)(C) and (D), 86 Stat. 980-981.

For purposes of this litigation, the most significant of the 1972 amendments pertained to the pesticide-registration procedure and the public disclosure of informa-

tion learned through that procedure. Congress added to FIFRA a new section governing public disclosure of data submitted in support of an application for registration. Under that section, the submitter of data could designate any portions of the submitted material it believed to be "trade secrets or commercial or financial information." § 10(a), 86 Stat. 989. Another section prohibited EPA from publicly disclosing information which, in its judgment, contained or related to "trade secrets or commercial or financial information." § 10(b). In the event that EPA disagreed with a submitter's designation of certain information as "trade secrets or commercial or financial information" and proposed to disclose that information, the original submitter could institute a declaratory judgment action in federal district court. § 10(c).

The 1972 amendments also included a provision that allowed EPA to consider data submitted by one applicant for registration in support of another application pertaining to a similar chemical, provided the subsequent applicant offered to compensate the applicant who originally submitted the data. § 3(c)(1)(D). In effect, the provision instituted a mandatory data-licensing scheme. The amount of compensation was to be negotiated by the parties, or, in the event negotiations failed, was to be determined by EPA, subject to judicial review upon the instigation of the original data submitter. The scope of the 1972 data-consideration provision, however, ¹⁹⁹³was limited, for any data designated as "trade secrets or commercial or financial information" exempt from disclosure under § 10 could not be considered at all by EPA to support another registration application unless the original submitter consented. *Ibid.*

The 1972 amendments did not specify standards for the designation of submitted data as "trade secrets or commercial or financial information." In addition, Congress failed to designate an effective date

ture did not publicly disclose the health and safety information. Brief for Appellant 5, n. 5.

3. Appellant here concedes, however, that as a matter of practice, the Department of Agricul-

for the data-consideration and disclosure schemes. In 1975, Congress amended § 3(c)(1)(D) to provide that the data-consideration and data-disclosure provisions applied only to data submitted on or after January 1, 1970, 89 Stat. 755, but left the definitional question unanswered.

Much litigation centered around the definition of "trade secrets or commercial or financial information" for the purposes of the data-consideration and data-disclosure provisions of FIFRA. EPA maintained that the exemption from consideration or disclosure applied only to a narrow range of information, principally statements of formulae and manufacturing processes. In a series of lawsuits, however, data-submitting firms challenged EPA's interpretation and obtained several decisions to the effect that the term "trade secrets" applied to any data, including health, safety, and environmental data, that met the definition of trade secrets set forth in Restatement of Torts § 757 (1939). See, e.g., *Mobay Chemical Corp. v. Costle*, 447 F.Supp. 811 (WD Mo.1978); *Chevron Chemical Co. v. Costle*, 443 F.Supp. 1024 (ND Cal.1978). These decisions prevented EPA from disclosing much of the data on which it based its decision to register pesticides and from considering the data submitted by one ap-

plicant in reviewing the application of a later applicant. See S.Rep. No. 95-334, at 7; H.R.Rep. No. 95-663, p. 18 (1977) U.S. Code Cong. & Admin.News 1978, p. 1966.

Because of these and other problems with the regulatory scheme embodied in FIFRA as amended in 1972, see S.Rep. 1994 No. 95-334, at 2-5; H.R.Rep. No. 95-663, at 15-21; see generally EPA Office of Pesticide Programs, FIFRA: Impact on the Industry (1977), reprinted in S.Rep. No. 95-334, at 34-68, Congress enacted other amendments to FIFRA in 1978. These were effected by the Federal Pesticide Act of 1978, 92 Stat. 819. The new amendments included a series of revisions in the data-consideration and data-disclosure provisions of FIFRA's §§ 3 and 10, 7 U.S.C. §§ 136a and 136h.

Under FIFRA, as amended in 1978, applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i). All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. § 3(c)(1)(D)(ii).⁴ If the parties cannot agree

4. Section 3(c)(1)(D), 92 Stat. 820-822, 7 U.S.C. § 136a(c)(1)(D), reads in relevant part:

"(i) With respect to pesticides containing active ingredients that are initially registered under this Act [after September 30, 1978], data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide . . . ;

"(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such

item of data in support of an application by any other person . . . within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. . . . [T]he findings and determination of the arbitra-

on the amount of ¹⁹⁹⁵compensation, either may initiate a binding arbitration proceeding. The results of the arbitration proceeding are not subject to judicial review, absent fraud or misrepresentation. The same statute provides that an original submitter who refuses to participate in negotiations or in the arbitration proceeding forfeits his claim for compensation. Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. § 3(c)(1)(D)(iii).

Also in 1978, Congress added a new subsection, § 10(d), 7 U.S.C. § 136h(d), that provides for disclosure of all health, ¹⁹⁹⁶safety, and environmental data to qualified requesters, notwithstanding the prohibition against disclosure of trade secrets contained in § 10(b). The provision, how-

ever, does not authorize disclosure of information that would reveal "manufacturing or quality control processes" or certain details about deliberately added inert ingredients unless "the Administrator has first determined that the disclosure is necessary to protect against an unreasonable risk of injury to health or the environment." §§ 10(d)(1)(A) to (C).⁵ EPA may not disclose data to representatives of foreign or multinational pesticide companies unless the original submitter of ¹⁹⁹⁷the data consents to the disclosure. § 10(g). Another subsection establishes a criminal penalty for wrongful disclosure by a Government employee or contractor of confidential or trade secret data. § 10(f).

II

Appellee Monsanto Company (Monsanto) is an inventor, developer, and producer of

its separate ingredients, impurities, or degradation products and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans, and other mammals, plants, animals, and soil, and studies on persistence, translocation and fate in the environment, and metabolism, shall be available for disclosure to the public: *Provided*, That the use of such data for any registration purpose shall be governed by section 3 of this Act: *Provided further*, That this paragraph does not authorize the disclosure of any information that—

"(A) discloses manufacturing or quality control processes,

"(B) discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately added inert ingredients of a pesticide, or

"(C) discloses the identity or percentage quantity of any deliberately added inert ingredient of a pesticide, unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.

"(2) Information concerning production, distribution, sale, or inventories of a pesticide that is otherwise entitled to confidential treatment under subsection (b) of this section may be publicly disclosed in connection with a public proceeding to determine whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment, if the Administrator determines that such disclosure is necessary in the public interest."

5. Section 10(d), 92 Stat. 830, reads in relevant part:

"(1) All information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or

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various kinds of chemical products, including pesticides. Monsanto, headquartered in St. Louis County, Mo., sells in both domestic and foreign markets. It is one of a relatively small group of companies that invent and develop new active ingredients for pesticides and conduct most of the research and testing with respect to those ingredients.⁶

These active ingredients are sometimes referred to as "manufacturing-use products" because they are not generally sold directly to users of pesticides. Rather, they must first be combined with "inert ingredients"—chemicals that dissolve, dilute, or stabilize the active components. The results of this process are sometimes called "end-use products," and the firms that produce end-use products are called "formulators." See the opinion of the District Court in this case, *Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency*, 564 F.Supp. 552, 554 (ED Mo.1983). A firm that produces an active ingredient may ¹⁹⁹⁸use it for incorporation into its own end-use products, may sell it to formulators, or may do both. Monsanto produces both active ingredients and end-use products. *Ibid.*

The District Court found that development of a potential commercial pesticide candidate typically requires the expenditure of \$5 million to \$15 million annually for several years. The development process may take between 14 and 22 years, and it is usually that long before a company can expect any return on its investment. *Id.*, at 555. For every manufacturing-use pesticide the average company finally markets, it will have screened and tested 20,000 others. Monsanto has a significantly better-than-average success rate; it suc-

6. A study by the Office of Pesticide Programs of the EPA showed that in 1977 approximately 400 firms were registered to produce manufacturing-use products. S.Rep. No. 95-334, p. 34 (1977). It was estimated that the 10 largest firms account for 75% of this country's pesticide production. *Id.*, at 60. A correspondingly small number of new pesticides are marketed each year. In 1974, only 10 new pesticides were

cessfully markets 1 out of every 10,000 chemicals tested. *Ibid.*

Monsanto, like any other applicant for registration of a pesticide, must present research and test data supporting its application. The District Court found that Monsanto had incurred costs in excess of \$23.6 million in developing the health, safety, and environmental data submitted by it under FIFRA. *Id.*, at 560. The information submitted with an application usually has value to Monsanto beyond its instrumentality in gaining that particular application. Monsanto uses this information to develop additional end-use products and to expand the uses of its registered products. The information would also be valuable to Monsanto's competitors. For that reason, Monsanto has instituted stringent security measures to ensure the secrecy of the data. *Ibid.*

It is this health, safety, and environmental data that Monsanto sought to protect by bringing this suit. The District Court found that much of these data "contai[n] or relate to trade secrets as defined by the Restatement of Torts and Confidential, commercial information." *Id.*, at 562.

Monsanto brought suit in District Court, seeking injunctive and declaratory relief from the operation of the data-consideration provisions of FIFRA's § 3(c)(1)(D), and the data-disclosure provisions of FIFRA's § 10 and the related § 3(c)(2)(A). Monsanto alleged that all of the challenged provisions⁹⁹⁹ effected a "taking" of property without just compensation, in violation of the Fifth Amendment. In addition, Monsanto alleged that the data-consideration provisions violated the Amendment because they effected a taking of property for a private, rather than a public, purpose. Fi-

introduced. See Goring, *The Costs of Commercializing Pesticides*, International Conference of Entomology, Aug. 20, 1976, reprinted in *Hearings on Extension of the Federal Insecticide, Fungicide, and Rodenticide Act before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture, Nutrition, and Forestry*, 95th Cong., 1st Sess., 250, 254 (1977).

nally, Monsanto alleged that the arbitration scheme provided by § 3(c)(1)(D)(ii) violates the original submitter's due process rights and constitutes an unconstitutional delegation of judicial power.

After a bench trial, the District Court concluded that Monsanto possessed property rights in its submitted data, specifically including the right to exclude others from the enjoyment of such data by preventing their unauthorized use and by prohibiting their disclosure. 564 F.Supp., at 566. The court found that the challenged data-consideration provisions "give Monsanto's competitors a free ride at Monsanto's expense." *Ibid.* The District Court reasoned that § 3(c)(1)(D) appropriated Monsanto's fundamental right to exclude, and that the effect of that appropriation is substantial. The court further found that Monsanto's property was being appropriated for a private purpose and that this interference was much more significant than the public good that the appropriation might serve. 564 F.Supp., at 566-567.

The District Court also found that operation of the disclosure provisions of FIFRA constituted a taking of Monsanto's property. The cost incurred by Monsanto when its property is "permanently committed to the public domain and thus effectively destroyed" was viewed by the District Court as significantly outweighing any benefit to the general public from having the ability to scrutinize the data, for the court seemed to believe that the general public could derive all the assurance it needed about the safety and effectiveness of a pesticide from EPA's decision to register the product and to approve the label. *Id.*, at 567, and n. 4.

After finding that the data-consideration provisions operated to effect a taking of property, the District Court found 11000 that the compulsory binding-arbitration scheme

7. The District Court's judgment in this case is in conflict with the holdings of other federal courts. See, e.g., *Petrolite Corp. v. United States Environmental Protection Agency*, 519 F.Supp. 966 (DC 1981); *Mobay Chemical Corp. v. Costle*, 517 F.Supp. 252, and 517 F.Supp. 254 (WD Pa. 1981), *aff'd sub nom. Mobay Chemical Co. v.*

set forth in § 3(c)(1)(D)(ii) did not adequately provide compensation for the property taken. The court found the arbitration provision to be arbitrary and vague, reasoning that the statute does not give arbitrators guidance as to the factors that enter into the concept of just compensation, and that judicial review is foreclosed except in cases of fraud. 564 F.Supp., at 567. The District Court also found that the arbitration scheme was infirm because it did not meet the requirements of Art. III of the Constitution. *Ibid.* Finally, the court found that a remedy under the Tucker Act was not available for the deprivations of property effected by §§ 3 and 10. 564 F.Supp., at 567-568.

The District Court therefore declared §§ 3(c)(1)(D), 3(c)(2)(A), 10(b), and 10(d) of FIFRA, as amended by the Federal Pesticide Act of 1978, to be unconstitutional, and permanently enjoined EPA from implementing or enforcing those sections. See Amended Judgment, App. to Juris. Statement 41a.⁷

We noted probable jurisdiction. 464 U.S. 890 (1983).

III

In deciding this case, we are faced with four questions: (1) Does Monsanto have a property interest protected by the Fifth Amendment's Taking Clause in the health, safety, and environmental data it has submitted to EPA? (2) If so, does EPA's use of the data to evaluate the applications of others or EPA's disclosure of the data to qualified members of the public effect a taking of that property interest? (3) If there 11001 is a taking, is it a taking for a public use? (4) If there is a taking for a public use, does the statute adequately provide for just compensation?

Gorsuch, 682 F.2d 419 (CA3), cert. denied, 459 U.S. 988, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982); *Chevron Chemical Co. v. Costle*, 499 F.Supp. 732 (Del.1980), *aff'd*, 641 F.2d 104 (CA3), cert. denied, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981).

For purposes of this case, EPA has stipulated that "Monsanto has certain property rights in its information, research and test data that it has submitted under FIFRA to EPA and its predecessor agencies which may be protected by the Fifth Amendment to the Constitution of the United States." App. 36. Since the exact import of that stipulation is not clear, we address the question whether the data at issue here can be considered property for the purposes of the Taking Clause of the Fifth Amendment.

[1] This Court never has squarely addressed the applicability of the protections of the Taking Clause of the Fifth Amendment to commercial data of the kind involved in this case. In answering the question now, we are mindful of the basic axiom that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Monsanto asserts that the health, safety, and environmental data it has submitted to EPA are property under Missouri law, which recognizes trade secrets, as defined in § 757, Comment *b*, of the Restatement of Torts, as property. See *Reddi-Wip, Inc. v. Lemay Valve Co.*, 354 S.W.2d 913, 917 (Mo.App.1962); *Harrington v. National Outdoor Advertising Co.*, 355 Mo. 524, 532, 196 S.W.2d 786, 791 (1946); *Luckett v. Orange Julep Co.*, 271 Mo. 289, 302-304, 196 S.W. 740, 743 (1917). The Restatement defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." § 757, Comment *b*. And the parties have stipulated that much of the information, research, and test data that Monsanto has submitted under FIFRA to EPA "contains or relates to

trade secrets as defined by the Restatement of Torts." App. 36.

[2] Because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others. See *Harrington, supra*; *Reddi-Wip, supra*; Restatement of Torts, *supra*; see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-476, 94 S.Ct. 1879, 1882-1883, 40 L.Ed.2d 315 (1974). Information that is public knowledge or that is generally known in an industry cannot be a trade secret. Restatement of Torts, *supra*. If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished. See *Harrington, supra*; 1 R. Milgrim, Trade Secrets § 1.01[2] (1983).

[3] Trade secrets have many of the characteristics of more tangible forms of property. A trade secret is assignable. See, e.g., *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 401-402, 31 S.Ct. 376, 382, 55 L.Ed. 502 (1911); *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 225 (CA2 1971). A trade secret can form the res of a trust, Restatement (Second) of Trusts § 82, Comment *e* (1959); 1 A. Scott, Law of Trusts § 82.5, p. 703 (3d ed. 1967), and it passes to a trustee in bankruptcy. See *In re Uniservices, Inc.*, 517 F.2d 492, 496-497 (CA7 1975).

Even the manner in which Congress referred to trade secrets in the legislative history of FIFRA supports the general perception of their property-like nature. In discussing the 1978 amendments to FIFRA, Congress recognized that data developers like Monsanto have a "proprietary interest" in their data. S.Rep. No. 95-334, at 31. Further, Congress reasoned that submitters of data are "entitled" to "compensation" because they "have legal ownership of the data." H.R. Conf. Rep. No. 95-1560, p. 29 (1978), U.S. Code Cong. & Admin.

News 1978, pp. 1966, 2045.⁸ This general perception of trade secrets as property is consonant with a notion of "property" that extends beyond land and tangible goods and includes the products of an individual's "labour and invention." 2 W. Blackstone, Commentaries *405; see generally J. Locke, *The Second Treatise of Civil Government*, ch. 5 (J. Gough ed. 1947).

Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 44, 46, 80 S.Ct. 1563, 1566, 1567, 4 L.Ed.2d 1554 (1960) (materialman's lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602, 55 S.Ct. 854, 866-869, 79 L.Ed. 1593 (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of the protection of the Taking Clause has

8. Of course, it was not necessary that Congress recognize the data at issue here as property in order for the data to be protected by the Taking Clause. We mention the legislative history merely as one more illustration of the general perception of the property-like nature of trade secrets.

9. Contrary to EPA's contention, Brief for Appellant 29, Justice Holmes' dictum in *E.I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 37 S.Ct. 575, 61 L.Ed. 1016 (1917), does not undermine our holding that a trade secret is property protected by the Fifth Amendment Taking Clause. *Masland* arose from a dispute about the disclosure of trade secrets during preparation for a trial. In his opinion for the Court, the Justice stated:

"The case has been considered as presenting a conflict between a right of property and a right to make a full defence, and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defence are adjudged against him before he has a chance to be heard or to prove his case. We

long been implicit in the thinking of this Court:

"It is conceivable that [the term "property" in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945).

[4] We therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law,¹¹⁰⁰⁴ that property right is protected by the Taking Clause of the Fifth Amendment.⁹

IV

Having determined that Monsanto has a property interest in the data it has submitted to EPA, we confront the difficult question whether a "taking" will occur

approach the question somewhat differently. The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs." *Id.*, at 102, 37 S.Ct., at 575. Justice Holmes did not deny the existence of a property interest; he simply deemed determination of the existence of that interest irrelevant to resolution of the case. In a case decided prior to *Masland*, the Court had spoken of trade secrets in property terms. *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-253, 25 S.Ct. 637, 639-640, 49 L.Ed. 1031 (1905) (Holmes, J., for the Court). See generally 1 R. Milgrim, *Trade Secrets* § 1.01[1] (1983).

when EPA discloses those data or considers the data in evaluating another application for registration. The question of what constitutes a "taking" is one with which this Court has wrestled on many occasions. It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking, for

"courts have held that the deprivation of the former owner rather than the accretion of a right or interest ¹⁰⁰⁵to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *United States v. General Motors Corp.*, 323 U.S., at 378, 65 S.Ct., at 359.

See also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

[5] As has been admitted on numerous occasions, "this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action' " must be deemed a compensable taking. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); accord, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. *Kaiser Aetna*, 444 U.S., at 175, 100 S.Ct., at 390. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those

factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center v. Robins*, 447 U.S., at 83, 100 S.Ct., at 2041; see *Kaiser Aetna*, 444 U.S., at 175, 100 S.Ct., at 390; *Penn Central*, 438 U.S., at 124, 98 S.Ct., at 2659. It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data.

A

[6] A "reasonable investment-backed expectation" must be more than a "unilateral expectation or an abstract need." ¹⁰⁰⁶*Webb's Fabulous Pharmacies*, 449 U.S., at 161, 101 S.Ct., at 451. We find that with respect to any health, safety, and environmental data that Monsanto submitted to EPA after the effective date of the 1978 FIFRA amendments—that is, on or after October 1, 1978 ¹⁰—Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration.

Thus, with respect to any data submitted to EPA on or after October 1, 1978, Monsanto knew that, for a period of 10 years from the date of submission, EPA would not consider those data in evaluating the application of another without Monsanto's permission. § 3(c)(1)(D)(i). It was also aware, however, that once the 10-year period had expired, EPA could use the data without Monsanto's permission. §§ 3(c)(1)(D)(ii) and (iii). Monsanto was further aware that it was entitled to an

provisions applied with full force to all data submitted after that date.

10. The Federal Pesticide Act of 1978 was approved on September 30, 1978. 92 Stat. 842. The new data-consideration and data-disclosure

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offer of compensation from the subsequent applicant only until the end of the 15th year from the date of submission. § 3(c)(1)(D)(iii). In addition, Monsanto was aware that information relating to formulae of products could be revealed by EPA to "any Federal agency consulted and [could] be revealed at a public hearing or in findings of fact" issued by EPA "when necessary to carry out" EPA's duties under FIFRA. § 10(b). The statute also gave Monsanto notice that much of the health, safety, and efficacy data provided by it could be disclosed to the general public at any time. § 10(d). If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment¹¹ backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Monsanto argues that the statute's requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit. See Brief for Appellee 29. But Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for "the advantage of living and doing business in a civilized community." *Andrus v. Allard*, 444 U.S. 51, 67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979), quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 422, 43 S.Ct., at 162 (Brandeis, J., dissenting); see *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). This is particularly true in an area, such as pesticide sale and use, that has long been the source of public concern and the sub-

11. Because the market for Monsanto's pesticide products is an international one, Monsanto could decide to forgo registration in the United States and sell a pesticide only in foreign mar-

ject of government regulation. That Monsanto is willing to bear this burden in exchange for the ability to market pesticides in this country is evidenced by the fact that it has continued to expand its research and development and to submit data to EPA despite the enactment of the 1978 amendments to FIFRA.¹¹ 564 F.Supp., at 561.

Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking. See *Corn Products Refining Co. v. Eddy*, 249 U.S. 11008427, 431-432, 39 S.Ct. 325, 327, 63 L.Ed. 689 (1919) ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth"); see also *Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n*, 555 F.2d 82, 95 (CA3 1977).

B

Prior to the 1972 amendments, FIFRA was silent with respect to EPA's authorized use and disclosure of data submitted to it in connection with an application for registration. Another statute, the Trade Secrets Act, 18 U.S.C. § 1905, however, arguably is relevant. That Act is a general criminal statute that provides a penalty for any employee of the United States Government who discloses, in a manner not authorized by law, any trade-secret information that is revealed to him during the course of his official duties. This Court has determined that § 1905 is more than an "anti-leak" statute aimed at deterring Government employees from profiting by information they receive in their official capacities. See *Chrysler Corp. v. Brown*, 441 U.S.

kets. Presumably, it will do so in those situations where it deems the data to be protected from disclosure more valuable than the right to sell in the United States.

281, 298-301, 99 S.Ct. 1705, 1715-1717, 60 L.Ed.2d 208 (1979). Rather, § 1905 also applies to formal agency action, *i.e.*, action approved by the agency or department head. *Ibid.*

It is true that, prior to the 1972 amendments, neither FIFRA nor any other provision of law gave EPA authority to disclose data obtained from Monsanto. But the Trade Secrets Act is not a guarantee of confidentiality to submitters of data, and, absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data con-

cerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. Thus, with respect to data submitted to EPA in connection with an application for registration prior to October 22, 1972,¹² the Trade Secrets Act provided no basis for a reasonable investment-backed expectation that data submitted to EPA would remain confidential.

A fortiori, the Trade Secrets Act cannot be construed as any sort of assurance against internal agency use of submitted data during consideration of the application of a subsequent applicant for registration.¹³ Indeed, there is some evidence that the practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known.¹⁴ Thus, with respect to any data that Monsanto submitted to EPA prior to the effective date of

12. The 1972 amendments to FIFRA became effective at the close of the business day on October 21, 1972. 86 Stat. 998.

13. The Trade Secrets Act prohibits a Government employee from "publish[ing], divulg[ing], disclos[ing] or mak[ing] known" confidential information received in his official capacity. 18 U.S.C. § 1905. In considering the data of one applicant in connection with the application of another, EPA does not violate any of these prohibitions.

14. The District Court found: "During the period that USDA administered FIFRA, it was also its policy that the data developed and submitted by companies such as [Monsanto] could not be used to support the registration of another's product without the permission of the data submitter." *Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency*, 564 F.Supp. 552, 564 (ED Mo.1983) (emphasis in original). The District Court apparently based this finding on the testimony of two former Directors of the Pesticide Regulation Division, who testified that they knew of no instance in which data submitted by one applicant were subsequently considered in evaluating another application. *Ibid.*

This finding is in marked conflict with the statement of the National Agricultural Chemicals Association, presented before a Senate Subcommittee in 1972, which advocated that the 1972 amendments to FIFRA should contain an exclusive-use provision:

"Under the present law registration information submitted to the Administrator has not routinely been made available for public inspec-

tion. Such information has, however, as a matter of practice but without statutory authority, been considered by the Administrator to support the registration of the same or a similar product by another registrant." Federal Environmental Pesticide Control Act: Hearings before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, 92d Cong., 2d Sess., pt. 2, p. 245 (1972).

In addition, EPA points to the Department of Agriculture's Interpretation with Respect to Warning, Caution and Antidote Statements Required to Appear on Labels of Economic Poisons, 27 Fed.Reg. 2267 (1962), which presents a list of pesticides that would require no additional toxicological data for registration. The clear implication from the Interpretation is that the Department determined that the data already submitted with respect to those chemicals would be sufficient for purposes of evaluating any future applications for registration of those chemicals.

Although the evidence against the District Court's finding seems overwhelming, we need not determine that the finding was clearly erroneous in order to find that a submitter had no reasonable expectation that the Department or EPA would not use the data it had submitted when evaluating the application of another. The District Court did not find that the policy of the Department was publicly known at the time or that there was any explicit guarantee of exclusive use.

the 1972 amendments to FIFRA, we hold that Monsanto could not have had a "reasonable investment-backed expectation" that EPA would maintain those data in strictest confidence and would use them exclusively for the purpose of considering the Monsanto application in connection with which the data were submitted.

C

The situation may be different, however, with respect to data submitted by Monsanto to EPA during the period from October 22, 1972, through September 30, 1978. Under the statutory scheme then in effect, a submitter was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. When Monsanto provided data to EPA during this period, it was with the understanding, embodied in FIFRA, that EPA was free to use any of the submitted data that were not trade secrets in considering the application of another, provided ¹¹⁰¹¹that EPA required the subsequent applicant to pay "reasonable compensation" to the original submitter. § 3(c)(1)(D), 86 Stat. 979. But the statute also gave Monsanto explicit assurance that EPA was prohibited from disclosing publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and EPA determined the data to constitute trade secrets. § 10, 86 Stat. 989. Thus, with respect to trade secrets submitted under the statutory regime in force between the time of the adoption of the 1972 amendments and the adoption of the 1978 amendments, the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive

15. We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. Thus, it is the fact that operation of the data-consideration or data-disclosure provisions will allow a competitor to register more easily its product or to use the disclosed data to improve its own technology that may constitute a taking. If, however, a public disclosure of data reveals, for example,

use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA, consistent with the authority granted it by the 1978 FIFRA amendments, were now to disclose trade-secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of FIFRA in effect between 1972 and 1978, EPA's actions would frustrate Monsanto's reasonable investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

The right to exclude others is generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S., at 176, 100 S.Ct., at 391. With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.¹⁵ ¹¹⁰¹²That the data retain usefulness for Monsanto even after they are disclosed—for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries—is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.

EPA encourages us to view the situation not as a taking of Monsanto's property

the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.

interest in the trade secrets, but as a "pre-emption" of whatever property rights Monsanto may have had in those trade secrets. Brief for Appellant 27-28. The agency argues that the proper functioning of the comprehensive FIFRA registration scheme depends upon its uniform application to all data. Thus, it is said, the Supremacy Clause dictates that the scheme not vary depending on the property law of the State in which the submitter is located. *Id.*, at 28. This argument proves too much. If Congress can "pre-empt" state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, "by *ipse dixit*, may not transform private property into public property without compensation This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S., at 164, 101 S.Ct., at 452.

¹¹⁰¹³If a negotiation or arbitration pursuant to § 3(c)(1)(D)(ii) were to yield just compensation to Monsanto for the loss in the market value of its trade-secret data suffered because of EPA's consideration of the data in connection with another application, then Monsanto would have no claim against the Government for a taking. Since no arbitration has yet occurred with respect to any use of Monsanto's data, any finding that there has been an actual taking would be premature. See *infra*, at 2881-2882.¹⁶

In summary, we hold that EPA's consideration or disclosure of data submitted by Monsanto to the agency prior to October

16. Because the record contains no findings with respect to the value of the trade-secret data at issue and because no arbitration proceeding has yet been held to determine the amount of recovery to be paid by a subsequent applicant to Monsanto, we cannot preclude the possibility that the arbitration award will be sufficient to provide Monsanto with just compensation, thus nullifying any claim against the Government for a taking when EPA uses Monsanto's data in considering another application. The statutory arbitration scheme, of course, provides for compensation only in cases where the data are con-

22, 1972, or after September 30, 1978, does not effect a taking. We further hold that EPA consideration or disclosure of health, safety, and environmental data will constitute a taking if Monsanto submitted the data to EPA between October 22, 1972, and September 30, 1978;¹⁷ the data constituted trade secrets under Missouri law; Monsanto had designated the data as trade secrets at the time of its submission; the use or disclosure conflicts with the explicit assurance of confidentiality or exclusive use contained in the statute during that period; and the operation of the arbitration provision ¹¹⁰¹⁴does not adequately compensate for the loss in market value of the data that Monsanto suffers because of EPA's use or disclosure of the trade secrets.

V

[7] We must next consider whether any taking of private property that may occur by operation of the data-disclosure and data-consideration provisions of FIFRA is a taking for a "public use." We have recently stated that the scope of the "public use" requirement of the Taking Clause is "coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984); see *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). The role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow. *Midkiff, supra*; *Berman, supra*, at 32, 75 S.Ct., at 102.

The District Court found that EPA's action pursuant to the data-consideration provisions of FIFRA would effect a taking for

considered in connection with a subsequent application, not in cases of disclosure of the data.

17. While the 1975 amendments to FIFRA purported to carry backward the protections against data consideration and data disclosure to submissions of data made on or after January 1, 1970, 89 Stat. 751, the relevant consideration for our purposes is the nature of the expectations of the submitter at the time the data were submitted. We therefore do not extend our ruling as to a possible taking to data submitted prior to October 22, 1972.

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a private use, rather than a public use, because such action benefits subsequent applicants by forcing original submitters to share their data with later applicants. 564 F.Supp., at 566. It is true that the most direct beneficiaries of EPA actions under the data-consideration provisions of FIFRA will be the later applicants who will support their applications by citation to data submitted by Monsanto or some other original submitter. Because of the data-consideration provisions, later applicants will not have to replicate the sometimes intensive and complex research necessary to produce the requisite data. This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public. *Midkiff*, 467 U.S., at 243-244, 104 S.Ct., at 2330-2331; *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923); *Block v. Hirsh*, 256 U.S. 135, 155, 41 S.Ct. 458, 459, 65 L.Ed. 865 (1921).

So long as the taking has a conceivable public character, "the means by which it will be attained is ... for Congress to determine." *Berman*, 348 U.S., at 33, 75 S.Ct., at 103. Here, the public purpose behind the data-consideration provisions is clear from the legislative history. Congress believed that the provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Allowing applicants for registration, upon payment of compensation, to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products.

18. Monsanto argues that EPA and, by implication, Congress misapprehended the true "barriers to entry" in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry. Brief for Appellee 35, n. 48. Such economic arguments are better directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated

S.Rep. No. 95-334, at 30-31, 40-41; 124 Cong.Rec. 29756-29757 (1978) (remarks of Sen. Leahy). Such a procompetitive purpose is well within the police power of Congress. See *Midkiff*, 467 U.S., at 241-242, 104 S.Ct., at 2329-2330.¹⁸

Because the data-disclosure provisions of FIFRA provide for disclosure to the general public, the District Court did not find that those provisions constituted a taking for a private use. Instead, the court found that the data-disclosure provisions served no use. It reasoned that because EPA, before registration, must determine that a product is safe and effective, and because the label on a pesticide, by statute, must set forth the nature, contents, and purpose of the pesticide, the label provided the public with all the assurance it needed that the product is safe and effective. 564 F.Supp., at 567, and n. 4. It is enough for us to state that the optimum amount of disclosure to the public is for Congress, not the courts, to decide, and that the statute embodies Congress' judgment on that question. See 123 Cong.Rec., at 25706 (remarks of Sen. Leahy). We further observe, however, that public disclosure can provide an effective check on the decision-making processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product. See H.R.Rep. No. 95-343, p. 8 (1977) (remarks of Douglas M. Costle); S.Rep. No. 95-334, at 13.

We therefore hold that any taking of private property that may occur in connection with EPA's use or disclosure of data submitted to it by Monsanto between October 22, 1972, and September 30, 1978, is a taking for a public use.

objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective. *Midkiff*, 467 U.S., at 242-243, 104 S.Ct., at 2330 (slip op. 12); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-672, 101 S.Ct. 2070, 2084-2085, 68 L.Ed.2d 514 (1981).

VI

[8, 9] Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law,¹⁹ when a suit for compensation can be brought against the sovereign subsequent to the taking. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, n. 18, 69 S.Ct. 1457, 1465, n. 18, 93 L.Ed. 1628 (1949). The Fifth Amendment does not require that compensation precede the taking. *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637 (1932). Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491.²⁰ *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction¹⁰¹⁷ of the Court of Claims to hear and determine"); *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 21, 60 S.Ct. 413, 415, 84 L.Ed. 554 (1940).

In this case, however, the District Court enjoined EPA action under the data-consideration and data-disclosure provisions of FIFRA, finding that a Tucker Act remedy is not available for any taking of property that may occur as a result of the operation of those provisions. We do not agree with the District Court's assessment that no Tucker Act remedy will lie for whatever taking may occur due to EPA activity pursuant to FIFRA.

[10] In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether

19. Any taking of private property that would occur as a result of EPA disclosure or consideration of data submitted by Monsanto between October 22, 1972, and September 30, 1978, is, of course, duly authorized by FIFRA as amended in 1978.

20. The Tucker Act, 28 U.S.C. § 1491, reads, in relevant part:

Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded ... upon the Constitution.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126, 95 S.Ct. 335, 350, 42 L.Ed.2d 320 (1974) (emphasis in original).

Nowhere in FIFRA or in its legislative history is there discussion of the interaction between FIFRA and the Tucker Act. Since the Tucker Act grants what is now the Claims Court "jurisdiction to render judgment upon any claim against the United States founded ... upon the Constitution," we would have to infer a withdrawal of jurisdiction with respect to takings under FIFRA from the structure of the statute or from its legislative history. A withdrawal of jurisdiction would amount to a partial repeal of the Tucker Act. This Court has recognized, however, that "repeals by implication are disfavored." *Regional Rail Reorganization Act Cases*, 419 U.S., at 133, 95 S.Ct., at 353. See, e.g., *Amell v. United States*, 384 U.S. 158, 165-166, 86 S.Ct. 1384, 1388, 16 L.Ed.2d 445 (1966); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 565, 83 S.Ct. 520, 526, 9 L.Ed.2d 523 (1963); *United States v. Borden Co.*, 308 U.S. 188, 198-199, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939).

[11, 12] ¹⁰¹⁸Monsanto argues that FIFRA's provision that an original submitter of data who fails to participate in a procedure for reaching an agreement or in an arbitration proceeding, or fails to comply with the terms of an agreement or arbitration decision, "shall forfeit the right to compensation for the use of the data in support of the application," § 3(c)(1)(D)(ii), indicates Congress' intent that there be no

"The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

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Tucker Act remedy. But where two statutes are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Regional Rail Reorganization Act Cases*, 419 U.S., at 133-134, quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, contrary to Monsanto's claim, it is entirely possible for the Tucker Act and FIFRA to co-exist. The better interpretation, therefore, of the FIFRA language on forfeiture, which gives force to both the Tucker Act and the FIFRA provision, is to read FIFRA as implementing an exhaustion requirement as a precondition to a Tucker Act claim. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S., at 154-156, 95 S.Ct., at 364-365 (viewing Tucker Act remedy as covering any shortfall between statutory remedy and just compensation).²¹

With respect to data disclosure to the general public, FIFRA provides for no compensation whatsoever. Thus, Monsanto's argument that Congress intended the compensation scheme provided in FIFRA to be exclusive has no relevance to the data-disclosure provisions of § 10.

[13] Congress in FIFRA did not address the liability of the Government to pay just compensation should a taking occur. Congress' failure specifically to mention or provide for recourse¹⁰¹⁹ against the Government may reflect a congressional belief that use of data by EPA in the ways authorized by FIFRA effects no Fifth Amendment taking or it may reflect Congress' assumption that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur. In any event, the failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act reme-

21. Exhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred. To the extent that the operation

dy. "[W]hether or not the United States so intended," any taking claim under FIFRA is one "founded . . . upon the Constitution," and is thus remediable under the Tucker Act. *Regional Rail Reorganization Act Cases*, 419 U.S., at 126, 95 S.Ct., at 350. Therefore, where the operation of the data-consideration and data-disclosure provisions of FIFRA effect a taking of property belonging to Monsanto, an adequate remedy for the taking exists under the Tucker Act. The District Court erred in enjoining the taking.

VII

Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution. Because of the availability of the Tucker Act, Monsanto's ability to obtain just compensation does not depend solely on the validity of the statutory compensation scheme. The operation of the arbitration procedure affects only Monsanto's ability to vindicate its statutory right to obtain compensation from a subsequent applicant whose registration application relies on data originally submitted by Monsanto, not its ability to vindicate its constitutional right to just compensation.

Monsanto did not allege or establish that it had been injured by actual arbitration under the statute. While the District Court acknowledged that Monsanto had received several offers of compensation from applicants for registration, 564 F.Supp., at 561, it did not find that EPA had considered¹⁰²⁰ Monsanto's data in considering another application. Further, Monsanto and any subsequent applicant may negotiate and reach agreement concerning an outstanding offer. If they do not reach agreement, then the controversy must go to arbi-

of the statute provides compensation, no taking has occurred and the original submitter of data has no claim against the Government.

tration. Only after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S., at 138, 95 S.Ct., at 355.

VIII

We find no constitutional infirmity in the challenged provisions of FIFRA. Operation of the provisions may effect a taking with respect to certain health, safety, and environmental data constituting trade secrets under state law and designated by Monsanto as trade secrets upon submission to EPA between October 22, 1972, and September 30, 1978.²² But whatever taking may occur is one for a public use, and a Tucker Act remedy is available to provide Monsanto with just compensation. Once a taking has occurred, the proper forum for Monsanto's claim is the Claims Court. Monsanto's challenges to the constitutionality of the arbitration procedure are not yet ripe for review. The judgment of the District Court is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE took no part in the consideration or decision of this case.

¹¹⁰²¹Justice O'CONNOR, concurring in part and dissenting in part.

I join all of the Court's opinion except for Part IV-B and the Court's conclusion, *ante*, at 2878, that "EPA's consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972 . . . does not effect a taking." In my view public disclosure of pre-1972 data would

²² We emphasize that nothing in our opinion prohibits EPA's consideration or disclosure, in a manner authorized by FIFRA, of data submitted to it by Monsanto. Our decision merely holds that, with respect to a certain limited class of

effect a taking. As to consideration of this information within EPA in connection with other license applications not submitted by Monsanto, I believe we should remand to the District Court for further factual findings concerning Monsanto's expectations regarding interagency uses of trade secret information prior to 1972.

It is important to distinguish at the outset public disclosure of trade secrets from use of those secrets entirely within EPA. Internal use may undermine Monsanto's competitive position within the United States, but it leaves Monsanto's position in foreign markets undisturbed. As the Court notes, *ante*, at 2876, n. 11, the likely impact on foreign market position is one that Monsanto would weigh when deciding whether to submit trade secrets to EPA. Thus a submission of trade secrets to EPA that implicitly consented to further use of the information within the agency is not necessarily the same as one that implicitly consented to public disclosure.

It seems quite clear—indeed the Court scarcely disputes—that public disclosure of trade secrets submitted to the Federal Government before 1972 was neither permitted by law, nor customary agency practice before 1972, nor expected by applicants for pesticide registrations. The Court correctly notes that the Trade Secrets Act, 18 U.S.C. § 1905, flatly proscribed such disclosures. The District Court expressly found that until 1970 it was Government "policy that the data developed and submitted by companies such as [Monsanto] be maintained confidentially by the [administrative agency] and was not to be disclosed without the permission of the data submitter." *Monsanto Co. v. Acting Administrator, EPA*, 564 F.Supp. 552, 564 (1983). Finally, the Court, *ante*, at ¹¹⁰²²2876, n. 14, quotes from a 1972 statement by the National Agricultural Chemicals Association that "registration information submitted to the

data submitted by Monsanto to EPA, EPA actions under the data-disclosure and data-consideration provisions of the statute may give Monsanto a claim for just compensation.

Administrator has not routinely been made available for public inspection." It is hard to imagine how a pre-1972 applicant for a pesticide license would not, under these circumstances, have formed a very firm expectation that its trade secrets submitted in connection with a pesticide registration would not be disclosed to the public.

The Court's analysis of this question appears in a single sentence: an "industry that long has been the focus of great public concern and significant government regulation" can have no reasonable expectation that the Government will not later find public disclosure of trade secrets to be in the public interest. *Ante*, at 2876. I am frankly puzzled to read this statement in the broader context of the Court's otherwise convincing opinion. If the degree of Government regulation determines the reasonableness of an expectation of confidentiality, Monsanto had as little reason to expect confidentiality *after* 1972 as before, since the 1972 amendments were not deregulatory in intent or effect. And the Court entirely fails to explain why the nondisclosure provision of the 1972 Act, § 10, 86 Stat. 989, created any greater expectation of confidentiality than the Trade Secrets Act. Section 10 prohibited EPA from disclosing "trade secrets or commercial or financial information." No penalty for disclosure was prescribed, unless disclosure was with the intent to defraud. The Trade Secrets Act, 18 U.S.C. § 1905, prohibited and still prohibits Government disclosure of trade secrets and other commercial or financial information revealed during the course of official duties, on pain of substantial criminal sanctions. The Court acknowledges that this prohibition has always extended to formal and official agency action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 298-301, 99 S.Ct. 1705, 1715-1717, 60 L.Ed.2d 208 (1979). It seems to me that the criminal sanctions in the Trade Secrets Act therefore created at least as strong an expectation of privacy before 1972 as the precatory language of § 10 created after 1972.

¹⁰²³The Court's tacit analysis seems to be this: an expectation of confidentiality can

be grounded only on a statutory nondisclosure provision situated in close physical proximity, in the pages of the United States Code, to the provisions pursuant to which information is submitted to the Government. For my part, I see no reason why Congress should not be able to give effective protection to all trade secrets submitted to the Federal Government by means of a single, overarching, trade secrets provision. We routinely assume that wrongdoers are put on notice of the entire contents of the Code, though in all likelihood most of them have never owned a copy or opened a single page of it. It seems strange to assume, on the other hand, that a company like Monsanto, well served by lawyers who undoubtedly do read the Code, could build an expectation of privacy in pesticide trade secrets only if the assurance of confidentiality appeared in Title 7 itself.

The question of interagency use of trade secrets before 1972 is more difficult because the Trade Secrets Act most likely does not extend to such uses. The District Court found that prior to October 1972 only two competitors' registrations were granted on the basis of data submitted by Monsanto, and that Monsanto had no knowledge of either of these registrations prior to their being granted. 564 F.Supp., at 564. The District Court also found that before 1970 it was agency policy "that the data developed and submitted by companies such as [Monsanto] could not be used to support the registration of another's product without the permission of the data submitter." *Ibid.* This Court, however, concludes on the basis of two cited fragments of evidence that "the evidence against the District Court's finding seems overwhelming." *Ante*, at 2876, n. 14. The Court nevertheless wisely declines to label the District Court's findings of fact on this matter clearly erroneous. Instead, the Court notes that the "District Court did not find that the policy of the Department [of Agriculture] was publicly known at the time [before 1970] or that there was any explicit guarantee of exclusive use." *Ibid.* This begs exactly the right question, but

the ¹⁰²⁴Court firmly declines to answer it. The Court simply states that "there is some evidence that the practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known." *Ante*, at 2876 (footnote omitted). And then, without more ado, the Court declares that with respect to pre-1972 data Monsanto "could not have had a 'reasonable investment-backed expectation' that EPA would . . . use [the data] exclusively for the purpose of considering the Monsanto application in connection with which the data were submitted." *Ante*, at 2877.

If one thing is quite clear it is that the extent of Monsanto's pre-1972 expectations, whether reasonable and investment-backed or otherwise, is a heavily factual question. It is fairly clear that the District

Court found that those expectations existed as a matter of fact and were reasonable as a matter of law. But if the factual findings of the District Court on this precise question were not as explicit as they might have been, the appropriate disposition is to remand to the District Court for further factfinding. That is the course I would follow with respect to interagency use of trade secrets submitted by Monsanto before 1972.



cedural option we leave to the courts called upon to administer it.³⁰

IV

For the reasons set forth above, we agree with the Court of Appeals that no interest was due on the condemnation award paid to petitioner. Petitioner's meritorious contention that it is constitutionally entitled to the value of its land on the date of the taking, not on the date of the valuation, can be accommodated by allowing petitioner, on remand, to present evidence pertaining to change in the market value of the tract during the period between those two dates. On the understanding that petitioner will be afforded that opportunity, the judgment is

Affirmed.



467 U.S. 20, 81 L.Ed.2d 17

120 SEATTLE TIMES COMPANY, et al., Petitioners

v.

Keith Milton RHINEHART et al.

No. 82-1721.

Argued Feb. 21, 1984.

Decided May 21, 1984.

Religious organization, its spiritual leader, and other members brought defamation action against newspapers. Newspapers' motions to compel discovery were granted, but protective orders were issued covering information relating to donations to the group, and the parties appealed. The Supreme Court of Washington, 98

believe that the value of his property changed materially between valuation and payment.

30. We do not mean to suggest that the constitutional difficulty discussed in this section can be solved only by affording a condemnee in petitioner's position an opportunity to file a motion to amend the judgment under Rule 60(b). Ei-

Wash.2d 226, 654 P.2d 673, affirmed and newspapers sought certiorari. The Supreme Court, Justice Powell, held that where a protective order is entered on a showing of good cause, it is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if it is gained from other sources in addition to the discovery, it does not offend the First Amendment.

Affirmed.

Justice Brennan filed a concurring opinion in which Justice Marshall joined.

1. Pretrial Procedure ⇐31, 33

Under the Washington discovery rules, which are modeled on the federal rules, there is no differentiation between information that is private or intimate and that to which no privacy interests attach; only express limitations are that the information sought is not privileged and is relevant to the subject matter of the pending action. Wash.CR 26.

2. Federal Civil Procedure ⇐1276

In determining whether litigant is free to disseminate information which he has obtained pursuant to court ordered discovery, it is necessary to consider whether the practice furthers an important substantial governmental interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms imposed by protective order is greater than necessary or essential to protect the particular governmental interest involved. U.S. C.A. Const.Amend. 1.

3. Constitutional Law ⇐55

Rules authorizing discovery adopted by state legislature are a matter of legislative grace.

ther Congress or a lower court might perceive a more easily administrable way of ensuring that the compensation paid to the owner of condemned land does not fall substantially below the fair market value of the property on the date of the taking.

4. Constitutional Law ⇨90.1(3)

Litigant has no First Amendment right of access to information made available only for purposes of trying his suit. U.S. C.A. Const.Amend. 1.

5. Constitutional Law ⇨90.1(3)

Continued court control over discovered information does not raise the same spectre of government censorship that such control might suggest in other situations.

6. Federal Civil Procedure ⇨1313, 1472

Pretrial depositions and interrogatories are not public components of a civil trial.

7. Records ⇨32

Pretrial depositions and interrogatories were not open to the public at common law.

8. Federal Civil Procedure ⇨1276

Restrictions placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information and need not be viewed in that manner for First Amendment purposes. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇨90.1(3)

Order prohibiting dissemination of discovered information before trial is not the type of classic prior restraint which requires exacting First Amendment scrutiny. U.S.C.A. Const.Amend. 1.

10. Federal Civil Procedure ⇨1271

Protective order prevents a party only from disseminating that information obtained through use of the discovery process; party may disseminate the identical information covered by the protective order as long the information is gained through means independent of the court's processes.

11. Pretrial Procedure ⇨41

Because of the liberality of pretrial discovery permitted by Washington rules, which were modeled on federal discovery rules, it is necessary for the trial court to

have the authority to issue protective orders. Wash.CR 26(c).

12. Constitutional Law ⇨90.1(3)

Provision for protective orders contained in Washington rules for discovery does not require First Amendment scrutiny. Wash.CR 26(c); U.S.C.A. Const. Amend. 1.

13. Constitutional Law ⇨90.1(3)

Imposition on newspapers of protective order covering information concerning contributors to religious organization, which information was acquired by the newspapers pursuant to discovery in defamation action brought against the newspapers by the religious organization and its members, did not violate First Amendment rights of the newspapers. U.S.C.A. Const.Amend. 1.

14. Constitutional Law ⇨90.1(3)

Where protective order is entered on showing of good cause, is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment. U.S.C.A. Const.Amend. 1.

Syllabus *

Respondent Rhinehart is the spiritual leader of a religious group, respondent Aquarian Foundation. In recent years, petitioner newspaper companies published several stories about Rhinehart and the Foundation. A damages action for alleged defamation and invasions of privacy was brought in a Washington state court by respondents (who also include certain members of the Foundation) against petitioners (who also include the authors of the articles and their spouses). During the course of extensive discovery, respondents refused to disclose certain information, including the identity of the Foundation's donors and members. Pursuant to state discovery Rules modeled on the Federal Rules of Civil Procedure, the trial court issued an

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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order compelling respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. However, pursuant to the State's Rule 26(c), the court also issued a protective order prohibiting petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. In seeking the protective order, respondents had submitted affidavits of several Foundation members averring that public release of the information would adversely affect Foundation membership and income and would subject its members to harassment and reprisals. By its terms, the protective order did not apply to information gained by means other than the discovery process. The Washington Supreme Court affirmed both the production order and the protective order, concluding that even if the latter order was assumed to constitute a prior restraint of free expression, the trial court had not violated its discretion in issuing the order.

Held: The protective order issued in this case does not offend the First Amendment. Pp. 2205-2210.

(a) In addressing the First Amendment question presented here, it is necessary to consider whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment 121 freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224. Pp. 2206-2207.

(b) Judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in other contexts. Rules authorizing discovery are

a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. Furthermore, restraints placed on discovered information are not a restriction on a traditionally public source of information. Pp. 2207-2208.

(c) Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression. Liberal pretrial discovery under the State's Rules has a significant potential for abuse. There is an opportunity for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The prevention of such abuse is sufficient justification for the authorization of protective orders. Pp. 2208-2209.

(d) The provision for protective orders in the Washington Rules—conferring broad discretion on the trial court—requires, in itself, no heightened First Amendment scrutiny. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders. P. 2209.

(e) In this case, the trial court entered the protective order upon a showing that constituted good cause as required by Rule 26(c). Also, the order is limited to the context of pretrial civil discovery, and does not restrict dissemination if the information is obtained from other sources. It is sufficient for purposes of this Court's decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law. Pp. 2209-2210.

98 Wash.2d 226, 654 P.2d 673 (1982), affirmed.

Evan L. Schwab, Seattle, Wash., for petitioners.

122Malcolm L. Edwards, Seattle, Wash., for respondents.

Justice POWELL delivered the opinion of the Court.

This case presents the issue whether parties to civil litigation have a First Amendment right to disseminate, in advance of trial, information gained through the pre-trial discovery process.

I

Respondent Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. The Foundation has fewer than 1,000 members, most of whom live in the State of Washington. Aquarian beliefs include life after death and the ability to communicate with the dead through a medium. Rhinehart is the primary Aquarian medium.

In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between \$35,000 and \$50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their lgowns and bikinis and sang . . ."

1. The record is unclear as to whether all five of the female plaintiffs participated in the "chorus line" described in the 1978 articles. The record also does not disclose whether any of the female plaintiffs were mentioned by name in the articles.
2. Although the complaint does not allege specifically that the articles caused a decline in membership of the Foundation, respondents' an-

App. 25a. The two articles that appeared in 1979 referred to a purported connection between Rhinehart and Lou Ferrigno, star of the popular television program, "The Incredible Hulk."

II

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs.¹ The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants—petitioners here—knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." *Id.*, at 8a. With respect to the Foundation, the complaint also states: "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes." *Id.*, at 9a. The complaint alleges that the articles misrepresented the role of the Foundation's "choir" and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked . . ." *Id.*, at 6a. The complaint requests \$14,100,000 in damages for the alleged defamation and invasions of privacy.²

swers to petitioners' interrogatories raised this issue. In response to petitioners' request that respondents explain the damages they are seeking, respondents claimed that the Foundation had experienced a drop in membership in Hawaii and Washington "from about 300 people to about 150 people, and [a] concurrent drop in contributions." Record 503.

¹²⁴Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses.³ Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart's income tax returns. Respondents refused, however, to disclose certain financial information,⁴ the identity of the Foundation's donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion under the State's Civil Rule 37 requesting an order compelling discovery.⁵ In their supporting memorandum, petitioners recognized that the principal issue as to discovery was respondents' "refusa[li] to permit any effective inquiry into their financial affairs, such as the source of their donations, their financial transactions, uses of ¹²⁵their wealth and assets, and their financial condition in general." Record 350. Respondents opposed the motion, arguing in particular that compelled production of the

identities of the Foundation's donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association. Respondents also moved for a protective order preventing petitioners from disseminating any information gained through discovery. Respondents noted that petitioners had stated their intention to continue publishing articles about respondents and this litigation, and their intent to use information gained through discovery in future articles.

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. Relying on *In re Halkin*, 194 U.S. App.D.C. 257, 598 F.2d 176 (1979),⁶ the court refused to issue a protective order. It stated that the facts alleged by respondents in support of their motion for such an order were too conclusory to warrant a finding of "good cause" as required²⁶ by Washington Superior Court Civil Rule

the county where the action is pending, for an order compelling discovery"

3. Affirmative defenses included contentions that the articles were substantially true and accurate, that they were privileged under the First and Fourteenth Amendments, that the statute of limitations had run as to the 1973 articles, that the individual respondents had consented to any invasions of privacy, and that respondents had no reasonable expectation of privacy when performing before 1,100 prisoners.
4. Rhinehart also refused to reveal the current address of his residence. He submitted an affidavit stating that he had relocated out of fear for his safety and that disclosure of his current address would subject him to risks of bodily harm. Petitioners promptly moved for an order compelling Rhinehart to give his address and the trial court granted the motion.
5. Washington Superior Court Civil Rule 37 provides in relevant part: "A party, upon reasonable notice to other parties and all persons affected thereby, may apply to the court in the county where the deposition was taken, or in

6. The *Halkin* decision was debated by the courts below. Prior to *Halkin*, the only Federal Court of Appeals to consider the question directly had understood that the First Amendment did not affect a trial court's authority to restrict dissemination of information produced during pretrial discovery. See *International Products Corp. v. Koons*, 325 F.2d 403, 407-408 (CA2 1963). *Halkin* considered the issue at length. Characterizing a protective order as a "paradigmatic prior restraint," *Halkin* held that such orders require close scrutiny. The court also held that before a court should issue a protective order that restricts expression, it must be satisfied that "the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." 194 U.S.App.D.C., at 272, 598 F.2d, at 191 (footnotes omitted).

26(c).⁷ The court stated, however, that the denial of respondents' motion was "without prejudice to [respondents'] right to move for a protective order in respect to specifically described discovery materials and a factual showing of good cause for restraining defendants in their use of those materials." Record 16.

Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request. The affidavits detailed a series of letters and telephone calls defaming the Foundation, its members, and Rhinehart—including several that threatened physical harm to those associated with the Foundation. The affiants also described incidents at the Foundation's headquarters involving attacks, threats, and assaults directed at Foundation members by anonymous individuals and groups. In general, the affidavits averred that public release of the donor lists would adversely affect Foundation membership and income¹⁷ and would subject its members to additional harassment and reprisals.

7. Rule 26(c) provides:

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

Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." App. 65a. The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process.⁸ In an accompanying opinion, the trial court recognized that the protective order would restrict petitioners' right to publish information obtained by discovery, but the court reasoned that the restriction was necessary to avoid the "chilling effect" that dissemination would have on "a party's willingness to bring his case to court." Record 63.

Respondents appealed from the trial court's production order, and petitioners

Rule 26(c) is typical of the provisions adopted in many States.

8. The relevant portions of the protective order state:

"2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.

"3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes." App. 65a.

appealed from the protective order. ¹²The Supreme Court of Washington affirmed both. 98 Wash.2d 226, 654 P.2d 673 (1982). With respect to the protective order, the court reasoned:

"Assuming then that a protective order may fall, ostensibly, at least, within the definition of a 'prior restraint of free expression', we are convinced that the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification. The need to preserve that integrity is adequate to sustain a rule like CR 26(c) which authorizes a trial court to protect the confidentiality of information given for purposes of litigation." *Id.*, at 256, 654 P.2d, at 690.⁹

The court noted that "[t]he information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had a recognizable privacy interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression." *Id.*, at 256-257, 654 P.2d, at

9. Although the Washington Supreme Court assumed, *arguendo*, that a protective order could be viewed as an infringement on First Amendment rights, the court also stated:

"A persuasive argument can be made that when persons are required to give information which they would otherwise be entitled to keep to themselves, in order to secure a government benefit or perform an obligation to that government, those receiving that information waive the right to use it for any purpose except those which are authorized by the agency of government which exacted the information." 98 Wash.2d, at 239, 654 P.2d, at 681.

10. The Washington Supreme Court also held that, because the protective order shields respondents from "abuse of the discovery privilege," respondents could not object to the order compelling production. We do not consider here that aspect of the Washington Supreme Court's decision.

11. See n. 6, *supra*.

12. In *San Juan Star*, the Court of Appeals for the First Circuit considered and rejected *Halkin's* approach to the constitutionality of protective orders. Although the *San Juan* court held that protective orders may implicate First

690. Therefore, the court concluded, the trial court had not abused its discretion in issuing the protective order.¹⁰

The Supreme Court of Washington recognized that its holding conflicts with the holdings of the United States Court of Appeals for the District of Columbia Circuit in *In re Halkin*, 194 U.S.App.D.C. 257, 598 F.2d 176 (1979),¹¹ and applies a different standard from that of the Court of Appeals for the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108 (1981).¹² We granted certiorari to resolve the conflict.¹³ 464 U.S. 812, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983). We affirm.

III

Most States, including Washington, have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure. F. James & G. Hazard, *Civil Procedure* 179 (1977).¹⁴ Rule 26(b)(1) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." It

Amendment interests, the court reasoned that such interests are somewhat lessened in the civil discovery context. The court stated: "In general, then, we find the appropriate measure of such limitations in a standard of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake" 662 F.2d, at 116.

13. The holding of the Supreme Court of Washington is consistent with the decision of the Court of Appeals for the Second Circuit in *International Products Corp. v. Koons*, 325 F.2d, at 407-408.

14. See *Bushman v. New Holland Division*, 83 Wash.2d 429, 433, 518 P.2d 1078, 1080 (1974). The Washington Supreme Court has stated that when the language of a Washington Rule and its federal counterpart are the same, courts should look to decisions interpreting the Federal Rule for guidance. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wash.2d 34, 37-38, 499 P.2d 869, 871 (1972). The Washington Rule that provides for the scope of civil discovery and the issuance of protective orders is virtually identical to its counterpart in the Federal Rules of Civil Procedure. Compare Wash.Super.Ct.Civ. Rules 26(b) and (c) with Fed.Rules Civ.Proc. 26(b) and (c).

further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought "appears reasonably calculated to lead to the discovery³⁰ of admissible evidence." Wash.Super.Ct.Civil Rule 26(b)(1); *Trust Fund Services v. Aro Glass Co.*, 89 Wash.2d 758, 763, 575 P.2d 716, 719 (1978); cf. 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2008 (1970).¹⁵

[1] The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.¹⁶ If a litigant fails to comply with a request for discovery, the court may issue an order directing compliance that is enforceable by the court's contempt powers. Wash.Super.Ct.Civil Rule 37(b).¹⁷

Petitioners argue that the First Amendment imposes strict limits on the availability of any judicial order that has the effect of restricting expression. They contend that civil discovery is not different from other sources of information, and that therefore the information is "protected speech" for First Amendment purposes. Petitioners assert the right in this case to disseminate any information gained

15. Washington Superior Court Civil Rule 26(b)(1), identical to Federal Rule of Civil Procedure 26(b)(1) in effect at the time, provides in full:

"In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

through discovery. They do recognize that in limited circumstances, not thought to be present here, some information may be restrained. They submit, however:

"When a protective order seeks to limit expression, it may do so only if the proponent shows a compelling governmental interest. Mere speculation and conjecture are insufficient. Any restraining order, moreover, must be narrowly drawn and precise. Finally, before issuing such an order a court must determine that there are no alternatives which intrude less directly on expression." Brief for Petitioners 10.

We think the rule urged by petitioners would impose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process.

IV

It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court. In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents. This interest may well include most—and possibly all—of what has been discovered as a result of the court's order under Rule 26(b)(1). It does not necessarily follow, however, that a litigant has an unre-

16. Under Rules 30 and 31, a litigant may depose a third party by oral or written examination. The litigant can compel the third party to be deposed and to produce tangible evidence at the deposition by serving the third party with a subpoena pursuant to Rule 45. Rule 45(b)(1) authorizes a trial court to quash or modify a subpoena of tangible evidence "if it is unreasonable and oppressive." Rule 45(f) provides: "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."

17. In addition to its contempt power, Rule 37(b)(2) authorizes a trial court to enforce an order compelling discovery by other means including, for example, regarding designated facts as established for purposes of the action. Cf. Fed.Rule Civ.Proc. 37(b)(2)(A).

Cite as 104 S.Ct. 2199 (1984)

strained right to disseminate information that has been obtained through pretrial discovery. For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that "[f]reedom of speech . . . does not comprehend the right to speak on any subject at any time." *American Communications Assn. v. Douds*, 339 U.S. 382, 394-395, 70 S.Ct. 674, 681-682, 94 L.Ed. 925 (1950).

[2] ¹³²The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used. In addressing that question it is necessary to consider whether the "practice in question [further]s an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procurier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974); see *Brown v. Glines*, 444 U.S. 348, 354-355, 100 S.Ct. 594, 599-600, 62 L.Ed.2d 540 (1980); *Buckley v. Valeo*, 424

18. Although litigants do not "surrender their First Amendment rights at the courthouse door," *In re Halkin*, 194 U.S.App.D.C., at 268, 598 F.2d, at 186, those rights may be subordinated to other interests that arise in this setting. For instance, on several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563, 96 S.Ct. 2791, 2804-2805, 49 L.Ed.2d 683 (1976); *id.*, at 601, and n. 27, 96 S.Ct., at 2823 and n. 27 (BRENNAN, J., concurring in judgment); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-311, 97 S.Ct. 1045, 1046-1047, 51 L.Ed.2d 355 (1977); *Sheppard v. Maxwell*, 384 U.S. 333, 361, 86 S.Ct. 1507, 1521-1522, 16 L.Ed.2d 600 (1966). "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104, n. 21, 101 S.Ct. 2193, 2201-2202 n. 21, 68 L.Ed.2d 693 (1981).

U.S. 1, 25, 96 S.Ct. 612, 637-638, 46 L.Ed.2d 659 (1976).

A

[3-5] At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective order, such as the one at issue here, may cause. As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information"). Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations. See *In re Halkin*, 194 U.S.App. D.C., at 287, 598 F.2d, at 206-207 (Wilkey, J., dissenting).¹⁸

[6-8] ¹³³Moreover, pretrial depositions and interrogatories are not public components of a civil trial.¹⁹ Such proceedings

19. Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. See Fed. Rule Civ. Proc. 5(d). Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. See *ibid.*; Wash. Super. Ct. Civil Rule 26(c). Federal district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. See, e.g., C.D. Cal. Rule 8.3; S.D. N.Y. Civ. Rule 19. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

were not open to the public at common law, *Gannett Co. v. DePasquale*, 443 U.S. 368, 389, 99 S.Ct. 2898, 2910, 61 L.Ed.2d 608 (1979), and, in general, they are conducted in private as a matter of modern practice. See *id.*, at 396, 99 S.Ct., at 2913-2914 (BURGER, C.J., concurring); Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L.Rev. 1 (1983). Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

[9,10] Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. See *Gannett Co. v. DePasquale*,¹² *supra*, at 399, 99 S.Ct., at 2915 (POWELL, J., concurring). As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would

20. See Comments of the Advisory Committee on the 1983 Amendments to Fed. Rule Civ. Proc. 26, 28 U.S.C.App., pp. 729-730 (1982 ed., Supp. I). In *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), the Court observed: "There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse." *Id.*, at 176-177, 99 S.Ct., at 1648-1649 (footnote omitted); see also *id.*, at 179, 99 S.Ct., at 1650 (POWELL, J., concurring). But abuses of the Rules by litigants, and sometimes the inadequate oversight of discovery by trial courts, do not in any respect lessen the impor-

restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.

B

[11] Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression. *Procunier, supra*, at 413, 94 S.Ct., at 1811. The Washington Civil Rules enable parties to litigation to obtain information "relevant to the subject matter involved" that they believe will be helpful in the preparation and trial of the case. Rule 26, however, must be viewed in its entirety. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.²⁰ This abuse is not limited to 133 matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.²¹ The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the

tance of discovery in civil litigation and the government's substantial interest in protecting the integrity of the discovery process.

21. Cf. *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488-491, 95 S.Ct. 1029, 1042-1044, 43 L.Ed.2d 328 (1975). Rule 26(c) includes among its express purposes the protection of a "party or person from annoyance, embarrassment, oppression or undue burden or expense." Although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.

hands of third parties may be subject to discovery.

There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. Cf. *Herbert v. Lando*, 441 U.S. 153, 176–177, 99 S.Ct. 1635, 1648–1649, 60 L.Ed.2d 115 (1979); *Gumbel v. Pitkin*, 124 U.S. 131, 145–146, 8 S.Ct. 379, 384–385, 31 L.Ed. 374 (1888). As stated by Judge Friendly in *International Products Corp. v. Koons*, 325 F.2d 403, 407–408 (CA2 1963), “[w]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court’s jurisdiction to do this under the inherent ‘equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices’” (citing *Gumbel v. Pitkin, supra*). The prevention of the abuse that can attend the coerced production of information under 136a State’s discovery rule is sufficient justification for the authorization of protective orders.²²

C

[12] We also find that the provision for protective orders in the Washington Rules requires, in itself, no heightened First Amendment scrutiny. To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. The Legislature of the State of Washington, following the example of the Congress in its approval of the Federal

22. The Supreme Court of Washington properly emphasized the importance of ensuring that potential litigants have unimpeded access to the courts: “[A]s the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.” 98 Wash.2d 226, 254, 654 P.2d 673, 689 (1982). Cf. *California Motor Transport Co. v. Trucking Un-*

Rules of Civil Procedure, has determined that such discretion is necessary, and we find no reason to disagree. The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery.²³ The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

V

[13, 14] The facts in this case illustrate the concerns that justifiably may prompt a court to issue a protective order. As we have noted, the trial court’s order allowing discovery was extremely broad. It compelled respondents—among other things—to identify all persons who had made donations over a 5-year period to Rhinehart and the Aquarian Foundation, together with the amounts donated. In effect the order would compel disclosure of membership as well as sources of financial support. The Supreme Court of Washington found that dissemination of this information would “result in annoyance, embarrassment and even oppression.” 98 Wash.2d, at 257, 654 P.2d, at 690. It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court’s decision to issue a protective order pursuant to a constitutional state law. We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other

limited, 404 U.S. 508, 510, 92 S.Ct. 609, 611–612, 30 L.Ed.2d 642 (1972); *NAACP v. Button*, 371 U.S. 415, 429–431, 83 S.Ct. 328, 335–337, 9 L.Ed.2d 405 (1963).

23. In addition, heightened First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals, as this case illustrates. See, e.g., *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 866 (E.D.Pa.1981).

sources, it does not offend the First Amendment.²⁴

The judgment accordingly is
Affirmed.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring.

The Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment. As the Court acknowledges, before approving such protective orders, "it is necessary to consider whether the 'practice in question [further] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Ante*, at 2207 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974)).

In this case, the respondents opposed discovery, and in the alternative sought a protective order for discovered materials, because the "compelled production of the identities of the Foundation's donors and members would violate the First Amendment rights of members and donors to privacy, freedom of religion, and freedom of association." *Ante*, at 2203. The Supreme Court of Washington found that these interests constituted the requisite "good cause" under the State's Rule 26(c) (upon "good cause shown," the court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). 98 Wash.2d 226, 256, 654 P.2d 673, 690 (1982). Given this finding, the court approved a protective order limited to "information ... regarding the financial affairs of the various [respondents], the

24. It is apparent that substantial government interests were implicated. Respondents, in requesting the protective order, relied upon the rights of privacy and religious association. Both the trial court and the Supreme Court of

names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various [respondents]." *Ante*, at 2204, n. 8. I agree that the respondents' interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment. I therefore join the Court's opinion.



467 U.S. 39, 81 L.Ed.2d 31

J. Guy WALLER, Petitioner,

v.

GEORGIA.

Clarence COLE et al., Petitioner,

v.

GEORGIA.

Nos. 83-321, 83-322.

Argued March 27, 1984.

Decided May 21, 1984.

Defendants were convicted in the State Court, Fulton County, Osgood O. Williams, J., of commercial gambling and communicating gambling information, in violation of the Racketeer Influenced and Corrupt Organizations Act, and they appealed. The Georgia Supreme Court, Clarke, J., affirmed at 251 Ga. 124, 303 S.E.2d 437. On certiorari, the Supreme Court, Justice Powell held that: (1) closure of entire suppression hearing was plainly unjustified and violated defendant's Sixth Amendment public-trial guarantee, and (2) new trial would be required only if new, public suppression hearing would result in suppression of ma-

Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been "chilled." See n. 22, *supra*.

EXPRESS-NEWS CORP. v. SPEARS
Cite as 766 S.W.2d 885 (Tex.App.—San Antonio 1989)

Tex. 885

Bruner v. State, 463 S.W.2d 205, 215 (Tex. Cr.App.1970) (emphasis added). The awarding of a door prize outside of the licensed bingo hours does not clearly come within the Act's prohibition.

Hence, a strict construction of the Act would require us to reach the same result: the Legislature did not intend for the phrase "present at a bingo occasion or participating in a bingo occasion" to include times outside an organization's licensed hours for conducting bingo games.

[3] Accordingly, whether arrived at by looking simply at the plain meaning of the terms used or by strictly construing the Act, we hold that the evidence conclusively shows that Lyon did not violate section 11(q) of the Bingo Enabling Act. She awarded a door prize to a person during the intermission separating two different bingo occasions. Thus, she did not award a prize to a party *present* at a bingo occasion, for the first bingo occasion had concluded and the second bingo occasion had not yet started. Nor did she award a prize to a party *participating* in a bingo occasion. "Participating" is the present participle of the verb "participate," and indicates the then-existing state of the action. At the time the door prize winner was awarded her prize, she was not presently participating in a bingo occasion.

In light of our holding, we need not address appellant's fourth point of error attacking the constitutionality of section 11(q).

For the reasons stated, the judgment of conviction is reversed and reformed to reflect an acquittal.

The EXPRESS-NEWS CORPORATION,
Kym Fox, and Jerome P.
Curry, Relators,

v.

Honorable Carolyn H.
SPEARS, Respondent.

No. 04-88-00526-CV.

Court of Appeals of Texas,
San Antonio.

March 15, 1989.

Rehearing Denied April 11, 1989.

Reporter, newspaper and taxpayer filed petition for writ of mandamus after district court denied their motion to intervene in civil action brought by parents against religious order and member of religious order for member's alleged fondling of two minor children. The Court of Appeals, Reeves, J., held that motion for intervention was properly denied as untimely, as it was filed after final judgment in action had been signed.

Writ denied.

Cadena, C.J., dissented and filed an opinion.

Parties ⇐42

Trial court properly denied motion by reporter, newspaper and taxpayers to intervene in civil action brought by parents against religious order and member of religious order for alleged fondling of two minor children; motion for intervention was untimely since it was filed after final judgment had been entered.

Mark J. Cannan, Laura Cavaretta, Lang, Cross, Ladon, Boldrick & Green, San Antonio, for relators.

Jackson Speed, Thomas Drought, Brite & Drought, San Antonio, Robert W. Wachsmuth, Brock & Kelfer, John F. Tafolla, San Antonio, Charles L. Babcock, Jackson & Walker, Dallas, for respondent.



EXPRESS-NEWS CORP. v. SPEARS
 Cite as 766 S.W.2d 885 (Tex.App.—San Antonio 1989)

Tex. 887

329b, and, therefore, the attempted intervention was untimely under existing case authority. While relators could have objected to a hearing on this motion on grounds of lack of sufficient notice, they instead waived the requisite notice and proceeded to have the trial court hear both their plea in intervention, as well as the motion to strike the plea. At the conclusion of the hearing, the trial court denied the plea in intervention and granted the motion of the Franciscan Friars to strike the plea; both orders were signed by the trial court on October 13, 1988.

Relators argue that *Comal County*, and other decisions cited by the real parties in interest as authority for denying the intervention, involved factual circumstances in which the party attempting intervention had an interest in the subject matter of the litigation prior to the time judgment was signed. Relators suggest that their own interest in the subject matter of this proceeding did not arise until after the judgment was signed. Relators contend also that in contrast to those cases cited by the real parties in interest, the instant circumstances do not involve any attempt to modify, reform, amend, or change the outcome of the litigation; their only interest is one in which they contend the right of public access to judicial proceedings is adversely affected by the trial court's decision to permit the records to be sealed after judgment. In *St. Paul Insurance Co. v. Rahn*, 586 S.W.2d 701 (Tex.Civ.App.—Corpus Christi 1979, no writ), one appellate court discussed the right to intervention in the following language:

Intervention is authorized by Rule 60. The right to intervene is given in furtherance of a speedy disposition of suits and to prevent multiplicity of actions. *Mulcahy v. Houston Steel Drum Co.*, 402 S.W.2d 817 (Tex.Civ.App.—Austin 1966, no writ). The intervenor bears the burden to show a justiciable interest, legal or equitable, in the lawsuit, and the trial court has wide discretion in judging the sufficiency of the opposing party's motion to dismiss the petition in intervention. *Rogers v. Searle*, 533 S.W.2d 440 (Tex.Civ.App.—Corpus Christi 1976, no

writ); *Armstrong v. Tidelands Life Insurance Co.*, 466 S.W.2d 407, (Tex.Civ.App.—Corpus Christi 1971, no writ); *Mulcahy v. Houston Steel Drum Company, supra*. But, where the petition in intervention is filed *after* judgment, the Supreme Court [in *Comal County*] has held that Rule 60 does not apply....

Id. at 703 (emphasis added). The real parties in interest have responded to relators' arguments by asserting that mandamus should be denied because of the procedural untimeliness of the relators' plea in intervention following judgment. They also assert the lack of standing on the part of relators to file their motion to vacate the judgment subsequent to the trial court's denial of their plea in intervention. The real parties in interest urge that relators' proper remedy would have been to appeal the denial of the intervention. See *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex.1987) (per curiam). Relators countered by urging that the accelerated manner in which its interest in the judgment arose rendered appeal of the denial of intervention an unfeasible remedy, and they further argued that they could not even have designated an appellate record pursuant to TEX.R.APP.P. 50 and 53, where they could not have known what documents or pleadings to select for inclusion, because of the court's order sealing the record. We do not reach the merits of these conflicting contentions because relators admit they could have appealed and did not, but instead urge that the newsworthiness of the resolution of the lawsuit would have been lost because of the delay inherent in the appellate process.

The real parties in interest contend that this Court does not have to consider relators' right of public access arguments because the trial court never had these arguments before it for a determination on the merits, where the intervention was denied and the real parties' motion to strike the plea was granted. Relators imply that because the trial court possessed plenary jurisdiction to modify, reform, or set aside the judgment at the time the plea in intervention was heard, there was an abuse of

discretion in the trial court's refusal to permit the intervention. Confronted with an analogous question in *St. Paul Insurance Co. v. Rahn*, one appellate court observed that:

The trial court had plenary power over its judgment at the time St. Paul filed its petition [in intervention] and could, *if it chose*, vacate, modify, correct or reform the judgment or grant a new trial. *Transamerican Leasing Company v. Three Bears, Inc.*, 567 S.W.2d 799 (Tex. Sup.1978); Rule 329b(5). But such power did not in any way impeach the finality of the . . . judgment. The judgment disposed of all issues and parties before the court and was therefore final. *North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex. Sup. 1966). St. Paul was not a party to the suit at that time, and its subsequent petition in intervention could not serve to recharacterize a previously final judgment into an interlocutory order. *Comal County Rural High School District No. 705 v. Nelson*, 158 Tex. 564, 314 S.W.2d 956 (1958).

586 S.W.2d 701, 702 (Tex. Civ. App.—Corpus Christi 1979, no writ) (emphasis added). There, as here, the operative language is that the trial court had plenary power to modify or vacate the judgment *if it chose*. Under these circumstances, as well as the authority of *Comal County*, the real parties in interest urge that the trial court had no choice but to deny an untimely intervention, and was not, therefore, required to reach a decision on whether to vacate or modify the prior judgment, where the motion to vacate was not drafted or presented until after the time the intervention had already been denied, thereby depriving relators of standing to complain. Relators urge that *Comal County* is only valid authority for the proposition that intervention must be filed prior to judgment where the potential intervenor has an interest in the subject matter of the litigation. There is, however, no authority for such a reading of TEX.R.CIV.P. 60, or of the cases construing it. The Supreme Court of Texas in *First Alief Bank v. White*, 682 S.W.2d 251 (Tex.1984) has recently reiterated, without

any such qualification as relators would impose, that:

[A] plea in intervention comes too late if filed after judgment and may not be considered unless and until the judgment has been set aside.

Id. at 252. Under the facts before us, we hold the intervention was untimely, and, therefore, the trial court had no choice but to deny it. We do not reach the merits of relators' contentions regarding right of public access to the record of the proceedings where it was not before the trial court, because "an appellate court may not deal with disputed areas of fact in a mandamus proceeding." *West v. Solito*, 563 S.W.2d 240, 245 (Tex.1978).

We accordingly decline to grant the writ of mandamus.

CADENA, Chief Justice, dissenting.

The majority opinion gives two reasons for its refusal to discuss the merits of relators' contentions which are based on the important right of the public to free access to judicial records. The first justification is that the question of the right of access "was not before the trial court." According to the majority opinion, the trial court declined to consider these questions and to set aside the secrecy order because, since the trial court had "no choice" but to strike the plea in intervention, there was no need to determine whether the trial court should have modified or vacated its secrecy order. The notion that a question which a trial court "declined" to consider establishes that such question "was not before the trial court" is surely a novel one. However, the merits of this argument need not here be considered. The conclusion that the trial court properly refused to consider the motion to vacate the secrecy order because the relators were not entitled to intervene runs afoul of the reasoning in the cases on which the majority relies in determining that relators had no right to intervene.

The second justification for the dismissal of relators' contentions based on the right of access to judicial records is somewhat puzzling. We are told that an appellate

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court "may not deal with disputed areas of fact in mandamus proceedings." The majority makes no effort to identify the disputed "areas of fact" which limit consideration of relators' contention based on the right of access. There are, in truth, no such disputed areas of fact.

Since the majority opinion rests solely on the cases dealing with the right to intervene after judgment and the conclusion which is drawn from such cases, a discussion of such cases is required. At the outset, it must be noted that only *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex.1987) (per curiam), involved the public's right of access to judicial records, and the opinion in that case, like the majority opinion here, avoids discussion of that right and concentrates solely on strictly procedural rules relating to intervention. In any event, *Times Herald* differs from this case because, there, the attempt to intervene came after the trial court had lost its plenary power over its judgment.

In *Comal County Rural High School District v. Nelson*, 158 Tex. 564, 314 S.W.2d 956 (1958), the right of the State of Texas to intervene after judgment was denied. The Supreme Court said, "No plea of intervention could be filed in the cause until and unless the district judge set aside his order...." *Id.* 314 S.W.2d at 957.

There is an important distinction between *Comal County* and the case before us. There, several school district patrons were attacking the validity of the creation of the district. The suit, therefore, involved a question in which the State of Texas had a legitimate, if not exclusive, interest. Under these circumstances, the State could have intervened in the case prior to rendition of judgment against the school patrons. In our case, relators had no legitimate interest in the suit for damages. None of the rights asserted by the parties in the damage suit could foreseeably result in a judgment affecting the rights of relators. As pointed out in *St. Paul Fire Insurance Co. v. Rahn*, 586 S.W.2d 701, 703 (Tex.Civ.App.—Corpus Christi 1979, no writ), a case in which the party seeking to intervene after judgment could have done

so before the judgment was rendered, a party seeking to intervene "bears the burden to show a justiciable interest, legal or equitable...." It was not until rendition of judgment in the damage suit and the entry of the secrecy order that any interest of relators, legal or equitable, was affected.

In *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex.1984), no effort was made to intervene until after the trial court had lost jurisdiction over the case. The Supreme Court, relying on *Comal County*, said that a plea in intervention "comes too late if filed after judgment and may not be considered until the judgment has been set aside." *Id.* Of course, under the facts of *First Alief Bank*, the trial court had lost its power to set aside the judgment.

If it is true that intervention after judgment is not possible until after the judgment has been set aside, then the critical question in this case is not the striking of the plea in intervention, but the refusal of the trial court to vacate the secrecy order. Such refusal is not addressed by the majority, although the setting aside of such order is obviously the only relief sought by relators, and the attempt to intervene was no more than one means of achieving that end.

As pointed out in the first paragraph of this dissent, the majority argues that there was no need for the trial court to consider relators' rights of access and to determine whether to set aside the secrecy order because it had "no choice" but to deny the intervention. The reasoning is somewhat strange.

According to the authorities relied on by the majority, the plea in intervention could not be considered until the judgment was set aside. The majority somehow manages to conclude that, since the intervention could not be considered until after the judgment had been set aside, the trial court was precluded from setting the judgment aside because relators' right to intervene had been denied. Reduced to basic and simple terms, the argument is that intervention was improper because the judgment had not been set aside, and the judg-

ment could not be set aside because relations could not intervene. Either the argument is circular or the majority has managed to pull itself off the ground by strenuously tugging at its own bootstraps.

The importance of the right of public access to court records cannot be questioned. The requirement of openness is basic to our form of government. Only by giving the greatest possible publicity to the acts of public officials can we make effective the guaranteed freedom of discussion of the acts of such officials and the proceedings of public tribunals. If judge and counsel are required to act under the public gaze they are more strongly moved to strict conscientiousness in the performance of their duties. Throughout history, secret tribunals have exhibited abuses which are absent when judicial proceedings and records are freely accessible to the public. See *In re Shortridge*, 99 Cal. 526, 34 P. 227, 228 (1893); 6 J. WIGMORE, EVIDENCE § 1834 (Chadbourn rev. ed. 1976).

The right of the press and public to have access to judicial records is guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604, 102 S.Ct. 2613, 2618, 73 L.Ed. 2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559, 100 S.Ct. 2814, 2818, 65 L.Ed.2d 973 (1980) (Stewart, J., concurring). Recognition of this right by the common law antedates federal and state constitutions. *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C.Cir. 1976), *rev'd on other grounds sub nom Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); *Bundy v. State*, 455 So.2d 330 (Fla. 1984). In *Nixon v. Warner Communications, Inc.*, *supra*, the United States Supreme Court not only reaffirmed the existence of this right but held that there is a presumption of the right of access to judicial records. This presumption casts upon those seeking to block such access the burden of establishing the existence of facts which justify secrecy. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511, 104 S.Ct. 819, 825, 78 L.Ed.2d 629 (1984). No other rule is consistent with the tradi-

tional principle that the public has "the right to know what is done in their courts." *In re Shortridge*, 34 P. at 228-29. "What happens in the court room is public property.... There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947).

The fact that in this case a settlement agreement is involved is irrelevant, even if we ignore the fact that the secrecy order is not limited to the settlement agreement. A settlement agreement filed with the court or incorporated in the judgment becomes a part of the public records as a public component of a trial, especially where, as here, approval by the court of the settlement is essential because it involves the rights of minors. The court's approval of a settlement is a matter which the public has a right to know and evaluate.

I have no difficulty in concluding that both the public and the news media have standing to challenge any secrecy order. Recognition of such a rule is, at least in some cases, essential to the preservation of the right of access. For example, in this case all parties to the damage action are determined to uphold the secrecy order. Unless standing of the public and the news media to challenge the attempt at secrecy is recognized, the attempt to deny access to judicial records is immunized against challenge.

It can be freely admitted that the right of access is not absolute. But those opposing access are required to show "an overriding interest" based on findings that closure is narrowly tailored to serve that interest. The proponents of secrecy in this case have made no such showing.

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with the Texas decisions restricting compensation under Section 17 of Article I to only those damages referable to a public use, as that term has been defined in the cases.

[7] Abbott and the other appellants in this case alleged a taking or damaging of their property without compensation and without their consent. Their amended petition states facts closely analogous to those cases in which recovery has been allowed. It does not appear from a reading of only the amended petition that their claim is necessarily based upon negligence. The construction of the amended pleading should not be colored by a reading of the abandoned allegations in the superseded pleadings. The trial court erred in rendering summary judgment for the City.

The cause is reversed and remanded.

(1) common-law right existed to inspect and copy judicial records subject to discretion of trial judge based upon facts of particular case; (2) trial court's order was not subject to heightened First Amendment scrutiny required for closure of public trials, but was properly reviewed for abuse of discretion; and (3) newspaper was not entitled to access to records pursuant to State Constitution or freedom of the press clause of First Amendment.

Affirmed.

Whitham, J., concurred and filed opinion.

Howell, J., dissented and filed opinion.

McCraw, J., dissented and filed opinion joined by Akin, Howell and Scales, JJ.



TIMES HERALD PRINTING COMPANY, Appellant,

v.

Wayne C. JONES, M.D., Wayne C. Jones, a Professional Corporation and Carolyn Tuttle, Appellees.

No. 05-85-00301-CV.

Court of Appeals of Texas, Dallas.

Aug. 5, 1986.

Rehearing Denied Oct. 16, 1986.

Newspaper moved for access to orders, opinions, and nondiscovery pleadings sealed by trial court pursuant to request of parties to civil suit. The 95th District Court, Dallas County, Nathan L. Hecht, J., denied access. Newspaper appealed. The Court of Appeals, Stephens, J., held that:

1. Records ⇐33

Newspaper, which was not party of record, had standing to bring action to gain access to records of civil suit which had been sealed pursuant to trial court's order and settlement agreement executed before trial.

2. Records ⇐34

Newspaper's motion to unseal records which was brought against all parties to original civil suit was new cause of action brought for purpose of gaining access to records previously sealed pursuant to trial court's order and settlement agreement executed before trial.

3. Records ⇐32

Common-law right existed to inspect and copy judicial records subject to discretion of trial judge based upon facts of particular case.

4. Records ⇐32

Trial judge's decision to seal orders, opinions, and nondiscovery pleadings of civil suit in compliance with parties' request that was condition of settlement was not abuse of discretion and did not deny news-

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paper common-law right to inspect and copy judicial records.

5. Records ⇐32

Agreement of parties to deny public access to court records is not binding on court.

6. Records ⇐32

Confidentiality order that prohibits disclosure of records and that has been entered by trial court and relied upon by parties should be modified only in extraordinary circumstances or for compelling need.

7. Records ⇐34

Newspaper, which sought disclosure of orders, opinions, and nondiscovery pleadings filed in civil suit and sealed by trial court pursuant to parties' request that was condition of settlement agreement, was required to show extraordinary circumstances or compelling need to gain access to records pursuant to freedom of the press clause of First Amendment or State Constitution. Vernon's Ann.Texas Const. Art. 1, § 8; U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐90.1(3)

Trial court's order, that refused to open previously sealed orders, opinions, and nondiscovery pleadings of civil suit which were sealed pursuant to condition of settlement of parties before trial, was not subject to heightened First Amendment scrutiny required for closure of public trials, but was properly reviewed for abuse of discretion. Vernon's Ann.Texas Const. Art. 1, § 8; U.S.C.A. Const.Amend. 1.

9. Records ⇐32

Trial court's order, which sealed orders, opinions, and nondiscovery pleadings pursuant to settlement agreement and request of parties in civil suit and which made findings concerning various factors to be considered such as parties' reliance on closure order in settling case, was not abuse of discretion, and, thus, records were not subject to disclosure pursuant to State Constitution and freedom of press clause of First Amendment. Vernon's Ann.Texas

Const. Art. 1, § 8; U.S.C.A. Const.Amend. 1.

Charles L. Babcock, Fred D. Wilshusen, Dallas, for appellant.

John H. Martin, Judy C. Norris, Dallas, for appellee, Wayne C. Jones, M.D.; Robert H. Mow, Jr., Bruce W. Collins, Dallas, of counsel.

Timothy E. Kelley, Dallas, for appellee Carolyn Tuttle.

Before the court en banc.

ON MOTION FOR REHEARING

STEPHENS, Justice.

On motion for rehearing, the court, sitting en banc, withdraws its former opinion and substitutes this one.

The Times Herald Printing Company seeks reversal of a trial court's judgment sealing the records of a civil suit in which the parties to the suit settled the suit without trial, conditioning their settlement upon the sealing of the records. The Times Herald contends, in numerous points of error, that the sealing order abridges its rights guaranteed under Article 1, Section 8 of The Texas Constitution, violates the First Amendment to the United States Constitution, and denies it the common law right of access to judicial records for the purpose of inspecting and copying. In conjunction with these contentions the Times Herald argues that there was no evidence, or insufficient evidence to justify the sealing order.

Appellees counter these points, and by way of cross-points contend that this appeal should be dismissed because the trial court had no jurisdiction to grant the relief sought by the Times Herald; first, because the Times Herald was not a party to the original suit; and second, because the trial court had lost its plenary power over the

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JURISDICTION

case before the Times Herald entered the case, seeking an unsealing of the records.

We conclude that we have jurisdiction of this appeal; we disagree with the arguments advanced by the Times Herald. Accordingly, we affirm the judgment of the trial court.

STATEMENT OF FACTS

In the original action an individual sued a physician in his individual capacity and his professional corporation, seeking damages. The physician answered, filed special exceptions, sought a protective order limiting disclosure of the contents of depositions taken, and filed a motion for partial summary judgment. Other matters were filed and heard such as motions to compel answers, pleas in abatement, and motions for continuance. Finally, on November 29, 1983, before trial, an agreed final judgment signed by the parties and their attorneys, providing that "the records of this case be sealed from public access and disclosure" except as to the parties to the suit, was submitted to and entered by the court.

On June 7, 1984, some five months and several days after the entry of the judgment, the Times Herald filed its motion to unseal court records and to remove restrictions on the press. The motion was filed in the original cause seeking access to "pleadings, discovery and other court records" in the case. The contention advanced to the trial judge was essentially that the record contained information of importance to the public. On appeal, the Times Herald has abandoned its quest for access to the depositions and discovery in the case and seeks only access to the "Orders, opinions and non-discovery pleadings" filed with the District Clerk and to remove any restraint upon publication of all or a portion of these public records. Additionally, on appeal, the thrust of the Times Herald's argument in favor of unsealing the records is so that the public might be more informed, and thus more capable of evaluating the performance of a certain judge, for purposes of re-election.

[1, 2] First we address the question of the trial court's and this court's jurisdiction in the posture in which the appeal reaches us. Appellees' argument as to jurisdiction is two-fold: first, the question of the Times Herald's standing is placed in issue, because it was not a party of record to the original action; and second, the trial court's plenary power to change or alter the judgment is questioned. Appellees rely on *Hubbard v. Lagow*, 559 S.W.2d 133 (Tex.Civ.App.—Austin 1977), *rev'd on other grounds* 567 S.W.2d 489 (1978), *on remand*, 576 S.W.2d 163 (1979); and *Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex. 1965). We agree with appellees that generally non-parties of record have no standing to appeal a trial court's judgment. We also agree that the trial judge had lost plenary power to *alter* or to *change* the judgment. However, the part of that judgment sealing the records did affect the rights of Times Herald; therefore, it may attack that portion by direct or collateral proceedings. See *Dean v. First National Bank of Athens*, 494 S.W.2d 222, 226 (Tex.Civ.App.—Tyler 1973, writ ref'd n.r.e.) (citing *Kirby Lumber Corp. v. Southern Lumber Co.*, 145 Tex. 151, 196 S.W.2d 387 (1946)); *Standard Oil Co. v. State*, 132 S.W.2d 612, 614 (Tex.Civ.App.—Austin 1939, writ dismiss'd cor.). See also *Meyer v. Wichita County Water Improvement Dist.*, 265 S.W.2d 660, 665 (Tex.Civ.App.—Fort Worth 1954, writ ref'd n.r.e.); *Bussan v. Donald*, 244 S.W.2d 271, 273 (Tex.Civ.App.—Fort Worth 1951, writ ref'd n.r.e.). We treat Times Herald's motion to unseal as a new cause of action brought by the Times Herald for the sole purpose of gaining access to the records previously sealed, and not to change or affect the settlement of the parties. All parties to the original suit as well as the Times Herald were before the court, just as though service of citation had been perfected in a new and independent cause.

Thus, we conclude that the trial court had jurisdiction to entertain the Times Herald's motion to unseal, and that the Times Herald had duly perfected its appeal from

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the trial court's action on its motion to this court. Appellees' cross-points of error are overruled.

COMMON-LAW RIGHT OF ACCESS

The Times Herald argues that it has a common-law right of access to court records. Although no Texas authority is cited for this proposition, and we have found none, we agree generally with this contention.

[3.4] The United States Supreme Court, in *Nixon v. Warner Communications, Inc.* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), recognizes a general common-law right to copy and inspect public records and documents, including judicial records and documents, yet holds that each court has supervisory power over its own records and files, including the right to deny access to the court's files where such files might become a vehicle for improper purposes. The Court goes on to state that the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify spite, promote public scandal, or for the publication of "the painful and sometimes disgusting details of a divorce case." *Warner*, 435 U.S. at 598, 98 S.Ct. at 1312 (quoting *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893)). Perhaps the most significant language to be found in *Warner*, insofar as this case is concerned, is in the following quote:

It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

Id. 435 U.S. at 599, 98 S.Ct. at 1312 (footnotes omitted). We conclude that, although as a general proposition, a common-law right of inspection and copying judicial

records exists, this right is not absolute, and must bow to the discretion of the trial judge in making a decision based upon the facts of a particular case. In this case the trial judge chose to seal the records in compliance with the parties request, and finding no abuse of discretion, we decline to disturb the trial court's action.

TEXAS CONSTITUTION

Article 1, Section 8

The Times Herald argues Article 1, section 8 of the Texas Constitution is even broader than the First Amendment to the United States Constitution in its treatment of access to court records. Philosophical argument as to the necessity of openness of court proceedings are made, citing general authority extending back to the Virginia Bill of Rights in 1776. The arguments are persuasive as to general canons of law, but are not persuasive in the context of this case. Most of the cases cited address criminal trials; only one addresses a civil trial, and its context is of a criminal nature; i.e. the detention and release of criminals from prison—a subject matter of considerable importance to the public. However, no case, in this or any other jurisdiction, has been offered to address the question of the propriety of unsealing records of a suit in which, before trial on the merits but after certain pre-trial motions have been heard and ruled upon, the parties have reached a settlement conditioned upon the sealing of the records.

Most of the cases cited concern the right of the press to publish information in its possession, cases concerning "freedom of expression" rather than the press's "right of access" to judicial records. Those cases dealing with the "right of access" concern criminal proceedings. *Houston Chronicle Publishing Co. v. Shaver*, 630 S.W.2d 927 (Tex.Crim.App.1982); *Houston Chronicle Publishing Co. v. McMaster*, 598 S.W.2d 864 (Tex.Crim.App.1980). We do not find the historical practice and the intertwining aspects of public policy consideration underlying the recognition of this "right of access" to criminal proceedings to be

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present in the case before us. Accordingly, we decline to construe Article 1, section 8 of the Texas Constitution as providing a greater right of access than does the First Amendment to the United States Constitution.

RIGHT OF ACCESS AS PROVIDED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

We recognize, as the Times Herald argues, that the United States Supreme Court has held that the First Amendment does assure a right of access to criminal trials. *Press Enterprises Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 824, 78 L.Ed. 629 (1984) (voir dire proceedings), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11, 102 S.Ct. 2613, 2622, 73 L.Ed.2d 248 (1982) (minor's testimony during rape trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980) (criminal trial).

Thus, the crucial question before us is whether the freedom-of-the-press clause of the First Amendment requires us to apply to the trial court's order refusing to open its sealed records for inspection the same heightened scrutiny required in the case of an order denying public access to a criminal trial. The standard for this heightened scrutiny was formulated by Chief Justice Burger in *Press Enterprises*, when he stated:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press Enterprises, 104 S.Ct. at 824; see also *Globe Newspaper* 457 U.S. at 606-07, 102 S.Ct. at 2619-20; *Richmond Newspapers*, 448 U.S. at 580-81, 100 S.Ct. at 2829. *In re the Reporter's Committee for Freedom of the Press*, 773 F.2d 1325 (D.C.Cir. 1985), stated that "the precise contours of

that right are in the process of being drawn" and the principle underlying these decisions "has not yet been applied to access to civil trials (though the Court has perhaps intimated that it [applies] there), much less to access to records in civil trials—or, for that matter, even records in criminal trials." *In re Reporters Committee*, 773 F.2d at 1331 (emphasis in original) (citations omitted). We further note with interest that Justice O'Connor in her concurring opinion in *Globe Newspaper*, 457 U.S. at 612, 102 S.Ct. at 2623, states, "Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." *Globe Newspaper*, 457 U.S. at 611, 102 S.Ct. at 2622. In that same case, Chief Justice Burger, in his dissenting opinion, joined by Justice Rehnquist wrote the following: "The Court seems to read our decision in *Richmond Newspapers* as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances. That is plainly incorrect." *Globe Newspaper*, 457 U.S. at 613, 102 S.Ct. at 2623 (citations omitted).

Perhaps the Supreme Court case most closely dealing with the First Amendment right of access to judicial records is the Court's decision in *Nixon v. Warner*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570. There, the Court rejected a claim by the press that access to the Watergate tapes, previously admitted into evidence in a criminal trial, was mandated by the freedom-of-the-press clause of the First Amendment. The Court also observed with respect to the claimed common-law right of access, that the trial court, as custodian of the tapes obtained by subpoena,

has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material "to gratify private spite or promote public scandal." *In re*

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Caswell, supra, [18 R.I. 835], at 836, 29 A. 259, with no corresponding assurance of public benefit.

Id. 435 U.S. at 603, 98 S.Ct. at 1314.

This holding has not been expressly, or impliedly overruled, nor questioned in subsequent Supreme Court decisions dealing with the First Amendment right of access. See e.g. *Richmond Newspaper*, 448 U.S. at 581, n. 18, 100 S.Ct. at 2830, n. 18. Moreover, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 2205, 2207, 81 L.Ed.2d 17 (1984), the Court held that a protective order preserving the confidentiality of information obtained under the Washington civil discovery rules was not subject to heightened First Amendment scrutiny, disapproving contrary holdings in *In re Halkin*, 598 F.2d 176 (D.C.Cir.1979), and *In re San Juan Star*, 662 F.2d 108 (1st Cir.1981). In *Seattle Times* the Court said that the trial court's discretion in such matters was necessary because the trial court "is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." 104 S.Ct. at 2209.¹

The sealed records in this case do not contain information already disseminated to the public or even well known to the public as in *Warner*. Nor do they raise the question of disclosure of information obtained by discovery, as in *Seattle Times*, since the Times Herald has abandoned its request for the discovered information and now limits its request to nondiscovery pleadings and orders. Our question, therefore, is whether the heightened First Amendment scrutiny standard, as enunciated by Justice Burger in *Press-Enterprises*, applies to the materials here sought.

For the very limited decision to be rendered in this case, we assume, without deciding, that the presumption of a public

1. The Court also observed that pretrial depositions and interrogatories are not public components of a civil trial and noted that both state and federal discovery rules authorize the trial court to order that discovery materials not be filed, or be filed under seal, and "[t]hus to the

right of access to judicial records applies to civil cases as well as criminal cases. See *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1068-069 (3rd Cir.1984); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir.1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165, 1178-79 (6th Cir.1983), cert. denied, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984).

It has long been recognized that every court has supervisory powers over its own records and files and may deny access when court files may be used for improper purposes. *Warner*, 435 U.S. at 598, 98 S.Ct. at 1312; *In re Reporters Committee*, 773 F.2d at 1333. Among the competing interests that may be recognized as supporting denial of access are private rights of participants or third parties, trade secrets, and national security. *Brown & Williamson*, 710 F.2d at 1180; see *Seattle Times*, 104 S.Ct. at 2208 (privacy interest of prospective jurors balanced against public interest in open trials); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir.1985) (sealed plea bargain).

[5, 6] We also recognize that an agreement of the parties to deny public access is not binding on the court. *Brown & Williamson*, 710 F.2d at 1180. Nevertheless, once a confidentiality order has been entered by the court and relied upon by the parties, it should be modified only in extraordinary circumstances, or to meet a compelling need. *Federal Deposit Insurance Corp. v. Ernst & Ernst*, 677 F.2d 230, 232 (2nd Cir.1982) (challenge based on Freedom of Information Act); see *Martindell v. International Telephone & Telegraph*, 594 F.2d 291, 296 (2nd Cir.1979) (reliance by witness on protective order sealing deposition).

extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court." 467 U.S. 20, 104 S.Ct. at 2207, n. 19.

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An agreement may justify denial of public access, when, as in the present case, there is a binding contractual obligation between the parties to disclose certain information which to the court seems innocuous, yet may be newsworthy, and unbridled disclosure of the nature of the controversy would deprive a litigant of his right to enforce a legal obligation. *Publicker Industries*, 733 F.2d at 1073.

[7] After balancing the interests at stake, we conclude that notwithstanding the arguments advanced by the Times Herald, absent a showing of some extraordinary circumstances or compelling need, neither of which appear here, the limited right of access to judicial records afforded by the First Amendment to the United States Constitution does not mandate the opening of the records in this case.

STATE'S INTEREST IN SETTLEMENT OF LITIGATION

There is yet another compelling reason for upholding the trial court's sealing order; the State has a substantial interest in the settlement of litigation. The Times Herald's counsel agreed with this premise during oral argument. The State's interest in promoting settlements, when weighed against the right of access, may prevail. In our litigious society, for us to take the position that private litigants, who have settled their dispute before calling upon a court or jury to find true the facts alleged in the pleadings, and who have settled in reliance upon the court's agreement to seal the record from public disclosure, have no right to expect the confidentiality to which they agreed and to which they were assured, would seriously impair the settlement process and would increase the trial overload which presently exists in our judicial system.

Although no cases in this jurisdiction have addressed this precise concern, the United State Supreme Court, in *Seattle Times*, 104 S.Ct. 2199, affirmed a decision

of the Supreme Court of Washington approving an order of the trial court sealing certain information obtained under the State discovery rules. The United States Supreme Court commented that the Supreme Court of Washington had properly emphasized the importance of ensuring potential litigants unimpeded access to the courts, and quoted from that court's opinion as follows:

[A]s the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself. [*Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226] 654 P.2d at [673] 689.

Id. at 2209 n. 22.

Furthermore, a commentator has pointed out that the public interest in encouraging settlement of litigation is a legitimate ground for an agreed order sealing confidential information without requiring detailed findings with respect to each item suppressed. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L.REV. 1, 27-28 (1983). This same commentator also observes that the reasons supporting access to evidentiary material on which judicial decisions are based have little weight when a motion for summary judgment has been denied and suggests that access on this ground be limited to material forming the basis for a decision on the merits. *Id.* at 49.

This approach is consistent with the rationale usually given for public access to judicial proceedings, whether based on common-law or the First Amendment, which is said to be the enhancement of the basic fairness of the trial and the appearance of fairness essential to public confidence in the system. *Press-Enterprise*, 104 S.Ct. at 823. This rationale was stated long ago by Justice Holmes in *Cowley v.*

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Pulsifer, 137 Mass. 392, 394 (1884), as a basis for the privilege of reporting judicial proceedings in the press, but Justice Holmes went on to hold that no such privilege existed with respect to pleadings that had never come before the court for a ruling:

[I]t is clear that [these grounds] have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. *Cowley*, 137 Mass. at 394.

In re Reporters Committee, 773 F.2d at 1335; cf. *Express Publishing Co. v. Gonzalez*, 326 S.W.2d 544, 547-48 (Tex.Civ.App.—San Antonio 1959, writ dismissed) (Barrow, J., concurring) (abandoned petition in fraud suit was "no part of the proceedings had in the trial court").

[8] In light of these authorities, we conclude that the circumstances of the present case do not require that the trial court's order refusing to open its previously sealed records be subjected to the heightened First Amendment scrutiny required in the case of closure of public trials. We hold, rather, that the order is properly reviewed for abuse of discretion in accordance with the less rigorous standard recognized in *Nixon v. Warner* and *Seattle Times*.

[9] Applying this less rigorous standard, we find no abuse of discretion. None of the materials is relevant to a decision on the merits of the underlying litigation except, perhaps, the order denying the motion for summary judgment, which was only a preliminary ruling that a fact issue existed.

2. We recognize that the Court in *Press-Enterprises* was addressing the question of closure of criminal proceedings, and was not addressing the propriety of sealing pre-trial pleadings in a civil suit, yet we believe that the Court's statement that "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the clo-

The parties to that litigation agreed to an order sealing the records, and they settled their dispute in reliance on that order. Months later, when the *Times Herald* brought this proceeding to unseal the records, the trial judge heard evidence and argument of counsel and made a careful statement of his findings concerning the various factors he considered, including the parties' reliance on the closure order in making their settlement. The detailed findings in the trial court's written order are consistent with Justice Burger's mandate for "articulated findings" in *Press-Enterprise*.² The trial judge included his findings in a written opinion discussing both the facts and the law, which he ordered sealed so as not to nullify the confidentiality required by his original closure order.

After reviewing the evidence at the hearing, the records ordered sealed, the trial court's findings, and its opinion, we conclude that the trial court's action in sealing the records was within his discretionary authority, that there was a substantial basis for the court's refusal to unseal the records, and no abuse of discretion is shown.

The judgment of the trial court is affirmed, and appellant's motion for rehearing is denied.

GUITTARD, C.J., and VANCE, DEVANY, HOLLINGSWORTH, McCLUNG and STEWART, JJ., join in this opinion.

WHITHAM, J., files a concurring opinion.

HOWELL, J., files a dissenting opinion.

McCRAW, J., files a dissenting opinion in which AKIN, HOWELL and SCALES JJ., join.

sure order was properly entered", is a proper guideline to be followed by the trial court so that an appellate court may properly review the trial court's action for abuse of discretion, even though other requirements of heightened First Amendment scrutiny may not apply. We do not decide, however, whether such findings are required in this kind of case.

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ON MOTION FOR REHEARING

WHITHAM, Justice, concurring.

The case is before us en banc on motion for rehearing. I withdraw my concurring opinion of March 4, 1986. The following is now my concurring opinion.

I join in the majority's opinion. In doing so, I am influenced by a sentence contained in the Supreme Court's opinion in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 2207-08, 81 L.Ed.2d 17 (1984) in footnote nineteen. There the court states that "[t]hus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court." Admittedly, *Rhinehart* involved first amendment rights to disseminate, in advance of trial, information gained through the pretrial discovery process. Nevertheless, the Supreme Court's broad reference in the above-quoted sentence to "courthouse records" in a first amendment context must mean something. Otherwise, the Supreme Court would not have expanded the subject matter of "discovery" to the more broad scope of "courthouse records" in footnote nineteen. Therefore, I interpret the above-quoted sentence from *Rhinehart* to cover the orders, opinion and nondiscovery pleadings sought by the Times Herald in the present case. Thus, the present case involves an alleged First Amendment right of the press to access to courthouse records under the control of a trial court. Therefore, in the context of the present case, I read the above-quoted sentence from *Rhinehart* to mean that trial court control of courthouse records does not violate First Amendment rights of the press. The right to speak and publish does not carry with it the unrestrained right to gather information. *Rhinehart*, 104 S.Ct. at 2207 (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-81, 14 L.Ed.2d 179 (1965)). Moreover, in my view, the Times Herald has shown no valid reason for this court to interfere with the trial court's control over its records.

I am also influenced to join in the majority opinion by the Supreme Court's ap-

proach to the question before it in *Rhinehart*:

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

Rhinehart, 104 S.Ct. at 2207. In my view, the trial court's sealing order furthers an important and substantial governmental interest of the State of Texas; i.e., to encourage and facilitate the settlement of lawsuits pending in its courts. Furthermore, this important and substantial interest of the State is unrelated to the suppression of expression. To my mind, the State's interest in encouraging and facilitating settlement of lawsuits pending in its courts stands unconnected to the suppression of expression. Obliging settlement of a lawsuit before trial on the merits is one thing. Hanging a newspaper editor for story content is another. Moreover, the limitation imposed by the trial court's sealing order is no greater than is necessary or essential to the protection of the State's interest in encouraging and facilitating the settlement of lawsuits pending in its courts. All the trial court did was accommodate an agreement of the parties to a lawsuit who wished to settle their dispute before trial on the merits. By so doing, the trial court did no more than encourage and facilitate the settlement of a lawsuit pending in a court of the State of Texas. The trial court did not order the Times Herald to cease gathering information about the lawsuit or about a certain judge for purposes of re-election evaluation. The trial court did not order the Times Herald never to publish information about the lawsuit or about a certain judge for purposes of re-election evaluation. On balance, therefore, I must conclude that the asserted First Amendment right of the Times Herald to the orders, opinion and non-discovery pleadings

sought by the Times Herald must yield to a legitimate interest of the State of Texas which is unrelated to the suppression of expression and which is advanced within permissible limits.

Therefore, I agree with the majority that the common law right of access must bow to the sound discretion of the trial court and that neither the state nor the federal constitution affords the Times Herald a right of access to the "courthouse records" sought.

McCRAW, Justice, dissenting.

I must dissent. I would hold that the trial court had no jurisdiction to hear the Times Herald's case. Inasmuch as our jurisdiction is by way of appeal, we are likewise without jurisdiction. In a memorandum opinion the trial court made the following finding:

It is not necessary in this case to resolve the significant jurisdictional issue raised but not fully addressed by the parties. Because the Court concludes that the Times Herald's motion must be denied on the merits, the Court does not decide the difficult and significant issue of its jurisdiction to consider the motion.

The court then proceeded to deny the Times Herald's motion styled, "Motion to Unseal Court Records and to Remove Restrictions on the Press." I would hold that the trial court does not have the luxury of avoiding the "difficult and significant issue of its jurisdiction," but must, upon proper motion, determine the issue of jurisdiction before ruling on the merits. This clearly did not occur in this case.

I adhere to the majority's statement that generally nonparties of record have no standing to appeal a trial court's judgment and that the trial court lost plenary power to alter or change the judgment. I cannot, however, agree with the majority that the Times Herald's motion in this cause was

1. The appeal is styled: *The Times Herald Printing Co. v. Jones, M.D.; Wayne C. Jones, a Professional Corp.; and Carolyn Tuttle*. The appeal bond and all other documents, including the Times Herald's motion to unseal the court

the equivalent to a new petition in a new cause of action. The Times Herald is not a party to the original proceeding; neither did it petition to intervene. TEX.R.CIV.P. 60. Consequentially, it has no standing to appeal a final judgment entered in a proceeding to which its the Times Herald, was not a party. *California and Hawaiian Sugar Co. v. Bunge Corp.*, 593 S.W.2d 739, 740-41 (Tex.Civ.App.—Houston [1st Dist.] 1979, no writ).

The general rule in Texas is that the remedy by appeal in the usual form, or by writ of error, is available only to parties to the litigation which resulted in entry of the challenged judgment. *Gunn v. Cavanaugh*, 301 S.W.2d 723, 724 (Tex.1965); *Bunge*, 593 S.W.2d at 740. The Times Herald attempts to portray itself as a party to this cause of action for the first time upon appeal in it's brief filed with this court.¹ The record does not demonstrate that the Times Herald was ever a party to the cause of action presented at the trial court; or an intervenor, TEX.R.CIV.P. 60; or an additional party as provided for in Texas Rules of Civil Procedure 37 and 41, therefore, the appeal must be dismissed. The Times Herald was not properly before the trial court and, therefore, is not properly before this court. *See Bilbo Freight Lines, Inc. v. State*, 645 S.W.2d 925, 926-27 (Tex.1983). I would vacate the order of the trial court and dismiss all proceedings brought by the Times Herald.

AKIN, SCALES and HOWELL, JJ., join in this dissenting opinion.

HOWELL, Justice, dissenting.

I dissent. First, I would vacate the trial court's ruling for want of jurisdiction for the reasons stated in Justice McCraw's opinion. If I were to reach the majority, I would reverse and grant the right of access to appellant as outlined herein.

records are brought under the style: *Carolyn Tuttle v. Wayne C. Jones, M.D.; and Wayne C. Jones, a Professional Corp.* Trial court cause number 82-10626D.

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The majority bases its First Amendment analysis on a case decided before the First Amendment right of access was fully explicated. It misinterprets the emerging jurisprudence of access and refuses to employ the United States Supreme Court's methodology in determining the scope of access rights. From such faulty premises, a sound conclusion could not have been expected.

The majority finds that *Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) provides the closest factual analog. Warner's factual similarity is far outweighed by the differences in legal issues presented. *Warner* involves a request for access to the Watergate tapes and begins by distinguishing between access rights and the rights of publication. Previous cases had confirmed the press's right to publish that information which had already come into its possession. *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). The *Warner* court commenced with the *Cox* premise stating:

[T]he issue presented in this case is not whether the press must be permitted access to public information to which the public is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying.

Warner, 435 U.S. at 609, 98 S.Ct. at 1317. The court went on to state the often-cited proposition that the press has no greater right to information than that of the general public. *Id.*

Read properly, *Warner* only affirms that the press has no special right to information unavailable to the public. If this reading is correct, the case before us is readily distinguishable. The Times Herald is not seeking special access, only the access to which any citizen is entitled. See *In re Reporter's Committee For Freedom of the Press*, 773 F.2d 1325, 1331 (D.C.Cir.1985) (In *Warner* "the point of a First Amendment right of public access was not raised and not explicitly decided."). It is impor-

tant to note that unlike *Warner*, the sealed information in the case at hand was once available for inspection and reporting. Here, the actual flow of information has been impeded.

To the extent *Warner* reaches the question of First Amendment access rights, its import is clear. The First Amendment protects expression and dissemination, not access. This holding was dramatically affected by three subsequent Supreme Court decisions.

In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the Supreme Court announced for the first time a right of access to criminal trials. Chief Justice Burger, writing for the plurality, examined the history of criminal trials in Anglo-American jurisprudence. He concluded that trials had traditionally been open to the public. He further stressed the functional role of publicity in educating the public and providing an outlet for the community's "natural yearning to see justice done." 448 U.S. at 571, 100 S.Ct. at 2824. The right to attend trials, he stated, was implicated in the enjoyment of freedom of speech and press. 448 U.S. at 577, 100 S.Ct. at 2827. The government may not summarily foreclose the traditional open channel of public information, "absent an overriding interest articulated in findings." 448 U.S. at 581, 100 S.Ct. at 2829.

The landmark nature of *Richmond Newspapers* was instantly recognized. Justice Stevens remarked:

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but *never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.* [emphasis added]

448 U.S. at 582, 100 S.Ct. at 2830. (Stevens, J., concurring). With *Richmond Newspapers* a new day dawned and it, not *Warner*, must govern the case at hand.

The second access decision was *Globe Newspapers v. Superior Court*, 457 U.S.

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Digest

596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). The case concerned a Massachusetts statute requiring closure of trials during the testimony of minor complainants in sex offense cases. The Court ruled that mandatory closure violates the First Amendment. 457 U.S. at 602, 102 S.2d at 2617. Justice Brennan, writing for the majority, again stated the rationale for access—the tradition of openness and the salutary effects of publicity on the administration of justice. 457 U.S. at 605-06, 102 S.Ct. at 2619. Although the access right is not absolute, a state seeking to inhibit disclosure must show a *compelling state interest and narrowly tailor* its restrictions to meet that interest. 457 U.S. at 607, 102 S.Ct. at 2620.

In its third decision, *Press-Enterprise Company v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), the Supreme Court extended access protection to jury voir dire proceedings. Again, the Court reviewed both the history of jury selection and the function of publicity in the judicial system and concluded that blanket denial of access was unconstitutional. 104 S.Ct. at 824-25.

The majority alludes to these decisions but summarily distinguishes them as "criminal proceedings" (Maj.op. 936). The majority wholly fails to discuss or analyze the distinction that it perceives between civil and criminal cases. This dissent would hold that the similarities far outweigh the dissimilarities.

The overarching flaw in the majority's analysis is that in determining whether or not access rights apply in this case, it has not employed the method used by the Supreme Court. It reaches the wrong result because it asks the wrong question. The Supreme Court's reasoning in the three criminal cases outlines a clear methodology for determining the scope of access rights.

When resolving issues involving these rights, the Supreme Court has not examined whether there has been a tradition of access with respect to information of a particular character involved or whether that information is of significant public interest. Rather it has inquired whether

there has *historically been public access* to this particular part of the judicial process and whether access to that portion of the process will *significantly enhance public understanding and appreciation* of the judicial process or improve the process itself.

United States v. Smith, 776 F.2d 1104, 1114 (3d Cir.1985) (emphasis added). See *In re Reporter's Committee*, 773 F.2d at 1331. The proper inquiry then is an historical and a functional one. We must examine whether the factors that demand openness in the criminal trial context apply to civil cases as well.

There is little doubt that civil as well as criminal proceedings partake of a historical presumption of openness. Reviewing courts have consistently stated that civil and criminal trials have traditionally been open for public scrutiny. *Richmond Newspapers*, 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17; *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15, 99 S.Ct. 2898, 2908, n. 15, 61 L.Ed.2d 608; *Publicker Industries v. Cohen*, 733 F.2d 1059 (3d Cir.1984); *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984).

It is also evident that public access to civil proceedings plays a significant role in the proper "functioning of the judicial process and the government as a whole." *Globe Newspaper*, 457 U.S. at 606, 102 S.Ct. at 2619. Justice Burger has written of a "community therapeutic value,"—a type of catharsis gained by seeing justice done. *Press-Enterprise*, 104 S.Ct. at 823; *Richmond Newspapers*, 448 U.S. at 570, 100 S.Ct. at 2823. Perhaps access to civil trials does not provide so striking a public therapy. Nevertheless, the glare of public scrutiny is of value to the process. Requiring judges to work in the public view makes them more directly responsible for their decisions. *Brown & Williamson*, 710 F.2d at 1179; See *Wilson v. American Motors*, 759 F.2d at 1568, 1570 (11th Cir. 1985). Publicity discourages perjury and

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may impel new witnesses to come forward. *Brown & Williamson*, 710 F.2d at 1179.

Under a form of government where the assent of the governed is given primacy, it is imperative not only that the courts be just but that they appear to be just. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572, 100 S.Ct. at 2824. Secrecy breeds distrust and disillusionment. Abuses exposed can be remedied. Abuses concealed can only fester.

These potent policy considerations apply with equal force to the administration of both civil and criminal justice. Today, the business of the civil courts touches and concerns the whole population. Environmental concerns, race relations, the conduct of the professions, product safety, and a host of noteworthy issues pass through the civil courts. The impact of their decisions is daily felt by the whole people. To deny public access to civil proceedings is to shut away from the people an institution that governs their lives.

The historical-functional analysis provides adequate justification for a right of access to documents as well as oral proceedings. As the majority correctly states, there is a well-established common law right to inspect judicial documents. *Nixon v. Warner Communications*, 435 U.S. at 597, 98 S.Ct. at 1311; *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir.1984). See generally Annot., 84 A.L.R.3d 598 (1978). Although this right is subject to limitation, *Warner*, 435 U.S. at 598, 98 S.Ct. at 1312, there is a presumption of openness in court documents. *United States v. Edwards*, 672 F.2d 1289, 1293-94 (7th Cir.1982) (and cases cited therein). Clearly, the tradition of access extends to records.¹ This writer further notes that this state has traditionally afforded access to judicial opinions. *Alamo Motor Lines v.*

1. The precise contours of the traditional right are difficult to determine. See *Reporter's Committee*, 773 F.2d at 1332-1336 (No right of access to

International Brotherhood of Teamsters, 229 S.W.2d 112, 117 (Tex.Civ.App.—San Antonio 1950, no writ).

Access to court documents also has a vital governmental function. "Official records and documents open to the public are the basic data of governmental operations." *Cox Broadcasting*, 420 U.S. at 492, 95 S.Ct. at 1044. The work of our civil courts is in large measure documentary. Pleadings and motions provide the schematic for decision making. They frame the issues to be decided. Opinions are the tangible fruits of the adjudicatory process. They explain the reasoning and precedent underlying the exercise of judicial power. Judgments are the final product, the statement of the court's command. Obviously, some proceedings, such as summary judgments, are conducted solely in documentary form. If an open judiciary is mandated, judicial records must themselves be open. Access to the records serves a vital public function in illuminating the judicial process and deterring its misuse. *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982); *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C.Cir.1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978).

Obviously, the functional role of access to court records is somewhat diminished where, as in the present case, the litigation comes to an end without trial. Yet the writer perceives a public interest in knowing how the judicial system is used by its litigants, what types of plaintiffs opt out of the system, and what types of defendants buy their peace. The civil justice system itself has become controversial. An understanding of its functions must take into account abridged as well as completed litigation. Considering the tradition of access to court records and the vital role they play, First Amendment protection is mandated.

documents before judgment); *Id.* at 1348-1351 (Wright, J., dissenting) (Right of access arises at time of trial.)

Thus the case for extending First Amendment protection to access to civil court documents is compelling. Even the majority appears to concede this grudgingly. But the majority would permit the trial court to abrogate this right on the flimsiest of grounds. Perhaps the most disturbing aspect of the majority's opinion is its failure to furnish proper guidance to trial courts in making access determinations. The majority opinion leaves the closure of records to the judicial whim; discretion is to be governed by the length of the chancellor's foot.

Where First Amendment rights are at stake, a different standard is mandatory: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, 104 S.Ct. at 824. See *Globe Newspaper*, 457 U.S. at 606-07, 102 S.Ct. at 2619-20; *Smith*, 776 F.2d at 1109; *Publlicker Industries*, 733 F.2d at 1070; *Wilson*, 759 F.2d at 1571. No lesser standard of protection exists; there are no second-class First Amendment rights. It is necessary, therefore, to apply this mandated standard in evaluating the trial court's order to seal the record.

The majority opinion does attempt to raise what it views as compelling state interests to justify the closure order. Before examining them individually, this author would observe that some of the cited interests, settlement of litigation for example, were not employed by the trial court. Furthermore, the interests given are not discussed in terms of the case presently before us. Indeed, the majority's language regarding the settlement interest is so broad it licenses the closure of records in every case that is settled without a complete trial on the merits. We note that the case at hand was "tried" in summary judgment proceedings, but the majority refuses to distinguish on these grounds. Finally, the majority has completely reversed the burden of persuasion by stating that "absent a showing of some extraordinary circumstances or compelling need, neither of

which appear here, the limited right of access to judicial records . . . does not mandate the opening of the records in this case." Although the access cases are inconsistent, they speak with one voice in declaring that openness is the norm and is to be presumed. Those that insist on secrecy are burdened to show "extraordinary circumstances" or "compelling need."

As this writer reads the majority, the primary factor set forth in opposition to access is the parties' agreement to seal the records. This should be given little weight. The public has an independent interest in the record that the parties may not foreclose by mere agreement. *Wilson*, 759 F.2d at 1571. If the matter were left entirely to the litigants and disclosure forbidden unless at least one party consented to public access, the vast majority of civil records would be screened from the public view. A drastic diminution of the stock of information available to those who pay for the creation and operation of the courts would inevitably result.

It is urged that encouraging settlement provides a compelling state interest. This is not so.

There is no question that courts should encourage settlements. However, the payment of money to an injured party is simply not "a compelling governmental interest" legally recognizable or even entitled to consideration in deciding whether or not to seal a record. We feel certain that many parties to lawsuits would be willing to bargain (with the adverse party and the court) for the sealing of records after listening to or observing damaging testimony and evidence. Such suspension of public records cannot be authorized.

Wilson, 759 F.2d at 1571-72 n. 4. See also *Brown & Williamson*, 710 F.2d at 1180. The majority's analysis is curiously contradictory. On one hand, we are told that closure is needed to remove litigants from trial via settlement. On the other hand, we are informed that secrecy is needed to encourage timorous litigants to seek the

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courts. In the hands of the majority, a sealing order is a marvelously versatile tool.

Of course, both concerns are chimeras. The notion that publicity-shy persons will refuse to settle merely because the papers cannot be sealed fails of its own weight; the timorous will hardly elect the only available alternative to settlement—proceeding to trial. As for the hypothetical litigant who is too frightened to ever bring his suit to court for fear of publicity's glare, the prospect that, *if* a settlement can be effected, the court *might* be persuaded to seal the record, could hardly be an inducement. The civil courts have never guaranteed secret justice to litigants; we turn back the clock in holding out any such hope.

However, even if one or both of these hypotheses were likely, the settlement interest remains an inadequate justification. Every right extended extracts a toll in judicial efficiency. Were we to enthrone expediency as a compelling interest, the underlying principle of judicial openness would inevitably be eroded. Historically, we have decided that the salutary effects of openness outweigh its price in efficiency. We should so hold today.

An interest worthy of much greater weight is the privacy interest of the litigants. Courts have consistently weighed privacy against access rights. *Warner*, 435 U.S. at 598, 98 S.Ct. at 1312; *Smith*, 776 F.2d at 1113; *In re Knoxville News Sentinel*, 723 F.2d 470, 477 (6th Cir.1983). The intrusion must be a serious one, exceeding mere embarrassment. *Mitchell*, 551 F.2d at 1263. In this case, the legitimate privacy interests, though entitled to some weight do not overcome the public right of access. We have before us two civil litigants. The law has not traditionally recognized the right of privacy as to facts disclosed by court proceedings. 420 U.S. at 493, 95 S.Ct. at 1045. The Supreme Court in *Cox Broadcasting* held that the press may not be held liable for truthfully reporting the contents of public records. 420 U.S. at 497, 98 S.Ct. at 1047.

Cases where privacy has been held to outweigh access are generally quite different from the case before us. Typical is *Knoxville News Sentinel*, 723 F.2d at 470. The court denied access to certain bank records that had been used as exhibits. The court upheld the privacy claims of the depositors, "who were not responsible for the initiation of the underlying litigation." 723 F.2d at 477. The court emphasized that the confidentiality of bank records is protected by law and that the privacy of third parties was involved. On the other hand, the parties before us seek to avoid disclosure of facts not traditionally protected by law. No third parties are implicated.

Even if the purported interests were viewed as compelling, the trial court's order is in no way "narrowly tailored." It has sealed the entire record, without stopping to distinguish those parts of the record that are innocent from those that might be argued as intrusive upon legitimate interests. Our law disapproves of such blanket approaches. In *Globe Newspapers*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248, the Supreme Court held unconstitutional a statute requiring mandatory closure of trials during the testimony of minor complainants in sex offense cases. Although the privacy interests underlying the statute are more substantial than those of the parties, the Court required a case-by-case determination. Likewise, in *Press Enterprise*, 104 S.Ct. at 819, the Court held that a trial court could not close voir dire proceedings despite the risk to privacy of jurors, innocent third parties who are actually compelled to appear and give testimony. Again, the interests of each juror must be separately balanced. 104 S.Ct. at 825. Serious consideration of the public's access rights demands that a compelling interest be shown with respect to each part of the record that is sealed. Such was not done in the case before us.

In summary, *Richmond Newspapers* and its progeny for the first time established a First Amendment right of access to judicial proceedings. The historical and functional approach applied in *Richmond* and its com-

panions must be applied in civil actions because there is no "criminal cases only" proviso in the First Amendment. Appellees have failed to bring forth a compelling state interest to overcome the right of access. Further, the order of the court below is not narrowly tailored to promote any interest that may exist. The records should be unsealed.



Frank SALEM, Appellant,

v.

AMERICAN BANK OF COMMERCE, Appellee.

No. 08-86-00012-CV.

Court of Appeals of Texas, El Paso.

Aug. 13, 1986.

Judgment creditor brought action for satisfaction of judgment. The County Court at Law #3, El Paso County, Jack Ferguson, J., appointed a receiver and ordered judgment debtor to turn over payment received from his employer to receiver each payday. Debtor appealed. The Court of Appeals, Fuller, J., held that wages upon receipt by judgment debtor were not exempt from attachment, execution or seizure and debtor could be required to deliver his paycheck, upon receipt, to court-appointed receiver.

Affirmed.

Exemptions §48(1)

Wages upon receipt by judgment debtor were not exempt from attachment, execution or seizure under "turnover" statute, and debtor could be required to deliver his paycheck, upon receipt, to court-appointed

receiver. V.T.C.A., Civil Practice & Remedies Code § 31.002.

John Whitaker, El Paso, for appellant.

Temple B. Ingram, Jr., Crowson & Ingram, El Paso, for appellee.

Before OSBORN, C.J., and SCHULTE and FULLER, JJ.

OPINION

FULLER, Justice.

Appellant appeals from an order of the trial court which appointed a receiver and ordered Appellant to turn over to the receiver each payday the payment received from his employer to satisfy a money judgment Appellee had previously obtained against the Appellant. We affirm.

By two points of error, the Appellant claims the trial court erred in holding that wages upon receipt by the Appellant were not exempt and further that the trial court erred in ordering Appellant to deliver his paycheck, upon receipt, to the court appointed receiver. Appellant claims that wages received are exempt as current wages under Tex.Const. art. XVI, sec. 28, and under Tex.Prop.Code Ann. sec. 42.001 and 42.002(8), until deposited to a bank account or otherwise changed. The sole question to be decided by this Court is whether or not wages are "current" wages even after receipt by the wage earner. If not, then they are not exempt from attachment, execution or seizure for the satisfaction of liabilities under the "turnover" statute. Tex.Civ.Prac. & Rem.Code Ann. sec. 31.002 (Vernon 1986), formerly Article 3827a, Tex.Rev.Civ.Stat.Ann.

The answer has long been resolved against the Appellant. When wages are paid to and received by the wage earner, they cease to be current wages and the exemption statute does not apply. *Sutherland v. Young*, 292 S.W. 581 (Tex.Civ.App.—Waco 1927, no writ); *Lee v. Emerson-Brantingham Implement Co.*, 222 S.W. 283 (Tex.Civ.App.—Dallas 1920, no writ). In *Lee*, the court specifically held that it

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In reality, *Cook v. Neill* supports the position of the teachers' union in this case as it would have permitted, even when facts were in dispute, resort to the courts, so long as a binding election to pursue the administrative route had not first been made. Consistent with *Cook v. Neill* is *Benton v. Wilmer-Hutchins Independent School District*, 662 S.W.2d 696 (Tex.App.—Dallas 1983, writ dismissed w.o.j.), where the court of appeals observed that while not all facts were undisputed, those still in dispute were immaterial. The court of appeals reversed the denial of a temporary injunction in a suit by teachers against the school district to enjoin the district from making pay deductions from the teachers' monthly checks. The Dallas court concluded that irreparable harm would exist if the injunction did not issue and further determined that the remedy of administrative appeal was wholly inadequate.

A case involving reasonableness of school district policy involving tuition-free school attendance was determined to be solely a question of law in *Jackson v. Waco Independent School District*, 629 S.W.2d 201 (Tex.App.—Waco 1982, writ refused n.r.e.). The court of appeals held it had jurisdiction over the matter because the issue of the policy's reasonableness was a question of law.

The controlling facts in the case at bar being undisputed, I would rely upon sound precedent that the courts do have jurisdiction in this matter. Accordingly, I join in the reversal of the judgment of the court of appeals.

WALLACE, J., joins in this concurring opinion.

HILL, Chief Justice, dissenting.

The longstanding general rule in Texas school law cases is that parties must exhaust available administrative remedies before resorting to the courts when there are facts in dispute. *Mission Independent School District v. Diserens*, 144 Tex. 107, 111, 188 S.W.2d 568, 570 (1945). Any harm that the teachers might have suffered had they been required to pursue an appeal through administrative channels is far out-

weighed by the damage the majority's departure from this rule will wreak upon the administrative law of this state.

Numerous issues of fact will have to be decided in order to resolve this dispute. As the court of appeals recognized, it is unclear from the record before us exactly how HISD's plan would have been implemented within the various high schools in the district. Another contested central fact issue concerns the degree of autonomy the teachers have exercised in the past as to how they would spend their lunch hours. These are exactly the types of factual issues that should aptly be resolved in the first instance by authorities familiar with the day-to-day administration of public schools. The majority's opinion thus undermines one of the most important purposes of the exhaustion doctrine: allowing administrative bodies to apply expertise to questions of fact and policy. See *Public Utility Commission of Texas v. Pedernales Electric Cooperative, Inc.*, 678 S.W.2d 214, 220 (Tex.App.—Austin 1984, writ refused n.r.e.). Accordingly, I must dissent.

GONZALEZ, J., joins in this dissent.



The TIMES HERALD PRINTING
COMPANY, Petitioner,

v.

Wayne C. JONES, M.D., et al,
Respondents.

No. C-5947.

Supreme Court of Texas.

April 29, 1987.

Rehearing Denied June 17, 1987.

Newspaper moved for access to orders,
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by trial court pursuant to request of parties. The 95th District Court, Dallas County, Nathan L. Hecht, J., denied access, and newspaper appealed. The Dallas Court of Appeals, Fifth Supreme Judicial District, Stephens, J., 717 S.W.2d 933, affirmed. Newspaper appealed. The Supreme Court held that trial court had no jurisdiction to consider newspaper's motion to unseal court records in civil action to which newspaper was never party.

Judgment vacated; cause dismissed.

Records ⇐32

Trial court had no jurisdiction to consider newspaper's motion to unseal court records in civil suit to which newspaper was not party, where newspaper filed motion to unseal and to intervene in action more than five months after entry of final judgment sealing records; under the circumstances, trial court had lost its plenary power either to alter or to uphold its judgment. Vernon's Ann.Texas Rules Civ. Proc., Rules 60, 329b.

Charles L. Babcock, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, for petitioner.

John H. Martin and Judy C. Norris, Thompson & Knight, Dallas, for respondents.

PER CURIAM.

This is an appeal by The Times Herald Printing Company from an order denying a motion to unseal court records. The facts are set out in the opinion of the Court of Appeals. 717 S.W.2d 933 (Tex.App.—Dallas 1986). Since Times Herald was never a party to or an intervenor in the cause of action, the appeal should have been dismissed. *Gunn v. Cavanaugh*, 391 S.W.2d 723 (Tex.1965); TEX.R.CIV.P. 60. We hold that the trial court and court of appeals erred in assuming jurisdiction. The record shows that the motion to unseal was filed and that Times Herald attempted to intervene after the trial court lost plenary power over its judgment. *First Alief Bank v. White*, 682 S.W.2d 251 (Tex.1984); TEX.R.

CIV.P. 329b. The court of appeals erred in disposing of this issue by implying that the district court only lost its plenary power to *alter or change* the judgment and that it still had plenary power to *uphold* the judgment. The trial court had no jurisdiction to consider the Motion to Unseal, because the judgment sealing the records was final in all respects. The court of appeals' judgment conflicts with TEX.R.CIV.P. 329b. Therefore, pursuant to TEX.R.APP.P. 133(b), a majority of the court grants the application for writ of error and without hearing oral argument, the judgment of the court of appeals is vacated and the cause is dismissed.



ST. ELIZABETH HOSPITAL et al., Petitioners,

v.

James GARRARD et ux., Respondents.

No. C-5412.

Supreme Court of Texas.

May 6, 1987.

On Rehearing June 24, 1987.

Patient and her husband brought action seeking damages for mental anguish after stillborn daughter's body had been disposed of in unmarked, common grave, without their knowledge or consent. The 136th District Court, Jefferson County, Jack R. King, J., dismissed petition upon motion by hospital and pathologist. The patient and husband appealed. The Beaumont Court of Appeals, Don Burgess, J., 708 S.W.2d 571, reversed and remanded. Appeal was taken. The Supreme Court, Ray, J., held that proof of physical injury is no longer required to recover for negligent infliction of mental anguish.

Affirmed.

did not comply with the court's judgment. It merely recites:

Respondent is in contempt of this Court in that he failed and refused to make support payments in defiance of the Judgment hereinabove referred to and further that the unpaid support under said order as of this date is the sum of \$5,800.00.

The commitment order is void on its face. The order of the trial court does not set out with particularity, nor incorporate by reference from the motion for contempt, the dates on which relator did not comply with the court's orders. *Ex parte Sinclair*, 746 S.W.2d 956 (Tex.App.—Houston [14th Dist.] 1987, orig. proceeding).

In *Sinclair*, the trial court entered an order in which it found relator in contempt of its divorce decree and later order to pay child support arrearages, and found him \$1667.50 in arrears on his child support payments. The *Sinclair* court held that the commitment order did not adequately indicate how relator violated the court's divorce decree and earlier order to pay arrearages.

Because the commitment order recites only total arrearages under the divorce decree and the February 5, 1987 order, it fails to satisfy the § 14.33(a) requirement that an enforcement order state the time, date, and place of relator's violations.

Ex parte Sinclair, 746 S.W.2d at 958.

[2] A contempt order must clearly state in what respect a party violated the court's order. *Ex parte Rosborough*, 723 S.W.2d 273, 274 (Tex.App.—Houston [1st Dist.] 1987, orig. proceeding). The commitment order in this case only recites total arrearages. As such, it does not meet the requirements of § 14.33(a) that an enforcement order state the time, date and place of relator's violations. *Ex parte Sinclair*, 746 S.W.2d at 958-59.

Before § 14.33(a) became effective in 1985, we held that enforcement orders that merely recited the amount of arrearage were valid. See, e.g. *Ex parte Papageorgiou*, 685 S.W.2d 776 (Tex.App.—Houston [1st Dist.] 1985, orig. proceeding). In *Pa-*

pageorgiou, a case that arose in 1984, we held the trial court was not required to enter specific findings as to each contemptuous act. *Papageorgiou*, 685 S.W.2d at 779. We note that the legislature's enactment of § 14.33(a) invalidates *Papageorgiou*.

We find that the commitment order does not adequately indicate how relator violated the court's divorce decree and order to pay arrearages, and it is, therefore, void on its face. *Ex parte Rosborough*, 723 S.W.2d at 274. The application for writ of habeas corpus is GRANTED. We order relator discharged from custody, noting that relator's discharge does not relieve him of his obligation to pay the child support arrearage.



James R. ASHPOLE, et al., Relators,

The Honorable Richard W. MILLARD
Judge of the 189th Judicial District
Court of Harris County, Texas, Respondent.

No. 01-89-00471-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

Sept. 21, 1989.

Parties to shareholder derivative suit that was dismissed without prejudice petitioned for writ of mandamus, attacking trial court order vacating previous order sealing record in case. The Court of Appeals, Evans, C.J., held that trial court's inherent power to control public access to its records did not extend beyond period of its plenary power and order directing that record be sealed which was not signed until

12 years after agreed order of dismissal was void and was properly vacated.

Petition denied.

1. Records §32

Trial court's inherent power to control public access to its official records does not extend beyond period of its plenary power.

2. Judgment §326

After court's plenary power over judgment or order expires, it may only make nunc pro tunc corrections of clerical errors in prior judgment or order and declare previous judgment or order void because it was signed after court's plenary power had expired. Vernon's Ann. Texas Rules Civ. Proc., Rule 329b(f).

3. Pretrial Procedure §517

Agreed dismissal without prejudice is not adjudication of rights of parties; it merely puts them back in position as if suit had never been brought.

4. Pretrial Procedure §517

Taking of voluntary nonsuit does not constitute litigating of issues in case and does not prejudice parties against seeking the same relief in subsequent suit.

5. Pretrial Procedure §517

Once case is voluntarily dismissed, no further action may be had in that cause and any further action must be taken by instituting suit de novo, unless there is successful motion to reinstate.

6. Records §32

Agreed order sealing record, signed 12 years after entry of agreed order of dismissal without prejudice, was void and properly vacated by trial court. Vernon's Ann. Texas Rules Civ. Proc., Rule 329b(f).

Richard F. Bergner, Karen E. Murray, Houston, for relators.

Kevin M. O'Malley, Houston, for respondent.

Before EVANS, C.J., and DUNN and MIRABAL, JJ.

OPINION

EVANS, Chief Justice.

The relators in this case were parties to a shareholder derivative suit, which resulted in an agreed order of dismissal without prejudice on January 12, 1977. Some twelve years later, on January 19, 1989, the parties jointly moved to seal the record in the case. The court granted the parties' motion and entered an agreed order sealing the record. In March 1989, the real parties in interest in this mandamus proceeding, who were not parties to the original cause, filed a motion with the trial court asking that the court vacate its previous order and that the record be unsealed, making it available for public inspection and copying. Although the court on April 10, 1989, initially denied this motion to unseal, the real parties in interest filed a motion for reconsideration of the motion to unseal, and on May 15, 1989, the court unsealed the file. Relators attack this second order, unsealing the file, in their petition for writ of mandamus.

[1] Courts have long recognized the general right of the public to have access to judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1311, 55 L.Ed.2d 570 (1978). A court of record, however, does have an inherent, if limited, right to control public access to its official records, and it is within the court's discretionary authority to order such records sealed. *See id.* at 598-99, 98 S.Ct. at 1312-13; *North Dakota ex rel. Williston Herald v. O'Connell*, 151 N.W.2d 758, 763 (N.D.1967); *Deere & Co. v. Finley*, 103 Ill.App.3d 774, 59 Ill.Dec. 444, 446, 431 N.E.2d 1201, 1203 (1981).

In this case, the dispositive question raised by relator's motion is whether a court has authority to order the record sealed after it has entered a final order dismissing a case without prejudice and its plenary power over the order has expired. We conclude that the trial court's inherent power to control public access to its records does not extend beyond the period of its plenary power.

[2] After a court's plenary power over a judgment or order expires, it may only: (1) make nunc pro tunc corrections of clerical errors in a prior judgment or order, and (2) declare a previous judgment or order void because it was signed after the court's plenary power had expired. Tex.R. Civ.P. 329b(f); see *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987).

The parties cite *Times Herald Printing Co. v. Jones* as analogous to this case. In *Times Herald Printing Co.*, an individual brought an action for damages against the defendant, a physician, who sought a protective order limiting disclosure of the contents of certain depositions. The parties later settled, and the court entered an agreed final judgment, signed by the parties and their attorneys, which provided that the records of the case be sealed from public access and disclosure except as to the parties to the suit. About five months after the judgment was entered, Times Herald moved to unseal the records and to obtain access to the court's "orders, opinions, and non-discovery pleadings" in the case.

The Dallas Court of Appeals decided, in an en banc opinion, that even though the trial judge had lost plenary power to alter or change the judgment in the case, that part of the judgment ordering the record sealed affected the rights of Times Herald, and that Times Herald could attack that portion of the judgment by direct or collateral proceedings. *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 935 (Tex.App.—Dallas 1986), *rev'd*, 730 S.W.2d 648. The court treated Times Herald's motion to unseal as a new cause of action brought for the sole purpose of gaining access to the records previously sealed, concluding that the relief sought by Times Herald would not change or alter the settlement reached by the parties. *Id.* However, after finding that Times Herald had not shown the required extraordinary circumstances or compelling need to modify the sealing order, the court upheld the trial court's refusal to unseal the file.

The Texas Supreme Court granted Times Herald's application for writ of error, and

in a per curiam opinion, a majority of the court, without hearing oral argument, ordered the judgment of the court of appeals vacated and the cause dismissed. *Times Herald Printing Co.*, 730 S.W.2d 648. The supreme court held that both the trial court and the court of appeals had erred in assuming jurisdiction, because Times Herald's motion to unseal, which the court construed as also a motion to intervene, was filed after the trial court had lost plenary power over its judgment. Thus, the Texas Supreme Court held that the trial court had no jurisdiction to consider Times Herald's motion to unseal, because the judgment sealing the records was final in all respects. Concluding that the court of appeals' decision was in conflict with Tex.R. Civ.P. 329b, the supreme court vacated that ruling.

The circumstances in the *Times Herald* are somewhat different from the facts here. In the *Times Herald* case, there was an agreed judgment, which was signed by both parties and their counsel and contained an express provision that the record be sealed.

[3,4] Here, the court entered an "Agreed Dismissal Without Prejudice," according to the relators' petition. Such a dismissal is not an adjudication of the rights of the parties; it merely puts them back in the position as if suit had never been brought. *Crofts v. Court of Civil Appeals for the Eighth Supreme Judicial Dist.*, 362 S.W.2d 101 (Tex. 1962); *U.S. Fidelity & Guar. Co. v. Beuhler*, 597 S.W.2d 523, 525 (Tex. Civ.App.—Beaumont 1980, no writ). The taking of a voluntary nonsuit does not constitute a litigating of the issues in a case, and does not prejudice the parties against seeking the same relief in a subsequent suit. See *West v. Plantation Hills, Inc.*, 497 S.W.2d 460, 462-63 (Tex. Civ.App.—Houston [1st Dist.] 1973, no writ).

[5] Once a case is voluntarily dismissed, however, no further action may be had in that cause. *Gibson v. Gibson*, 653 S.W.2d 646 (Tex.App.—Waco 1983, no writ); see *Greenberg v. Brookshire*, 640 S.W.2d 870 (Tex. 1982). Any further action must be taken by instituting a suit de novo, unless there is a successful motion to reinstate.

U.S. Fidelity & Guar. Co. v. Beuhler, 597 S.W.2d at 524; *Brown v. Nelms*, 374 S.W.2d 917. (Tex.Civ.App.—Fort Worth 1964, no. writ). The time limits for filing motions to reinstate are prescribed by the rules of civil procedure and had expired long before the parties filed their agreed motion to seal the file in this case.

Thus, no further action in the case could have been taken without reinstatement, and the time for reinstatement, as well as the trial court's plenary power over its 1977 order of dismissal had long expired.

[6] The January 19, 1989 order, which directed that the record be sealed, was not signed until some 12 years after entry of the dismissal order. The court's January 19, 1989 order is void because the dismissed case had not been reinstated, and the court had lost plenary power to amend, modify, or otherwise affect its prior order. Tex.R.Civ.P. 329b(f); *Times Herald Printing Co. v. Jones*, 730 S.W.2d at 649. Because the January 19, 1989 order was void, the trial court acted within its authority in vacating it. Tex.R.Civ.P. 329b(f). No abuse of discretion has been shown.

We deny relator's petition for writ of mandamus.



Katherine Helen ARNOLD, Theresa Ann Case, Daniel Frank Gohl, Carey Lynn Hattic, Kathleen Martha Kern, Justin Matthew McCoy, Marc Evan Salomon, Kelly Severin, Susan L. Svatek, Denise Lynette Szymczak, Appellants,

The STATE of Texas, Appellee.

Nos. 3-87-249-CR through 3-87-253-CR.

Court of Appeals of Texas,
Austin.

Sept. 27, 1989.

Rehearing Denied Oct. 25, 1989.

Defendants were convicted in the County Court at Law No. 1, Travis County,

Leslie D. Taylor, J., of disruptive activity on university campus, and they appealed. The Court of Appeals, Earl W. Smith, J. (Retired), held that: (1) testimony of chairman of university antiapartheid committee about events on campus in relation to events just prior to defendants' takeover of office of university president in protest of investments in South Africa, offered to give jury insight into defendants' mental states immediately prior to charged acts, and other testimony as to same matters could be excluded, as cumulative to testimony of defendants and based on witnesses' inability to testify as to each defendant's own state of mind; (2) civil rules setting forth grounds and procedures for recusal of judges do not apply in criminal cases; and (3) trial court was not required to excuse for cause in prospective juror who made "hanging gesture" with tie during break in voir dire.

Affirmed.

1. Criminal Law ¶675

Testimony of chairman of university antiapartheid committee about events on campus in relation to events just prior to defendants' takeover of office of university president in protest of investments in South Africa, offered to give jury insight into defendants' mental states immediately prior to charged acts, and other testimony as to same matters could be excluded, in prosecution for disruptive activities on campus, as cumulative to testimony of defendants and based on witnesses' inability to testify as to each defendant's own state of mind; there was a great deal of undisputed testimony about conditions in South Africa and events on campus.

2. Constitutional Law ¶46(2)

Indictment and Information ¶138

Motion to quash information charging violation of Texas Education Code provision making it misdemeanor to be involved in disruptive activity on university campus as impermissibly vague and overbroad was

APPENDIX—Continued
(202) 357-0462

Signature as Approving
/s/ James B. Eaton
Attorney for Appellant
Prepared with the mutual cooperation of
government and claimant's attorneys.
/s/ James B. Eaton
Attorney for Appellant



BELO BROADCASTING
CORPORATION,
Plaintiff-Appellant,

v.

Jesse CLARK, Defendant-Appellee.

UNITED STATES of America, Plaintiff,

v.

Billy Wayne CLAYTON, et
al., Defendants,

KDFW-TV, Inc. and Quin Mathews,
Movants-Appellants.

Nos. 80-2169, 80-2239.

United States Court of Appeals,
Fifth Circuit.
Unit A

Aug. 28, 1981.

Broadcasters filed requests to copy for public broadcast audiotapes of discussions between defendants and FBI agents in connection with the "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas. The United States District for the Southern District of Texas, Robert O'Connor, Jr., J., denied the request. Broadcasters appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) the denial of a request for a "temporary restraining order" was appealable where factual development

was irrelevant to determination of the motion, the hearing was not ex parte and time was exceedingly short; (2) there was no First Amendment right of access to the audiotapes of discussions between the defendants and the FBI agents in connection with the "Brilab" sting operation; (3) a constitutional right of access to the audiotapes could not be grounded on the petition clause of the First Amendment; and (4) even though there is a common-law right of access that predates the Constitution itself, the district judge did not abuse his discretion in denying the broadcasters access to the tapes, when that denial was grounded on the right of a yet-to-be tried defendant to a fair trial.

Affirmed.

1. Federal Courts ⇌ 573

Disposition of motion for temporary restraining order is generally not appealable as order granting, denying or modifying injunction. 28 U.S.C.A. § 1292(a)(1).

2. Federal Courts ⇌ 573

Denial of so-called temporary restraining order is properly appealable when entered after hearing in which all interested parties had opportunity to participate, thus allowing for full presentation of relevant facts. 28 U.S.C.A. § 1292(a)(1).

3. Federal Courts ⇌ 573

Denial of motion seeking what was styled as temporary restraining order seeking to require district court to allow broadcasting station to copy for public broadcast audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas was order sufficiently final to endow Court of Appeals with jurisdiction, since factual development was irrelevant, hearing was not ex parte and time was exceedingly short. 28 U.S.C.A. § 1292(a)(1).

4. Constitutional Law ⇌ 90.1(1)

There is no First Amendment right of access to audiotapes of discussions between

defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas. U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇌ 90.1(9)

Where members of press were allowed to listen to audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operations concerned with alleged bribery in awarding employee insurance contracts in Texas when tapes were played in court, transcripts were prepared and distributed for use of members of press, and reporters and broadcasters were free to report information as they wished, Constitution did not require that members of press be allowed to play those tapes over airwaves. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇌ 90.1(1)

Press enjoys no constitutional right of physical access to courtroom exhibits. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇌ 91

Broadcasters did not have right of access to audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas under clause of First Amendment providing that Congress shall make no law abridging right of people to petition government for redress of grievances. U.S.C.A.Const. Amend. 1.

8. Records ⇌ 32

There is right of access to courtroom exhibits derived not from Constitution, but rather, common-law right of access that predates Constitution itself.

9. Criminal Law ⇌ 1147

In reviewing decisions of district judge in connection with request for access to courtroom exhibits, issue is whether district judge abused his discretion.

10. Criminal Law ⇌ 633(1)

District judge did not abuse his discretion in denying requests by broadcasters to

copy for public broadcast audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas where judge's concern was with right of yet-to-be tried defendant. U.S.C.A.Const. Amend. 6.

11. Criminal Law ⇌ 633(1)

In determining whether district judge abused his discretion in denying requests by broadcasters to copy audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas when district judge based denial on right of yet-to-be tried defendant to fair trial, it would be better to err on side of generosity in protection of yet-to-be-tried defendant's right to fair trial before impartial jury. U.S.C.A.Const. Amend. 6.

12. Criminal Law ⇌ 633(1)

In determining whether district judge abused his discretion in denying request by broadcasters to copy for public broadcast audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas, fact that there may have been easy selection of jury for earlier trial in connection with same case did not establish unlikelihood that pre-trial publicity would affect rights of yet-to-be tried defendant, and, therefore, it was not abuse of discretion to deny access based on right of yet-to-be tried defendant to fair trial. U.S.C.A.Const. Amend. 6.

13. Telecommunications ⇌ 529

District judge did not abuse his discretion in denying requests by broadcasters to copy audiotapes of discussions between defendants and FBI agents in connection with "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas even if other procedural devices were available to guarantee yet-to-be tried defendant's fair trial right, since broadcasters' common-law right

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of access did not rise to level of importance or merit same degree of protection as yet-to-be tried defendant's right to fair trial. U.S.C.A.Const. Amend. 6.

14. Criminal Law ⇌ 633(1)

Because of difficulties inherent in formulating broad yet clear rule to govern variety of situations in which right of access of press to courtroom exhibits must be reconciled with legitimate countervailing public or private interests, decision as to access is one which rests in sound discretion of trial court, and any denial or infringement of "precious" and "fundamental" common-law right remains subject to appellate review for abuse.

Locke, Purnell, Boren, Laney & Neely, Stephen Philbin, Dallas, Tex., for plaintiff-appellant.

Mary L. Sinderson, Asst. Atty. Gen., Houston, Tex., for defendant-appellee.

Jackson, Walker, Winstead, Cantwell & Miller, Charles L. Babcock, Stephen Philbin, Dallas, Tex., for movants-appellants.

Appeals from the United States District Court for the Southern District of Texas.

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS *, District Judge.

GEE, Circuit Judge:

As the result of a Federal Bureau of Investigation "sting" operation (the "Brilab" investigation) concerned with alleged bribery in the awarding of state employee insurance contracts, the Speaker of the Texas House of Representatives, two Austin, Texas, attorneys, and a Houston, Texas, labor official, L. G. Moore, were indicted and the first three tried and acquitted in Houston on a number of federal offenses.¹

* District Judge of the Western District of Texas, sitting by designation.

1. L. G. Moore's trial was severed from that of the other defendants and originally set for December 1, 1980. A continuance beyond that date was granted by the district court, and

Prominent items of proof at trial were audiotapes of discussions between defendants and the FBI operatives. Prior to and during the criminal trial, the presiding district judge prohibited the clerk of the court, counsel, or any party from providing the news media with the tapes or copies of the tapes admitted into evidence at trial. Belo Broadcasting Corporation and station KDFW, two Dallas broadcasting stations, made separate requests to the district judge to copy these Brilab tapes for public broadcast. Both the Belo motion, made during the criminal trial, for a temporary restraining order that would have required the clerk to turn over the tapes to the broadcaster, and the KDFW "Petition for Hearing and for Vacation of Restrictions on Press and Other News Media," filed after the verdicts of acquittal, were denied by the district court. In refusing to permit the requested access, the district judge made clear his concern that broadcast of the tapes outside his courtroom would have a deleterious effect on the pending trial of defendant Moore. In his memorandum opinion rejecting Belo's request, which was incorporated by reference in his denial of the subsequent KDFW motion, the district judge wrote:

Widespread publication of these tapes prior to trial will severely prejudice Mr. Moore's sixth amendment right to a fair trial, as well as potentially deny him rights guaranteed by the fourth and fifth amendments. Moreover, if the tapes are prematurely heard by the public, this court would be severely hampered in selecting a fair and impartial jury in the forthcoming trial.

The broadcasters' appeals have been consolidated for our consideration. We affirm the orders of the district court.

I. Appellate Jurisdiction.

A brief but necessary discussion of the appealability of these district court orders is

from what appears in the record, the trial of defendant Moore has yet to begin. That Moore was standing trial separately was the dispositive factor in the trial court's decision that prompts this appeal.

warranted. The disposition below of KDFW's "Petition for Hearing and for Vacation of Restrictions on Press and Other News Media" is an appealable order. The petition was copied from one filed in the criminal trial of former U.S. Senator Edward Gurney, the lower court disposition of which was found by this court to be a sufficiently appealable order in *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).

[1, 2] The Belo request stands in a somewhat different light: Belo appeals from the denial of what all concerned styled a temporary restraining order ("TRO"). The disposition of a motion for a temporary restraining order is generally not appealable under 28 U.S.C. § 1292(a)(1) as an order granting, denying, or modifying an injunction. In certain circumstances the denial of a requested TRO can be considered denial of a preliminary injunction. The label appended by the requesting party or the judge is not conclusive as to its proper characterization. The central inquiry goes to the nature and scope of the hearing that precedes the denial of the motion. The denial of a so-called temporary restraining order is properly appealable when entered after a hearing in which all interested parties had an opportunity to participate, thus allowing for full presentation of relevant facts. See *Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965).

[3] Application of these principles to this "TRO" denial does not yield a certain

2. The immediate relief sought by Belo was contemporaneous access to the tapes. That relief is of course beyond the power of this, or any, court—the period for contemporaneity expired with the jury verdict last October. But the broadcasters' requests for access are continuing and continue to be denied. The controversy remains with us; the issue is not moot. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 2820–21, 65 L.Ed.2d 973 (1980); *United States v. Gurney*, 558 F.2d at 1207.

3. Our jurisdictional resolution is bolstered by knowledge that subsequent to the denial of its "TRO" Belo filed for a preliminary injunction seeking the identical relief in the district court; that motion languishes unanswered in the court below, indicating that in all but name the motion for this TRO served the same function as

result. From what appears in the transcript, the hearing on Belo's motion could not have lasted over a minute. Belo's lawyers asked for access, the judge denied it. An assistant United States attorney was present, but no occasion arose for her to address the court on behalf of the clerk as custodian of the tapes. The presence of counsel for defendants or L. G. Moore is not reflected in the record. More lawyers could have added little to this hearing; it does not appear that any facts required fuller explication. On these particular facts—a motion for which factual development was irrelevant, the hearing was not *ex parte*, and time was exceedingly short²—we find the denial of the TRO for access to be an order sufficiently final to endow us with jurisdiction.³

With both appellants properly before us, we proceed to a consideration of the substance of their positions. Because, as will appear, our conclusions place us in something of a minority among our fellow circuits, we write at greater length than explaining an affirmance of a trial court's exercise of discretion usually requires.

II. Constitutional Claims.

[4, 5] The broadcasters assert both a constitutional and a common law right of access to the tapes. We deal first with the claimed right of constitutional derivation:⁴ there is no such first amendment right. In *Nixon v. Warner Communications*, 435 U.S.

that for preliminary injunction. Once the TRO was denied, nothing remained to be done on this point in the district court. In finding three oral rulings by the trial judge to have "sufficient finality to permit appeal," this court in *United States v. Gurney*, 558 F.2d at 1207, found one important factor in "the improbability of further consideration by the trial court."

4. We do this with full recognition that constitutional issues are not to be decided unless necessary. As will be seen shortly, because of our decision on the common law right of access, consideration of the constitutional claim was unavoidable. We treat the constitutional issue out of turn in these first pages simply for our own purposes in more efficiently discussing the cases and issues.

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Cite as 654 F.2d 423 (1981)

589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), confronted with a claim identical to that made by the broadcasters here, the Supreme Court squarely rejected a claimed constitutional right of physical access to trial exhibits: "Respondents claim that *Cox Broadcasting*⁵ guarantees the press 'access' to—meaning the right to copy and publish—exhibits and materials displayed in open court. This argument misconceives the holding in *Cox Broadcasting*." *Id.* at 608–09, 98 S.Ct. at 1317–18. In *Cox Broadcasting* the Court held that the press could not be prohibited from reporting what it had learned in open court and what the public was thus entitled to know. In *Warner Communications* the Court recognized the difference between the situation in *Cox Broadcasting* and the one immediately before it and now before us. Here, as in *Warner Communications*, there were "no restrictions on press access to, or publication of any information in the public domain." *Id.* at 609, 98 S.Ct. at 1318. Members of the press were allowed to listen as the tapes were played in court; transcripts were prepared and distributed for their use; reporters and broadcasters were free to report this information as they wished. All that was denied them was the right to play these tapes over the air waves; that the Constitution does not require.

The district judge here recognized, consistent with prior Supreme Court authority relied on by the Court in *Warner Communications*, that the right of access enjoyed by the press is generally no greater than that of the public at large.

Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had physical access—must be made available for copying. Our decision in *Cox Broadcasting* simply is not applicable.

5. In *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court struck down as violative of the first amendment a state law that prohibited publication by the press of the names of rape victims revealed in open court.

435 U.S. at 609, 98 S.Ct. at 1318 (emphasis in original). As recognized by the Court in *Warner Communications*, neither the public nor the press enjoys any constitutional right of physical access to exhibits introduced in evidence at a criminal trial. Constitutional requirements are fully satisfied by the kind of untrammelled access to the information contained therein that was afforded press and public alike in this case.

Our decision in *United States v. Gurney*, *supra*, where we found it significant that the documents withheld from the press were not part of the public record in the criminal case, may be read as holding, in reliance on *Cox Broadcasting*, that there exists a constitutional right of physical access to and inspection of courtroom exhibits. To that extent, it must be considered overruled by *Warner Communications*. Counsel for KDFW suggested at oral argument that the subsequent Supreme Court attention to fair trial-free press questions in *Richmond Newspapers, Inc. v. Virginia*, *supra*, had rescued *Gurney* from obliteration by *Warner Communications*. We have carefully considered the argument that *Richmond Newspapers* has altered the firm "no constitutional right of access" holding of *Warner Communications* and thus breathed new life into the broadcasters' claim of first amendment entitlement to copy and broadcast these tapes. We find it unpersuasive.

The question before the Court in *Richmond Newspapers* was a narrow but important one: "whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution." 448 U.S. at 558, 100 S.Ct. at 2818.⁶ The Supreme Court answered that question affirmatively but left us with an even narrower holding: the state court here impermissibly closed *this* criminal trial to public

6. Unless noted otherwise, all quotations from or citations to *Richmond Newspapers* will be to the plurality opinion of Chief Justice Burger. The derivation of certain principles from this case is a difficult task: besides the opinion by the Chief Justice, there were two concurring statements, three opinions concurring in the judgment, and a dissent.

and press alike. That the right to attend criminal trials is not absolutely guaranteed by the first amendment is indicated in the plurality opinion. In restating the question before the Court in a subsequent passage, the Chief Justice writes:

But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.

Id. at 2821. Similarly, in the final portion of his opinion, the Chief Justice examined the particular circumstances of this closure order, concluding, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Id.* at 2830.⁷

[O]ur holding today does not mean that the First Amendment right of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Id. n.18.

In its historical analyses and constitutional exegesis, the Court in its several opinions

7. To the same effect, see 100 S.Ct. at 2831 (Stevens, J., concurring):

I agree that the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.

8. "Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Id.* at 2837 (citation omitted) (Brennan, J., concurring in judgment).

9. "The crucial prophylactic aspects of the administration of justice cannot function in the

wrote sensitively of the important societal values served by open criminal proceedings: further assurance of fairness to the accused,⁸ a community cathartic effect, a prophylactic benefit for the system of administration of justice,⁹ among others. It is argued that these sentiments, when applied to the situation before us, resuscitate the misreading of *Cox Broadcasting* (rejected by the Court in *Warner Communications*) that animates the broadcasters' constitutional claim here. As should be apparent in our restatement of that position, we decline to find the Supreme Court to have ratified that misreading. On the basis of comments general in nature and addressed to a different problem, the Supreme Court will not here be presumed to have abandoned an only recently stated principle.

[6] Our reading of *Richmond Newspapers* convinces us that the holding of *Warner Communications* that the press enjoys no constitutional right of physical access to courtroom exhibits remains undisturbed. Despite a gentle suggestion perhaps to the contrary,¹⁰ we are left with the principle iterated by Justice Powell in *Warner Communications* that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public," 435 U.S. at 609, 98 S.Ct. at 1318, and the conclusion there reached that the Constitution grants neither press nor public the right to physical access to courtroom exhibits.¹¹ Though four justices dis-

dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 2825 (citation omitted.)

10. A conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public. But no such contention is at stake here. Since the media's right of access is at least equal to that of the general public, this case is resolved by a decision that the state statute unconstitutionally restricts public access to trials.

100 S.Ct. at 2832 n.2 (citations omitted) (Brennan, J., concurring in judgment).

11. "Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Nei-

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sented from the opinion of the Court in *Warner Communications*, no voice was raised against this particular constitutional conclusion. Nothing in *Richmond Newspapers* stands to the contrary.¹²

[7] Appellant KDFW raises an additional constitutional ground for access to the tapes, one allegedly found in the petition clause¹³ of the first amendment:

The public (and the press' rights are coextensive with that of the public) cannot adequately petition the federal government with respect to the alleged improprieties in establishment or maintenance of the "Brilab" investigation, nor can they effectively petition government with respect to the qualifications of Speaker Clayton without access to these tapes.

Appellant points to no authority suggesting that any treatment extended press or public in the court below has affected the right to petition for redress of grievances. The cited cases, chiefly on inmates' rights of access to legal materials, are inapposite. Appellant's position is simply its "freedom of the press" argument cast in a slightly different mold. There is no doubt that, to whatever extent, if any, the petition clause would enter in here, its values are fully served by the opportunity allowed press and public alike to view the proceedings and the provi-

ther supports respondents' conclusion." 435 U.S. at 608, 98 S.Ct. at 1317.

12. Opinions in *Richmond Newspapers* recognized the special informative role played by the press in the maintenance of open criminal proceedings, but this status was acknowledged to be born of practical necessity rather than constitutional entitlement.

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.

100 S.Ct. at 2825. "As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of the right of access because it serves as the 'agent' of inter-

tion of transcripts of the tapes for republication or broadcast. The government is not required under the first amendment—through the petition clause or otherwise—to provide representatives of the news media with the tapes for copying and rebroadcasting.

III. *The Common Law Right of Access.*

[8] There is a right of access to these courtroom exhibits derived not from the Constitution: a common law right of access "that predates the Constitution itself." *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C.Cir. 1976), *rev'd sub nom. Nixon v. Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). As with the constitutional claim, the Court's opinion in *Warner Communications* provides the measure by which we review the trial court decision on the right of physical access to these tapes. "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." 435 U.S. at 597, 98 S.Ct. at 1312 (footnote omitted). While the question was not certainly answered by the Court's opinion in *Warner Communications*,¹⁴ we assume for purposes of this discussion that the right of access extends beyond scroll and paper to tape recordings. Finding no need on the facts of

ested citizens, and funnels information about trials to a large number of individuals." *Id.* at 2832-33 n.2 (Brennan, J., concurring in judgment).

13. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

14. Petitioner also contends that the District Court was totally without discretion to consider release of the tapes at all. He offers three principal arguments in support of that position: . . . (ii) recorded materials, as opposed to written documents, are not subject to release by the court in custody; . . .

As we assume for the purposes of this case . . . that the common law right of access is applicable, we do not reach or intimate any view as to the merits of these various contentions by petitioner.

435 U.S. at 599 n.11, 98 S.Ct. at 1313.

the Watergate Tapes case "to delineate precisely the contours of the common-law right," *id.* at 599, 98 S.Ct. at 1313, the Court found it "uncontested" that the right to inspect and copy judicial records is not absolute. *Id.* at 598, 98 S.Ct. at 1312. The question becomes, then, under what circumstances access may be denied, and to whose judgment that decision is substantially committed. The Supreme Court's answer to the second question suggests the impossibility of definitively answering the first: "The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599, 98 S.Ct. at 1312-13. The District of Columbia Circuit, whose decision was reversed in *Warner Communications*, acknowledged the same answers to the prefatory questions: "Because no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within the sound discretion of the courts, subject to appellate review for abuse." *Mitchell*, 551 F.2d at 1260.

[9] Before turning to a review of the district judge's exercise of discretion in denying access, we consider briefly the appellants' suggestion that review for abuse of discretion is not our sole function. The broadcasters argue that certain language in *Warner Communications*, quoted in the

15. "We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above." 435 U.S. at 603, 98 S.Ct. at 1315. "At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." *Id.* at 602, 98 S.Ct. at 1314.

16. The Court "also recognizes that the court with custody of the records must have substantial discretion in making the decision regarding access." *Id.* at 613, 98 S.Ct. at 1320 (Marshall, J., dissenting).

17. The somewhat confused characterization of what the Court was actually doing in this case stems from the bifurcated nature of the decision below on access: two district judges, in two orders, separately addressed the issue. At

margin,¹⁵ indicates an unwillingness on the part of the Court to submit the question substantially to the discretion of the trial judge. While acknowledging the possible ambiguity of that language, we find the entirety of the majority opinion, as well as remarks in the dissents, not supportive of appellants' position. In discussing the existence of this right of access, Justice Powell in his majority opinion recognized as an initial matter that the cases were in agreement "that the decision as to access is one best left to the sound discretion of the trial court" 435 U.S. at 599, 98 S.Ct. at 1312. In examining the right of access in this particular case, the majority opinion decided that the Presidential Recordings and Materials Preservation Act concluded the issue against access. The Court found that in this instance Congress had withdrawn access to these tapes from any exercise of judicial discretion: the Act was "a decisive element in the proper exercise of discretion with respect to release of the tapes." *Id.* at 607, 98 S.Ct. at 1317 (emphasis added). The decision to allow access, however, in the general run of cases would remain in the sound discretion of the district court. While rejecting the majority's conclusion on the statute's determination of the question, Justice Marshall's dissent reflects an acceptance of the principle of limited review.¹⁶ Justice Stevens, viewing the actions of the lower courts and the history of the case differently from the majority,¹⁷

the time of the initial request, the judge presiding at the criminal trial (Judge Sirica) in which the tapes were introduced was quite occupied with that trial; the request was then favorably acted on by another judge (Judge Gesell) in that district to whom the matter had been transferred. Subsequent to his decision that access should be allowed, Judge Gesell transferred the matter back to Judge Sirica, now freed of duties in the recently concluded criminal trial. Judge Sirica decided that granting access to the tapes was inadvisable at the time, due largely to the possible interference with the rights of defendants in the event of retrial after appeal. Justices Marshall and Stevens indicate in their dissents that the trial judge whose discretion they were reviewing was Judge Gesell.

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vigorously dissented from what he perceived as the majority's reversal of the court of appeals' affirmance of a district court decision to allow access to the tapes: "The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal." *Id.* at 613-14, 98 S.Ct. at 1320. We take our lesson, then, as we must, from the Supreme Court and review the district court decision for abuse of discretion.¹⁸

[10] In denying the broadcasters' request for physical access to the Brilab tapes, the district judge did not abuse his discretion. The judge's concern was with the rights of a yet-to-be tried defendant; the provision to a defendant of a fair trial is a reasonable and necessary concern of the presiding judge. The substantially postponed trial of L. G. Moore, while the indictment remains outstanding, is not of a "hypothetical" nature.¹⁹ The broadcasters argue to this court that the trial judge exaggerated the risks to a fair trial posed by public broadcast of the tapes; as "evidence," they point to facts about what they perceived as a smooth and effortless empaneling of a jury in the criminal trial of the other defendants (two days; seven jurors stricken for cause). This argument fails for several related reasons.

18. In rejecting the broadcasters' contention that our target on review is other than abuse of discretion, we acknowledge that a recent opinion from another circuit has found proper review under these circumstances to be more exacting than that here applied. The Third Circuit in *In re Application of National Broadcasting Co. (United States v. Criden)*, 648 F.2d 814 (3d Cir. 1981), after an extended analysis of the appropriate standard of review, substantially based on Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L.Rev. 635 (1971), found that proper appellate review in these circumstances required appellate reconsideration of "the relevance and weight of the factors," 648 F.2d at 818, considered by the trial judge. The court found that a decision on release of tapes "is not accorded the narrow review reserved for discretionary decisions based on first hand observations" of the trial judge. *Id.* We have considered this analysis presented by the Third

The broadcasters' argument that the concern for defendant Moore's fair trial rights was exaggerated beyond proper proportion is addressed to an audience in perhaps the worst possible position to make that judgment: appellate courts are far removed in time and space from the events in the course of criminal trials. And while distance may allow us to escape the smoke and heat generated in those proceedings, our distance from the flame robs us as well of the light cast thereby.

[11] In urging reversal of the district court's determination that Moore's rights would be compromised by access to the tapes, the appellants would have us say that the trial court must have positive proof of the impossibility of assuring defendant a fair trial before access may be denied. A forecast of future difficulty is by definition uncertain, but equally uncertain is the rejection of that forecast. Speculative dismissal by an appellate court of a trial judge's admittedly uncertain but quite reasonable prognostication only compounds the problem. The informed and considered judgment of the trial judge should prevail in any choice between such equally speculative results. It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury.

Circuit but are unable to follow it beyond its foundation—that the decision to grant or deny access to tapes during the course of a criminal prosecution is not based on "first hand observations" of the presiding trial judge. When the concern is the efficient administration of justice and the provision to defendants of fair trials, the consideration of competing values is one heavily reliant on the observations and insights of the presiding judge.

19. "We thus adhere to our holding in *Mitchell* that the interest in avoiding the risk of potential prejudice at a hypothetical second trial is seldom of sufficient weight to justify denying access to judicial records which have been displayed in open court." *In re Application of National Broadcasting Co. (United States v. Jenrette)*, 653 F.2d 609 (D.C.Cir. 1981) (emphasis in original).

[12] Finally, in pointing to events surrounding the allegedly easy selection of a jury for the earlier trial as indicative of the unlikelihood that pretrial publicity would affect the rights of the untried defendant, the appellants disregard the effect that media access to and rebroadcast of the tapes could have. General pretrial publicity and any attendant prejudice to a defendant's rights before disclosure and rebroadcast of the tapes would not necessarily be the same as what may obtain in a second trial following public broadcast. That prior to broadcast of the tapes pretrial publicity had not unduly infringed the fair trial rights of particular defendants does not answer the inquiry presented to the district judge here.

[13] Appellants further argue that the trial judge abused his discretion in denying them access because a number of procedural devices were otherwise available to guarantee the defendant's fair trial rights: searching *voir dire* examination of potential jurors; empaneling of a larger body of veniremen; and change of venue, among others. Accepting this argument would require us to direct the trial judge in the practical management and operation of his courtroom, a course we are loath to take in any but the most extreme circumstances. We cannot assume trial court ignorance of these familiar devices, and we will not assume inattention to their availability. Second, on this inquiry we remain in a poor position from which to second guess the trial judge on the relative costs and benefits to the efficient administration of justice of such protective measures. Finally, the Supreme Court's preference for such devices over the closure of the flow of information about criminal trials, expressed in cases like *Nebraska Free Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1975),²⁰ came in the context of government infringement of first amendment rights—in *Stuart*, for example, a gag order imposed by the state trial judge prohibiting publica-

tion of certain statements of the accused and of information strongly implicating him in the commission of the crimes. But as the Supreme Court has held and as we repeat, access to court records and exhibits for copying and rebroadcasting is not a matter of constitutional right. That the balance is heavily weighted in favor of protective measures other than absolute closure of the trial to press or public, or of prior restraints on publication of information, does not mean that the same balance prevails when less compelling rights are asserted by the press. As Justice Black observed in *Bridges v. California*, 314 U.S. 252, 260, 62 S.Ct. 190, 192, 86 L.Ed. 192 (1941), "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." That "issue . . . of the very greatest moment," *id.*, is not before us. The common law right of access certainly antedates the Constitution's free press guarantee, but it does not rise to that level of importance or merit the same degree of protection. The first amendment rights of the broadcasters, as noted above, were fully satisfied here. No restrictions on the ability of the news media to receive and transmit information were imposed. The district court was not at all required to balance "fair trial" with "free press" concerns. The "choice" was rather between an undeniably important but non-constitutional right of physical access to courtroom exhibits and a defendant's due process right to a fair trial, "the linchpin of our criminal justice system." *In re Application of National Broadcasting Co. (United States v. Criden)*, 648 F.2d at 827. While the provision to media representatives of verbatim transcripts of the recordings and preferential seating at the trial, as afforded in the court below, certainly does not conclude the matter against a right to further access, it has been recognized by the Supreme Court as a factor properly to be considered in the grant or denial of physical access.²¹

20. "We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior

restraint unnecessary." 427 U.S. at 569, 96 S.Ct. at 2807.

21. Petitioner further argues that this is not a "right of access" case, for the District Court

[14] In reaching our conclusion that the district judge did not abuse his discretion in denying the appellants' request for access to the taped evidence, we have considered carefully, along with *Warner Communications*, the lodestar from the Supreme Court, three recent cases from other circuits deciding this same question of access in the context of another FBI operation. *In re Application of National Broadcasting Co. (United States v. Myers)*, 635 F.2d 945 (2d Cir. 1980); *In re Application of National Broadcasting Co. (United States v. Criden)*, 648 F.2d 814 (3d Cir. 1981); and *In re Application of National Broadcasting Co. (United States v. Jenrette)*, 653 F.2d 609 (D.C.Cir. 1981).²² We have previously mentioned where we part company with the Third Circuit in *United States v. Criden*, see note 18, *supra*, and will not here repeat

already has permitted considerable public access to the taped conversations through the trial itself and through publication of the printed transcripts. We need not decide whether such facts ever could be decisive. In view of our disposition of this case, the fact that substantial access already has been accorded the press and the public is simply one factor to be weighed.

435 U.S. at 599 n.11, 98 S.Ct. at 1313.

22. Subsequent references to these cases will be to the style of the underlying criminal case, rather than to the ubiquitous *In re Application of National Broadcasting Co.*

23. Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court. Any denial or infringement of this "precious" and "fundamental" common law right remains subject to appellate review for abuse.

United States v. Jenrette, 653 F.2d at 613 (quoting *United States v. Mitchell*, 551 F.2d at 1260, 1261).

24. *Warner Communications* does not clarify whether, in the absence of statute, the decision to release the tapes would have been left to the trial court, reviewable only for traditional abuse of discretion, or whether reviewing courts would themselves assess the competing interests. While the opinion refers to the need for the trial court to exercise an informed discretion, the court also says that in the absence of a statute "we" would be

those reservations. Our attention here is directed to the remaining cases, *Myers* and *Jenrette*, one of which (*Jenrette*) reviews for abuse of discretion²³ and finds it, the other of which (*Myers*), in affirming the decision of the district court to allow access, leaves as an open question whether abuse of discretion is the sole appellate inquiry.²⁴

Our fundamental difference with both these cases²⁵ lies in their holdings that "only the most compelling circumstances" should prevent access to these tapes²⁶ and that the party opposing access must demonstrate that "justice so requires,"²⁷ and the correlative finding that the potential risks to defendants' fair trial rights in these circumstances could not prevail against the strong, indeed overwhelming, presumption in favor of access.²⁸ In our judgment, the opinion in *Nixon v. Warner Communica-*

tion is faced with the task of weighing the competing interests.

United States v. Myers, 635 F.2d at 950 n.3.

25. In the third case, *United States v. Criden*, the Third Circuit in its de novo reweighing of the competing values, found the "strong common law presumption of access" to countervail the fair trial right of defendant, thought sufficiently defensible by less drastic measures than denial of access. If the courts' approaches in *Myers* and *Jenrette* are misguided, as we suggest, then the *Criden* court shares that error.

26. "When physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the most compelling circumstances should prevent contemporaneous public access to it." *United States v. Myers*, 635 F.2d at 952 (footnote omitted).

27. "[A]ccess may be denied only if the district court, after considering "the relevant facts and circumstances of the particular case," and after "weighing the interests advanced by the parties in light of the public interest and the duty of the courts," concludes that "justice so requires."

United States v. Jenrette, 653 F.2d at 613 (citations omitted).

28. "We disagree . . . that the likelihood of such enhanced awareness of the tapes poses the kind of risk to fair trials for Abscam defendants that justifies curtailing the public's right of access to courtroom evidence." 635 F.2d at 953.

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tions offers no basis from which one can derive the overpowering presumption in favor of access discovered by the Second and District of Columbia Circuits. The Supreme Court there neither drafted explicit limits nor assigned specific weight to this common law right of access. The Court, rather, acknowledged "the presumption—however gauged—in favor of public access to judicial records," as one of the interests to be weighed on the broadcasters' "side of the scales." 435 U.S. at 602, 98 S.Ct. at 1314. It did not find the simple existence of the right conclusive. In elaborating on its observation that this right of access is not absolute, the Court noted several circumstances in which "the common-law right of inspection has bowed before the power of the court to insure that its records" are not used as "vehicle[s] for improper purposes."²⁹ The Second Circuit acknowledged the Supreme Court's recitation of these circumstances but devalued their significance with the observation that those past circumstances had warranted preventing all public scrutiny of the materials and not the simple copying and rebroadcasting of items already revealed in open court. 635 F.2d at 950. Pretermittting any argument with the logic of that position, we are convinced, by reference to one of the listed circumstances in the Supreme Court's discussion of the competing interests in *Warner Communications*, that these circumstances, among others, were thought appropriate considerations in deciding requests for access to courtroom exhibits.³⁰

That the broadcasters seek the tapes for appropriate, and not for "improper," pur-

29. For example, the common-law right of inspection has bowed before the power of the court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." . . . [C]ourts have refused to permit their files to serve as reservoirs of libelous statements for press consumption . . . or as sources of business information that might harm a litigant's competitive standing

Id. at 598, 98 S.Ct. at 1312.

30. The court—as custodian of tapes obtained by subpoena over the opposition of a sitting

poses does not diminish the importance of the Court's discussion to our analysis. That good reasons may exist for a trial court, in the exercise of its "supervisory power over its own records and files," 435 U.S. at 598, 98 S.Ct. at 1312, to deny requested access to courtroom exhibits is our focus. The Supreme Court has not directed lower courts to measure requests for access to evidence only against the "most compelling circumstances." Rather, we read the Court's pronouncements as recognizing that a number of factors may militate against public access. In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights. With all due respect, we find such standards to be misreadings of the Supreme Court's directives, and we decline to apply them here. In his decision to deny the broadcasters' request for access to the audiotapes, the district court did not abuse its discretion. The judgments below are

AFFIRMED.



President, solely to satisfy "fundamental demands of due process of law in the fair administration of criminal justice" . . . has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material "to gratify private spite or promote public scandal," . . . with no corresponding assurance of public benefit.

435 U.S. at 603, 98 S.Ct. at 1314-15 (citations omitted).

In re the REPORTERS COMMITTEE
FOR FREEDOM OF THE
PRESS, et al.

Nos. 82-1820, 82-1821 and 83-1744.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 10, 1984.

Decided Sept. 20, 1985.

Reporters' group sought to intervene in civil defamation action to obtain access to discovery documents which district court had sealed. The United States District Court for the District of Columbia, Oliver Gasch, Senior District Judge, allowed intervention but denied reconsideration, and group appealed. Group also appealed from later order which, upon conclusion of the trial, unsealed the documents. The Court of Appeals, Scalia, Circuit Judge, held that: (1) reporters could not appeal from latter order which granted them all the relief requested at that point, and (2) district court did not violate First Amendment right of public access by sealing the documents until entry of judgment.

Affirmed.

J. Skelly Wright, Circuit Judge, filed a concurring and dissenting opinion.

1. Federal Courts ⇨544

Reporters' group, which had sought access to discovery documents filed in civil suit, could not appeal from district court order which granted them all the relief they requested at that point.

2. Federal Courts ⇨13

Reporters' group's claim for prejudgment access to discovery documents filed in civil suit was not mooted by postjudgment release of the documents; since issue of prejudgment release was capable of repetition yet evading review.

3. Federal Courts ⇨574

Order entered by district court in defamation action between newspaper and cor-

porate president and his son which determined that reporters' group was not entitled to prejudgment access to discovery documents filed in the action was final order for purposes of appeal since group's claims were separable from and collateral to rights of parties to underlying proceeding. 28 U.S.C.A. § 1291.

4. Constitutional Law ⇨90.1(3)

District court did not violate First Amendment right of public access to court records by postponing reporters' access to discovery documents filed in civil suit and used in connection with summary judgment and trial proceedings until after trial where claim of confidentiality had been raised by party who had produced the documents. U.S.C.A. Const. Amend. 1.

Appeal from the United States District Court for the District of Columbia (Civil Action Nos. 80-3032 & 80-2387).

Anthony C. Epstein, Washington, D.C., with whom Bruce G. Joseph, Jack C. Landau and Judy D. Lynch, Washington, D.C., were on brief, for appellants.

Loren Kieve, Washington, D.C., with whom George A. Birrell, New York City, and Judah Best, Washington, D.C., were on brief, for appellee Mobil Corp.

Before WRIGHT and SCALIA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SCALIA.

Opinion concurring in part and dissenting in part filed by Circuit Judge J. SKELLY WRIGHT.

SCALIA, Circuit Judge.

The Reporters Committee for Freedom of the Press and four individual reporters appeal from two District Court orders delaying until after trial and entry of judgment the public's access to court records consisting of documents produced by, and depositions furnished by the officers of,

Mobil Oil Corp. in the course of third-party discovery in a civil suit, and used in connection with summary judgment and trial proceedings. The case presents preliminary issues of mootness and finality, and the merits issue of whether there is a First Amendment right of public access to court records pertaining to private civil actions prior to judgment.

I

The matters contested here arose in the course of litigation to which neither appellants nor appellee was a party—a libel suit brought by William Tavoulareas, the President of Mobil Oil Corp., and his son Peter, against the Washington Post Co. and a number of individuals connected with the Post, and a slander suit by the same plaintiffs against Philip Piro. In the course of those suits, which were consolidated, the Post sought to discover large numbers of documents from Mobil, and to take the depositions of Mobil-related witnesses. Before conducting a document search, Mobil requested a protective order to prevent public dissemination of the information to be obtained, on the ground that much of it was sensitive and confidential. It supported this request with an affidavit from Mobil Vice-President Walter E. MacDonald describing in general terms the negative effect release of the materials as a whole would have on Mobil's business in Saudi Arabia and its competitive position in shipping. The affidavit also stated that it would be impractical for Mobil to go through documents one by one during the discovery process to determine whether they contained any confidential information.

The District Court entered a protective order on November 5, 1981. It held that the MacDonald affidavit adequately identified the harm which disclosure of the information would cause Mobil, and that it would be undesirable to have Mobil specify, and the court rule on, objections to disclosure of particular documents, since that would slow discovery enormously and involve the court excessively in the discovery

process. Instead, it adopted the following procedure:

Mobil would simply note the confidentiality of certain documents produced, based upon a relatively cursory review of the contents or source of the documents, and would then turn them over to *The Post* for use in this litigation. In the event *The Post* then wished to challenge Mobil's designation, W[ashington] P[ost] C[o.] counsel could seek an accommodation with Mobil or, as a last alternative, a court ruling that the material is neither confidential nor otherwise privileged.

Tavoulareas v. Piro, 93 F.R.D. 24, 29 (D.D.C. 1981) (footnotes omitted). If the Post did make such a challenge, "Mobil . . . would then bear the burden of establishing 'good cause' for the document's continued protection." *Id.* at 29-30 n. 3. The court also subjected to the protective order depositions in which information or documents designated confidential might be disclosed. *Id.* at 34.

On December 16, 1981, Mobil was granted leave to intervene to protect its interest in confidentiality. Discovery proceeded, in the course of which Mobil designated approximately 3,800 pages of deposition and an unspecified number of documents as confidential. Plaintiffs and defendants made cross-motions for summary judgment, in connection with which they filed under seal substantial portions of the materials designated confidential. The District Court denied those motions on June 30, 1982, a week before the trial was to begin. *Tavoulareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387 (D.D.C. June 30, 1982) (Order).

On July 2, 1982, Mobil moved to extend the November 5 protective order to the trial itself. In an order filed on July 8, without requiring any supporting materials in addition to those Mobil had furnished to obtain the original protective order, the District Court granted Mobil's request. It ruled that documents or depositions that Mobil continued to classify as confidential will continue to be subject to the terms of the protective orders previously en-

tered by the Court, but may be used by the parties for any proper trial purpose. They may be used to question or impeach witnesses and may be read or otherwise introduced into evidence. The document itself, however, will continue to remain subject to the protective orders of this Court.

Tavoulaareas v. Washington Post Co., Civil Nos. 80-3032 & 80-2387, slip op. at 2 (D.D.C. July 8, 1982) (Memorandum-Order). As we understand this order, those portions of each protected document or deposition used to question or impeach witnesses or otherwise read into evidence were made available to the public as part of the transcript, but the rest, although part of the exhibit sent to the jury, was not. On the basis of this order, Mobil designated 52 trial exhibits as confidential.

During this entire period, the Post had not exercised its right to challenge Mobil's confidentiality designations.¹ On July 12, 1982, however, appellants here, four individual newspaper reporters and The Reporters Committee for Freedom of the Press, an unincorporated association ("the reporters"), filed a motion to intervene to ask the District Court to reconsider its November 5 and July 8 orders. On July 20, 1982, the District Court granted the motion to intervene but denied the motion to reconsider the orders because continued sealing was "essential to the efficient and expeditious conduct of the trial," *Tavoulaareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387, slip op. at 4 (D.D.C. July 20, 1982) (Order). It did, however, agree to review the need for continuation of its protective order after the close of

trial, and stated that it would require Mobil to identify the documents it considered confidential and explain the basis of its secrecy claim within thirty days after the end of trial. *Id.*

The reporters sought review of that order in separate appeals (consolidated here) pertaining to the two consolidated cases below. In accompanying motions for expedited appeal and mandamus, they urged us to take emergency action on the ground that, as to any documents used at trial or which were part of the summary judgment record,² maintenance of the protective order during trial without a prior hearing on the need for that order as to each individual document denied their First Amendment right of immediate access to judicial records. We denied both motions. *Tavoulaareas v. Piro*, Nos. 82-1820 & 82-1821 (D.C.Cir. July 30, 1982) (Order); *In re The Reporters Committee for Freedom of the Press*, Nos. 82-1819, 82-1820 & 82-1821 (D.C.Cir. July 26, 1982) (Order). The appeals were subsequently stayed with the agreement of the parties, pending the District Court's post-trial reexamination of the need for continued sealing of the documents.

The jury trial ended July 30, 1982, with a verdict for William Tavoulaareas against the Washington Post defendants, for the Washington Post defendants against Peter Tavoulaareas, and for William and Peter Tavoulaareas against Philip Piro. As the District Court had directed, thirty days later, on August 30, Mobil filed a memorandum identifying those documents whose confidentiality it still wished preserved and

the panel opinion and remanded the case to the District Court for reconsideration in light of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), and Fed.R. Civ.P. 26(c). *Tavoulaareas v. Washington Post Co.*, 737 F.2d 1170 (D.C.Cir.1984).

1. In fact, it did not do so until September 14, 1982, well after completion of the trial. At that point it moved to unseal all documents filed with the court. The court ultimately granted that motion at the same time that it granted the reporters' request to unseal the last of the trial and summary judgment exhibits. *Tavoulaareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387 (D.D.C. June 21, 1983) (Order). Mobil challenged in a separate appeal the District Court's unsealing of deposition exhibits not used at trial. A panel of this court reversed the District Court and ordered the seal reinstated. *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010 (D.C.Cir.1984). The court en banc vacated
2. By the summary judgment record, the reporters mean all documents on file with the court at the time of its summary judgment ruling which could have been considered by the court under Fed.R.Civ.P. 56(c). Brief for Appellants at 31 n. 21.

1. In fact, it did not do so until September 14, 1982, well after completion of the trial. At that point it moved to unseal all documents filed with the court. The court ultimately granted that motion at the same time that it granted the reporters' request to unseal the last of the trial and summary judgment exhibits. *Tavoulaareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387 (D.D.C. June 21, 1983) (Order). Mobil challenged in a separate appeal the District Court's unsealing of deposition exhibits not used at trial. A panel of this court reversed the District Court and ordered the seal reinstated. *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010 (D.C.Cir.1984). The court en banc vacated

explaining the basis for its request. These included only 18 of the 52 trial exhibits originally designated as confidential and an unidentified number of documents that were part of the summary judgment record.

On May 2, 1983, the District Court granted judgment *non obstante veredicto* ("judgment n.o.v.") for the Washington Post defendants. *Tavoulaareas v. Washington Post Co.*, 567 F.Supp. 651 (D.D.C. 1983). On May 18, 1983, the court released 14 of the 18 trial exhibits, because they either had never been subject to the protective order or were already publicly available. *Tavoulaareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387, slip op. at 2 (D.D.C. May 18, 1983) (Order). As to the remaining four trial exhibits and those materials that were part of the summary judgment record, the court was not satisfied with Mobil's showing, but gave Mobil additional opportunity to make a more specific demonstration of need. *Id.* In response, Mobil waived its claim as to all but one trial exhibit, and as to all but two summary judgment documents. On May 20, 1983, the court completed its rulings on post-trial motions going to the merits of the consolidated cases by granting a judgment n.o.v. to Piro. *Tavoulaareas v. Piro*, Civil Nos. 80-2387 & 80-3032 (D.D.C. May 20, 1983) (Memorandum-Order). On June 21, it ruled on the last three documents for which Mobil continued to advance a claim of confidentiality. The trial exhibit proved to be among those the District Court had already ordered unsealed because it had never been subject to the protective order. The court examined the two summary judgment documents in camera, concluded that Mobil had not substantiated its claim of irreparable injury, and therefore ordered them unsealed as well. *Tavoulaareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387, slip op. at 4 (D.D.C. June 21, 1983) (Memorandum). Mobil did not appeal from that decision, but the reporters did, in appeal No. 83-1744. On September 8, 1983, this appeal was consolidated with their appeals from the District Court order of July 20, 1982, which were unstayed on the same

date. *Tavoulaareas v. Piro*, Nos. 82-1820, 82-1821 & 83-1744 (D.C.Cir. Sept. 8, 1983) (Order).

II

A

[1] This case comes to us in a peculiar posture. The reporters appeal from two District Court orders: (1) in appeals Nos. 82-1820 and 82-1821, from the District Court's July 20, 1982 refusal to reexamine its order forbidding disclosure of documents on file with the court at the time the summary judgment motions were denied, and of documents to be used at trial, other than the portions read into evidence or used to examine witnesses; and (2) in appeal No. 83-1744, from the June 21, 1983 order releasing all documents. The latter is plainly unappealable by these appellants, since it granted them all the relief they requested at that point. "A party may not appeal from a judgment or decree in his favor." *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242, 59 S.Ct. 860, 860, 83 L.Ed. 1263 (1939). Appeal No. 83-1744 is dismissed.

[2] As for the appeals from the first order in each of the two cases, the ultimate release of the documents appears at first to moot any claims the reporters may have. Insofar as the reporters object to the documents' sealing in the past—during the trial proceedings (which seems to be their principal grievance) and after trial, prior to issuance of the second order—that complaint is beyond remedy. And the second order eliminates any grievance they might have had regarding sealing in the future. Claims otherwise moot, however, will nonetheless be entertained if "the underlying dispute between the parties is . . . 'capable of repetition, yet evading review,'" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797, 49 L.Ed.2d 683 (1976), quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). That exception applies if "there [is] a reasonable expectation that the same complaining party

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[will] be subjected to the same action again" and "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975).

The "capable of repetition" requirement is clearly met here. In *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), the Supreme Court held that Gannett's objection to a trial court order closing a suppression hearing in a criminal trial to the press presented a controversy "capable of repetition" because "it is reasonably to be expected that the petitioner, as publisher of two New York newspapers, will be subjected to similar closure orders entered by New York courts in compliance with the judgment of that State's Court of Appeals." *Id.* at 377-78, 99 S.Ct. at 2904. Similarly, it is reasonably to be expected that at least the Reporters Committee for Freedom of the Press, which is headquartered in the District of Columbia and regularly participates in litigation involving media access to judicial proceedings, will again be confronted by an order of this sort issued by the United States District Court for the District of Columbia. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 102 S.Ct. 2613, 2618, 73 L.Ed.2d 248 (1982).³

Whether the "evading review" requirement is satisfied is less obvious. The issue, as we see it, is whether, without considering the possibility of expedited review (which would of course make the "evading

3. It is perhaps *not* likely that future orders restricting the Reporters Committee's access to summary judgment and trial materials will be entered at Mobil's behest. *Gannett*, however, considers the court entering the order to be the relevant factor. 443 U.S. at 377-78, 99 S.Ct. at 2904-05. If the requesting party were relevant, the facts here would present a stronger case for review than *Gannett*, where the order was entered at the request of a criminal defendant whose case had ultimately been disposed of by a plea bargain. *Id.* at 376 n. 4, 99 S.Ct. at 2904 n. 4.

4. We regard completion of trial as the cut-off date both because the order on appeal envisioned giving appellants what they desired (document-by-document justification for the sealing)

review" test virtually impossible to meet), a sealing order is normally unsusceptible of review before completion of trial in the case in which it is entered.⁴ Although in this case the issue of the sealing of the documents during trial came up very close to trial, because Mobil did not make a motion to keep them under seal until that time, Mobil could have moved for a protective order that would last through trial when it asked for its original protective order for discovery purposes. But even accepting the beginning of discovery as the starting point for computing the availability of review with regard to sealing both before and during trial, we still find that the reporters' claim would evade review. *Globe Newspaper Co. v. Superior Court* found that the issue of the constitutionality of closure of a criminal trial to the press evaded review "because criminal trials are typically of 'short duration.'" 457 U.S. at 603, 102 S.Ct. at 2618 (emphasis added) (citation omitted). The interval of time that typically elapses between the beginning of discovery and the completion of trial in a civil case is hard to measure, but it is safe to conclude that it is less than two years, which the Supreme Court has held short enough to cause action which would be mooted if not reviewed within that time to evade review. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. at 514-16, 31 S.Ct. at 283-84.

We find, therefore, that the reporters' claims arising out of the first (July 20)

shortly after trial (Mobil was to provide such justification within thirty days thereafter); and because the reporters' principal grievance is the denial of access during trial, when the material was current news. Mobil argues that the reporters' claims do not evade review because in a future case the District Court might decide *never* to unseal the documents. That is true, but irrelevant. If the case came to us in that posture, it would present a live controversy as to the future status of the documents, but with regard to their prior sealing would be just as moot as it is here. Furthermore, since the timing and length of the denial of access may determine its permissibility, see *infra* pages 1338-1339, review of the permanent sealing of documents would not present the same issue.

order are not barred by the mootness doctrine.

B

[3] Mobil also argues that the July 20 order was not a "final decision," and hence we have no jurisdiction to entertain an appeal from it under 28 U.S.C. § 1291 (1982). That section provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Ordinarily a district court renders a final decision from which appeal may be taken under § 1291 only when it has finished adjudicating the case before it. There is, however, a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). The reporters claim that the July 20 order is in that class. They contend that it finally determined that they were not entitled to a document-by-document assessment of confidentiality before sealing of the information, and resulted in their being denied access to it without that assessment during a critical period, the trial and its immediate aftermath.

We agree. In *United States v. Hubbard*, 650 F.2d 293 (D.C.Cir.1980), this court held that a district court order to unseal documents obtained in connection with a criminal trial was a collateral order capable of being appealed immediately. There, as here, the party challenging the order was not a party to the underlying criminal proceeding. We found that the order was "'separable from, and collateral to' the rights of the parties to the . . . proceedings"; that because public access to the documents would irreparably damage the interests asserted, the unsealing order would as a practical matter "'finally determin[e] the claim"; and that consideration

of the issues raised would neither halt nor disturb the orderly progress of the criminal proceeding. 650 F.2d at 314, quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546, 69 S.Ct. at 1225.

Mutatis mutandis, this analysis holds for the counterpart right of access to information asserted by the reporters. The reporters' claims arising from the July 20 order are just as separable from, and collateral to, the rights of the parties to the underlying proceeding. None of those parties is even involved in this appeal. Since the essence of the reporters' claims is that they had a right to the unprivileged information during trial, when it had greater news value, and not, as the July 20 order's provision for later submissions held forth as a prospect, after the conclusion of proceedings, the order "irreparably damage[d] the interest[] asserted," *id.*, and as a practical matter finally determined the claims. Finally, appellate consideration of the reporters' claims would not disrupt the trial, even if it were still now in progress. Mobil's counsel, who were presumably somewhat involved in the trial representing Mobil witnesses, would be distracted; but a similar objection could have been made to treating the unsealing order as collateral in the *Hubbard* case.

III

[4] Although appellants in cases of this sort typically assert a *common law* right of access to court records, the reporters place the issue before us in purely constitutional terms. They have framed and argued their appeal as follows: "Does the First Amendment prohibit a trial court from indefinitely postponing public access to the complete record of civil trials and summary judgment proceedings without a prior judicial determination that temporary sealing of specific documents is the least restrictive means necessary to protect a compelling governmental interest?" Brief for Appellants at 1 (Statement of Issue Presented).

No Supreme Court decision deals with the precise issue of the public's First

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Amendment rights to court records in civil cases. It was not until 1980 that the Supreme Court found that the "common core purpose of assuring freedom of communication on matters relating to the functioning of government" shared by the various clauses of the First Amendment created a right to observe criminal trial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980). The precise contours of that right are in the process of being drawn. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (no exception for victims in rape trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (right extends to voir dire proceedings); cf. *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (Sixth Amendment right extends to evidence suppression hearings). The principle has not yet been applied to access to civil trials (though the Court has perhaps intimated that it obtains there, see *Richmond Newspapers*, 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17), much less to access to records in civil trials—or, for that matter, even records in criminal trials.

On its facts, perhaps the closest Supreme Court case in point is *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), relating to the court records in a criminal case. The Court rejected press claims of a right to physical access to the so-called "Watergate tapes" introduced and played at the trial of former Attorney General John Mitchell. The holding is not, however, particularly helpful here. In addition to the fact that it was expressly tied closely to "all the circumstances of this concededly singular case," 435 U.S. at 608, 98 S.Ct. at 1317, it did not resolve the issue before us, even in the context of those circumstances. The Court found no common law right of access to the tapes, *id.*, no right under the Sixth Amendment, *id.* at 610, 98 S.Ct. at 1318, and no right under the "freedom of press" clause of the First Amendment, *id.* at 608-10, 98 S.Ct. at 1317-19. The latter claim was curtly rejected on the ground

that "the public [had] never had physical access" to the tapes in question, and that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Id.* at 609, 98 S.Ct. at 1318. Presumably the Court believed that it was constitutional that the public had been denied access (one would surmise that from its finding of no common law right of access); but the point of a First Amendment right of public access was not raised and not explicitly decided.

The only other Supreme Court case dealing with First Amendment rights to court records (or at least potential court records) is *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Though this was closer to the present case in that it involved a civil rather than a criminal trial, it was more remote in that it did not involve a claim by the public to access, but rather a claim by one of the parties of the right to disseminate information acquired in the course of pretrial discovery. The Court upheld the trial court's imposition of a protective order that restrained such dissemination. The information in question, however, had not, evidently, been filed with the court, much less introduced into evidence.

Since the Supreme Court has not spoken to the existence of a First Amendment right to court records of civil proceedings, we must resolve the question on the basis of the analysis which the Court has brought to bear in this general field. In deciding whether the public has a First Amendment right of access to judicial proceedings, the Court has made two inquiries: (1) whether the proceeding has historically been open, see *Press-Enterprise Co. v. Superior Court*, 104 S.Ct. at 822-23; *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 605, 102 S.Ct. at 2619; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569-70, 100 S.Ct. at 2823-24; and (2) whether the right of access plays an essential role in the proper functioning of the judicial process and the government as a whole, see *Press-Enterprise*, 104 S.Ct. at

823-24; *Globe Newspaper*, 457 U.S. at 606, 102 S.Ct. at 2619; *Richmond Newspapers*, 448 U.S. at 569-73, 100 S.Ct. at 2823-26. Apparently, both these questions must be answered affirmatively before a constitutional requirement of access can be imposed. An historical tradition of at least some duration is obviously necessary, particularly to support a holding based upon the remote implications of a constitutional text—which implications potentially include, in the case of the free speech clause of the First Amendment, not merely a right of access but all that furthers the “common core purpose of assuring freedom of communication on matters relating to the functioning of government.”⁵ With neither the constraint of text nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential. The further requirement that the historical practice play “an essential role” in the proper functioning of government is also needed, since otherwise the most trivial and unimportant historical practices—for example, the courts’ earlier practice of reading their judgments aloud in open session—would be chiselled in constitutional stone. *Cf. Williams v. Florida*, 399 U.S. 78, 102, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970) (no Sixth Amendment requirement of trial by a jury of twelve because “the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system”).

As to the historical tradition: The Supreme Court opinion in *Seattle Times* contains the statement that “to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.” 104 S.Ct. at 2207-08 n. 19. This was said, however, in the context of a discussion of discovery materials not yet introduced into evidence, and the Court gave as illustrations of the “control” it had

5. If the holding falls directly within the text of the constitutional provision—as in *Seattle Times*, where not an implied right of access but the expressly protected right of “freedom of

in mind the ability of the trial court to exempt such materials from filing requirements, or to provide for filing under seal. Despite the breadth of its expression, this statement cannot reasonably be considered support for the proposition that courts have traditionally had plenary power to close civil records in general to public access. That is clear from the qualification included within the Court’s later statement that “restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information,” *id.* at 2208 (emphasis added).

Nixon v. Warner Communications contains much more discussion relevant here. Though, as noted earlier, the case did not reach the First Amendment issue, it did consider the traditional practice with regard to court records at some length, in connection with its holding on the common law right of access. The practice immediately relevant was that relating to criminal trials, but the discussion goes well beyond that, and warrants quotation at some length:

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, see, *e.g., Browne v. Cumming*, 10 B. & C. 70, 109 Eng.Rep. 377 (K.B.1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen’s desire to keep a watchful eye on the workings of public agencies, see, *e.g., State ex rel. Colscott v. King*, 154 Ind. 621, 621-27, 57 N.E. 535, 536-38 (1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-39 (1879), and in a newspaper publish-

speech” was at issue—historical practice may be relegated to a lesser role, serving not as a *sine qua non* but as an important tool for interpretation.

er's intention to publish information concerning the operation of government, see, e.g., *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 677, 137 N.W.2d 470, 472 (1965), modified on other grounds, 28 Wis.2d 685a, 139 N.W.2d 241 (1966). But see *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896).

It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893). Accord, e.g., *C. v. C.*, 320 A.2d 717, 723, 727 (Del.1974). See also *King v. King*, 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N.W. 731, 734-35 (1888); see *Cowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer v. Blaisdell*, 268 App.Div. 9, 11, 48 N.Y.S.2d 355, 356 (1944); see also *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E.2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, see, e.g., *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A.2d 799, 800 (N.J.Ch.1945). 435 U.S. at 597-98, 98 S.Ct. at 1312 (footnotes omitted).

On the basis of this discussion, we take it as a given that there is a tradition of public access to court records, and that that right is not absolute. The factor most obviously distinguishing the request for records in the present case from the requests at issue in the vast majority of reported cases—and the factor that obviously caused the Dis-

trict Court to deny access without the document-by-document examination that ordinarily accompanies Rule 26(c) protective orders—was the pendency of the litigation at the time the request was made. We must consider, therefore, whether the tradition of public access includes pre-judgment access.

An early opinion of this court speaks to the point. *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894), ruled on a motion made in connection with an appeal from a decision of the Patent Office. The appellant, "upon filing the transcript of the papers pertaining to the appeal with the clerk of this court, . . . moved the court . . . 'that the files relating to the above appeal be preserved in secrecy, and that the clerk of this court be directed not to permit said files, nor any part thereof, to be inspected, nor any copy to be taken from said files, except upon request of the appellant or his attorneys, or upon special order of this court first obtained, after due notice to appellant's attorneys.'" *Id.* at 404. The motion was denied. In the course of its opinion, the court made the following observations relevant to the issue now before us:

But the record or transcript brought into this court on appeal, *after judgment entered on the proceedings by the tribunal appealed from*, do not stand upon the footing of original papers placed in the files of a court of original jurisdiction, and where there has been no trial had or judgment entered thereon.

Id. at 406 (emphasis added).

[T]here is also a distinction made in some of the cases between the right to inspect judicial records *after trial*, and the right to inspect and take copies from papers merely filed, but before any action had thereon by the court. In the latter case, it has been held, in one instance at least, that the court might withhold from a publisher of a newspaper the right to inspect and take copies of papers or documents on file, for publication before the trial of the cause. That was done in the case of *Schmedding v. May*, 85 Mich., 1 [48 N.W. 201], and the same power was

intimated to exist, rather than decided, in the case of *Cowley v. Pulsifer*, 137 Mass., 392. But those decisions have no application to this case.

Id. at 407.

The two cases cited in the foregoing excerpt—both of which were also referred to by the Supreme Court in *Nixon*, see *supra* page 1333—assert as the common law rule that there is no right of public access to pre-judgment records in civil cases. The first of them, *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891), was a holding by the Michigan Supreme Court, which was soon followed by another holding of the same court to the same effect, *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896). The second case, *Cowley v. Pulsifer*, 137 Mass. 392 (1884), contained a dictum on the point by Justice Holmes. A

holding to the same effect appears in a 1953 decision of the United States District Court for the Northern District of Illinois, *Birnbaum v. Wilcox-Gay Corp.*, 17 F.R.D. 133, 139, 140 (N.D.Ill.1953).⁶ And a number of cases, including several federal cases, refer to the pre-judgment rule adopted by other courts, without confirming that it represents general common law, but likewise without disapproving it, see *Ex parte Drawbaugh*, 2 App.D.C. at 407, quoted *supra* at page 1333; *In re Sackett*, 136 F.2d 248, 249 (C.C.P.A.1943); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 309, 260 N.Y.S.2d 791, 795 (1965); or express what they regard as the common law rule in a fashion that allows for the pre-judgment exception, see *Ex parte Drawbaugh*, 2 App.D.C. at 406, quoted *supra* at page 1333.⁷

6. The dissent contends that *Schmedding*, *Burton* and *Birnbaum* do not constitute holdings because on their facts they excluded access only pre-trial and not after the commencement of trial but pre-judgment. See Dissent at 1348-49, 1350 n. 20. This is a quibble over the meaning of "holding." The rationale on which the court rested its decision in all three of these cases was that there was no right of access until judgment. If one chooses not to consider that a holding, it is no less forceful—especially given the absence of any contrary expression in any case we have been able to discover—as an indication of the common-law rule.
7. The dissent seeks to make much of the fact that the language used to describe the rule in the foregoing cases is not consistent, but sometimes refers to the absence of a right of access "before trial," or "until after trial," rather than "before judgment." See Dissent at 1348-51. But the former variation ("before trial") is entirely consistent with the pre-judgment access rule, which, as described above, holds that access is not a matter of right before judgment *except to the extent that material is disclosed at trial*. It is an entirely natural and accurate description of the consequences of the rule to say that there is no right of access "before the trial of the cause," *Drawbaugh*, 2 App.D.C. at 407, or "prior to trial," *Werfel*, 23 A.D.2d at 309, 260 N.Y.S.2d at 795, or "before trial," *In re Sackett*, 136 F.2d at 249. In fact *Schmedding* itself uses this simplified formulation, see 85 Mich. at 4, 48 N.W. at 202 (characterizing issue as whether there is a "right to an examination of the records and papers in a cause . . . , before trial or hearing, or before they become public by proceedings in open court"). As for the latter variation (no right of access until "after

trial"), see, e.g., *Drawbaugh*, 2 App.D.C. at 407; *Birnbaum*, 17 F.R.D. at 139, that is admittedly an inaccurate description of the rule, though only by implication—i.e., it is entirely true that under the pre-judgment rule there is no right of access until trial is completed, but the implication that there is a right of access after trial is completed is wrong. The implication is in any event not inevitable (cf. the longstanding controversy among biblical exegetes over "And [Joseph] knew her not till she had brought forth her first-born son," *Matthew* 1:25), and is particularly weak when one considers that the time between conclusion of trial and judgment is ordinarily brief, and that none of the cases using this formulation involved that interval, so that in the writer's mind the conclusion of trial and judgment may have been synonymous. Since all of the cases using the variations cite *Schmedding* or annotations based on *Schmedding* (except *Sackett*, whose reference to "some cases," 136 F.2d at 249, must allude to the same line of authority) as support for the rule they are applying or describing, there is no reasonable basis to believe that they are setting forth anything but the *Schmedding* rule itself. And *Schmedding*, despite the dissent's selective quotation to establish the contrary, is *unequivocal* that entry of judgment is the crucial stage.

It is, moreover, extravagant to believe, as the dissent evidently does, see Dissent at 1348 n. 17, that *Schmedding's* exception for material "made public . . . by proceedings in open court," 85 Mich. at 7, 48 N.W. at 202 (citing *Cowley v. Pulsifer*), meant to generate access, at the time of trial, to all material entered into evidence at the trial, whether or not read aloud or displayed to the jury in a fashion visible to the public. To think that, one would have to accept that the

A suspicion that the pre-judgment nonaccess rule represented the general common law is aroused by the natural connection between such a policy of nonaccess and another common law rule that was indisputably (at least prior to 1927) "supported by an almost unbroken line of authority," Annot., 52 A.L.R. 1438, 1438 (1928): the rule that the "public records privilege"—the privilege against liability for defamation in the accurate reporting of public records—did *not* extend to "accusations contained in papers filed by a party and not yet brought before a judge or magistrate for official action." *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E.2d 5, 6 (1945). See also *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568-69, 40 N.W. 731, 734 (1888). It would be strange, if not unthinkable, see *Cowley v. Pulsifer*, 137 Mass. at 396, to assess civil liability for bringing to the public's attention government records which the public is entitled to see. The reasons that support the one rule support the other as well. *Schmedding's* perception that matters in a civil lawsuit "involve private dealings between private parties" until made public in open court, or until "their truthfulness has been determined by the judgment or decree of the court," 85 Mich. at 5, 48 N.W. at 202, was the very basis for that court's earlier holding that pre-judgment civil records do not come within the public records privilege:

One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers.... The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either nonlibelous character

court, writing in the days before photostatic copying, envisioned the passing around of documentary exhibits from the jury to the audience, or the manual copying of all of them. The more natural meaning of the phrase "made pub-

lic by proceedings" and the reason of the matter unite to establish that the court had in mind only those disclosures to the viewing audience automatically produced by the oral proceedings in a traditionally open trial.

or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial the case may easily fail of proof or probability. The law has never authorized any such mischief. *Park v. Detroit Free Press*, 72 Mich. at 568-69, 40 N.W. at 734. And Justice Holmes' expression of the reasons why public policy does not require that publication of pre-judgment records enjoy the same immunity from defamation liability as publication of post-judgment records applies as well to a distinction between public access to the two:

The chief advantage to the country which we can discern [from application of the public records privilege to judicial records] ... is the security which publicity gives for the proper administration of justice.... It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

[I]t is clear that [these grounds] have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court.

Cowley v. Pulsifer, 137 Mass. at 394.

Because of their sparseness, the authorities discussed above are perhaps weak support for a general common law rule of nonaccess to pre-judgment records in pri-

lic by proceedings" and the reason of the matter unite to establish that the court had in mind only those disclosures to the viewing audience automatically produced by the oral proceedings in a traditionally open trial.

vate civil cases. But when laid beside our inability to find *any* historical authority, holding or dictum, to the contrary, they are more than enough to rule out a general tradition of *access* to such records. It is possible that modern American practice is to the contrary—though that is less than clear from the cases,⁸ and it is risky to generalize from one's familiarity with the practice in a few jurisdictions, or, for that matter, to assume that a practice of granting access where no objection is made establishes the existence of an acknowledged *right* to access. See, e.g., *In re McLean*, 16 F.Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8,877) (in a case where no one but the clerk of court resisted the provision of records to a person who had no qualifying private interest in them, "[t]he judges afterwards granted ex gratia what they ruled the petitioner was not entitled to, as a matter of law"). But even accepting as representative of current law the modern dicta which,

8. See *Times-Call Publishing Co. v. Wingfield*, 159 Colo. 172, 410 P.2d 511 (1966) (en banc) (interpreting Colorado statute that denies pre-judgment access); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758, 762-63 (N.D. 1967) (pre-judgment access denied, even in *criminal* case); *C. v. C.*, 320 A.2d 717, 724 (Del. 1974) ("It is generally held that judicial records are subject to inspection after completion of the proceedings") (dictum). The closely related pre-judgment exception to the public records privilege rule, discussed above, continues to be the majority rule in this country. See *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, 745-46, 47 Ill.Dec. 429, 438-39, 415 N.E.2d 434, 443-44 (1980).

Many statutes express an absolute right of access to court records. See, e.g., ILL. ANN. STAT. ch. 25, § 16(6) (Smith-Hurd Supp. 1984-85); VA. CODE § 17-43 (1982); W. VA. CODE § 51-4-2 (1981). But the purpose of most if not all of these was evidently to eliminate the English rule that *no* civil court records, pre-judgment or post-judgment, were accessible to persons without some private interest in them. See, e.g., *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 507 (C.C.D. Colo. 1902); *In re McLean*, 16 F.Cas. 237, 238 (C.C.S.D. Ohio 1879) (No. 8,877). They have not been read to prevent judicial withholding entirely, see, e.g., *Deere & Co. v. Finley*, 103 Ill.App.3d 774, 775-76, 59 Ill.Dec. 444, 445-46, 431 N.E.2d 1201, 1202-03 (1981), and thus need not be read to exclude judicial withholding prior to judgment.

Our substantial, though perhaps not exhaustive, research has disclosed no case, even in recent times, explicitly discussing and rejecting

without distinguishing between pre-judgment and post-judgment, announce a "public right of access" in civil cases, see, e.g., *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 362 N.E.2d 1189 (1977), we cannot discern an historic practice of such clarity, generality and duration as to justify the pronouncement of a *constitutional rule* preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment.

The same conclusion would result from application of the second of the Supreme Court's tests for First Amendment entitlement to access: whether access plays an essential role in the proper functioning of the judicial process. The Court has found that open criminal trials enhance the quality and safeguard the integrity of factfinding, see *Globe Newspaper*, 457 U.S. at 606, 102 S.Ct. at 2619; *Richmond Newspapers*,

the pre-judgment nonaccess rule. Indeed, we find few cases *without* such discussion that reverse a trial court's denial of access (or even affirm a trial court's grant of access) in a civil matter prior to merits judgment, and in most of these either (1) a government agency was a party, see *The Miami Herald Publishing Co. v. Collazo*, 329 So.2d 333 (Fla. Dist. Ct. App. 1976), *cert. denied*, 342 So.2d 1100 (Fla. 1976); *Charlottesville Newspapers, Inc. v. Berry*, 215 Va. 116, 206 S.E.2d 267 (1974), or (2) at least with respect to some of the parties, the action had been dismissed (and probably dismissed with prejudice), see *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *Mary R. v. B. & R. Corp.*, 149 Cal.App.3d 308, 196 Cal.Rptr. 871 (Cal. Ct. App. 1983); *The Miami Herald Publishing Co. v. Collazo*, *supra*. The former category of case appears always to have been outside the pre-judgment nonaccess rule. see *Schmedding*, 85 Mich. at 5, 48 N.W. at 202 (referring to civil suits that involve "private dealings between private parties," 85 Mich. at 5, 48 N.W. at 202); and perhaps "with prejudice" dismissals were regarded as judgments (insofar as the sought-after records pertained to parties and claims dismissed)—at least where the dismissal was for a reason other than settlement. see 85 Mich. at 6, 48 N.W. at 202 (justifying the non-access rule on the ground that "[t]hese suits, involving private transactions, may never come to trial or hearing. The troubles may be settled, and the charges withdrawn").

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448 U.S. at 569, 100 S.Ct. at 2823; assure an appearance of fairness, see *Press-Enterprise*, 104 S.Ct. at 823; *Globe Newspaper*, 457 U.S. at 606, 102 S.Ct. at 2619; *Richmond Newspapers*, 448 U.S. at 569-70, 100 S.Ct. at 2823-24; function as a check on the judicial and governmental process, see *Globe Newspaper*, 457 U.S. at 606, 102 S.Ct. at 2619; *Richmond Newspapers*, 448 U.S. at 569, 100 S.Ct. at 2823; and play a cathartic role in permitting the community to observe justice being done. see *Press-Enterprise*, 104 S.Ct. at 823-24; *Richmond Newspapers*, 448 U.S. at 570-72, 100 S.Ct. at 2823-25. Even assuming, as seems unlikely, that these functions are as important in the context of civil suits between private parties as they are in criminal prosecutions, they are not greatly enhanced by access to documents (which, unlike live proceedings, do not contain unrecordable subtleties) before judgment rather than after. In fact, such access appears to be rarely requested, and its denial does not provoke the kind of outcry which closing of a trial usually excites.⁹

We have been assuming in the foregoing discussion that the relevant inquiry is, as the reporters have framed it, whether there is an important tradition of public access to court records. The more precise inquiry, however, is a functional rather than classificational one: whether information of the sort at issue here—regardless of its prior or current classification as court records—was traditionally open to public scrutiny. An historical tradition of access to civil and criminal judgments, adequate to sustain a constitutional claim, could hardly be defeated, for example, by a state statute providing that henceforth such judgments will not become part of court records. Con-

trariwise, a new constitutional right of public access to litigants' personal financial data would hardly be created by a state statute requiring such data to be filed with the court, simply because all other court records have been (let us assume) traditionally open. This distinction is significant here with regard to the pre-trial materials sought by the reporters—i.e., those materials never introduced at trial—the vast majority of which consisted of depositions and discovery documents.

Traditionally, absent a statute or court order, even parties to the case did not have the right to inspect depositions taken at the behest of their opponents. See 18 C.J. *Depositions* § 312 (1919). Requirements for the filing and "publication" ¹⁰ of depositions were designed to make their contents known to the litigants, and even these requirements were far from absolute. See *id.* at § 300. And when filed, unless delivered to the court personally by the magistrate who took them, depositions were filed under seal, and "[u]nless by consent . . . [could not] be opened out of court. . . ." *Id.* at § 306. See *Beale v. Thompson*, 12 U.S. (8 Cranch) 70, 3 L.Ed. 491 (1814). The tradition that the opening (i.e., publication) of depositions merely made them available to parties was carried forward following passage of the Federal Rules of Civil Procedure in 1938, as most district courts adopted local rules providing that depositions, which the rules required to be filed "securely seal[ed] . . . in an envelope," FED. R.Civ.P. 30(f)(1), were to remain sealed except "upon request of any counsel in the case." Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal*

Enterprise make clear, the focus is upon the public's ability to assure proper functioning of the courts. Contemporaneity of access to written material does not significantly enhance that ability.

10. Publication meant "the open showing of depositions and giving copies of them to the parties by the clerks or examiners in whose custody they are." 18 C.J. *Depositions* § 311 at 721 n. 59 (1919) (emphasis added).

9. The dissent's response to this point is to appeal to *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), which stresses that the public interest in obtaining news is an interest in obtaining contemporaneous news. See Dissent at 1352-53. Quite so. But the dissent is mistaken in assuming that the public interest in obtaining news is the focus of inquiry in right-of-access cases, as it was in *Bridges*, which involved the attempted suppression of editorial comment concerning pending litigation. Rather, as *Globe*, *Richmond Newspapers*, and *Press-*

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Rules, 63 MINN.L.REV. 253, 284 (1979). The current Federal Rules require deposition transcripts to be filed, but the court may on its own motion dispense with the requirement, FED R.CIV P. 5(d). Many district courts have adopted local rules making such dispensation standard except where the depositions are needed in connection with motion proceedings, and excluding public access even where filing occurs. See Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L.REV. 1, 13-14 & nn. 61-62 (1983). It can thus hardly be said that there was a tradition, or is even now a general practice, of public access to pretrial depositions. As for discovery documents: Besides the fact that they (at least in their currently permitted scope—including all third-party documents such as those at issue here) are a relatively modern phenomenon, see 18 C.J. *Discovery* §§ 111-16 (1919), the Federal Rules continue to contain no provision for their filing. See Marcus, *op. cit.*, at 13.

Chief Justice Burger, in a passage of his concurring opinion in *Gannett* cited approvingly by the Court in *Seattle Times*, described the past and present practice with regard to pre-trial proceedings in general as follows:

Even though the draftsmen of the Constitution could not anticipate the 20th-century pretrial proceedings to suppress evidence, pretrial proceedings were not wholly unknown in that day. Written interrogatories were used pretrial in 18th-century litigation, especially in admiralty cases. . . . Yet, no one ever suggested that there was any "right" of the public to be present at such pretrial proceedings as were available in that time; until the trial it could not be known whether and to what extent the pretrial evidence would be offered or received.

Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, as far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.

Gannett Co. v. DePasquale, 443 U.S. at 396, 99 S.Ct. at 2914 (Burger, C.J., concurring), cited with approval in *Seattle Times Co. v. Rhinehart*, 104 S.Ct. at 2208. It is true that in the present case the reporters were only seeking those pretrial materials that could have been considered by the court in its disposition of the Rule 56(c) motion—what they call the "summary judgment record." Chief Justice Burger's analysis does not make any such distinction, though it would be an obvious one to make if it were relevant. We are certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre-trial motions. If such a tradition existed, public files would presumably be filled with complaints stricken as scurrilous and with proffered evidence ruled inadmissible. The passage of *Seattle Times* which cites Chief Justice Burger's analysis with approval evidently considers the admission of evidence the touchstone of a First Amendment right to public access: "Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." 104 S.Ct. at 2208 (emphasis added). Even if one were to expand this perception to include all *admissible* evidence, it would still lead to the conclusion that material placed before the court in connection with summary judgment motions is not constitutionally required to be open to the public—unless we are to subject trial courts to the constitutional necessity of ruling, either pre-trial or post-trial, on the admissibility of voluminous material that is filed, and perhaps even referred to in the summary judgment motion, but not sought to be introduced.

Since the functional analysis we have just undertaken does not resolve the case as to all the documents at issue (certainly not as to those introduced into evidence), we return to the pre-judgment distinction we discussed earlier, to determine whether that suffices to dispose of the entire matter. Final judgment in the libel case against the Post was entered upon the trial

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court's grant of judgment n.o.v. in favor of the defendants on May 2, 1983, and in the slander case against Piro upon the grant of judgment n.o.v. in defendant's favor on May 20, 1983. We therefore find that until May 2, 1983 and May 20, 1983, respectively, the District Court could, without violating the First Amendment to the Constitution, categorically refuse the reporters access to the materials at issue in the two cases. The reporters thus had no First Amendment entitlement to a document-by-document determination of the need for confidentiality prior to those dates.

Part of the reporters' grievance, however, consists of the District Court's continuing failure to grant the requested access until June 21, 1983, more than a month after the entry of final judgment in the suit against Piro and more than seven weeks after final judgment in the suit against the Post. It is questionable, to begin with, whether a challenge to the July 20, 1982 denial of the motion to reconsider the sealing order—which denial did not even mention the date on which unsealing would be ruled upon, much less specify that that date would be after entry of judgment—is the proper vehicle to place in issue the post-judgment delay. Even if a new motion to be accorded immediate access was not necessary, and a ruling on the earlier motion could be regarded as having been merely deferred, surely the appropriate means of appealing the allegedly unconstitutional continuation of the deferral to a point too long after the entry of judgment would have been a petition for mandamus rather than the appeal of the earlier order. Assuming that the point is properly before us, however, we think it readily disposed of.

To the extent a First Amendment right to post-judgment civil records exists, it does not exceed, for the reasons discussed earlier, the traditional common law right. That was not conceivably violated here. The District Court had, as early as July 20, 1982, determined that its final ruling on confidentiality would turn on Mobil's ability to provide specific, document-by-document justification for the claim of confidentiality

ty—which is precisely the substantive standard, though not the time frame, insisted upon by the reporters. Thus, the only issue with regard to post-judgment access is the propriety of retaining the seals on the documents after entry of judgment in the two cases, pending the final (document-specific) determination. For obvious reasons, courts have uniformly approved the practice of provisionally sealing documents pending assessment of justification for a request to seal. See *In re Knight Publishing Co.*, 743 F.2d 231, 235 n. 1 (4th Cir. 1984); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir.1984); *Hubbard*, 650 F.2d at 324-25. Mobil's claim, supported by the MacDonald affidavit, that disclosure of the material would be likely to injure its competitive standing established a prima facie case for placing it under seal until the confidentiality claims could be ruled on. It is true that Mobil had, by the time the judgments n.o.v. were entered, abandoned the claim of confidentiality with regard to almost all of the documents initially designated under the protective order. That could have been regarded, as appellants suggest, as casting doubt on the totality of the MacDonald affidavit. But it did not have to be so regarded—and could indeed have been thought to suggest a particularly high need for confidentiality with respect to the documents remaining. What view to take was assuredly one of those matters regarding access "best left to the sound discretion of the trial court." *Nixon*, 435 U.S. at 599, 98 S.Ct. at 1312. The reporters make much of the fact that at the end of the day all of Mobil's confidentiality claims were either abandoned or found to be unwarranted. That, however, goes only to the merits of the claims, not to whether the affidavit asserting them could reasonably be regarded as sufficient to overcome the presumption of access pending a determination of the merits. The only remaining question, then, is whether the provisional seals were retained after judgment for an unreasonable length of time; in making its final ruling and setting aside the provisional

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seals in the two cases within fifty and thirty-two days, respectively, of the entries of judgment n.o.v., the District Court did not, in our estimation, exceed the limits of its discretion.

We have addressed in this opinion only the assignment of error presented, holding that the District Court's action did not violate the First Amendment to the Constitution of the United States. Conceivably, it violated the federal common law, which can of course go beyond constitutional prescriptions—either because the pre-judgment nonaccess rule was never so general as to include the federal courts, or because the federal rule (by reason of adoption of the Federal Rules of Civil Procedure or otherwise) has changed.

Although these points were neither raised, briefed nor argued, the dissent takes us to task for not considering them—perhaps after requesting supplemental briefing—and for thus reaching the constitutional question unnecessarily. *see* Dissent at 1342. That charge is unfounded. We decline to consider the existence of a common law right to access in these circumstances for the same reason (presumably) appellants declined to raise and argue it: In the absence of some overriding constitutional command to provide access, the eminently reasonable action of the trial court in deferring his ruling on these complex matters unrelated to the dispute between the parties, declining to interrupt an ongoing trial for that purpose, seemed to us unquestionably lawful. The prudential rule against reaching constitutional issues unnecessarily, *see, e.g., Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568–72, 67 S.Ct. 1409, 1419–21, 91 L.Ed. 1666 (1947), does not require a vain excursion through areas of law considered potentially helpful neither by the parties nor the court.

The dissent's excursion into the modern common law of access does not show our estimation of its futility to have been wrong. The dissent concludes that current law does not provide a right of access

except with respect to documents designated as exhibits at trial—so with respect to the remaining documents at issue here, even in the dissent's view the constitutional issue must be reached. Even as to designated exhibits, however, the dissent's avoidance of the constitutional question is illusory. What the dissent would prescribe is a "minimal" common-law requirement that the trial judge demand "document-by-document justification of . . . confidentiality" before he renders designated trial exhibits inaccessible to the public pending later judgment; but *no* requirement (which the dissent evidently agrees would be unreasonable in a case such as this, involving "massive documentation") that the trial judge immediately *rule upon* the claim of confidentiality. Dissent at 1344. If this is correct (which is debatable, since document-by-document justification will often disrupt the responding party's ability to conduct a pending case as much as document-by-document ruling on the "provisional sealing" will disrupt the judge's), then the dissent has assuredly provided useful guidance to our district court for the future. But it has *not* determined the invalidity of the July 20, 1982 denial, in this case, of the motion here on appeal—which sought *not* a more precise statement of Mobil's basis for its claims of confidentiality (followed by a deferral of the ruling on those claims), but a *ruling*, then and there, and a release of the subject documents. It would be extraordinary to reverse a trial judge for failing to provide something that was not remotely the relief requested, and not remotely the relief sought on appeal. In other words, the dissent demonstrates that our answer to the question of the utility of the common law is wrong only by changing the question to one that is not presented here. Since, even on the dissent's analysis, the district court would have to be affirmed with regard to all of the documents on common-law grounds, consideration of constitutional grounds for reversal was essential.

Moreover, even if the petitioners could be deemed properly to have requested some-

thing short of a conclusive ruling on Mobil's confidentiality claims, we cannot imagine what request they would have been entitled to, under the most favorable assumptions of modern common law, that would warrant a reversal here. The dissent's categorical rule that no claim for confidentiality of trial exhibits can be sustained unless accompanied by a document-by-document justification is simply unworkable. At the time the requirement to provide such justification would have arisen in the present case, Mobil's counsel were engaged in preparing for and attending depositions of Mobil witnesses; according to Mobil's uncontested representation, depositions noticed by the *Post*, most of which involved Mobil officers and employees, "took up the entire two months prior to" the trial, and even continued mornings and nights during the trial itself. Brief for Appellees at 17. See also Transcript at 2351 (July 16, 1982) (at argument on Reporters' request for access, lead counsel for Mobil stated the request had to be discussed with his client by another attorney, since "I attended the deposition last night that lasted until 10:00 o'clock"). It does not suffice to say that this problem was Mobil's fault for making its sealing request at the "eleventh hour." Dissent at 1355 n. 27. Any request for such protection, other than one for blanket sealing of all trial exhibits (which we presume the dissent does not intend to promote) must be made close to the date of trial, since only then are the parties' lists of proposed trial exhibits available. Here those lists were filed on July 2, 1982, and trial began five days later (never mind that two of those days were a weekend, and a third an official holiday).¹¹ Given the other matters on which counsel were occupied, it was effort enough (and surely a demonstration of good faith) to review the approximately 600 Mobil documents (comprising a much

11. It appears that the proposed lists were transmitted to Mobil's counsel some time before their filing, but close enough beforehand that, as of July 1, review of the documents simply to determine whether they were subject to the preexisting protective orders was "not as yet complete." Letter of July 1, 1982, from Loren

larger number of pages) included in plaintiffs' and defendants' proposed trial exhibits, and to limit the confidentiality claims to such degree that of the approximately 150 Mobil documents considered important enough ultimately to be used at trial, only 52 were within the remaining scope of the confidentiality claim. It would have been excessive to expect in addition, at that stage of the proceedings, the crafting of a document-by-document specification of bases for the claim that would sustain post-trial legal attack. And the difficulties encountered in the present case are as nothing compared with those that a major antitrust trial would present. In sum, the dissent's made-for-the-occasion categorical rule of instantaneous document-by-document justification is utterly infeasible; and any feasible rule, which would have to accord the district judge a reasonable degree of discretion, could not conceivably have been violated here, where the document-by-document justification was required within 30 days after conclusion of the trial.

The appeal in No. 83-1744 is dismissed. The ruling in appeals Nos. 82-1820 and 82-1821 is

Affirmed.

J. SKELLY WRIGHT, Circuit Judge, concurring in part and dissenting in part.

I concur in the judgment of the court insofar as it rejects appellants' claims to a right of access to documents considered by the District Court in denying a summary judgment motion. But because I believe that appellants have a right of access to designated trial exhibits, I must respectfully dissent from that part of the majority's opinion affirming the provisional sealing of such exhibits.

Kieve to John J. Walsh, *et al.* at 1, *Tavoulareas v. Washington Post Co.*, Civil Nos. 80-3032 & 80-2387 (D.D.C. filed July 2, 1982). It was envisioned that after this review the documents would be classified into two categories, those as to which the protection would continue and those as to which it would not. *Id.*

It is my view that appellants' right of access to designated trial exhibits is secured by federal common law. Unfortunately, the majority has seized this occasion to issue an advisory opinion on the scope of the First Amendment. Ordinarily, I would not comment on such unnecessary constitutional ruminations. The dangerous drift of the majority's analysis, however, leaves me little alternative. Contrary to the view of other United States Courts of Appeals, the majority finds that the First Amendment does not provide the slightest protection to the public's interest in contemporaneous access to evidentiary exhibits in civil proceedings. In so doing, the majority opens the door to the abuse of provisional seals entered on the basis of mere summary affidavits. Proponents of such seals will be able to make broad, unsubstantiated, claims of confidentiality and prevent public access to critical evidentiary exhibits until public interest in such documents has long faded. I fear that public understanding of judicial decision-making will suffer accordingly.

I. THE COMMON LAW RIGHT OF ACCESS

As the Supreme Court has recently reminded us, federal courts ought "not decide a constitutional question if there is some other ground upon which to dispose of the case." *Lowe v. SEC*, — U.S. —, 105 S.Ct. 2557, 2563, 86 L.Ed.2d 130 (1985), quoting *Escambia County, Florida v. McMillan*, 466 U.S. 48, 104 S.Ct. 1577,

1. This is essentially the course followed by the *Escambia* Court. In *Escambia*, however, the Court not only required the parties to rebrief the issues but, because the issue of avoiding a constitutional decision first arose in the context of Supreme Court review, it also forced the parties to argue their case at the appellate level.
2. Nothing in this opinion should be taken to suggest that there is an absolute right of access to disputed evidentiary documents regardless of their content. On the contrary, my analysis assumes that at some point the proponent of a seal should have the opportunity to present a document-by-document justification of the need for confidentiality. Consequently, throughout this opinion I will only refer to a "conditional" or "presumptive" right of access.
3. The status of the common law right of access to discovery documents is less clear. The Seventh Circuit has found that a presumptive right

1579, 80 L.Ed.2d 36 (1984). See also *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Presumably mindful of this well established principle, the majority justifies its declaration of constitutional law by reference to the parties' failure to brief the common law issues in this case. See majority opinion (maj. op.) at 1340.

The Supreme Court, however, has also indicated that the mere failure of the parties to brief a non-constitutional issue does not legitimate constitutional adjudication. *Escambia County, supra*, 104 S.Ct. at 1579. An order directing the parties to submit supplemental briefs on the common law issues would have addressed the majority's concern.¹ Although such a procedure might be inadvisable if it deprived the litigants of timely justice, all concede that our judgment in this case is merely prospective. Consequently, there would have been little to lose and much to gain by prudent exercise of our authority to require supplemental briefing of the common law issues in this case.

Even without the benefit of briefing, it requires little research to determine that federal courts have extended a conditional common law right of access, prior to judgment, to evidentiary materials on which a court relies in issuing an order determining a litigant's substantive rights.³ See *Matter*

of contemporaneous access attaches before trial, as long as the case is at an "adjudicative stage." *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir.1984). The Second Circuit has found a post-summary judgment right of access. *Joy v. North*, 692 F.2d 880, 893 (2d Cir.1982). In both of these cases, however, the court made a final determination of private rights in the course of deciding a pre-trial motion. In our case, however, the court denied the summary judgment motion, essentially postponing a final determination of substantive legal rights. The public interest in obtaining contemporaneous access to such documents is not as pressing. Consequently, I fail to find a common law right of access to the documents to which the District Court may have referred in denying the summary judgment motions. My concurrence, however, should not be read to signify that I think there would be no federal common law right of access in a case

84). See also *Ash*, 524 U.S. 47, 56 S.Ct. 1936, (Brandeis, J., concurring), mindful of this, the majority justifies the failure to brief the issue in this case. See major- ity opinion at 1340.

However, the failure of the parties to raise this constitutional issue does not constitute a procedural bar. *Id.*, 104 S.Ct. at 1340. The parties to the litigation have not addressed the major- ity's proposed procedure for briefing this issue. It is merely prospective. The majority has little to say about the require- ments of the law in

briefing, it is to be noted that a conditional access, prior to judg- ment, on which a court is determining rights.³ See *Matter*

attaches before tri- als at an "adjudicative hearing." *Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir.1984). In *Joy v. North*, 692 F.2d 1011, 1014 (7th Cir.1982), in both of these cases, a final determination of the course of deciding a case, however, the majority judgment motion, a final determination of the public interest in access to such doc- uments. Consequently, I fail to see how a right of access to the records of a trial court may have been denied. However, should not be denied there would be no right of access in a case

of *Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir.1984);⁴ (contemporaneous right of access to materials on which court relied in dismissing derivative claims against corporate directors); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir.1983), cert. denied, — U.S. —, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984) (right of access to trial record in civil proceeding contesting agency action); *In re Coordinated Pre-trial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 43 (C.D.Cal.1984) (right of access attaches as soon as documents are submitted to a court in connection with a motion); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 866, 899 (E.D.Pa.1981)

where a pre-trial motion resulted in a final judgment.

4. The majority suggests that the conclusion of the Seventh Circuit is distinguishable because the court effectively dismissed some of the claims in the case at the time it granted access to the disputed documents. See maj.op. at 1336 n. 8. Assuming, *arguendo*, that such a dismissal were relevant, it should be noted that the *Continental Illinois* court only reviewed the effective dismissal of derivative claims against *some* of the defendants. 732 F.2d at 1306. The disputed evidentiary document, the Special Litigation Report, would continue to affect the rights of the remaining defendants. Nonetheless, the Seventh Circuit affirmed the pre-judgment disclosure of that Report.
5. The majority claims that this case is distinguishable on the ground that a government agency was a party. This is unpersuasive for two reasons. First, the court reversed an order that would have barred public access to all papers in any new civil action filed in that court until 21 days had elapsed from the date of such filing. Although the court also restricted access to hearings concerning a challenge by the Board of Supervisors to a special grand jury, the order sealing court records was not, by its terms, restricted to that case. Second, the common law right of access vindicates the public's interest in receiving information about the operations of the *judicial* branch of government. The public interest in access is implicated whether or not another government agency is involved in the case.
6. The majority attempts to distinguish *Wingfield* on the ground that the court in that case merely construed the scope of a state statute. The statute in question provided that only "parties in

(presumptive right of access applies to documents once there is an evidentiary hearing). Nor would I ignore the views of several state courts that have clearly articulated a pre-judgment presumptive right of access to the records of civil trials. See *State of Florida ex rel. Gore Newspapers Co. v. Tyson*, 313 So.2d 777 (Fla.App.1975); *Charlottesville Newspapers v. Berry*, 215 Va. 116, 206 S.E.2d 267 (1974);⁵ *Des Moines Register & Tribune Co. v. Hildreth*, 181 N.W.2d 216 (Iowa 1970); *Times-Call Publishing Co. v. Wingfield*, 159 Colo. 172, 410 P.2d 511, 512 (1966) (dicta).⁶

Admittedly, few courts have directly considered whether a conditional right of contemporaneous access applies when a trial court enters a *provisional* seal.⁷ Provi-

interest or their attorneys[] shall have the right to examine pleadings or other papers filed in any cause pending in such court." 410 P.2d at 512, citing C.R.S.1963, 35-1-1. In holding that the statute did *not* require sealing of the pleadings in a civil suit contesting a school bond election, the court apparently relied on its understanding of the American common law presumptions in 1885 when the statute was enacted. Because the court believed that the general understanding in 1885 in Colorado would have been to provide access to civil actions "involving matters of public interest" the court carved out an exception to the otherwise restrictive state statute. *Id.* Thus *Wingfield* expresses both modern and historical concerns for the presumptive openness of the records of civil procedures.

7. Courts that have spoken approvingly of provisional seals have only done so in cases where the underlying litigation turned on the confidentiality of information that would be made public if no provisional seal were entered. Thus in *Des Moines Register & Tribune Co. v. Hildreth*, 181 N.W.2d 216 (Iowa 1970), the appellate court granted a writ of mandamus, forcing the trial court to unseal the record of a pending civil case. The court, however, did suggest that a provisional seal might be acceptable. *Id.* at 221. But the reason the *Hildreth* court believed that such a provisional seal might defeat an application for a writ of mandamus was that the underlying litigation in that case concerned the confidentiality of certain government records. Consequently, it would make sense to allow for a provisional seal so as not to moot the substantive issue of the underlying litigation. No such consideration presents itself in this case. See also *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir.1984).

sional seals, unlike permanent seals, merely delay final determination of the confidential status of the contested documents. In gauging the public interest in access to civil proceedings, however, the timing of such access simply cannot be ignored. Indeed, the Supreme Court has found that the question of timing can rise to constitutional magnitude.⁸ And at least one United States Court of Appeals has explicitly concluded that the right of access is presumptively a right of "contemporaneous" access. *Continental Illinois Securities, supra*, 732 F.2d at 1310.⁹ Consequently, it would seem that the common law right of access would require, *at a minimum*, that a party seeking a provisional seal of trial exhibits should have to make a document-by-document showing as to the need for such a seal.

Presumably, the majority seeks to preserve the flexibility of trial courts in cases involving massive documentation. This is a worthy concern. But the majority fails to explain why a District Court would be unduly burdened if it were to require the proponent of a provisional seal to come forward with a pre-trial document-by-document justification of the confidentiality of the contested material. Once such a pre-trial showing were entered, nothing would then prevent a District Court from postponing a final determination of the confidential status of the contested material by issuing a provisional seal. In the meantime, however, the proponent of confidentiality would have to substantiate its concerns.

In the usual case such a minimal requirement would vindicate the public's interest

8. See text *infra* at 1352-53 (discussing the importance of *contemporaneous* access under the First Amendment).

9. Although the Supreme Court has held that the common law right of access to evidentiary exhibits in civil cases does not provide an absolute right to *copy and broadcast* such exhibits, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608, 98 S.Ct. 1306, 1317, 55 L.Ed.2d 570 (1978), the Court never questioned the common law right to *inspect* such exhibits at the time of trial.

in contemporaneous access to trial exhibits in civil proceedings and allow the District Court to retain administrative flexibility. In particular, it would protect the public from abuse of provisional seals. Such abuse tends to occur whenever a party can obtain a provisional seal on the basis of a rather general affidavit describing the harm it fears from disclosure of its documents.¹⁰ By contrast, the majority's approach nullifies the public's common law right of contemporaneous access. It would allow a summary affidavit to justify provisional sealing of trial exhibits in civil proceedings and therefore would do nothing to prevent abuse of such orders.

This case provides an object lesson in the dangers of such an approach. In this case the District Court did not require Mobil to make a document-by-document showing as to the need for a provisional seal. Instead it was content to rely on the June 12, 1981 affidavit which merely identified the harm that might befall Mobil from disclosure in general. The affidavit said nothing as to how the alleged harm might result from the disclosure of specified individual documents. Mobil consequently claimed thousands of pages of discovery documents to be "confidential." Once the trial ended and the intensity of public attention abated, Mobil conceded the non-confidentiality of all but a handful of its documents. In the end it was unable to sustain its claims of confidentiality for a single document. Because this course of action effectively subverted the public's common law right of contemporaneous access to trial exhibits, I would reverse the District Court's decision

See *id.* at 609. See also *Continental Illinois Securities, supra* note 7, 732 F.2d at 1309 n. 11.

10. Cf., e.g., *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 866, 873-74 (E.D.Pa.1981); 513 F.Supp. 1100 (E.D.Pa.1981) (plaintiff designated 100,000 pages of discovery documents as "confidential" under an umbrella protective order). See also Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L.Rev. i, 11 n. 51 (1983).

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to extend the terms of its umbrella protective order to the trial itself.¹¹

The foregoing analysis leads me to the conclusion that, under the facts of this case,¹² the District Court should have granted the Reporters Committee's request for immediate access to the designated trial exhibits. My conclusion is based on two predicates. First, Mobil had effectively waived its right to demand a document-by-document analysis of the confidentiality of the disputed trial exhibits. Second, the District Court's determination that a document-by-document analysis would disrupt the trial justified an order summarily granting access to such documents.

As I have suggested, I believe the federal common law presumption of access imposes, *at a minimum*, an obligation on the proponent of a provisional seal to provide a document-by-document justification for such a seal. But federal common law does not provide an absolute right to provide such a justification. Whatever the right to provide such justification, circumstances may indicate that a party has waived its right in a particular case. In a case where this right has been waived there is no longer any reason to delay a ruling on the issue of access. I believe this to have been such a case.

In this case Mobil could and should have provided its document-by-document justification in its *eve-of-trial* motion. It chose not to. In so doing Mobil could have anticipated that any challenge to the provisional seal would arise at a time when a doc-

ument-by-document review would disrupt the trial. In a typical case the prospect of such a disruption might decisively shift the balance of competing interests against an immediate ruling on the issue of confidentiality. If such a ruling were delayed, the proponent of the provisional seal would benefit from its own failure to present a document-by-document justification before the trial began. Such a result would encourage tactical abuse of provisional seals and vitiate the federal common law right of contemporaneous access. Only a policy of summarily sustaining the challenge to a provisional seal in such circumstances would effectively deter this abuse. Accordingly, I would hold that whenever a party has an opportunity to present its document-by-document justification before trial and fails to do so, that party has constructively waived its right to present such a justification should the issue be raised mid-trial.

Notwithstanding such a waiver of the right to present a document-by-document justification, the District Court of course retained discretion to require Mobil to provide such a justification. The District Court, however, determined that a document-by-document ruling in the midst of trial would be unduly disruptive. Given this conclusion, the appropriate course of action would have been to grant immediate access *without* such a document-by-document analysis.

In sum, having failed to provide a document-by-document justification of the

while providing an incentive to proponents of provisional seals to provide such justifications before the trial began.

11. I am not unaware of the practical difficulties that faced the District Court in this case, given appellants' mid-trial intervention. But for the reasons stated, I do not think this justified the July 20, 1982 order. My analysis leads me to conclude that the District Court ought not to have allowed the conditions for appellants' mid-trial intervention to have come to fruition, *i.e.*, it ought to have denied Mobil's July 5, 1982 motion seeking to extend the terms of the November 5, 1981 protective order to the trial. Thus the rule I suggest today would not force disruption of ongoing trials. Rather, its general effect would be to require District Court judges to deny *eve-of-trial* motions to seal trial exhibits absent a document-by-document justification

12. Nothing in my reasoning suggests that the federal common law right of access necessarily bars parties from presenting a document-by-document justification in the midst of trial. I only address the narrow case where (a) proponents of a provisional seal had the chance to make a document-by-document justification and instead presented a summary affidavit, and (b) the District Court determined that a mid-trial document-by-document analysis would be unduly disruptive.

need for confidentiality in its eve-of-trial motion, Mobil bore the risk that public intervention in the midst of trial might spur the District court to take summary action.¹³ Any rule to the contrary would effectively encourage proponents of provisional seals to manipulate the balance of competing interests to obtain a near-automatic delay of any ruling on the confidentiality of their documents. I am fearful that the majority's opinion invites precisely this sort of abusive behavior. Such a legal regime will unacceptably force the public to secure efficient trials only by sacrificing the openness of such proceedings. I therefore believe that the federal common law right of access required the District Court to grant access to the designated trial exhibits in this case.¹⁴

13. It might be argued that it would be unfair to place such a burden on Mobil, given that the law of this circuit was not clarified at the time Mobil entered its eve-of-trial motion. If our holding today were anything other than a purely prospective statement of the law, such an argument would have merit. But given the prospective character of our ruling, Mobil's arguable lack of notice is irrelevant.

Indeed, the majority's critique of the practicality of the rule I suggest today, *see* maj.op. at 1340-41, can be traced to its failure to view the proponent of a provisional seal as being fully aware of its common law obligations. Thus the majority fails to appreciate the fact that Mobil had close to *eight months* to prepare its case justifying a provisional seal. Discovery of Mobil's documents had proceeded under the District Court's protective order since November 5, 1981. Nonetheless, the majority pretends that the first time Mobil could or should have thought of the need to provide a document-by-document justification of the need for a provisional seal was on the date on which it received a list of designated trial exhibits. Surely, a reasonable would-be proponent of a provisional seal, *aware of its common law obligation to provide a document-by-document justification*, could be expected to begin preparing its case well before the eve of trial.

I am well aware that the list of discovery documents was far longer than the list of designated trial exhibits. But at the very least, Mobil would have been alerted to the allegedly most sensitive documents and could have prepared a few brief paragraphs on each one (as that was all that it prepared in its ultimate justification presented to the District Court after completion of trial). Then, when the list of designated trial exhibits was issued, Mobil could have culled the

II. THE FIRST AMENDMENT AND THE PRESUMPTIVE RIGHT OF CONTEMPORANEOUS ACCESS TO TRIAL EXHIBITS

Notwithstanding appellants' colorable common law claims, the majority proceeds to declare that it finds no conditional First Amendment right of contemporaneous access to trial exhibits in civil proceedings.¹⁵ The majority's conclusion rests on two premises. First, the majority claims that before the First Amendment can provide the slightest protection to the public's interest in access to trial exhibits, such pre-judgment access must be shown to have been firmly established in nineteenth century common law. Maj. op. at 1332. Second, the majority claims that, as a matter of historical fact, there was no common law right of access before a judgment issued. Maj. op. at 1332-34. Supreme Court

relevant documents from the complete universe of discovery materials and filled the remaining gaps. In the unusual case where there was inadequate time for such last minute gap-filling, the District Court could easily provide for additional time. In any event, I fail to understand why the public should bear the burden of Mobil's failure to take the proper notes necessary to make its case when it was Mobil that sought the benefits of a provisional seal.

Thus, although majority's sympathetic portrait of Mobil's overburdened counsel is touching, the facts are to the contrary. Indeed, if one were to accept the majority's view one would have to believe that Mobil did not know why it was going through the exercise of requesting a provisional seal in the first place.

14. Thus, contrary to the majority's suggestion, *see* maj.op. at 1340, my analysis of the federal common law in this case leads me to argue in favor of granting the relief requested below regarding the designated trial exhibits. My concern to avoid the constitutional issues surrounding the right of access to designated trial exhibits follows as a direct result.

15. The majority implies that the doctrine of constitutional avoidance does not prevent it from reaching the issue of the right of access to *designated trial exhibits* because there is a genuine constitutional issue concerning access to *pre-trial* discovery documents. It has always been my understanding that the doctrine of constitutional avoidance cautions us to be quite discriminating in deciding whether to reach a particular constitutional *issue*. I therefore fail to understand why the majority paints with so broad a brush.

precedent contradicts the first proposition. Careful reading of the common law undermines the second. Consequently, I find myself in agreement with those Courts of Appeals that have found that the First Amendment provides a presumptive right of contemporaneous access to materials admitted into evidence in a civil proceeding.¹⁶ See *Continental Illinois Securities, supra*; *Brown & Williamson, supra*.

A. *The Scope of the First Amendment Right of Access to Trial Exhibits*

1. *The role of historical practice in delineating the right of access.* The majority asserts that before it would find that the First Amendment extends a pre-judgment right of access to documents in a civil proceeding it would have to be assured that such a right of access was clearly and specifically established by "historical" common law precedent. Maj. op. at 1332. As I read the Supreme Court's discussion of the public's right of access under the First Amendment, I find no such requirement.

The Court's most recent consideration of the degree to which the First Amendment affects the open character of judicial proceedings, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), devoted precisely one sentence to the historical status of pre-trial proceedings, *id.* 104 S.Ct. at 2207-08. Far from declaring the lack of historical support for a right to disseminate pre-trial discovery documents to be dispositive, the Court merely weighed that consideration along with many other factors. The statutory source of the right to conduct discovery, the general custom governing publicity at pre-trial proceedings, the irrelevance of many discovery documents to the underlying cause of action, and the limited effect

of pre-trial protective orders on an individual's capacity for self-expression were all weighed in the balance. *Id.* at 2207-08 & n. 19. Had all other indicia been to the contrary, it is far from clear that the Court would have found historical practice, standing alone, to be conclusive. In light of such an eclectic approach, it is not surprising that a panel of the Second Circuit recently concluded that a majority of the Justices have come to rely on functional arguments in determining the scope of the right of access. See *Application of the Herald Co.*, 734 F.2d 93, 98 (2d Cir.1984).

There can be no question but that the Court has indicated that historical practice can shed light on the general contours of the right of access and that history can illuminate the underlying policy concerns surrounding the right. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 822, 78 L.Ed.2d 629 (1984) (terming the historical data "helpful"). See also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 2619, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-69, 100 S.Ct. 2814, 2820-23, 65 L.Ed.2d 973 (1980) (plurality opinion). Nonetheless, I cannot agree with the majority's assertion that the Court has fossilized the First Amendment. Nowhere does the Court equate the scope of its protections with those precise practices that can be shown to have been firmly established at common law. Instead, the Court appears to have weighed historical practice as one factor among many in evaluating the appropriate scope of the right of access.

In the context of this case, the majority would find the general historical presumption of the open character of trial exhibits

16. It does not appear that any other circuit has adopted the view expressed by the majority opinion. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir.1981), found no First Amendment right to copy or broadcast trial exhibits, but the court noted that the public had been afforded the right to inspect the exhibits in question. It argued that the Constitution is "fully satisfied by the kind of untrammelled access" afforded in that case. *Id.* at 427. *Publicker*

Industries, supra note 7, 733 F.2d at 1073, includes dicta approving of a provisional seal. But as in *Hildreth*, see note 7 *supra*, the underlying litigation concerned the confidentiality of information that would be made available at the closed hearing. Under these circumstances the Third Circuit indicated that a provisional seal might be warranted so as not to moot the underlying litigation.

in civil proceedings to be irrelevant. Only a specific tradition of pre-judgment access would suffice. By contrast, I would find such a general historical tradition illuminating. Unless the common law were plainly established to the contrary, I would weigh that tradition, along with other factors, in determining whether the First Amendment provides a presumptive right of access to trial exhibits in civil proceedings before a judgment has been entered.

2. *The general common law presumption of access.* As the majority implicitly concedes, there is a longstanding common law tradition assuring a presumption of access to trial exhibits in civil proceedings. See *Richmond Newspapers, supra*, 448 U.S. at 580 n. 17, 100 S.Ct. at 2829 n. 17 (“[H]istorically both civil and criminal trials have been presumptively open.”); *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15, 99 S.Ct. 2898, 2908 n. 15, 61 L.Ed.2d 608 (1979) (same); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 98 S.Ct. 1306, 1311-12, 55 L.Ed.2d 570 (1978) (there is a long-standing conditional common law right of access to trial exhibits). The underlying rationale for this presumption of openness was succinctly stated by the then Judge Holmes: “[I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

The majority contends, however, that the historical common law right of access was

17. Nor can the phrase “made public by proceedings taken in open court” refer only to those documents actually read aloud in open court. The *Schmedding* court indicated that this was not its view when it stated its understanding of the rationale underlying the right of access: the need to assure that everyone be able “to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201, 202 (1891), quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). If the purpose of the right of access was to assure that the public understood the basis of judicial decisionmaking, it would make little sense to enable the public to obtain

not implicated prejudgment. Maj. op. at 1335-36. My own reading of the cases cited by the majority fails to persuade me of this proposition. Instead, these cases suggest that the right of access to trial exhibits attached *once such exhibits were introduced at trial* and thus became, in the words of Chief Justice Burger, “part of the [presumptively open] trial.” *Gannett Co., supra*, 443 U.S. at 396, 99 S.Ct. at 2914 (Burger, C.J., concurring).

The majority cites only two “historical” cases directly addressing the right of access. The earlier of the two, *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891), concerned the attempt of a reporter to obtain access to pre-trial pleadings. The court framed the issue as follows:

The question is therefore fairly presented, have parties the right to an examination of the records and papers in a cause for the purpose of publishing statements in regard thereto in the newspapers, *before trial* or hearing, or before they become public by proceedings taken in open court? * * *

Id. 48 N.W. at 202 (emphasis added). The Michigan court’s holding was framed in similarly narrow terms. “[O]ur conclusion is that the parties to suits in court may, under the direction of the court, lawfully withhold the records and papers in the case * * * until they are made public * * * by proceedings in open court.” *Id.* 48 N.W. at 203. At no point does the court suggest that the trial court has plenary discretion to seal trial exhibits until *judgment* issues.¹⁷

the information it needed only in those case where the crucial evidence was given orally rather than in the form of exhibits.

It is true that the *Schmedding* court also articulated a rationale for a limit on the right of access: the need to protect private parties from scurrilous charges contained in pre-trial pleadings. But the court apparently saw the principal danger as inhering in those pleadings that although filed “may never come to trial or hearing.” Thus the court sought to protect litigants’ privacy by preventing pre-trial disclosure.

The *Schmedding* court sought to balance the public’s interest in access and the individual’s

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The majority also cites *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896). In that case the Michigan court again refused to require a trial court to allow a non-litigant to have access to the pre-trial pleadings. Not only does this case merely purport to follow the rule established in *Schmedding*, but it reiterated the view that trial courts had unfettered discretion to refuse pre-trial requests for access, saying: "[I]t is not the absolute right of persons to make merchandise of the contents and allegations contained in the records of private actions and suits, before trial, for gain." *Id.* (emphasis added).¹⁸

Unable to muster support from "historical" cases, the majority seeks support in more recent precedent. But only one of

interest in privacy by limiting the right of access to the trial stage of the litigation. As the majority suggests, a complete vindication of the private interest in reputation might have required the court to deny the right of access pre-judgment. But unlike the majority here, the *Schmedding* court sought to achieve a measure of protection for both the public and the private interest; it did not seek to vindicate the individual's privacy interest at the cost of eviscerating the public interest in self-governance. Consequently, it drew the line at the onset of the trial.

18. The majority also cites *Ex parte Drawbaugh*, 2 App.D.C. 404 (1894). In dicta the court distinguished the right of access to papers that had been "merely filed" and those as to which the court had taken some action. *Id.* at 407. The court also distinguished between post-judgment papers and pre-judgment and pre-trial papers. *Id.* at 406. Consequently, this case cannot provide support, even in dicta, for the majority's alleged "post-judgment rule."

The majority also alludes to a line of cases concerning the scope of the reporter's privilege in libel cases to report judicial proceedings without fear of liability. Maj. op. at 1335. Again, neither of the "historical" cases cited by the majority provide support for a "post-judgment" rule. In *Cowley v. Pulsifer*, *supra* note 17, the court refused to extend the privilege when a newspaper published the contents of pre-trial pleadings. The court found that there was no privilege as to such a "preliminary written statement of a claim or charge" because "[k]nowledge of them throws no light on the administration of justice." 137 Mass. at 394. Although Holmes noted that allowing access to the civil trial itself might present some peril to individual privacy and reputation, he concluded that "[f]or the purposes of the present case, it is enough to mark the plain distinction between what takes place in open court, and that which

the mid-century cases cited by the majority contains dicta suggesting adherence to a "post-judgment rule," *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758 (N.D.1967). *O'Connell*, however, concerned the right of access in a criminal case. Its view of the pre-judgment right of access was limited accordingly: "The records of criminal trials conducted in respondent's court are public only after such proceedings are completed and entered in the docket of the court." *Id.* at 763. Thus it is far from clear that *O'Connell* endorsed a common law "rule" concerning pre-judgment access in civil cases, a rule that the majority claims was grounded in the need to protect private reputations from private calumny.¹⁹ Rather, the

is done out of court by one party alone, or more exactly * * * the contents of a paper filed by him in the clerk's office." *Id.* at 395.

Park v. The Detroit Free Press, 72 Mich. 560, 40 N.W. 731 (1888), also cited by the majority, *see maj. op.* at 1333, was another libel suit for publication of a pre-trial filing. In holding that such a publication was not privileged, the court again drew a distinction between pre-trial and trial papers:

If pleadings and other documents can be published to the world by anyone who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court[.] * * * *Id.* 40 N.W. at 734 (emphasis added).

Finally, it should be noted that recent scholarly treatment of the "historical" cases analyzed by the majority finds that such cases established a pre-trial, not a "post-judgment," rule. *See Marcus, supra* note 10, 69 CORNELL L.REV. at 33 n. 136.

19. The *O'Connell* court did assert that "[w]e believe that it is the right of the public to inspect the records of judicial proceedings after such proceedings are completed and entered in the docket of the court." 151 N.W.2d at 763. Admittedly, *this* dicta is not restricted to criminal proceedings. But neither does this dicta indicate that there is no pre-judgment right of access pre-judgment. It only asserts that there is a conditional right of access post-judgment. Indeed, the issue presented in *O'Connell* was whether a newspaper could gain access to post-judgment criminal records and thereby avoid the burden of having a reporter present in the court-room during the trial. *Id.* at 760. Not

court may simply have been moved by the need to provide a fair trial to a criminal defendant, free of prejudicial pre-judgment publicity.

Although two of the mid-century cases cited by the majority²⁰ suggest that access

only did the court not have occasion to consider the right of access at the time of trial, it may have assumed that such a right *did* obtain at that time. Thus, the court argued, "The trials in respondent's court are open to the public, and the petitioner's reporters, or anyone else, may attend such trials. We are faced here not with the right to know, but with the very limited question of the right of the petitioner to inspect the criminal records of the court after the trial has been concluded." *Id.* at 762. Although this language does not expressly indicate that the *record* was open at the time of trial, a prior statement of the court suggests that this may have been its meaning: "[Petitioner] desires to inspect the criminal records of the county court so that this information can be obtained without having its reporter present throughout the trial of each case. This proceeding involves, therefore, not so much the right of the petitioner to secure the information it seeks as it does the method of getting such information." *Id.* at 760. Thus the court appears to have assumed that the press could obtain *all* of the information it desired on the basis of its right of contemporaneous access to the "trial."

20. Of the cases cited in support of the "post-judgment rule" only one, *C. v. C.*, 320 A.2d 717 (Del.1974), concerned a pre-judgment request for access to records that might contain trial exhibits in a civil case. In *C. v. C.* a reporter sought access to a sealed file in a divorce case after the trial had been completed but *before* judgment had issued. The court noted, in dicta, that there was a general right to access "after completion of the proceedings," but then went on to explain why that right was not absolute. *Id.* at 724. What is remarkable about the court's discussion, given that *C. v. C.* was a pre-judgment case, is that it nowhere referred to the alleged "post-judgment rule." Moreover, at no point does the court suggest that there was *no* right to access *before* completion of the proceedings; it simply referred to the state of the law governing access to trial records after completion of the proceedings because it was confronted with a post-trial pre-judgment case.

Similarly in *Birnbaum v. Wilcox-Gay Corp.*, 17 F.R.D. 133, 139 (N.D.Ill.1953), the court stated, in dicta, that "[t]he records of proceedings of a court are not required to be open to public inspection until *after the trial.*" (Emphasis added.) Although the majority is meticulous in insisting that recent cases that do not expressly provide for pre-judgment access to trial exhibits cannot be read to imply such a right, *maj. op.* at 1336 n. 8, the majority oddly believes that the

could be unconditionally barred before the end of the "trial" (but not before "judgment"), most of the remaining mid-century cases that the majority claims refer to a "post-judgment" rule actually recite a "pre-trial" rule.²¹ And as I have noted, the

"post-trial" language of *Birnbaum* and *C. v. C.* must be liberally construed to refer to a "post-judgment" rule. Even assuming the majority's reading, however, *Birnbaum* is readily distinguishable from our case. Once again, the litigation concerned the trial court's power to seal pre-trial *pleadings* and not trial exhibits. Indeed, the *Birnbaum* court only sealed the pleadings on a provisional basis so that it might have the opportunity to determine whether they were frivolous. Thus at most *Birnbaum* stands for the proposition that a court may enter a provisional seal before the trial has begun to prevent public access to potentially frivolous complaints. It says nothing about access to exhibits in causes that actually come to trial.

21. Thus in *Werfel v. Fitzgerald*, 23 A.D.2d 306, 260 N.Y.S.2d 791, 794-95 (1965), the passage cited by the majority reads: "[Although some courts have provided for pre-trial access,] [o]n the other hand, other American courts held that records *prior to trial* were not available to public inspection until there were proceedings in open court, following which the records were accessible to all persons, whether they had a special interest or not[.]" (Citation omitted; emphasis added.)

Similarly, *In re Sackett*, 136 F.2d 248, 249 (Ct.Cus. & Pat.App.1943), stated, in the passage cited by the majority, that in addition to distinguishing between official records in general and judicial records in particular, "[d]istinction has also been made in some cases between the right to inspect judicial records *before* trial and the right to inspect the record of the court after trial." (Emphasis added.) Although the court does not appear to have focused on the question of mid-trial access, it is also clear that it did not understand the common law to have enunciated a "post-judgment" rule.

Finally, the more recent libel cases cited by the majority simply do not refer to a post-judgment rule. On the contrary, *Sanford v. Boston Herald Traveler Corp.*, 318 Mass. 156, 61 N.E.2d 5, 6 (1945), states that "the doctrine long established in this Commonwealth is that the right to report proceedings in the court does not extend to reporting accusations contained in papers filed by a party and *not yet brought before a judge or magistrate for official action.*" (Emphasis added.) And in *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, 47 Ill.Dec. 429, 415 N.E.2d 434 (1980), the court does not assert that the contemporary majority rule is a post-judgment rule. *But see maj. op.* at 1336 n. 8. Rather

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trend in the cases over the last 15 years
has been to declare a presumptive right of
access to the records of civil proceedings.²²

Not surprisingly, the majority concedes
that there is "sparse" authority, whether
"historical" or otherwise, supporting the
"post-judgment rule." Maj. op. at 1335.
Indeed, there is almost none. Instead, a
review of common law precedent suggests
a presumptive right of contemporaneous
access to the records of civil proceedings.
To the degree that the common law limited
the time at which such access might occur
it appears to have shown a preference for
access at the time the trial began, not at
the time judgment issued. Given the func-
tional arguments supporting the right of
access, identified by Holmes over a hun-
dred years ago, it is difficult to imagine
how the line could have been drawn any-
where else.

2. *The functional basis of a right of
access to trial exhibits in civil cases.*
Open trials serve several important func-
tions. They enhance the quality of fact-
finding. Cf. *Globe Newspaper, supra*, 457
U.S. at 606, 102 S.Ct. at 2619 (criminal
trial). They assure the appearance of fair-
ness. Cf. *Press-Enterprise, supra*, 104
S.Ct. at 823 (criminal trial). And they play
a cathartic role in permitting the communi-
ty to observe justice being done. Cf. *Rich-*
mond Newspapers, supra, 448 U.S. at 570-

it states that the majority view of the judicial
records privilege is that it does not attach until
"some judicial action" has been taken. The lan-
guage of the case does not indicate whether the
court thought that "judicial action" referred
only to final judgments or whether it might
refer to evidentiary rulings or preliminary mo-
tions. When read against the facts of that case,
however, the meaning of the *Newell* court is
clear. *Newell* concerned the issue of whether
the privilege attached to publication of pre-trial
pleadings. Thus in evaluating conflicting prece-
dent the *Newell* court was simply seeking to
determine whether the privilege applied pre-tri-
al (as the emerging trend of cases would have it)
or whether it did not cover such pleadings (as
was the case under the older cases). The ques-
tion of restricting the privilege to post-judgment
publications simply did not present itself.

22. See text *supra* at 1342-43.

23. Indeed, at least one circuit has suggested that
these functional concerns are *more* compelling

572, 100 S.Ct. at 2823-25 (plurality opinion)
(criminal trial). But most important, open
trials are essential to the legitimacy of
judicial proceedings. As the Chief Justice
observed in *Richmond Newspapers*:

People in an open society do not de-
mand infallibility from their institutions,
but it is difficult for them to accept what
they are prohibited from observing.
When a criminal trial is conducted in the
open, there is at least an opportunity
both for understanding of the system in
general and its workings in a particular
case[.]

448 U.S. at 572, 100 S.Ct. at 2825. See also
Press-Enterprise, 104 S.Ct. at 823; *Globe
Newspaper*, 457 U.S. at 606, 102 S.Ct. at
2619; *Richmond Newspapers*, 448 U.S. at
569-70, 100 S.Ct. at 2823-24.

Although the Supreme Court has not yet
expressly applied this logic to civil proceed-
ings, several United States Courts of Ap-
peals have found that the same functional
concerns that argue in favor of open crimi-
nal proceedings also argue in favor of open
civil proceedings in general, *Publicker In-*
dustries, Inc. v. Cohen, 733 F.2d 1059,
1070 (3d Cir.1984), and to evidentiary exhib-
its in particular. *Continental Illinois Se-*
curities, supra, 732 F.2d at 1308-09;
Brown & Williamson, supra, 710 F.2d at
1179.²³

in civil cases because the criminal defendant's
right to a fair trial, free of prejudicial publicity,
is not implicated. *Wilson v. American Motors
Corp.*, 759 F.2d 1568, 1571 (11 Cir.1985). And
although some might argue that because the
state is always a party to criminal cases there is
a stronger presumption of publicity surround-
ing such proceedings, the Supreme Court has
found such a distinction to be of dubious value.
See *Gannett Co. v. DePasquale*, 443 U.S. 368,
386-87 n. 15, 99 S.Ct. 2898, 2908-09 n. 15, 61
L.Ed.2d 608 (1979) ("Indeed, many of the advan-
tages of public criminal trials are equally appli-
cable in the civil trial context. While the opera-
tion of the judicial process in civil cases is often
of interest only to the parties in the litigation,
this is not always the case. * * * Thus, in some
civil cases the public interest in access, and the
salutary effect of publicity, may be as strong as,
or stronger than, in most criminal cases.")
Only one Supreme Court Justice has suggested
that the First Amendment right of access to trial
proceedings does not apply to civil cases. See

I agree. Civil adjudication, no less than criminal trials, must maintain its public legitimacy. And to the degree that such legitimacy turns on public access to the grounds of judicial decisionmaking, it makes little sense to distinguish oral and written testimony. Either may provide the basis for a final determination of individual legal rights. As the Sixth Circuit observed in *Brown & Williamson*: "These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decisions." 710 F.2d at 1177. Consequently, I find little reason not to extend the presumptive right of access to trial exhibits in civil proceedings.

The majority, however, suggests three reasons why the records of civil proceedings ought not be presumptively open until a judgment has issued.

First, the majority speculates that pre-judgment access is rarely requested. Maj. op. at 1337. Whether or not this is true as an empirical matter, it is simply irrelevant. It may be that the public often has little interest in private suits. But the functional concern for judicial legitimacy does not depend on ongoing, daily public monitoring of the court system. Rather it depends on the public's assurance that when an important case arises the public will have a presumptive right of access to the bases of judicial decisionmaking at the time when that case is newsworthy.

Second, the majority argues that denial of contemporaneous access to trial exhibits "does not provoke the kind of outcry which closing of a trial usually excites." *Id.* The volume of public outcry does not provide the measure of constitutional guarantee. This is particularly true where the value of that guarantee can only be appreciated *after* the documents in question have been publicized in a timely manner. Indeed, provisional seals, preventing timely release of

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611, 102 S.Ct. 2613, 2622, 73 L.Ed.2d 248

critical materials, are probably the surest method for minimizing public concern over closed proceedings.

Finally, and perhaps more seriously, the majority argues that, unlike live proceedings, the public can learn of the subtleties of trial exhibits through a post-judgment reading as readily as by a pre-judgment reading. *Id.* The majority, however, has completely misapprehended why courts have found that "the presumption of access normally involves a right of *contemporaneous* access[.]" *Continental Illinois Securities, supra*, 732 F.2d at 1310 (emphasis in original). As the Supreme Court observed over 40 years ago in *Bridges v. California*, 314 U.S. 252, 268-69, 62 S.Ct. 190, 196-97, 86 L.Ed. 192 (1941):

It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. * * *

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. * * *

This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality.

(1982) (O'Connor, J., concurring in judgment).

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* * * And to assume that each [temporary moratorium on publicity] would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.

In short, the harm to the public interest does not lie in the possible *distortions* that might result from untimely release of important documents. Instead, the harm to the public interest derives from the effective *suppression* of important news through delay which, as the Court noted in *Bridges*, can be as censorial as an overt scheme of restraints.

The facts of this case provide an object lesson in the importance of assuring a *contemporaneous* presumptive right of access to trial exhibits. Mobil initially swept thousands of pages under the November 5, 1981 umbrella protective order. When put to its proof, Mobil only specifically contested the confidentiality of three of these documents (and only contested two of them in a consistent manner). When the trial judge examined Mobil's brief justification for its claim of confidentiality for these documents it found it insufficient to sustain a permanent seal.

Mobil fully understood that it would some day have to justify its claims of confidentiality. Indeed, the terms of the July 20, 1982 order made plain that the court would determine the confidentiality of the documents at issue shortly after completion of the trial. Mobil was presumably aware that many of its allegations would ultimately fail to pass muster. Nonetheless, Mobil indiscriminately sought to

24. In its historical discussion the majority hints at another policy reason for supporting a post-judgment rule: vindication of private interests in reputation and privacy. Presumably, by delaying access until a judgment has been issued the court will be able to prevent publication of unfounded allegations absent a legal determination reflecting on the weight of such data. Maj. op. at 1335. But even if such a view would provide grounds for limiting the common law privilege in libel cases, it is a wholly one-sided resolution of the issue of public access. When facing the question of access the courts have sought to balance individual privacy interests and the public interest in learning of the

take maximum advantage of the terms of the provisional seal, obtaining the one sure benefit the July 20, 1982 order could provide: delay. Once the trial was over, and the glare of publicity had subsided, Mobil voluntarily waived its claims to confidentiality. Such conduct, if nothing else, belies the majority's assertion that little turns on the timing of the public's presumptive right of access.²⁴

In the end, the majority's argument rests on its *ipse dixit* that there be "an historic practice of such clarity, generality and duration as to justify the pronouncement of a constitutional rule preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment." Maj. op. at 1336 (emphasis in original). For the reasons stated above, I find this requirement to be unacceptably rigid. Few constitutional rights that we now take for granted would survive this brittle test. In light of the general common law presumption of access to civil trial exhibits, at least once the trial had begun, and in light of the compelling policy considerations identified by the Supreme Court, I would find that the First Amendment provides a presumptive right of contemporaneous access to trial exhibits in civil proceedings.

B. *The Applicable Standard*

Having found that a presumptive right of contemporaneous access applies to trial exhibits in civil proceedings, it remains for us to determine what standard the First Amendment imposes on a court before it

grounds of judicial decisionmaking. By contrast, under the majority's view the public interest would be swept aside in the hope of a more complete vindication of individual privacy interests. Such a justification sweeps too far. Under such a rationale public access to the trial itself ought to be restricted until a judgment has been rendered. Unwilling to face such a patently unacceptable result, the majority never fully articulates the grounds for its preference for a post-judgment rule and instead rests its conclusion on its questionable reading of the view of a Michigan court at the turn of the century. Maj. op. at 1334 n. 7.

can provisionally seal such exhibits until the completion of the trial. The Supreme Court has most recently spoken as if closure orders must meet the test of strict scrutiny. *See, e.g., Press-Enterprise, supra*, 104 S.Ct. at 824; *Globe Newspaper, supra*, 457 U.S. at 606, 102 S.Ct. at 2619. But the Court has also sometimes suggested that less exacting standards might apply. *See, e.g., Gannett Co., supra*, 443 U.S. at 393, 99 S.Ct. at 2912; *Richmond Newspapers, supra*, 448 U.S. at 600, 100 S.Ct. at 2840 (Stewart, J., concurring). Indeed, the Second Circuit has gone so far as to suggest that "uncertainty marks the nature—and strictness—of the standard of closure" adopted by the Supreme Court regarding the right of access to criminal trials. *Application of the Herald Co., supra*, 734 F.2d at 99, quoting *Richmond Newspapers*, 448 U.S. at 603, 100 S.Ct. at 2841 (Blackmun, J., concurring in judgment).²⁵

But even if the most recent Supreme Court pronouncements on the subject can be said to establish a rule of strict scrutiny, I would hesitate to apply that standard to issuance of a *provisional seal*. Although the strict scrutiny standard applied to closure of criminal trials might appropriately be extended to permanent closure of civil trial records, common sense suggests that a trial court ought to retain the flexibility to issue provisional seals without meeting such an exacting test.

As noted above, in choosing to enter a provisional seal the trial court infringes on the public's First Amendment rights by imposing a delay on access. Although a delay plainly restricts First Amendment

rights, it need not be understood as a direct restriction on the right of access. In many cases the District Court will provisionally seal certain designated trial exhibits without a document-by-document determination because it is concerned about the administrative burden caused by the need to sift through large quantities of documents stamped "confidential." Neither the content of the contested material nor the consequences of publicity need animate the decision to issue a provisional seal. Under such circumstances, where the government has burdened First Amendment rights without regard to content and without seeking to stifle expression, courts have declined to employ strict scrutiny. *Cf. United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

On the other hand, the merely provisional character of the seal does not, as the majority suggests, prevent such a seal from running afoul of the First Amendment. Indeed, provisional seals pose a particular danger to the public's First Amendment interests where they are subject to abuse because they have been entered on the basis of an affidavit that merely identifies the general harms that might flow from disclosure without suggesting why disclosure of particular documents will produce that harm.²⁶

Consequently, I am inclined to require only that the trial court establish (a) that the provisional seal was justified by a substantial government interest, and (b) that there was no less restrictive means of achieving that interest. *Cf. Application of the Herald Co., supra*, 734 F.2d at 100-01

25. Nor do the standards provided by the other Courts of Appeals that have considered this question yield a single standard. *See, e.g., Continental Illinois Securities, supra* note 3, 732 F.2d at 1313 (*ad hoc* balancing); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir.1983) (assuming the right to access unless the seal could be shown to be (a) a mere time, place, and manner restriction, or (b) required because of the sensitive nature of particular documents). The Supreme Court has also suggested that time, place, and manner restrictions would include those rules necessary to maintain order or decorum in the courtroom.

See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n. 18, 100 S.Ct. 2814, 2830 n. 18, 65 L.Ed.2d 973 (1980) (plurality opinion). Because delay in access can result in such serious First Amendment harm, I do not find that such a seal is a mere time, place, and manner restriction, to be sustained if it is merely "reasonable" under the circumstances. *See Richmond Newspapers*, 448 U.S. at 600, 100 S.Ct. at 2840 (Stewart, J., concurring).

26. *See* note 10 *supra* and accompanying text.

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(applying a similar intermediate standard in the context of reviewing closure of a suppression hearing); *Publicker Industries, supra*, 733 F.2d at 1070 (applying similar standard in the context of reviewing closure of a preliminary injunction hearing and sealing of the record of that hearing). Moreover, in evaluating the government's interest I would require that it be unrelated both to the content of the material subject to the provisional seal and to the consequences of disclosure. *Cf. generally O'Brien, supra*, 391 U.S. at 377, 88 S.Ct. at 1679 (applying this standard to "incidental" infringements on First Amendment rights). Requiring a showing of a mere "substantial" government interest would enable the District Court to cite the need to avoid undue delay in the underlying substantive litigation as a good and sufficient reason for entering a provisional seal. But requiring the court to consider less restrictive means of attaining such legitimate ends will protect the public from the talismanic invocation of the need for efficient litigation as a ground for delaying public access.

C. The Standard Applied

There is no doubt that the interest relied upon by the District Court in its order of July 20, 1982 constituted an adequate government interest. The court argued that it sought to postpone a final determination of the confidential status of the disputed documents so that it might concentrate its efforts on the substance of the underlying libel litigation. Order of July 20, 1982 at 4, Appellants' Record Excerpts at 163. When the District Court entered this order it was faced with several unpa-

27. Thus my First Amendment analysis, like my analysis of appellants' federal common law rights, *see* note 11 *supra*, would not require disruption of ongoing trials. Rather the District Court would simply deny motions to extend provisional seals to trial exhibits absent a document-by-document justification. It is true that, under the particular circumstances of this case, Mobil's "pre-trial" motion was filed on the eve of trial. Consequently, it might be argued that there was no real opportunity for the court to require Mobil to file a document-by-document justification without disrupting the trial. Such

latale choices. It could have (1) continued the terms of its protective order, (2) stopped the trial until it had determined the confidentiality of all of those designated trial exhibits for which Mobil still claimed confidentiality, or (3) issued collateral orders on the confidential status of various documents as they were admitted into evidence. It is hardly surprising that the court chose the first option.

The District Court, however, could have avoided this mid-trial dilemma by denying Mobil's motion of July 5, 1982. Had the court required Mobil to provide the sort of document-by-document justification for the continued confidentiality of those documents that the parties had designated as trial exhibits it would never have had to face such an unfortunate set of mid-trial choices.²⁷ I am mindful that parties tend to designate many more documents as exhibits than are actually introduced as evidence at trial. But the document-by-document justification eventually offered by Mobil was hardly voluminous. The record reveals that Mobil only provided a paragraph or two for each of the documents whose confidentiality it ultimately contested. A comparison of Mobil's affidavit of June 12, 1981 supporting the initial protective order and the affidavit of May 31, 1983 suggests that it would not have been that difficult for the District Court to make a pre-trial determination of the confidentiality of Mobil's documents. For example, the District Court appears to have been able to dispose of at least one of Mobil's claims of confidentiality merely by noting that the document in question was too old to contain

an objection, however, passes over a critical fact: there is no reason why the District Court ought not to have made Mobil bear the burden of its eve-of-trial motion. Had the District Court determined that a full-blown analysis of the contested documents was impractical at this late date, it need merely have denied Mobil's motion and unsealed the record. As with the public's common law interest in access, there is no reason why the public's First Amendment interests should suffer because Mobil only acted at the eleventh hour to extend the terms of the original protective order.

competitively sensitive information. Memorandum of June 21, 1983 at 4, Appellants' Record Excerpts at 183.

Of course, it is wholly possible that Mobil would have contested a larger number of documents if it were faced with the prospect of mid-trial disclosure. It may also have expended greater resources in arguing for the confidentiality of particular documents. In that instance, I would defer to the judgment of the District Court in postponing a final determination until after completion of the trial. But by forcing Mobil to make some sort of document-specific showing *before* trial the District Court would have reduced the potential for abuse of its umbrella order of July 8, 1982. Such an order would have served the public's First Amendment interest in access to those materials as to which there was not even a colorable claim of confidentiality.²⁸ Put simply, it would have been a "less restrictive alternative."

Thus, although I would not require a District Court to make a document-by-document *determination* in every case before issuing a provisional seal, I believe the First Amendment minimally requires that the proponents of a provisional seal provide a pre-trial document-by-document justification for the continued confidentiality of designated trial exhibits. A provisional sealing order entered in the absence of such a showing would constitute a failure to consider reasonable alternatives. Consequently, I believe that the District Court's order of July 8, 1982 violated the First Amendment. Insofar as the order of July 20 simply sustained the July 8 order, it too ran afoul of the public's right of access.

I respectfully dissent from affirmance of the provisional sealing of designated trial exhibits.

²⁸. To the degree that the public interest is strongest as to those documents actually offered in evidence, Mobil would have to bear the burden of justifying the confidentiality of documents as to which there was little or no First Amendment value. The alternative, however, would be to require the District Court to engage

**COMMUNITY NUTRITION INSTITUTE,
et al., Petitioners,**

v.

**Dr. Frank YOUNG, Commissioner,
Food and Drug Administration,
Respondent.**

G.D. Searle & Co., Intervenor.

**COMMUNITY NUTRITION INSTITUTE,
et al., Appellants,**

v.

**Dr. Frank YOUNG, Commissioner,
Food and Drug Administration,
Appellee.**

Nos. 84-1153, 84-5253.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 25, 1985.

Decided Sept. 24, 1985.

Plaintiffs sought temporary restraining order to bar addition of additive aspartame to food products. The Food and Drug Administration filed motion to dismiss. The United States District Court for the District of Columbia, Barrington D. Parker, J., 583 F.Supp. 294, dismissed for lack of jurisdiction and appeal was taken. The Court of Appeals, Mikva, Circuit Judge, combining appeal with review of FDA's regulation approving use of aspartame in liquid, held that: (1) district court lacked jurisdiction, and (2) FDA did not abuse its discretion in denying hearing on safety of aspartame.

Affirmed.

1. Food ⇐7

Court of Appeals had exclusive jurisdiction of petition seeking order compelling

in disruptive mid-trial motions. Consequently, the judicial interest in efficient litigation cut against the interests of the party seeking to seal the evidentiary exhibits in a civil hearing, forcing them to justify the confidentiality of all *designated* trial exhibits and not merely *admitted* or *introduced* trial exhibits.

The parties have filed a motion asking this Court "to adopt and sign the consent order to which the parties have agreed and to remand this case to the United States District Court for the Southern District of Georgia for the implementation of the terms of said consent order." Under the circumstances, it is appropriate for the district court to consider the proposed consent order in the first instance.

Accordingly, the judgment of the district court is reversed and the case is remanded for reconsideration in light of the United States Supreme Court's decision in *Wright*, and for consideration of such proposed consent orders as the parties may present.

REVERSED AND REMANDED.



In re ALEXANDER GRANT & CO.
LITIGATION, (ESM-1).

Appeal of NEWS AND SUN-SENTINEL
CO. and John Edwards.

No. 86-5223.

United States Court of Appeals,
Eleventh Circuit.

June 24, 1987.

Newspaper publisher and journalist intervened in bankruptcy-related proceedings to request reconsideration of court order protecting from disclosure to nonparties materials produced in discovery that were designated as confidential by producing party. The United States District Court for the Southern District of Florida, No. 85-6190, CIV-JAG, 629 F.Supp. 593, Jose A. Gonzalez, Jr., J., reconsidered and reaffirmed protective order without modification, and newspaper publisher and journalist appealed. The Court of Appeals held that: (1) newspaper publisher and journalist had no common law right to examine discovery materials; (2) newspaper publish-

er and journalist possessed no First Amendment rights to the protected information that overrode provisions of federal civil rule authorizing issuance of protective order for good cause shown; and (3) protective order would be sustained, pursuant to federal civil rule.

Affirmed.

Clark, Circuit Judge, filed dissenting opinion.

1. Bankruptcy \Leftrightarrow 11(3)

Newspaper publisher and journalist had standing to intervene in bankruptcy action and challenge propriety of court order protecting from disclosure discovery material designated confidential by party producing material.

2. Federal Courts \Leftrightarrow 574

Order denying access to court proceedings and records is immediately reviewable.

3. Records \Leftrightarrow 32

Newspaper publisher and journalist had no common law right to examine discovery materials disclosed in bankruptcy-related proceedings that were designated confidential by producing party and protected from disclosure by court order, although press and public possessed common law right to inspect and copy judicial records and public documents.

4. Constitutional Law \Leftrightarrow 90.1(3)

Newspaper publisher and journalist possessed no First Amendment rights of access to information, discovered in bankruptcy-related proceedings that had been designated as confidential by producing party and protected from disclosure by court order, that would override provisions of federal civil rule authorizing protective order. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.; U.S.C.A. Const.Amend. 1.

5. Constitutional Law \Leftrightarrow 90.1(3)

Protective order regulating access to sensitive materials disclosed in discovery is not subject to heightened scrutiny, based on First Amendment right of those seeking access to such materials, if protective order is issued upon good cause and limited to

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pretrial civil discovery. Fed.Rules Civ. Proc.Rule 26(c), 28 U.S.C.A.; U.S.C.A. Const.Amend. 1.

6. Federal Civil Procedure ⇐1623

District court must articulate its reasons for granting protective order, with respect to materials disclosed in discovery, sufficiently for appellate review.

7. Federal Civil Procedure ⇐1616

Sole criterion for determining validity of order protecting materials disclosed in discovery from access by nonparties is statutory requirement of "good cause." Fed. Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

8. Federal Civil Procedure ⇐1616

Court order protecting from disclosure materials disclosed in discovery in bankruptcy-related proceedings that were designated as confidential by producing party would be sustained against newspaper publisher and journalist seeking access to such information, pursuant to federal civil rule justifying protective orders based on "good cause." Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

9. Federal Civil Procedure ⇐1271

District court has broad discretion when fashioning protective orders.

10. Federal Civil Procedure ⇐1616

In complex litigation, where document-by-document review of discovery materials would be unpracticable, and where parties consent to umbrella order restricting access to sensitive information in order to encourage maximum participation in discovery process, conserve judicial resources, and prevent abuses of annoyance, oppression, and embarrassment, district court may find good cause and issue protective order. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

Ricki Tannen, Ferrero, Middlebrooks, Strickland, and Fischer, P.A., Ray Ferrero,

1. In a term repurchase transaction, a customer has short-term cash surplus and wishes to invest it in a no-risk liquid investment. The customer enters into an agreement to purchase securities and sell them back after expiration of a specified term at a higher price. In a reverse repur-

Jr., Wilton L. Strickland, Ft. Lauderdale, Fla., for News and Sun-Sentinel Co.

Jeffrey M. Weissman, Sparber, Shevin, Shapo, Heilbronner & Book, P.A., Miami, Fla., for Marvin L. Warner.

Richard E. Brodsky, Paul, Landy, Beiley & Harper, P.A., Miami, Fla., for Alexander Grant Co.

Appeal from the United States District Court For the Southern District of Florida.

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal challenges a protective order denying non-parties access to discovery materials compiled in a series of complex securities actions consolidated for discovery proceedings. The protective order was issued at the request of the parties. The District Court for the Southern District of Florida declined to modify the order. The non-parties, as intervenors, argue on appeal that the district court abused its discretion. For the reasons that follow, we affirm.

I. BACKGROUND

E.S.M. Government Securities, Inc. (hereinafter E.S.M.) is a Florida corporation formerly engaged in the securities brokerage business in Fort Lauderdale, Florida. E.S.M. was a parent and holding company for several subsidiaries and specialized in term repurchase and reverse repurchase transactions involving government entities.¹ In the late seventies, E.S.M. retained the Alexander Grant & Company (hereinafter "Grant"), a public accounting partnership organized under the laws of Illinois, as an independent Certified Public Accountant to perform audits and prepare financial

chase transaction, the customer owns securities and has a short-term cash need. The customer agrees to sell the securities and repurchase them after the expiration of a specified term at a higher price.

statements. At the time, Grant operated an office in Fort Lauderdale, Florida.

On March 4, 1985, the Securities and Exchange Commission filed a complaint for injunctive relief against E.S.M. alleging violations of the Securities Exchange Act of 1934. E.S.M. and its affiliates consented to the complaint and the district court entered a permanent injunction on March 6, 1985. After an involuntary Chapter 7 petition was filed on March 26, 1985, E.S.M. was adjudicated bankrupt.

Thereafter, approximately twenty actions were brought against Grant. The complaints, filed by a private individual, several financial institutions, and government entities, sought recovery for damages allegedly sustained by detrimental reliance on inaccurate financial statements prepared by Grant. The theories advanced by the plaintiffs included common-law fraud, ordinary, professional and gross negligence, and violations of (1) 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b) (1982); (2) Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1986); (3) the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 et seq. (1982); (4) the Florida Securities Act, Fla. Stat. Ann. § 517.301 (West Supp.1986); and (5) the Florida Racketeer Influenced and Corrupt Organization Act, Fla.Stat. Ann. §§ 895.02 and 895.03 (West Supp.1986).

Recognizing that multiple actions brought against Grant were based on similar facts and involved common questions of law, the district court pursuant to Fed. R.Civ.P. 42(a) consolidated the actions for discovery proceedings before one district judge on July 30, 1985. At the request of the parties, the district court also entered an accompanying protective order² pursuant to Fed.R.Civ.P. 26(c) authorizing any party producing discovery material containing tax returns, trade secrets, or other

2. The full text of the protective order appears in *In re Alexander Grant & Co. Litigation*, 629 F.Supp. 593, 595-97 (S.D.Fla.1986).

3. Fed.R.Civ.P. 26(c) provides in pertinent part: "for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrass-

sive material to designate any or all of it as "confidential."³ Under the terms of the order, any material so designated was only available to the parties for use in litigation, and was inaccessible to any non-parties. A party challenging a "confidential" designation could seek judicial review by making an objection. Once a notice of an objection was received, the party seeking to protect the sensitive material had ten days to apply to the district court for a ruling on the merits.

The consolidation of the actions for discovery purposes and the issuance of the protective order resulted in the accumulation of approximately 40,000 documents in a discovery depository maintained by the parties. On January 13, 1986, the News and Sun-Sentinel Company, the publisher of the *Fort Lauderdale News* and *Sun-Sentinel*, and John Edwards, a journalist employed by the newspaper publisher (hereinafter appellants), filed a motion to intervene for the limited purpose of requesting reconsideration of the protective order. The motion to intervene was granted pursuant to Fed.R.Civ.P. 24(b) and a hearing was conducted on February 18, 1986. In an order dated March 3, 1986, the district court reconsidered and reaffirmed the protective order without modification. *In re Alexander Grant & Co. Litigation*, 629 F.Supp. 593 (S.D.Fla.1986). Appellants filed a notice of appeal on March 26, 1986.

II. DISCUSSION

[1, 2] As a preliminary matter, we note that appellants have standing to intervene in this action and challenge the propriety of the district court's protective order. See *In re Tribune Co.*, 784 F.2d 1518 (11th Cir.1986); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir.1983). An order denying access to court proceedings and records is immediately reviewable. *In re Tribune Co.*, 784 F.2d at 1521. Appellants argue

ment, oppression, or undue burden or expense, including . . . (2) that the discovery may be had only on specified terms and conditions . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way...."

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 order limiting access to discovery material
 designated confidential. After reviewing
 the record and the applicable law, we dis-
 agree and affirm.

A. Access to Discovered Information

[3] First, appellants have no common-
 law right to examine the discovery materi-
 als at issue. There is no question that the
 press and the public jointly possess a com-
 mon-law right to inspect and copy judicial
 records and public documents. *Nixon v.*
Warner Communications, Inc., 435 U.S.
 589, 597, 98 S.Ct. 1306, 1311, 55 L.Ed.2d
 570 (1978); *United States v. Rosenthal*,
 763 F.2d 1291, 1293 (11th Cir.1985); *Wilson*
v. American Motors Corp., 759 F.2d 1568,
 1570 (11th Cir.1985). Nevertheless, this
 court has observed that private "docu-
 ments collected during discovery are not
 'judicial records'" *United States v.*
Anderson, 799 F.2d 1438, 1441 (11th Cir.
 1986). Thus, while appellants may enjoy
 the right of access to "pleadings, docket
 entries, orders, affidavits or depositions
 duly filed," *Wilson*, 759 F.2d at 1569 (em-
 phasis added), appellants' common-law
 right of access does not extend to informa-
 tion collected through discovery which is
 not a matter of public record. *See Seattle*
Times Co. v. Rhinehart, 467 U.S. 20, 33,
 104 S.Ct. 2199, 2207, 81 L.Ed.2d 17 (1984);
Anderson, 799 F.2d at 1441; *United States*
v. Gurney, 558 F.2d 1202, 1209 (5th Cir.
 1977), cert. denied sub nom., *Miami Her-*
ald Publishing Co. v. Krentzman, 435
 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59
 (1978).⁴

[4] Second, appellants possess no First
 Amendment rights to the protected infor-
 mation which override the provisions of
 Fed.R.Civ.P. 26(c). The discovery process,
 as a "matter of legislative grace," is a
 statutorily created forum not traditionally
 open to the public. *Seattle Times Co.*, 467
 U.S. at 32, 104 S.Ct. at 2207. Although

4. The Eleventh Circuit, in *Bonner v. City of*
Prichard, 661 F.2d 1206, 1207 (11th Cir.1981)
 (en banc), adopted as precedent decisions of the
 former Fifth Circuit rendered prior to October
 1, 1981.

information exchanged in pretrial discovery
 would often generate considerable public
 interest if publicly disseminated, private li-
 tigants have protectable privacy interests
 in confidential information disclosed
 through discovery. *See Seattle Times Co.*,
 467 U.S. at 35, 104 S.Ct. at 2208.

[5] In order to preserve the confiden-
 tiality of sensitive materials, a district
 court may regulate access to the informa-
 tion by issuing a protective order pursuant
 to Rule 26(c).⁵ *See Seattle Times Co.*, 467
 U.S. at 36, 104 S.Ct. at 2209; *In re Con-*
sumers Power Co. Securities Litigation,
 109 F.R.D. 45, 54-55 (E.D.Mich.1985); *In*
re Korean Air Lines Disaster of Septem-
ber 1, 1983, 597 F.Supp. 621, 622 (D.D.C.
 1984). Such an order, if issued upon good
 cause and limited to pretrial civil discovery,
 is not subjected to heightened scrutiny.
Seattle Times Co., 467 U.S. at 37, 104 S.Ct.
 at 2209; *see Cipollone v. Liggett Group,*
Inc., 785 F.2d 1108, 1119 (3d Cir.1986); *Ta-*
voulareas v. Washington Post Co., 737
 F.2d 1170, 1172 (D.C.Cir.1984); *Korean*
Air Lines Disaster, 597 F.Supp. at 623.
 After evaluating and balancing the compet-
 ing public and private interests, the Su-
 preme Court has concluded that valid pro-
 tective orders are not violative of the First
 Amendment because Rule 26(c) minimizes
 abuse of the discovery process—a substan-
 tial government interest unrelated to the
 suppression of expression. *Seattle Times*
Co., 467 U.S. at 34, 104 S.Ct. at 2208; *see*
Cipollone, 785 F.2d at 1119; *Tavoulareas*,
 737 F.2d at 1172.

B. Good Cause

[6, 7] A district court must articulate its
 reasons for granting a protective order suf-
 ficient for appellate review. *See United*
States v. Kooistra, 796 F.2d 1390, 1391
 (11th Cir.1986). Here, "the fear of adverse
 publicity, intimidation or other outside
 forces that could interfere with the free
 flow of information, most of which would

5. *See supra* note 3.

not be admissible during the actual litigation stage of [the] cases" served as the articulated justifications for the order. As indicated, the sole criterion for determining the validity of a protective order is the statutory requirement of "good cause." *Seattle Times Co.*, 467 U.S. at 37, 104 S.Ct. at 2209; *Cipollone*, 785 F.2d at 1119; *Tavoulareas*, 737 F.2d at 1172; see Fed.R. Civ.P. 26(c). "Good cause" is a well established legal phrase. Although difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action. In a different context, this court has identified four factors for ascertaining the existence of good cause which include: "[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order." *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir.1985). In addition, this circuit has superimposed a "balancing of interests" approach to Rule 26(c). See *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir.1985).

[8] The protective order in question was issued with the consent and upon the request of the parties. The order was intended to expedite the flow of discovery material, promote the prompt resolution of disputes over confidentiality, and facilitate the preservation of material deemed worthy of protection. The terms of the order were precisely drawn. The parties enjoyed liberal access to all of the discovery materials and were prohibited from disseminating to non-litigants only those items designated by another party as confidential. The order had no effect on the dissemination of information gathered by a party through sources other than the discovery process. Although the duration of the disclosure restriction extended throughout the pre-trial discovery process, no less onerous alternative existed.

Because parties often resist the exchange of confidential information, "parties regularly agree, and courts often order, that discovery information will remain private." *Anderson*, 799 F.2d at 1441. The

Manual for Complex Litigation, Second, prepared by the Federal Judicial Center, suggests that in complicated cases where document-by-document review of discovery materials would be unfeasible, an "umbrella" protective order, similar to the one issued in this case, should be used to protect documents designated in good faith by the producing party as confidential. *Manual for Complex Litigation, Second*, § 21.431 (1985). Under the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party. *Cipollone*, 785 F.2d at 1122. See *Manual for Complex Litigation, Second*, § 41.36. Protective measures requested by the parties incorporating umbrella orders have been approved by other courts pursuant to Rule 26(c). See e.g. *Cipollone*, 785 F.2d at 1123; *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1326 (D.C.Cir.1985); *Korean Air Lines Disaster*, 597 F.Supp. at 622; *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 866, 873 (E.D.Pa.1981); *Chambers Development Co. v. Browning-Ferris*, 104 F.R.D. 133, 135 (W.D.Pa.1985); *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 583 (E.D.N.Y. 1983).

[9,10] The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document. The order issued in this case, as in others, is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. After this sifting, material can be "filed" for whatever purpose consistent with the issues being litigated whether by pretrial hearing or an actual trial. Judicial review will then be limited to those materials relevant to the legal issues raised. History has confirmed the tremendous saving of time effected by such an approach. The objective is to

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speed up discovery. Efficiency should never be allowed to deny public access to court files or material of record unless there has been an appropriate predicate established. The procedures utilized here allow the litigation to proceed expeditiously without compromising the rights of anyone. After considering the factors previously mentioned for ascertaining good cause and balancing the interests of the parties and the non-parties concerning the dissemination of discovery materials, we affirm the protective order in this case. A district court has broad discretion when fashioning protective orders. *Farnsworth*, 758 F.2d at 1548. We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c). Accordingly, we find no abuse of discretion and affirm the order of the district court.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

In this prior restraint upon access to public information case, the majority opinion fails to recognize the distinction between the issue in this case and that in *Seattle Times*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), upon which it relies. *Seattle Times* was a private law suit by plaintiffs seeking damages from the newspaper for defamation. The newspaper wished to publicize information obtained by discovery in the law suit. The plaintiffs sought protection from publication of the names of the plaintiff religious organization, members of which had received threatening letters. In affirming that there was no abuse of discretion in the entry of the protective order by the Washington state trial court and the affirmance of the order by the Washington Supreme Court, the Supreme Court of the United States stated the following in its note 24:

It is apparent that substantial government interests were implicated. Respondents, in requesting the protective order, relied upon the rights of privacy and religious association. Both the trial court and the Supreme Court of Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been "chilled." See n. 22, *supra*.

In the *Seattle Times* case, there was no governmental entity or public official who was a party to the litigation. The law suit involved no issue of scrutinizing the actions of public officials in investing public funds. By contrast, the present case had amongst the plaintiffs ten local governing bodies from Pompano Beach, Florida to Clallam County, Washington, who along with others sought to recover damages resulting from the collapse of E.S.M. Government Securities, Inc. in which investors, including the municipal and local governments, lost millions of dollars. It is obvious that *this* law suit is not merely private litigation. The public has an interest in the facts of this case. This does not mean that the public or the press should have carte blanche access to discovery information obtained in the pretrial proceedings of this case. However, it does mean that the public interest and right of access to information should be considered in the balancing process of determining whether the pretrial information should be limited to the parties only. Here there was not even any inquiry as to whether there should be a balancing process.

While the right of access of the public and the press to public information had been considered by many as a component of the First Amendment, it was first announced by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Justice Stevens in his concurring opinion stated:

This is a watershed case. Until today, the court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of

newsworthy matter is entitled to any constitutional protection whatsoever.

Id. at 582, 100 S.Ct. at 2830.

Prior to *Richmond Newspapers, Inc.*, its author, Chief Justice Burger, had written the following as part of the plurality opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1, 15, 98 S.Ct. 2588, 2597, 57 L.Ed.2d 553 (1978): "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Two justices took no part in the consideration or decision of the case. Justice Stewart concurring in the judgment wrote the following:

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors. Accordingly, I agree substantially with what the opinion of The Chief Justice has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

When on assignment, a journalist does not tour a jail simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very

1. The protective order in question was issued with the consent and upon the request of the parties. The order was intended to expedite the flow of discovery material, promote the prompt resolution of disputes over confidentiality, and facilitate the preservation of material deemed worthy of protection....

After considering the factors previously mentioned for ascertaining good cause and balancing the interests of the parties and the non-parties concerning the dissemination of discovery materials, we affirm the protective

specific reasons. "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised..." *Branzburg v. Hayes*, 408 U.S. 665, 726, 92 S.Ct. 2646, 2672, 33 L.Ed.2d 626 (dissenting opinion). Our society depends heavily on the press for that enlightenment. Though not without its lapses, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences...."

Id., 438 U.S. at 16-17, 98 S.Ct. at 2597-98 (footnote omitted) (citations omitted).

For a district court to enter a protective order making information inaccessible pursuant to Fed.R.Civ.P. 26(c), the party must show good cause and the court must evaluate and balance "the competing public and private interests." Majority op. at 355. The majority is absolutely correct in making this legal statement and I concur without any hesitancy. The majority then approves the following finding of probable cause by the district court: "the fear of adverse publicity, intimidation or other outside forces that could interfere with the free flow of information, most of which would not be admissible during the actual litigation stage of [the] cases.'" *Id.* at 355-56. However, there are no facts in the record in this case that form the basis of a finding of any fear of adverse publicity or intimidation nor was there any consideration by the district court of the public right of access. To the contrary, in this case, the parties, including the public entities, stipulated to the consent order.¹

order in this case.... We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c).

Majority op. at 356-57.

In *Seattle Times*, the plaintiffs presented evidence establishing threats of harm to themselves and an abuse of their First Amendment right of religious association if the discovery sought were revealed to the public. Here the parties offered no facts in support of a probable cause finding. The majority approves a consent order denying the public access to information² without the evaluation and balancing of public and private interest which the opinion says is required. Thus, I cannot join it.



George B. BUCHANAN, Jr., et al.,
Plaintiffs-Appellees,

v.

Hugh E. BOWMAN, II, et al.,
Defendants-Appellants.

No. 86-8578.

United States Court of Appeals,
Eleventh Circuit.

June 24, 1987.

Investors in cattle herd brought action against appraiser of herd alleging conspiracy to defraud. The United States District Court for the Northern District of Georgia, No. C84-2283A, J. Owen Forrester, J., struck answer of appraiser and issued default judgment against appraiser for failure to comply with discovery, and appeal was taken. The Court of Appeals, Allgood, Senior District Judge, sitting by designation, held that: (1) order striking answer and entering default judgment was appropriate; (2) investors were entitled to recover additional tax they incurred as a result of Internal Revenue Service disallowance

2. I do not suggest that the public has an automatic right to the pretrial discovery in this case. It does have a right to know why it should not have access when the conduct of public officials may be under scrutiny. Similarly, I do not suggest wrongdoing on the part of any public

of deduction for losses incurred in investment; and (3) investors were entitled to recover prejudgment interest under Georgia law.

Affirmed.

1. Federal Civil Procedure ⇐1278

Striking of answer and entry of default judgment against civil defendant was warranted, where court had orally granted plaintiffs' motion to compel discovery and issued oral warning, and had subsequently issued written order compelling discovery, and defendant had not only failed to appear, but had failed to respond to interrogatories and requests for production of documents, had failed to appear for second scheduled deposition when directly ordered to do so by court, and had failed to make reasonable offer to appear. Fed.Rules Civ. Proc.Rule 37, 28 U.S.C.A.

2. Conspiracy ⇐20

Party which had performed appraisal of herd of breeder heifers, allegedly as participant in conspiracy to defraud, was liable to investors in herd for additional tax incurred by investors as a result of Internal Revenue Service disallowance of deduction for losses incurred in investment, where request for appraisal was initiated by IRS's challenge of deduction, and upon reliance on that appraisal, investors delayed their settlement with IRS.

3. Federal Courts ⇐628

Failure of defendant in civil action, based upon conspiracy to defraud in connection with cattle herd investment, to proffer evidence of substantial economic benefits investors received from investment, through sheltering of other income, precluded Court of Appeals from considering alleged trial court error in withholding evidence of economic benefits from jury.

officials. The record is a blank. See Van Alstyne, *Interpretations of the First Amendment*, 50-67, (Duke Press Policy Studies, 1984), for an excellent discussion of the competing considerations in granting or denying access.

call system will be "rendered useless."¹⁴ Maj.Op. at 997. Like the EPA, I do not submit to the notion that only individual vehicles within their useful lives at the time of recall (or notice) can be "nonconforming" so as to come within the scope of the remedial plan. Congressional enactments should be interpreted to avoid impediments to clear congressional purpose. Section 207 accordingly should be interpreted in a way that can sustain a workable recall system: *classes* and *categories* of cars that have exhibited substantial nonconformity during their useful lives should be subject to recall.

To sum up, I find nothing in the plain language, nor in the legislative history of the Clean Air Act Amendments to contradict the EPA's reasonable interpretative rule. The EPA rule presents a practical solution to the implementation of the clear congressional purpose of achieving effective automotive emission controls. The majority opinion, by its own admission, seriously detracts from this overarching purpose.¹⁵ Accordingly, I believe the majority, in invalidating the EPA rule, has transgressed the appropriate standards that limit judicial interference with an agency's reasonable actions to effectuate an important national policy.

I respectfully but emphatically dissent.



14. The majority cites other enforcement mechanisms created by the Clean Air Act, as if their existence excuses the gutting of section 207(c). See Maj. Op. at 997 n. 78. However, the certification provisions of the Act, 42 U.S.C. § 7525(a), (b), do not create a remedy for consumers who have already purchased defective vehicles or engines; instead, under the provision the EPA may only revoke the classwide manufacturing certificate, thereby preventing further *future* sales from the defective class of items. In addition, the performance and design warranty provisions, *id.* § 7541(a), (b) do not employ EPA oversight and testing capabilities; instead, they rely on individual consumers to detect that their cars are exceeding emission standards. Thus, the recall provision occupies an important position in the enforcement scheme: it combines the EPA role of conducting investigations of classes of vehicles and

William P. TAVOULAREAS, et al.
v.

The WASHINGTON POST COMPANY,
d/b/a the Washington Post, a
Delaware Corporation, et al.

Appeal of MOBIL CORPORATION,
et al.

No. 83-1688.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 27, 1983.

Decided Jan. 6, 1984.

Rehearings Denied March 15, 1984.

Rehearing En Banc Granted
March 15, 1984.*

Corporation appealed from an order of the United States District Court for the District of Columbia, Oliver Gasch, J., which unsealed 3,800 pages of deposition transcripts and 425 accompanying exhibits. The Court of Appeals, Tamm, Circuit Judge, held that corporation had a constitutionally protected privacy interest in avoiding public disclosure of sensitive commercial information not used at trial of a libel action brought by president of corporation and his son against newspaper company and therefore corporation was entitled to reinstate the seal on 3,800 pages of deposition transcript never used at trial where there

engines (also present in the certification provisions) and the purpose of policing on-the-road vehicles and engines (also present in the warranty provisions).

15. In a final assault, the majority peremptorily declares this case to be "virtually moot." Maj. Op. at 999 n. 81. The meaning and legal significance of "virtual mootness" is, of course, mysterious; for if this case were "truly moot," the entire majority opinion would be dictum. In any case, the majority teases the auto manufacturers with yet another legal doctrine with which to circumvent the clear purposes of the Clean Air Act. This final aside, *id.*, seems particularly inappropriate considering this court's own contribution to the long pendency of this case.

* Judgment and Opinion vacated.

was no overriding reason to disclose the information.

Reversed and remanded with instructions.

See also 93 F.R.D. 24.

1. Federal Civil Procedure ⇐ 1261

Presumptive openness of discovery materials not used at trial derives only from Federal Rules of Civil Procedure; no right of access to such materials lies either in common law or the constitution. Fed.Rules Civ.Proc.Rules 5(d), 5 note, 26(c), 30, 30(f)(1), 28 U.S.C.A.

2. Searches and Seizures ⇐ 7(15)

While corporations do enjoy privacy protection under Fourth Amendment, that protection is qualified to allow adequate policing of corporate conduct and therefore corporations must disclose information to regulatory agencies so long as the demand is not too indefinite and the information sought is reasonably relevant. U.S.C.A. Const.Amend. 4.

3. Federal Civil Procedure ⇐ 1269

Balancing approach should be followed in determining lawfulness of intrusions on protected nondisclosure rights.

4. Federal Civil Procedure ⇐ 1432

Corporation had a constitutionally protected privacy interest in avoiding public disclosure of sensitive commercial information not used at trial of a libel action brought by president of corporation and his son against newspaper company and therefore corporation was entitled to reinstate the seal on 3,800 pages of deposition transcript never used at trial where there was no overriding reason to disclose the information. U.S.C.A. Const.Amend. 1, 4; Fed. Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

1. Throughout the briefing of this appeal, Mobil Oil Corporation (Mobil) and The Washington Post Co. (the Post) occasionally disagreed on the number of Mobil's confidential depositions and accompanying exhibits that had been used at trial. Brief for Appellee at 15-16 n. 16; Reply Brief for Appellant at 14 n. 6. Mobil notes that assuming *arguendo* the accuracy of the Post's references, only 385 of the 3800

Appeal from the United States District Court for the District of Columbia (D.C.Civil Action No. 80-3032).

Loren Kieve, Washington, D.C., with whom Judah Best and George A. Birrell, Washington D.C., were on the brief, for appellants.

David E. Kendall, Washington, D.C., with whom Irving Younger, Kevin T. Baine, and Scott M. Matheson, Jr., Washington, D.C., were on the brief, for appellee The Washington Post Co.

Anthony C. Epstein, Washington, D.C., with whom Robert R. Bruce and Judy D. Lynch, Washington, D.C., were on the brief, for appellees The Reporters Committee for Freedom of the Press, et al.

Joseph A. Artabane, Washington, D.C., entered an appearance for appellee Tavoulareas.

H. Bartow Farr, III, Washington, D.C., entered an appearance for appellee Sandy Golden.

Before TAMM and WILKEY, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge TAMM.

TAMM, Circuit Judge:

Mobil Oil Corporation (Mobil) seeks reversal of the portion of a June 21, 1983 district court order that unsealed 3800 pages of deposition transcripts and 425 accompanying exhibits. The depositions and exhibits were initially designated confidential by Mobil pursuant to a "blanket" protective order issued on November 5, 1981. Mobil does not contest disclosure of the small portion of these depositions and exhibits that was used at trial.¹ It vigorously contests,

pages of sealed depositions were read into the record, and 32 of the 425 deposition exhibits were used in some fashion in the case. Reply Brief for Appellant at 14 n. 6. The district court order appealed from found only that "a small percentage of [the depositions and exhibits] were actually used at trial." *Tavoulareas v. The Washington Post Co.*, No. 80-3032 at 4. (D.D.C. June 21, 1983).

however, disclosure of those documents not used at trial.² Brief for Appellant at 2. Because we find constitutionally protected privacy interests in Mobil's confidential commercial information not used at trial and no overriding reason to disclose this information, we reverse the appealed portion of the district court's June 21, 1983 order. We remand with instructions to reinstate the seal on those depositions and exhibits designated confidential but never used at trial.³

I. BACKGROUND

This dispute arises out of a libel action brought by Mr. William Tavoulaareas, president of Mobil, and Mr. Peter Tavoulaareas, his son, against The Washington Post Company (the Post). The libel claim was based on two articles published by the Post on November 30 and December 1, 1979. Each stated essentially that Peter Tavoulaareas's ownership interest in Atlas Maritime Company and Mobil's extensive business transactions with Atlas were a result of nepotism. Record Excerpts (R.E.) at 531.⁴ The Post served broad discovery requests on Mobil, initially a nonparty, while defending the lawsuit.⁵

In response to the Post's discovery requests, Mobil moved for a protective order

On remand, the district court must determine which depositions and exhibits were used at trial. Mobil concedes that the seal should remain lifted from those depositions and exhibits that were used at trial, and we have determined that the seal should be reinstated on those that were not used at trial.

2. All the depositions and exhibits unsealed by the June 21 order had been filed with the district court, though the vast majority were not used at trial. Depositions and exhibits "not used at trial," for the purposes of this opinion, are those never submitted into evidence, read into the record, or submitted in support of a pretrial motion.
3. Hereinafter, this opinion will refer only to "the depositions" or "the depositions in dispute." This reference includes both the depositions and their accompanying exhibits, but only those documents not used at trial.
4. On November 25, 1980, Messrs. William and Peter Tavoulaareas filed a libel action against the Post and several individuals. On July 30,

securing the confidentiality of commercial information sought by the Post. R.E. at 2, 10-13. Mobil filed an affidavit by Mr. Walter E. MacDonald, a vice president in charge of Mobil's international marine transportation activities, in support of its motion for the protective order. R.E. at 144. Mr. MacDonald attested that protection of the materials sought by the Post "is essential not only to avoid impairing the competitive position of Mobil and to afford it reasonable protection against disclosure of proprietary and confidential business information, but also to minimize the possibility of impairing Mobil's relationship with the Government of the Kingdom of Saudi Arabia" R.E. at 145.

More specifically, Mr. MacDonald described the business relationships among Mobil, a Saudi Arabian marine company called Samarco, and the London-based Atlas Marine Company. He explained that the negotiation and implementation of business arrangements among these three companies revealed Mobil's strategy in maintaining access to substantial volumes of crude oil from Saudi Arabia. R.E. at 147. Mr. MacDonald also stressed the importance of keeping confidential "a company's vessel operating costs and investment return, its internal decision-making and financial analysis procedures regarding the chartering

1982, a jury found that the Post and two individuals were liable to William Tavoulaareas for publication of the November 30, 1979 article. On May 2, 1983, the district court entered judgment notwithstanding the verdict in favor of the Post and the two individual defendants regarding the November 30, 1979 article. Mr. William Tavoulaareas is currently appealing this judgment in a separate case (No. 83-1605). Brief for Appellee at 3.

5. Mobil originally was not a party to the libel action brought by the Tavoulaareas. Mobil later moved to intervene to ensure the continued confidentiality of its commercial information. On December 15, 1981, the district court granted Mobil's motion to intervene. At the same time, the district court extended the November 5, 1981 protective order, see *infra* note 6, to cover Mobil's confidential documents in the possession of Peter Tavoulaareas and of entities in which he has an interest. R.E. at 164-65.

... of tankers, and its economic criteria applicable to decisions for the purchase or sale of vessels." R.E. at 148. Mr. MacDonald then gave specific examples of how public disclosure of the kind of documents requested would harm Mobil's competitive position. R.E. at 148-50.

On November 5, 1981, the district court issued Mobil's proposed protective order.⁶ With regard to the harm disclosure could bring to Mobil's competitive position, the court noted:

Mobil has adequately specified the harm likely to result absent a protective order. As Mr. MacDonald attests, the public disclosure of many of these documents might undermine Mobil's relationship with the Kingdom of Saudi Arabia, ham-

per its ability to compete in the marine transportation business, and threaten its access to substantial volumes of crude oil from Saudi Arabia. Furthermore, many of the discovery requests appear likely to reveal confidential, internal Mobil documents dealing with strategy, negotiations, and long-range corporate planning. The conclusion is inescapable that public disclosure of these kind of sensitive corporate documents would cause Mobil competitive harm sufficient to warrant imposition of a protective order adequate in character and balanced to the needs of the parties.

Tavoulareas v. Piro, 93 F.R.D. 24, 29 (D.D.C.1981). The protective order permitted

6. The protective order states in pertinent part:

ORDERED that the following protective provisions be, and hereby are, imposed upon any discovery conducted by defendants in this action, whether this discovery is directed at a party to the litigation, at Mobil or any of its officers or directors, or at any other person:

1. Mobil shall have the right to designate as confidential any information or documents revealed or produced by it in connection with this action. In the event that Mobil does designate any information or document as confidential, the information or document shall be made available only to the named individual defendants in this litigation, [and] to the attorneys for the named defendants Any information or document designated as confidential shall not be made available to defendant *The Washington Post*, or to any officer, director, or employee of defendant, including in-house counsel, except as provided in this Protective Order.

3. Any depositions taken in this action in which any information or document designated confidential is or may be disclosed or utilized shall be attended only by the deponent, by counsel of record for the parties, by counsel or designated representatives of Mobil, and by persons described in paragraph 1, above, who have executed the attestation set forth in paragraph 2, above. All information disclosed in, and any transcripts made of, such depositions shall be treated in accordance with the confidential restrictions set forth in this Protective Order. . . .

7. Defendants' counsel shall ensure that all confidential materials, information, and documents covered by this Protective Order, together with any authorized summaries or

copies, are returned to counsel for Mobil at the time the above-referenced civil action terminates.

9. In the event that any counsel for the parties determines that any person other than those referred to in this Protective Order should be permitted to examine designated confidential material, documents, or information encompassed within this Protective Order, counsel shall confer with counsel for Mobil in an effort to resolve the matter. In the absence of agreement, counsel may apply to the Court for the person in issue to examine the confidential material, documents, or information, which application shall state with specificity the reasons justifying this examination.

12. The use of any information, document, or material encompassed within and protected by the terms of this Protective Order shall be restricted to this proceeding and shall not be used by defendants or any other person (other than Mobil) described in paragraphs 1, 3 and 9, above, for any other purpose whatsoever, provided, however, that this Protective Order shall apply only to information, documents, or material produced pursuant to discovery conducted in this civil action. This Protective Order, therefore, shall not apply to information, documents, or material that is obtained by reporters for *The Washington Post* through channels or means other than through discovery conducted in this civil action.

Tavoulareas v. Piro, 93 F.R.D. 24, 33-35 (D.D.C.1981). The protective order was structured in accordance with this court's directions in *In re Halkin*, 598 F.2d 176, 196 n. 47 (D.C.Cir. 1979).

Mobil to designate confidential those documents that contained sensitive commercial information. *Id.* at 33. If the Post wished to contest a confidential designation, it could apply to the court specifying the documents it wanted to disseminate, *id.* at 29, 30 n. 4, and the reasons justifying dissemination. *Id.* at 35.

Pursuant to the November 5, 1981 protective order, Mobil forwarded thousands of documents to the Post. Mobil's corporate officials responded to questions in depositions revealing sensitive commercial information. All totalled, the Post took over 6000 pages of deposition transcript, 3800 of which were designated confidential by Mobil. After trial of the libel claim had been completed, Mobil moved on August 8, 1982 for the return of its confidential documents. On September 14, 1982, the Post moved to unseal all documents filed with the court, including the 3800 deposition pages here at issue.⁷ The Post, however, did not identify which pages among the 3800 it wished to disseminate, or the specific reasons for objecting to Mobil's designation of the documents as confidential. R.E. at 255, 267-69. On May 18, 1983, the district court ordered Mobil to "more specifically inform the Court as to its justification for continuing to seal" the disputed depositions. R.E. at 202.

In response to the court's order, Mobil submitted on May 31, 1983 a second sworn statement of Walter E. MacDonald and several exhibits to demonstrate the continuing need for confidentiality of the depositions. R.E. at 203. Mr. MacDonald reaffirmed the confidential nature of Mobil's arrangements for transporting oil from Saudi Arabia. R.E. at 204. He again noted the impact that disclosing such information may have

7. Not all documents filed with the court were used at trial. See *supra* notes 1, 2.

8. Mr. MacDonald attested:

Mobil continues to maintain its business relations with its Saudi partners, not only in Samarco, but in other business enterprises as well. As I underscored in the June 12 affidavit, the "[u]nwarranted disclosure of materials of this nature [i.e., the type involving confidential business information requested

on Mobil's access to crude oil from Saudi Arabia.⁸ R.E. at 204. He explained that Mobil's counsel "were instructed to designate as confidential any portion of a deposition where Mobil's confidential documents were used or where the subject of Mobil's proprietary business relations with its Saudi partners was brought up." R.E. at 208-09. Thus, while confidential designations were not assigned after a document-by-document examination, they were assigned according to a systematic method tailored to protect only sensitive material.

While Mr. MacDonald noted that he had been able to review only a few of the 3800 pages of depositions, he did attest that he was "generally familiar with the subject-matter of the documents . . . as well as [with] the underlying transactions and their importance to Mobil." R.E. at 211. Mr. MacDonald assured the court that

Mobil's documents and information relating to its involvement in Samarco and its other shipping business remain confidential today as internal, proprietary, competitive information. Mobil has taken considerable care to maintain this information as nonpublic, proprietary material

Because Mobil is involved with these same persons [referred to in the depositions] today . . . it is just as important that Mobil's internal deliberations and analyses (as well as its confidential communications with its partners) remain confidential and nonpublic. No business organization can function effectively in the business marketplace if its internal, competitive documents and information are made public.

R.E. at 211-12. Mobil attached to this affidavit an exhibit listing thirty-three deposi-

by and produced to the Washington Post Company in discovery]" has "the very real potential of impairing Mobil's ability to negotiate future joint arrangements and other commercial transactions with business interests in Saudi Arabia, and could adversely affect Mobil's ongoing relationships with its Saudi partners in a variety of ventures unrelated to the Samarco shipping venture."

R.E. at 204.

tions and the confidential and nonconfidential portions of each deposition transcript. R.E. at 222-23.

On June 21, 1983, the district court unsealed all 3800 pages of depositions. *Tavoulareas v. Washington Post Co.*, No. 80-3032 (D.D.C. June 21, 1983). While the court noted that Mobil would not "have had to conduct a page-by-page examination of the over 3800 pages of sealed deposition," it concluded that "[i]t is sufficient merely to state that the justification Mobil has provided is not specific enough to warrant the continued sealing of these documents." R.E. at 231-32. On June 23, 1983, Mobil appealed this order. We have jurisdiction under 28 U.S.C. § 1291 (1976).

After full consideration, we disagree with the district court's conclusion that Mobil's showing was insufficient to justify continued confidentiality of those depositions never used at trial. Our decision follows from a different view of the relevant statutory and constitutional interests from that of the district court. While we acknowledge that discovery is presumptively open under the Federal Rules of Civil Procedure, we believe that statutory, common law, and constitutional privacy interests require protecting the confidentiality of Mobil's sensitive commercial information. Public dissemination of confidential discovery materials not used at trial cannot be justified by a common law or constitutional right of access or by a first amendment right of free speech or free press.

II. THE PRESUMPTION OF OPENNESS

[1] A statutory presumption of openness for discovery materials, even those not used

9. In 1978 the Advisory Committee proposed, because of storage costs, that discovery materials not be filed except upon order of the court or for use in the proceedings. Even if this amendment had been approved, the accompanying advisory committee note provided for access to discovered material by nonparties:

This amendment and amendments to the discovery rules permit the materials described to be retained by the parties unless and until they are used for some purpose in the action. But any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that

at trial, derives from the Federal Rules of Civil Procedure. The Federal Rules do not restrict the use of properly discovered materials. Rule 26(c) requires the proponent of confidentiality to show good cause to limit the amount, method, or use of discovery as well as the people who are present at discovery proceedings. Fed.R. Civ.P. 26(c).

Rule 5(d) requires that all papers served upon a party after the complaint, including depositions, be filed with the court unless the court orders otherwise. Fed.R.Civ.P. 5(d). The Advisory Committee intended this filing requirement to apply even to documents not used in the proceedings. Fed.R.Civ.P. 5(d), advisory committee note ("it often happens that no use is made of the materials after they are filed").⁹ The Committee requires such a filing because these "materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed.R.Civ.P. 5(d), advisory committee note.

Similarly, Rule 30(f)(1) requires that depositions be "promptly file[d] . . . with the court in which the action is pending" unless otherwise ordered by the court. Fed.R. Civ.P. 30(f)(1). This filing requirement was added to Rule 30 in 1980, and the advisory committee note refers to the note to Rule 5(d) as an explanation of the amended provision. Simply stated, the Federal Rules of Civil Procedure and the advisory committee notes indicate that discovery proceedings are presumptively open unless otherwise ordered by the court.¹⁰

the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).

Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978).

10. Courts have been virtually unanimous in concluding that the Federal Rules of Civil Procedure presume open discovery. See, e.g., *National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir.1981) ("[t]he discovery rules themselves place no limits on

This presumption of openness for discovery materials not used at trial is grounded only in the Federal Rules and does not derive either from a common law or first amendment right of access. The common law right of access to public records and documents, including judicial records and documents, allows public supervision of governmental proceedings. This right of access should extend only so far as necessary to serve its supervisory purpose.¹¹ Judge Wisdom noted in *Wilk v. American Medical Ass'n*, 635 F.2d 1295 (7th Cir.1980), that "[i]f the purpose of the common law right of access is to check judicial abuses, then that right should only extend to materials upon which a judicial decision is based." *Id.* at 1299 n. 7 (citations omitted).

what a party may do with materials obtained in discovery"); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980) (quoting *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.1978)) ("[a]s a general proposition, pretrial discovery must take place in the [sic] public unless compelling reasons exist for denying the public access to the proceedings"); *In re Halkin*, 598 F.2d 176, 188 (D.C.Cir.1979) ("without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public").

The treatises on civil procedure reach a similar conclusion. Professors Wright and Miller acknowledge that "[o]rdinarily a deposition is a public document freely open to inspection after it is filed with the clerk." 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2042 (1970). 4A J. MOORE, J. LUCAS & D. EPSTEIN, *MOORE'S FEDERAL PRACTICE* ¶ 30.63[6] (1983) ("Former Equity Rule 55 provided that a deposition shall be deemed published when filed, unless otherwise ordered by the court. That this rule is continued under the Federal Rules is shown by the provision of Rule 30(b) [now 26(c)(6)] permitting the court in a proper case to make a protective order 'that after being sealed the deposition shall be opened only by order of the court.'"); 7 E. KOEBER, *CYCLOPEDIA OF FEDERAL PROCEDURE*, ¶ 25.265 (1971) (depositions generally may be opened by the clerk unless an order is obtained).

11. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), the Supreme Court noted that "courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597, 98 S.Ct. at 1312 (footnotes omitted). Interests supporting such access include "the citizen's desire to keep a watchful

Depositions not used at trial cannot be the basis for a judicial decision. Though the lines delimiting the common law right of access are vague, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99, 98 S.Ct. 1306, 1312-13, 55 L.Ed.2d 570 (1978), we believe they do not include documents not used at trial.¹²

Similarly, there is no first amendment right of access¹³ to discovery materials not used at trial. Though the Post argued the public has a constitutional right of access to judicial proceedings and materials, citing, *inter alia*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion) (Brief for Appellee at 55), we do not believe that

eye on the workings of public agencies," and "a newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 598, 98 S.Ct. at 1312. In *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981), the Third Circuit emphasized that such access allowed "public supervision and inspection of courtroom proceedings, and the public's interest in learning of important matters." The Supreme Court in *Warner Communications* also noted that this common law right of access is not absolute. More specifically, it recognized that "courts have refused to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing . . ." 435 U.S. at 598, 98 S.Ct. at 1312.

12. In *Joy v. North*, 692 F.2d 880 (2d Cir.1982), cert. denied, — U.S. —, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983), the court endorsed a similar view: "Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public. . . . At the adjudication stage, however, very different considerations apply. An adjudication . . . should . . . be subject to public scrutiny." 692 F.2d at 893. See also *United States v. Hubbard*, 650 F.2d 293, 333 (D.C.Cir. 1980) (MacKinnon, J., dissenting) ("the public should have access to the testimony and written evidence in the record upon which the court relied in making its decision").

13. Any first amendment right of access to the fruits of discovery held by the public is to be distinguished from a first amendment right of free expression of material obtained in discovery held by the litigants. We discuss here only the public's right of access and defer discussion of the litigants' right of free expression to Part V *infra*.

such a right extends to the disputed depositions. In *Richmond Newspapers*, the Court held that the Constitution preserves a public right of access to criminal trials. At the same time, however, the Court explicitly distinguished *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), which held that the press and public could be constitutionally excluded from a pretrial suppression hearing.¹⁴ *Id.* at 394, 99 S.Ct. at 2912. In *Richmond Newspapers*, the Chief Justice began the plurality opinion by noting that right of access to criminal trials was an issue of first impression: "In *Gannett Co. v. DePasquale*, . . . the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pre trial motions, was constitutionally guaranteed." 448 U.S. at 564, 100 S.Ct. at 2820. After recognizing the constitutional right of access to criminal trials, the Chief Justice again distinguished *Gannett*: "In contrast to the pretrial proceeding dealt with in *Gannett*, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness." *Id.* at 581, 100 S.Ct. at 2829. Thus, even after *Richmond Newspapers*, there appears to be no constitutional right of access to criminal or civil pretrial proceedings.

More conclusively, in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-10, 98 S.Ct. 1306, 1317-18, 55 L.Ed.2d 570

14. The Chief Justice, in his concurring opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), noted that: [D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. *Id.* at 396, 99 S.Ct. at 2914 (Burger, C.J., concurring).

15. Federal Rule of Civil Procedure 26(c) provides in part:

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition

(1978), the Supreme Court held that no constitutional right of access inheres either in the first or sixth amendment to copy and disseminate judicial records or evidence used at trial. It follows a *fortiori* that no constitutional right of access exists with regard to discovery materials never used at trial. *Accord, Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 866, 913-14 (E.D.Pa.1981).

In sum, the presumptive openness of discovery materials not used at trial derives only from the Federal Rules of Civil Procedure. No right of access to such materials lies either in the common law or the Constitution.

III. PRIVACY INTERESTS THAT OVERCOME THE PRESUMPTION OF OPENNESS

A. *The Federal Rules of Civil Procedure and the Common Law*

The same statutory scheme that provides for public access to discovery materials acknowledges that a litigant's privacy interests may require those materials to be sealed from the public. Federal Rule of Civil Procedure 26(c) empowers a court, upon a showing of good cause, to order that discovery not be had, Fed.R.Civ.P. 26(c)(1); that it be conducted according to a certain method, Fed.R.Civ.P. 26(c)(3); or that its scope be limited, Fed.R.Civ.P. 26(c)(4).¹⁵

is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or

While the first six subparts of Rule 26(c) speak to the method and scope of discovery, subpart seven specifies the *kind* of information that warrants protection: "[T]he court . . . [may] order . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way" Fed.R.Civ.P. 26(c)(7).¹⁶ The drafters of the Federal Rules specially provided that the presumption of openness is out-

information enclosed in sealed envelopes to be opened as directed by the court.

16. The Federal Rules of Civil Procedure have since their inception recognized the importance of protecting the litigants' interests in maintaining the confidentiality of commercial information. Fed.R.Civ.P. 30(b) (1938) (providing that a court may order "that secret processes, developments, or research need not be disclosed.") The advisory committee note indicated that Rule 30(b) was "introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26 [Depositions Pending Action—Scope of Examination]." Fed.R.Civ.P. 30(b), advisory committee note (1938).

In 1970, the discovery provisions were rearranged so that the substance of Rule 30(b) became Rule 26(c). Accompanying the rearrangement was a change in text regarding protection of commercial information. The committee substituted broader language offering more protection which "reflects existing law." Advisory committee note, 48 F.R.D. 487, 505 (1970). The text of this provision has remained unchanged to date. See *supra* note 15.

Even before the Federal Rules of Civil Procedure became law in 1938, courts were protecting litigants from disclosure of confidential information unnecessary to the litigation of the claim. See, e.g., *Stone v. Goss*, 65 N.J.Eq. 756, 762-63, 55 A. 736, 738 (1903) ("Such a disclosure [to the court *in camera* of an allegedly stolen trade secret] is no publication to the world, and, although it may endanger the complainants' secret, it does not deprive them of the right to enjoin the defendants from making use of it."); *Williams v. The Prince of Wales Life Ins. Co.*, 23 Beav. 338, 340, 53 Eng.Rep. 133, 133 (1857) (court ordered the production of certain confidential documents only "upon the Plaintiff's undertaking not to make public or communicate to any stranger to the suit the contents of such documents").

17. Courts have continually followed the lead of the drafters of the Federal Rules in protecting confidential information from public disclosure in pretrial discovery. See, e.g., *Centurion Industries, Inc. v. Warren Steurer and Associates*,

weighed by a litigant's privacy interests in sensitive commercial information.¹⁷

Respect for sensitive commercial information has also enjoyed a long tradition at common law. The *Restatement on Torts* recognized that "[o]ne who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information."¹⁸ Typical

665 F.2d 323, 32 F.R.S.2d 1413, 1415-17 (10th Cir.1981) (confidential information regarding software design discoverable subject to protective order prohibiting public disclosure); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 868, 889 (E.D.Pa.1981) ("The propriety . . . of [umbrella] protective orders securing . . . sensitive commercial information . . . is too well established to belabor here."); *Liberty Folder v. Curtiss Anthony Corp.*, 90 F.R.D. 80, 82-83 (D. Ohio 1981) (court issues protective order to guard against unnecessary and potentially injurious disclosure of sensitive information such as distributor, vendor, and customer lists).

Congress has shown a similar awareness in other statutes of the need to protect sensitive commercial information when obtained through compulsory processes. See, e.g., 5 U.S.C. § 552(b)(4) (1982) (agency need not disclose under Freedom of Information Act trade secrets and confidential commercial and financial information); Privacy Act of 1974, 5 U.S.C. § 552a(b) (1982) (prohibits disclosure of personal information without consent except in certain circumstances); Internal Revenue Code, 26 U.S.C. § 6103 (1976 & Supp. V 1981) (prohibits disclosure of data regarding business affairs given for purposes of tax collection).

18. RESTATEMENT OF THE LAW, TORTS § 759 (1939). Comment b to § 759 defines the kinds of information referred to in this provision:

Examples of information, other than trade secrets, included in this Section are: the state of one's accounts, the amount of his bid for a contract, his sources of supply, his plans for expansion or retrenchment, and the like. There are no limitations as to the type of information included except that it relate to matters in his business. Generally, however, if the improper discovery of the information is to cause harm, the information must be of a secret or confidential character.

The RESTATEMENT OF THE LAW, TORTS § 757, Comment b (1939), defines "trade secret" broadly: A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advan-

of the broad protection given commercial information at common law are comments in *Witkop & Holmes Co. v. Boyce*, 61 Misc. 126, 112 N.Y.S. 874 (1908):

The names of the customers of a business concern whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret of compounding some article of manufacture and commerce.

Id. 112 N.Y.S. at 878.¹⁹ Protection of trade information extends well back into the nineteenth century.²⁰

B. Constitutional Privacy Interests

1. Constitutional Right of Nondisclosure of Personal Information

Recent Supreme Court decisions indicate that a litigant's interest in avoiding public disclosure of private information is grounded in the Constitution itself, in addition to federal statutes and the common law. In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court considered a New York statute that required information about the dispensing of certain drugs to be filed with the State Health Department. A group of patients who reg-

tage over competitors who do not know or use it.

These provisions of the RESTATEMENT are evidence of the broad protection afforded confidential commercial information at common law.

Courts have offered three grounds for this protection of confidential commercial information: (1) property rights in the secret information, *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889); (2) contract rights in securing confidentiality, *Westervelt v. National Paper & Supply Co.*, 154 Ind. 673, 57 N.E. 552 (1900); and (3) a fiduciary obligation not to disclose, *Du Pont Powder Co. v. Masland*, 244 U.S. 100, 37 S.Ct. 575, 61 L.Ed. 1016 (1917).

19. See also Barton, "A Study in the Law of Trade Secrets," 13 U.CIN.L.REV. 507, 521 (1939) ("the concept [of protecting trade secrets involving manufacturing processes] . . . has been extended to every variety of business secret that has value to the owner"); J. STORY, EQUITY JURISPRUDENCE (1853) § 952 ("Courts of Equity

ularly received those drugs claimed the statute violated their constitutional right to privacy. In deciding the claim, the Court clarified the privacy interests protected by the Constitution:

The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

Id. at 598-600, 97 S.Ct. at 875-877 (footnotes omitted). Justice Brennan, in his concurrence, stressed the Court's recognition of an individual's "interest in avoiding disclosure of personal matters." *Id.* at 606, 97 S.Ct. at 880 (Brennan, J., concurring). Though the Court upheld the New York statute, Justice Brennan noted that "[b]road dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." *Id.*

In *Nixon v. Administrator of General Services (A.G.S.)*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), the Supreme Court reaffirmed that "one element of privacy" is "the individual interest in avoiding disclosure of personal matters," 433 U.S. at 457, 97 S.Ct. at 2797 (quoting *Whal-*

will restrain a party from making a disclosure of secrets, communicated to him in the course of a confidential employment. And it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests." (footnote omitted)).

20. See, e.g., *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. 464, 60 A. 4 (1904) (an owner of a confidential instrument or document does not surrender rights thereto by delivering it to a bailee for a limited purpose); *Peabody v. Norfolk*, 98 Mass. 452, 458 (1868) (there is a property interest in process of manufacturing "which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons"); *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng.Rep. 425 (1820) (court grants injunction against employee disclosing confidential recipes obtained in course of employment).

en v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977)). There the Court upheld the Presidential Recordings & Materials Preservation Act, Pub.L. No. 93-526, Title I, note following 44 U.S.C. § 2107 (1976), directing the Administrator of General Services to screen the Presidential materials. The Administrator was instructed to return the President's private information and preserve information having historical value. The Court indicated that Mr. Nixon's constitutional right to avoid disclosure of personal matters derived from legitimate expectations of privacy. 433 U.S. at 458, 97 S.Ct. at 2797. It relied mostly on fourth amendment case law and analysis in evaluating the privacy claim. The implication is that the constitutional right to nondisclosure is rooted primarily in the fourth amendment. *Id.* at 458-65, 97 S.Ct. at 2797-01.

Also, in both *Whalen*, 429 U.S. at 600-02, 97 S.Ct. at 876-78, and *Nixon v. A.G.S.*, 433 U.S. at 458, 97 S.Ct. at 2797, the Court recognized the difference in intrusiveness between disclosures only to state employees and disclosures to the general public. The Court implied in both cases that strong governmental interests would be necessary to justify the latter, more severe intrusion on confidential matters. See *Whalen*, 429 U.S. at 606, 97 S.Ct. at 879 (Brennan, J., concurring). The fact that measures were taken to guard against such public dissemination figured importantly in the holdings favoring disclosure to the respective agencies.

The Fifth and Third Circuit Courts of Appeals have interpreted *Whalen* and *Nixon* as recognizing a constitutional right of confidentiality in personal matters. In *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979), five state senators argued that Florida's Sunshine Amendment requiring disclosure of financial information violated their constitutional right

21. See also *Doe v. Webster*, 606 F.2d 1226, 1238 n. 49 (D.C.Cir.1979) (recognizing individual's right to privacy in choosing extent to which the government may disclose criminal information about him where no countervailing govern-

"not to be known." Judge Wisdom, speaking for the Fifth Circuit, noted that financial privacy falls directly within the constitutional protection extended to personal matters against public disclosure. *Id.* at 1132. Also, he specifically acknowledged that disclosure of personal information to the public represented a more severe intrusion on privacy interests than disclosure only to state employees. *Id.* at 1133. Finally, however, after recognizing that financial privacy is a "matter of serious concern, deserving strong protection," the court concluded that the public interest in disclosure for elected officials was even stronger. *Id.* at 1136-38. See also *Fadjo v. Coon*, 633 F.2d 1172, 1175-76 (5th Cir.1981) (recognizing constitutional right of nondisclosure in personal information collected in criminal investigation).

In *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir.1980), Westinghouse claimed that a request by the National Institute for Occupational Safety and Health (NIOSH) for medical records of Westinghouse's employees violated its employees' right to nondisclosure of their personal records. The Third Circuit recognized that "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *Id.* at 577. After an exhaustive consideration of the litigants' respective interests, the court nonetheless concluded that the "strong public interest in facilitating the research and investigations of NIOSH justifies the minimal intrusion into the [employees'] privacy" *Id.* at 580.²¹

The significance in this context of the Supreme Court's decisions in *Whalen* and *Nixon v. A.G.S.*, and of the Third and Fifth Circuits' respective decisions in *Westinghouse* and *Plante*, lies in their explicit recognition of the constitutional right to avoid

ment interest asserted); but see *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir.1981) (no constitutional right of nondisclosure in juvenile social histories prepared by state).

disclosure of personal matters. In the discovery process, individuals are often forced by the court to disclose the kind of personal information deserving privacy protection under these decisions. An individual's constitutional privacy interest can thus be implicated by the discovery process to the same extent it is implicated by disclosure requirements of statutes.²² In both instances, the government is forcing disclosure of personal information. For the facts at hand, we must now examine whether this constitutional right of nondisclosure applies to corporations in the discovery context.

2. Corporations' Constitutional Interests in Nondisclosure of Confidential Discovery Materials Not Used at Trial

[2] In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Court noted that corporations are not without constitutional rights:

The ... court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies, or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 [97 S.Ct. 619, 629, 50 L.Ed.2d 530] (1977) (Fourth Amendment).

22. See also *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 239-43, 654 P.2d 673, 681-83 (1982), cert. granted, — U.S. —, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983) (recognizing significant federal constitutional privacy interests in litigants' maintaining the confidentiality of personal information produced in discovery).

23. In *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979), the Supreme Court protected Detroit Edison's "legitimate and substantial" concern for maintaining the secrecy of employment aptitude tests. The NLRB ordered the Company to disclose to the

Id. at 778 n. 14, 98 S.Ct. at 1417 n. 14 (citations omitted). The Court's acknowledgment of corporations' fourth amendment rights in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), is significant. There, corporate books and records were seized without a warrant by the Internal Revenue Service for the purposes of satisfying tax assessments. The Court noted that "respondents do not contend that business premises are not protected by the Fourth Amendment. Such a proposition could not be defended in light of this Court's clear holdings to the contrary. Nor can it be claimed that corporations are without some Fourth Amendment rights." *Id.* at 353, 97 S.Ct. at 629 (citations omitted).²³

The Seventh Circuit, in *Civil Aeronautics Board v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir.1976), denied the Civil Aeronautics Board's petition for immediate and unconditional access to United Airlines' land, buildings, accounts, and records. The court emphasized that agency demands for corporate documents must be "reasonably definite and reasonably relevant to some proper legislative purpose" to avoid "serious problems under the Fourth Amendment." *Id.* at 399. It then endorsed a particularly relevant admonition by Judge Leventhal in *Burlington Northern, Inc. v. ICC*, 462 F.2d 280 (D.C.Cir. 1972):

The items involved are internal papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items. That is ... a reason for limiting the occasion of ... production—

union employees' scores in psychological aptitude tests. The NLRB did not, however, adequately protect the tests from public disclosure or support its order with a principle of national labor policy requiring such disclosure. Unlike *G.M. Leasing Corp.*, however, the Court did not explicitly ground the Company's confidentiality interests on legitimate fourth amendment privacy expectations. Instead, it assumed the reasonableness of the Company's concern for test secrecy, and then looked for a substantial reason supporting infringement on that concern. *Id.* 440 U.S. at 314-17, 99 S.Ct. at 1130-32.

by agency or judicial limitation—and for forbidding its disclosure outside the agency except under careful conditions subject to court review.²⁴

Id. at 288 (Leventhal, J., separate statement dissenting from denial of petition for rehearing) (quoted, in part, in 542 F.2d at 399). These decisions establish that a corporation possesses legitimate constitutional expectations of confidentiality in internal commercial information.

In charting a corporation's privacy protection, however, we note that a corporation's right to nondisclosure is not equal to that of an individual. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n. 14, 98 S.Ct. 1407, 1417 n. 14, 55 L.Ed.2d 707 (1978). The Court recognized in *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974), that:

[N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret.

While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. . . . [L]aw-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Id. at 65–66, 94 S.Ct. at 1519–1520 (citations omitted) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52, 70 S.Ct. 357, 368–69, 94 L.Ed. 401 (1950)). We thus conclude that while corporations do enjoy pri-

24. Similarly, in *OKC Corp. v. Williams*, 490 F.Supp. 560 (N.D.Tex.1979), *aff'd*, 614 F.2d 58 (5th Cir.1980), the district court noted that the government's coercing an informer to turn over to a regulating agency a corporation's confidential internal investigation report "should raise serious Fourth Amendment questions." 490 F.Supp. at 562 n. 1.

25. See *G.M. Leasing Corp.*, 429 U.S. at 354, 97 S.Ct. at 629. Integral to the Court's holding that the warrantless seizure of corporate rec-

ords for purposes of tax assessments violated the corporation's fourth amendment right was that "the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. . . . [W]e find no justification for treating petitioner differently in these circumstances simply because it is a corporation." The implication here is that a corporation's legitimate privacy expectations are heightened when intrusions are not grounded in a regulatory context.

vacuity protection under the fourth amendment, that protection is qualified to allow adequate policing of corporate conduct. The government must be free to ensure "that corporate behavior is consistent with the law and the public interest." *United States v. Morton Salt Co.*, 338 U.S. at 652, 70 S.Ct. at 369. Thus, corporations must disclose information to regulatory agencies so long as "the demand is not too indefinite and the information sought is reasonably relevant." *Id.*

3. The Applicable Constitutional Standard

[3] We turn to the standard by which this constitutional interest in confidentiality is to be protected. The Supreme Court, in both *Whalen*, 429 U.S. at 600–04, 97 S.Ct. at 876–79, and *Nixon v. A.G.S.*, 433 U.S. at 458–65, 97 S.Ct. at 2797–2801, determined the propriety of a governmental intrusion by balancing the need for the intrusion against its severity. This approach comports with that taken by the Court in traditional fourth amendment warrant analysis. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its extensive progeny, the Court emphasized the importance of "balancing the need to search [or seize] against the invasion which the search

ords for purposes of tax assessments violated the corporation's fourth amendment right was that "the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. . . . [W]e find no justification for treating petitioner differently in these circumstances simply because it is a corporation." The implication here is that a corporation's legitimate privacy expectations are heightened when intrusions are not grounded in a regulatory context.

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[or seizure] entails." *Terry*, 329 U.S. at 21, 88 S.Ct. at 1879 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967)). Additionally, all lawful privacy intrusions must be narrowly drawn and "reasonably related in scope to the justification for their initiation." 392 U.S. at 29, 88 S.Ct. at 1884.

Other circuits agree that Supreme Court case law requires a balancing test in determining the lawfulness of intrusions on privacy interests. In *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir.1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979), the Fifth Circuit concluded that "the balancing test . . . is appropriate" in judging intrusions on an individual's right to avoid disclosure of personal matters. *Id.* at 1134. "The constitutionality of the [disclosure requirement] will be determined by comparing the interests it serves with those it hinders." *Id.* (footnote omitted). In *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir.1980), the court characterized the process of determining the extent of privacy protection as a "delicate task of weighing competing interests." *Id.* at 578.

On the basis of this case law, we adopt a balancing approach in determining the lawfulness of intrusions on protected nondisclosure rights. Such a balancing standard should afford necessary flexibility in serving conflicting interests in disclosure and confidentiality. We add, however, that our adoption of a balancing approach does not preclude in all circumstances the government's need to present a compelling interest to justify an intrusion. Indeed, when the intrusion is severe, a compelling interest is required to justify the intrusion. "Severe" intrusions include public dissemination of confidential information as opposed to disclosure of such information only to the government or other litigants. See *Whalen*, 429 U.S. at 606, 97 S.Ct. at 880 (Brennan, J., concurring) ("Broad dissemination by state officials of [personal] information . . . would presumably be justified only by compelling state interests.")

IV. MOBIL'S PRIVACY INTERESTS BALANCED AGAINST THE SEVERITY OF THE INTRUSION AND THE REASONS FOR DISCLOSURE

A. Mobil's Privacy Interests

[4] In this case, Mobil has a constitutionally protected privacy interest in avoiding the public disclosure of sensitive commercial information not used at trial. Given the long tradition of common law protection of confidential commercial information, see *supra* Part III(A), and the crucial importance of such material to continuing business operations, a company's sensitive commercial documents not yet in the public domain fall within the Constitution's protection of corporate privacy interests. Few categories of business information are more analogous to individuals' constitutionally protected personal affairs than trade secrets and related commercial information.

As discussed in Part I, Mr. Walter E. MacDonald submitted an affidavit in June 1981 outlining the categories of documents requested by the Post, and specifying why these categories of documents should remain confidential. R.E. at 147-50. In Mr. MacDonald's affidavit of May 31, 1983, he confirmed that the disputed documents were indeed of the kind anticipated in the June 1981 affidavit. R.E. at 203-04, 211-12.

The Post points out that Mr. MacDonald was unable "to review more than a very few of these numerous depositions or exhibits." R.E. at 211. The Post thereby challenges Mobil's position that these documents are in fact confidential. It contends that Mobil should be forced to show specifically which documents contain sensitive commercial information. (Brief for Appellee at 43-48). We do not believe a document-by-document specification of confidentiality is necessary. Rather, we agree with the practical wisdom of Judge Edward Becker:

Wholesale designations without repeated objection facilitate the discovery process. If a judge, magistrate, or special master had to rule upon countless invocations of Rule 26(c)(7), the progress of complex

cases would be severely impeded. Indeed, the judge is a veritable hostage; failure to approve an umbrella protective order is a consignment to years of adjudication of the confidentiality of individual documents. Moreover, it is enormously expensive to have thousands of documents reviewed by paralegals and lawyers and to brief and argue their confidentiality to the court. Needless to say, the skyrocketing cost of litigation is a matter of genuine concern to everyone involved in the legal process.

Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F.Supp. 866, 879 n. 18 (E.D.Pa.1981).

We also believe the procedural context of the instant case is important. There is a qualitative difference between a party's sustaining the confidentiality of a single document at the time of its designation and its sustaining the confidentiality of thousands of documents *en masse* long after they have been produced and given a confidential designation. See *Zenith Radio*, 529 F.Supp. at 893. The November 5, 1981 protective order obtained by Mobil contemplated objections to specific documents. The Post, instead of complying with the protective order, moved after trial for a blanket unsealing of all documents in the court record, including the depositions here at issue. R.E. at 252, 267-69.

Given the number of documents at issue and the procedural posture of this case, we think the documents should be judged according to categories of information. See

26. Situations do arise where the reason for keeping the information confidential has expired by the end of trial—as where, for example, the protective order was entered to protect against prejudicial pretrial publicity. See, e.g., *In re Halkin*, 598 F.2d 176, 183 n. 11 (D.C.Cir. 1979), and 203 n. 12 (Wilkey, J., dissenting). In those cases, the judge might very well wish to reconsider the wisdom of keeping the information sealed. In this case, however, Mobil established satisfactorily that the unused information contained in the contested depositions was entitled to full confidentiality. Absent some compelling reason, the trial judge was consequently obligated to protect Mobil's continuing interest in privacy.

Zenith Radio, 529 F.Supp. at 887, 888, 892. The proponent of confidentiality must show only that the disputed documents contain a given category of confidential information, and that disclosure of that kind of information will harm the proponent's competitive position. Once a litigant makes such a showing, it has established its constitutionally protected interest in avoiding disclosure of these documents. In order for the court to compel disclosure of such documents, it must articulate substantial supporting interests. The requisite strength of the interests will vary according to the severity of the intrusion.

Here, Mobil succeeded in confirming that the 3800 pages of depositions designated confidential contained a kind of information that, if revealed, would harm its competitive position. Though we admonish Mobil that its showing was barely sufficient, Mr. MacDonald's two affidavits and accompanying exhibit, R.E. at 203-23, specified and confirmed that the depositions covered confidential shipping arrangements. Also, Mr. MacDonald attested that the information in the depositions was not yet in the public domain.²⁶ Indeed, Mobil had taken "considerable care to maintain this information as non-public, proprietary material." R.E. at 211. In light of the difficulty of responding to a wholesale, post-trial motion to unseal, we find Mobil's references to categories of information sufficiently specific to establish its constitutionally protected interest in nondisclosure of the depositions.²⁷

27. Mobil's constitutional privacy interest in the disputed depositions is strengthened by the fact that Mobil is essentially a nonparty to the libel suit out of which this action arose. (Mobil intervened in the *Tavoulares* suit only to protect the confidentiality of its commercial information. See *supra* notes 4 and 5.) This court in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir.1980), noted:

An important element in this case is the fact that the party from whom the documents were seized was not made a defendant in the proceedings and now objects to public access to the fruits of the seizure. We think that where a third party's property and privacy rights are at issue the need for minimizing intrusion is especially great and the public

B. *The Governmental Intrusion and the Justifying Interests*

The intrusion of the district court's June 21, 1983 order on Mobil's privacy interest is indeed severe. The November 5, 1981 protective order, in comparison, represented a narrowly drawn, relatively minor intrusion on Mobil's protected privacy interests. Also, that intrusion was justified by the substantial interest of ensuring "the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1947). By unsealing the depositions, the district court has sanctioned public dissemination of Mobil's sensitive commercial information. Since public dissemination constitutes a severe intrusion, only a compelling interest can save the order to unseal. See *Whalen*, 429 U.S. at 606-07, 97 S.Ct. at 879-80 (Brennan, J., concurring).

The reasons cited by the district court for unsealing the depositions are inadequate. The court simply concluded that "[i]t is sufficient merely to state that the justification Mobil has provided is not specific enough to warrant the continued sealing of these documents." R.E. at 232. We have determined, however, that Mobil's justification, when examined in light of the procedural posture of this case and of the number of documents at issue, was sufficient to show the disputed documents contained information of the kind deserving constitutional protection.

The interests underlying the presumption of openness discussed in Part II also fail to support the district court's order to unseal. The presumption of openness is not absolute, as it is qualified by Federal Rule of Civil Procedure 26(c)(7) (providing for protection of confidential commercial information). Moreover, the interests underlying the presumption of openness here are purely statutory, see *supra* Part II, and pale in the face of Mobil's constitutional interests in nondisclosure.

interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small.

The Post argues, however, that its constitutional freedom to publish under the first amendment compelled the district court's June 21 order to unseal. Brief for Appellee at 29-38. The Post claims that Mobil failed to meet its burden of showing that "the harm posed by dissemination [will] be substantial and serious; the restraining order [was] narrowly drawn and precise; and there [was] no alternative means of protecting the public interest which intrudes less directly on expression." *Id.* at 30-31 (emphasis omitted) (quoting *In re Halkin*, 598 F.2d 176, 191 (D.C.Cir.1979)). The district court also made a vague reference to the Post's first amendment interests:

Any restrictions, such as those contained in this Court's November 5, 1981 protective order, on how materials obtained through discovery are utilized clearly infringes on certain First Amendment rights. *In re Halkin*, 598 F.2d 176, 190 (D.C.Cir.1979). Despite the fact that these rights are not absolute, it is only under the most unusual circumstances that they should give way to a party's demands for secrecy.

R.E. at 229.

The district court's severe intrusion on Mobil's privacy interest could arguably be justified if it were necessary to avoid an infringement on the Post's unqualified first amendment free expression rights. Our analysis accordingly shifts to examine the scope of the Post's first amendment interest in disseminating the depositions and whether that interest justifies the court's order to unseal.

V. FIRST AMENDMENT FREE EXPRESSION ANALYSIS

We begin by noting that the Post's status as a member of the institutional press gives it no greater constitutional interest in free expression than that held by individuals. The Supreme Court has recognized this principle in the context of a constitutional

Id. at 319 (footnote omitted).

right of access to information. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609-10, 98 S.Ct. 1306, 1317-18, 55 L.Ed.2d 570 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974). We believe this equality of protection regarding access applies as well to the right of expression afforded the institutional press and individuals under the press and speech clauses of the first amendment. *First National Bank v. Bellotti*, 435 U.S. 765, 797-802, 98 S.Ct. 1407, 1426-1429, 55 L.Ed.2d 707 (1978) (Burger, C.J., concurring); *Avin v. White*, 627 F.2d 637, 649 (3d Cir.1980), cert. denied, 449 U.S. 982, 101 S.Ct. 398, 66 L.Ed.2d 244 (1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n. 3 (D.C.Cir. 1975). Our discussion will therefore focus on the free expression interests (deriving either from the speech or press clause) of litigants generally in discovery materials.

In *In re Halkin*, 598 F.2d 176 (D.C.Cir. 1979), this court concluded that the first amendment right of unfettered expression attaches to materials made available through discovery. *Id.* at 186-91. In reaching this conclusion, the court denied that the source of information can affect the free expression interest of the speaker. *Id.* at 187-90. Judge Wilkey's dissent in *In re Halkin*, however, asserts to the contrary that the source of information can significantly qualify the recipient's free expression interest. *Id.* at 206-07 (Wilkey, J., dissenting). The year after *In re Halkin* was decided, the Supreme Court in *Snepp v. United States*, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam), indirectly spoke on this issue. The upshot, we believe, is that the source of information may in some instances qualify the strength of a recipient's first amendment interest in disclosing that information.

28. See *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), where the Court noted:

[I]t cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to

In *Snepp*, the Supreme Court held that a CIA employee, with or without a consent agreement, is subject to restrictions on disclosing confidential information obtained in the course of CIA employment. The Court noted:

[E]ven in the absence of an express agreement[,] the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.

444 U.S. at 509 n. 3, 100 S.Ct. at 765 n. 3 (citations omitted). Integral to the Court's holding was that Mr. Snepp "had been 'assigned to various positions of trust' ... and granted 'frequent access to classified information' Snepp published his book about CIA activities on the basis of this background and exposure." *Id.* at 511, 100 S.Ct. at 766 (citation and footnote omitted).

Though the facts in *Snepp* involved governmental employer-employee relations, the case sheds light on a broader principle of first amendment law. *Snepp* demonstrates that the government may regulate the use of confidential information it supplies a citizen. The extent of permissible regulation depends upon the balancing of the government's interest in confidentiality and the individual's interest in free expression.²⁸ Regardless of how that balance is struck in any given case, it remains certain that a citizen's right of free expression of confidential information received directly from the government is not unfettered. Rather, this right is qualified and must be balanced against the government's legitimate inter-

arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568, 88 S.Ct. at 1734. See also *Connick v. Myers*, — U.S. —, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983) (quoting *Pickering*).

est in controlling the use of information it dispenses.²⁹

In the discovery context, the government is in a very real sense the direct source of discovered materials since those materials are made available only through the compulsory processes of the court. A litigant's interest in disseminating information obtained through the court's processes consequently is not unfettered. Rather, the litigant's qualified expression interest must be balanced against the court's interest in preserving the confidentiality of private information it has supplied that litigant. Here the court has at least two interests in preserving the confidentiality of the disputed depositions. First, as discussed in Part IV, the court must avoid unjustified intrusions on Mobil's privacy interests. The court can no more sanction public dissemination of Mobil's private information absent a compelling reason than a federal agency can indiscriminately disseminate private information collected from citizens. Second, the court has an interest in preserving the integrity of the discovery process by encouraging full investigation of the disputed issues. Such investigation will occur effectively only if the court can assure the parties that disclosed confidential materials will be used only for the purpose of litigation.³⁰

The First, Second, and Third Circuits have all recognized that a litigant's free expression right in confidential information supplied by the court through discovery is at best qualified. In *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir.1981), the First Circuit noted that disclosure of "undigested

matter, forced from the mouth of an unwilling deponent . . . would not advance the informed civic and political discussion that the First Amendment is intended to protect." *Id.* at 115. The First Circuit continued:

We conclude, therefore, that although there is a First Amendment interest in information produced at trial that warrants full protection, a *judicially-powered process compelling information* that has not yet passed through the adversary-judicial filter for testing admissibility does not create communications that deserve full protection.

Id. at 115 (emphasis added).

Similarly, the Second Circuit, in *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir.1963), "entertain[ed] no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes." *Id.* at 407. The court, however, required that the protective order there at issue not curtail disclosure of information and writings obtained outside the court's processes:

We know of no authority that a court may restrain a private citizen in peace time from giving vent to his views, or publicizing his own information, as to the conduct of officials of foreign governments

We therefore suggest that the District Court modify its order so as to make it plain that no restrictions are imposed on the freedom of the persons named therein

tions on the free speech and petition rights of Air Force personnel); *Snepp v. United States*, *supra*; *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (commissioned officer may be prohibited from publicly urging enlisted personnel to disobey orders that might send them to combat). 447 U.S. at 585 n. 2, 100 S.Ct. at 2361 n. 2 (Rehnquist, J., dissenting).

29. Justice Rehnquist, in his dissenting opinion in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), noted that "[w]hile this Court has stated that the 'capacity [of speech] for informing the public does not depend upon the identity of its source,' the source of the speech nevertheless may be relevant in determining whether a given message is protected under the First Amendment." *Id.* at 585, 100 S.Ct. at 2361 (Rehnquist, J., dissenting) (citation and footnote omitted). Justice Rehnquist cited the following cases in support of this statement: *Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (upholding Air Force regulations imposing restric-

30. These interests in controlling the use of discovered materials arise only after a litigant from whom discovery is requested has demonstrated its need for confidentiality.

to make whatever use they wish of writings (other than papers filed in court) or information which have come into their possession otherwise than through the court's processes

Id. at 408, 409.

The Third Circuit in *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976), assumed *arguendo* that "if the district court had prohibited disclosure only of information derived from the discovery processes, its order would have been constitutional." *Id.* at 1006. The court proceeded to vacate the protective order to the extent that it prohibited "petitioners' counsel from disclosing information which they obtained otherwise than through the court's processes." *Id.* at 1006-09.³¹ Thus, these courts of appeals have recognized, and the Supreme Court has confirmed, that the government may control confidential information it supplies with significantly more ease than it can control confidential information obtained from independent sources.³²

Indeed, this circuit has noted that a necessary corollary to the court's power to

31. The Washington State Supreme Court, in *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 654 P.2d 673 (1982), *cert. granted*, — U.S. —, 104 S.Ct. 64, 78 L.Ed.2d 80 (1983), upheld a protective order limiting to trial purposes the use of certain discovered information. The court articulated its analytical approach:

In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. The judge's major concern should be the facilitation of the discovery process and the protection of the integrity of that process, which necessarily involves consideration of the privacy interest of the parties and, in the ordinary case at least, does not require or condone publicity.

98 Wash.2d at 256, 654 P.2d at 690.

The Washington State Supreme Court takes the position (1) that a protective order simply is not a prior restraint at all, 98 Wash.2d at 231, 654 P.2d at 676; and (2) that even if it is considered a prior restraint, protecting the privacy interests of the litigants and the integrity of the discovery process are compelling interests that justify regulating the speech of the opposing party. 98 Wash.2d at 255-56, 654 P.2d at 689-90.

32. It would indeed be anomalous to require the government to proffer a *compelling* reason to

compel production of (*i.e.*, supply) confidential information is the power to condition the use of that information. In *Freeman v. Seligson*, 405 F.2d 1326 (D.C.Cir.1968), this court required the Secretary of Agriculture to produce materials in discovery normally protected from disclosure by section 8 of the Commodity Exchange Act. The court's decision was grounded in its capacity to promote full discovery and still protect the secrecy of the disputed information: "The courts can limit, and in actual practice do limit, the persons having access to information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put." *Id.* at 1350. Implicit in this holding is the view that a litigant's free expression interest does not significantly hinder a court's controlling the use of confidential information it dispenses.

The import here is that the Post's first amendment interest in disclosing Mobil's commercial information supplied by the district court is not unfettered. Such interest, if at all existent, is not deserving of full

control the use of the confidential information it supplies. In effect, this would require the government to demonstrate a compelling reason to protect its own legitimate privacy expectations. It would be equally anomalous to require a court to provide a *compelling* reason for controlling the use of confidential information obtained in discovery where a litigant's privacy interests and the integrity of the discovery process are at stake.

We note, however, that this lesser standard applies only to the regulation of information received directly from the government and not to government information independently received from a third party. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-46, 98 S.Ct. 1535, 1540-45, 56 L.Ed.2d 1 (1978) (first amendment does not permit criminal punishment of *third persons* who are *strangers to the inquiry*, as distinguished from participants, for divulging truthful information regarding confidential proceedings); *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971) (*per curiam*) (first amendment prohibits issuing injunction, absent compelling interest, restraining newspaper's publishing government information received from third party).

constitutional protection.³³ The Post's free expression interest in Mobil's commercial information is qualified because the Post received that information directly from the district court. The Post's free expression interest must therefore bow to the court's obligation to avoid a severe intrusion on Mobil's constitutionally protected privacy interest and to preserve the integrity of the discovery process. Consequently, respect for the Post's free expression interest cannot provide the compelling reason necessary to justify the district court's order to unseal.

VI. CONCLUSION

Our holding in this case does not undercut in any way the first amendment's bulwark against infringements on speech independently obtained from nongovernmental sources. This decision will not require a court to evaluate the importance or propriety of speech according to its content or subjectively examine the speaker's motives for dissemination. Rather, our holding will require a court only to determine whether information obtained through its own compulsory processes may legitimately be called confidential. To allow the court to qualify the use of confidential information it supplies does not muzzle the recipient; it simply acknowledges and protects legitimate privacy expectations. The recipient remains free to comment on any related events independently discovered.

Protective orders, of course, should be narrowly drawn to guard the privacy expectations of the litigants and, if possible, to serve the primary purpose of discovery by

³³ Since the district court's interest in protecting the Post's free expression right must be compelling to justify its severe intrusion on Mobil's privacy interests, we need not specify the exact strength of the Post's free expression right, but only whether it is deserving of full constitutional protection. Indeed, we express no opinion on whether free expression interests exist at all in discovery materials.

Even if, however, we were to start our analysis by assuming the Post had some free expression interest in discovery materials and then identified Mobil's countervailing interests, our result would be unchanged. This court, in

allowing full investigation of the disputed facts and issues. Also, we recognize that a litigant's privacy interests may have to fall to the public's important interest in scrutinizing any documents providing the basis for a judicial decision.

In this case, the November 5, 1981 protective order did not silence all comment on issues covered in the depositions. See *supra* note 6. The order prohibited dissemination only of confidential information discovered from Mobil's files. Moreover, the November 5, 1981 protective order was narrowly drawn to allow the Post opportunity for full investigation of the disputed facts and issues. Finally, the depositions at issue were never used at trial, and therefore could not be the basis for a judicial decision. In the absence of a compelling interest supporting disclosure, Federal Rules of Civil Procedure 26(c)(7) provides for, and Mobil's constitutionally protected privacy interest compels, the district court to reinstate the seal on the 3800 pages of deposition transcript never used at trial.

It is so ordered.



McGehee v. Casey, 718 F.2d 1137 (D.C.Cir. 1983), concluded that restrictions on "the speech of government employees must 'protect a substantial government interest unrelated to the suppression of free speech,'" and be narrowly drawn. At 1142-1143 (citations and footnote omitted). The district court's interest in protecting Mobil's privacy interests and the integrity of the discovery process, see *supra* page 1027, is at least substantial, and the seal on the disputed depositions is narrowly drawn to cover information obtained only through formal discovery processes.

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I

THE REALITY OF DISCOVERY AND THE ROLE OF
PROTECTIVE ORDERS

To appreciate the reality of protective order litigation, one must first appreciate the reality of discovery in general. The Federal Rules of Civil Procedure were designed to effect a revolution in litigation by broadening the availability of discovery.²⁸ They did so, with the result that the intrusiveness and burdensome nature of discovery is the most cited objection to the litigation boom. As a former federal judge observed in 1976, "[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment."²⁹ This concern is not easily disregarded, particularly in view of the broad opportunity to compel disclosure by nonparties, and the urge to restrain discovery is hard to resist. In 1980, three Justices of the Supreme Court dissented from the promulgation of amendments to the Federal Rules' discovery provisions on the ground that the amendments did not sufficiently curb the overuse of discovery.³⁰ Since then, the Court has amended the discovery rules to require courts to take a more active role in controlling discovery.³¹ Thus, the tide may be turning against intrusiveness.

The need to permit full preparation for trial is the normal justification for intrusion into the affairs of parties and nonparties. The

provides no basis for restraining disclosure of information obtained by other means. *See International Prods. Corp. v. Koons*, 325 F.2d 403, 408-09 (2d Cir. 1963); *cf. Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) (holding that privileged materials stolen from defendant's garbage can by plaintiff may be used as evidence).

²⁸ *See generally* 8 C. WRIGHT & A. MILLER, *supra* note 2, §§ 2002-07 (1970); Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059-60 (1955); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 950-51 (1961).

²⁹ Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

³⁰ *See Amendments to the Federal Rules of Civil Procedure*, 446 U.S. 997 (1980) (Powell, Stewart, and Rehnquist, J.J., dissenting); *cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (discussing "possible abuse of the liberal discovery provisions of the Federal Rules" in securities cases).

³¹ The new amendments, which became effective on August 1, 1983, are designed to curb abusive litigation and assure that the courts take a more active hand in managing discovery. *See Federal Rules of Civil Procedure*, 97 F.R.D. 165 (1983). Rule 11, as amended, applies to all papers, including formal discovery, and imposes on the attorney signing such papers the duty to make "reasonable inquiry . . . that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.* at 167. Rule 26(b)(1) now authorizes courts to limit discovery when the party seeking discovery has had adequate opportunity to complete discovery, when more convenient means of discovery are available, or when "the discovery is unduly burdensome or expensive, given the needs of the case." *Id.* at 172. Finally, and most significantly, rule 16, as amended, requires courts to enter an order within 120 days of the filing of the complaint limiting the time in which the parties must complete discovery. *Id.* at 168-69. Thus, the amended discovery rules have greatly expanded the role of the court in discovery. *See generally* Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

Supreme Court, in its leading discovery case, *Hickman v. Taylor*,³² emphasized that full disclosure is at the heart of the discovery rules, which were intended to enable the parties "to obtain the fullest possible knowledge of the issues and facts before trial."³³ Accordingly, the Court directed that "the discovery provisions are to be applied as broadly and liberally as possible,"³⁴ an admonition many lower courts took to heart. Some lower courts, for example, have held that a lawyer's instruction to a deposition witness to refuse to answer a question on the ground that the question is irrelevant is improper behavior warranting sanctions.³⁵ Courts have extended this general presumption in favor of disclosure into the area of confidential information. As the Tenth Circuit has explained, "[t]he need for the information is held paramount but reasonable protective measures are supplied to minimize the effect on [the parties making the compelled disclosures]."³⁶ The reason for this attitude is that the use of discovered information should be limited to the purpose for which its disclosure was compelled—preparation for trial. Thus have protective orders removed some of the harsh edges of liberal discovery.

Emphasizing the rationale underlying discovery helps to explain a central psychological reality of discovery practice—the assumption that any use of discovery materials except to prepare for trial is inappropriate. Indeed, attorneys arguing against the issuance of a formal protective order often proclaim their adherence to this view to assure nervous adversaries that there is no need to worry that information they obtain through discovery will be put to nonlitigation uses. Proving that this

³² 329 U.S. 495 (1947).

³³ *Id.* at 501.

³⁴ *Id.* at 506.

³⁵ See, e.g., *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977); *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 32 Fed. R. Serv. 2d (Callaghan) 632, 634 (D.D.C. 1981); *United States v. IBM*, 79 F.R.D. 378, 381 (S.D.N.Y. 1978); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 519-20 (E.D. Tenn. 1977); *Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446, 449-50 (D.D.C. 1965). Rule 30(c) itself states that "[e]vidence objected to shall be taken subject to the objections." The justification is that requiring answers over objections that the question is irrelevant expedites the discovery process, although an exception is made, of course, where trade secrets or privileged information is involved. Thus, even the elastic relevancy limitations of rule 26 give way in the deposition situation to expedite the process.

³⁶ *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965), *cert. denied*, 380 U.S. 964 (1966). Sometimes the need for confidentiality outweighs the interest of the litigant in having the information. For example, in *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494 (N.D. Ill. 1983), the defendant drug manufacturer, sued for injuries allegedly caused by the drug DES, subpoenaed data compiled by a medical researcher who had spent years studying the effects of DES. The witness resisted on the ground that breaching the confidentiality under which he had been compiling information would destroy his research efforts. The court granted his motion for a protective order against the discovery, in part, on the theory that there is a first amendment interest that would be undercut by impairing the free flow of information to medical researchers. See *id.* at 500. One suspects that the court may have felt that the defendant hoped to undermine the research effort.

assumption exists is difficult, in part because it is so pervasive.³⁷ Even in *Halkin*, where there existed no protective order or prior agreement that the previously purged material be held in confidence, the plaintiffs felt constrained to give the defendants one week's notice of their intent to release discovered documents to the press.³⁸ The tendency of courts to enter protective orders, sometimes *sua sponte*,³⁹ limiting the use of *all* information produced through discovery to preparation for trial provides additional evidence of the existence of this assumption.⁴⁰ Even though there was no formal protective order, at least one court has enforced such a restriction on the ground that because the parties understood the practice it was tantamount to a stipulated Rule 26(c) order.⁴¹

³⁷ Faced with the challenge of *Halkin*, some courts are putting this previously unstated assumption into words. Thus, the Washington Supreme Court recently described the underlying assumption as follows:

Parties seeking to utilize the processes of discovery necessarily acquaint themselves with the rules which attend that process. They know the purposes for which discovery is intended, and that protective orders can be entered in the discretion of the court. Attorneys are surely aware that it is improper to exploit the fruits of discovery by using them for other than authorized purposes. It is true that no penalty can attach for such use if a protective order is not obtained; but it is understood in the majority of cases that confidentiality will be respected, thus removing the necessity of seeking such an order to protect against unwanted publicity.

Rhinehart v. Seattle Times, 98 Wash. 2d 226, 239 n.4, 654 P.2d 673, 681 n.4 (1982), *cert. granted*, 52 U.S.L.W. 3261 (U.S. Oct. 4, 1983) (No. 82-1721).

³⁸ As indicated *supra* note 12, there was an indication that the defendants had requested such notice. Absent an agreement to provide such notice, however, the plaintiffs would not have been under an obligation to do so.

³⁹ In *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 971 (3d Cir. 1982), for example, the trial court rejected the defendant's proposed protective order and directed instead that all material obtained by the plaintiff through discovery be used only in preparation for the litigation.

⁴⁰ *See, e.g.*, *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 971 (3d Cir. 1982); *Krause v. Rhodes*, 671 F.2d 212, 215 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982); *National Polymer Prods. Co. v. Borg-Warner Corp.*, 641 F.2d 418, 420 (6th Cir. 1981); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293 (2d Cir. 1979); *AT&T v. Grady*, 594 F.2d 594, 595 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 246 (2d Cir. 1961); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (documents disclosed by United States Department of Agriculture); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578, 578 (Pretrial Order No. 44 governing all videotaped depositions), 587, 588 (Pretrial Order No. 42 governing all documents produced by the Environmental Protection Agency) (E.D.N.Y. 1983); *United States v. ARA Servs., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,250 (E.D. Mich. 1978); *Alloy Cast Steel Co. v. United Steelworkers*, 70 F.R.D. 687, 689 (N.D. Ohio 1976); *Textured Yarn Co. v. Burkhart-Schier Chem. Co.*, 41 F.R.D. 158 (E.D. Tenn. 1966); W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 311-15 (1982) (reproducing protective order entered in *In re Uranium Indus. Antitrust Litig.* No. MDL 342 (N.D. Ill. Sept. 6, 1978)); Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RESEARCH J. 375, 398 (describing order in *United States v. AT&T* that applied to all documents produced).

⁴¹ *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 131-32 (S.D.N.Y. 1976) (limitation applied to all documents, not only those designated as confidential); *cf. Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84 (E.D.N.Y. 1981) (private prelitigation

Parties desire to keep information confidential for many legitimate reasons. Although some of these reasons might not constitute good cause under rule 26(c), they are often important to the parties. For example, in an antitrust price-fixing case, one would ordinarily expect that the defendants' principal concern would be to restrict the plaintiff's dissemination of information. Although that undoubtedly is a concern, the defendants may be more concerned about turning over such information to any codefendant competitors, not only because the information is a trade secret, but also because the exchange of such information is often the predicate for a price-fixing claim. Even if this concern initially appears specious, the astute antitrust defendant desires to preclude any possibility that the exchange of pricing information during discovery will return to haunt him in a later antitrust proceeding. One can imagine other similar concerns about disclosure. Thus, a protective order may protect a number of interests by precluding disclosure of otherwise confidential information that may have untoward consequences wholly unnecessary to the full preparation of the case for trial.

Against this background, it should come as no surprise that in complex cases the parties customarily stipulate to protective orders negotiated by opposing counsel. In recognition of the general confidentiality of discovery, these negotiations normally focus on which protective devices the parties will use—e.g., limitations on access, separate storage, and the designation of persons eligible for access—rather than on the question of whether there should be an order limiting dissemination of discovery materials. These stipulated orders, which usually provide “umbrella” protection for all materials designated confidential by the party producing them, have become the norm in many areas of federal practice. Judge Becker acknowledged this reality in *Zenith*, observing that he was “unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court. Protective orders have been used so frequently that a degree of standardization is appearing.”⁴² The parties agree to such orders in order to commence discovery without the expense and delay involved in debating the scope of protective provisions.

The standardized protective order forms confirm this practical ori-

agreement with respect to exchange of confidential materials held unenforceable against discovery request).

⁴² 529 F. Supp. at 889. Even in *Halkin*, the court recognized that “[t]his procedure is commonly used to preserve parties’ right to assert claims of privilege with respect to particular documents in complex cases.” 598 F.2d at 196 n.47. *But cf.* *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981):

[T]he fact that something may be the general practice does not mean that the practice must be adopted by an unwilling party. The State is certainly within its rights to demand that Hooker make the requisite showing if it believes the confidentiality claim would be used haphazardly like a “rubber stamp.”

entation. *The Handbook of Recommended Procedures for the Trial of Protracted Cases*, introduced in 1960, proposed that courts should routinely enter protective orders covering all confidential information produced through discovery.⁴³ The *Handbook's* successor, the *Manual for Complex Litigation*, sets forth an instructive sample protective order.⁴⁴ This order permits the party producing material to designate as confidential a broad range of commercial information.⁴⁵ The discovering party may disclose such information only to counsel of record and other "qualified persons" involved in preparation for trial, whom the discovering party has previously identified to the producing party.⁴⁶ The sample order further directs counsel to designate as confidential all summaries or exhibits that they have prepared using designated information.⁴⁷ The discovering party must return all designated information, including any

⁴³ HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, Sample Form No. 4 pt. II, para. 6, reprinted in 25 F.R.D. 351, 447 (1960) (adopted by Judicial Conference in March, 1960) (such information "shall be used for no purpose other than for preparation for trial in this case.").

⁴⁴ MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 357 (5th ed. 1982). For other examples of protective orders, see W. SCHWARZER, *supra* note 40, at 235-37, 311-15, 405-10 (reproducing protective orders entered in several recent cases).

⁴⁵ See MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 357-58, para. 1 (5th ed. 1982). This paragraph identifies financial, engineering, and marketing information and information relating to business plans as information eligible for designation. The paragraph further provides, however, that "[it] shall not be deemed to exclude any other type or classification of documents for which confidentiality is claimed by a party." Whether this provision is limited to matters included within rule 26(c)(7) is unclear. Consequently, the parties may devise their own version of confidentiality. Such liberties with the definition of confidentiality become significant when a challenge to the designation of certain materials comes before the court. The parties may then argue that the court should apply the order's definition of confidentiality rather than the definition in rule 26(c)(7). Although the fact that the order must be based on rule 26(c) may appear to undercut this argument, it must be remembered that the court does have broad discretion. Absent such a motion, however, protective provisions can apply to materials that would not otherwise qualify for protection under rule 26(c)(7). Oddly enough, the *Manual's* sample order does not contain an express provision relating to a possible challenge to a party's designation. Under the sample order, then, a court may have no occasion to limit the protective provisions to materials that would invoke rule 26(c) protections.

⁴⁶ See MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 358, para. 2 (5th ed. 1982). The sample order designates as qualified persons only counsel of record. Any other person, including the client, must execute an affidavit stating that he will obey the order. See Note, *Balancing Competing Discovery Interests in the Context of the Attorney-Client Privilege: A Trilemma*, 56 S. CAL. L. REV. 115 (1983) (arguing that prohibiting disclosure to clients strains attorney-client relationship).

The sample order further requires that the party producing the confidential material be given advance notice so that he may object to the inclusion of this new person. Such a provision, however, arguably invades the attorney's work product to the extent that it requires the identification of expert consultants retained by the attorney, whose identity would not otherwise have to be revealed. See FED. R. CIV. P. 26(b)(4)(B). Under the sample order, the attorney, prior to allowing such expert consultants to inspect designated materials, must first notify the producing party that the consultant has become a "qualified person." This matter is, of course, a proper subject for negotiation in the drafting of a stipulated protective order

⁴⁷ See MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 359, para. 6 (5th ed. 1982).

documents prepared by counsel, to the producing party at the termination of the litigation.⁴⁸ In the interim, the order strictly limits the use of the information; it provides that persons receiving confidential documents or information through their participation in the litigation "shall not disclose such confidential documents, their contents, or any portion or summary thereof to any person or persons not involved in the conduct of this litigation."⁴⁹

Thus, protective order practice has effected substantial limitations on the dissemination of discovery material without substantial court involvement. The parties are often overzealous in designating materials confidential. In *Zenith*, for example, plaintiff Zenith produced some 100,000 pages of material on paper preprinted with a confidentiality designation.⁵⁰ In some cases, the parties designate every document produced confidential.⁵¹ The availability and frequent use of substantial confidentiality protections should minimize concerns about the possible misuse of information and, at the same time, maximize access to it.

The assumption of confidentiality carries over into the conduct of the discovery process. Far from being open to the public, discovery actually occurs in private. For example, much of the information collected in preparation for litigation is gathered through investigation conducted by or for counsel rather than through formal discovery. In accordance with the belief of many judges and attorneys that investigation is the most important part of pretrial preparation, the public interest in pre-discovery investigation should be equal to the public interest in formal discovery. Although some have argued that such investigation is sufficiently formal to warrant court supervision,⁵² in practice this investigation remains a private affair. The work product doctrine generally

⁴⁸ *See id.* at 359-60, para. 7. Because counsel's own summaries are confidential materials within the meaning of the order, a judge should normally exempt work product materials from the duty to return. Courts treat the obligation to return discovered documents quite seriously. For example, in *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983), the trial court held the plaintiff in contempt for failure to return documents at the end of the litigation, as required by the protective order. A divided panel of the court of appeals reversed the finding of contempt on the ground that there was insufficient evidence that Falstaff had wilfully violated the protective order. It did, however, affirm the district court's order awarding defendants more than \$27,000 in attorney's fees in connection with proceedings regarding the failure to return the documents.

⁴⁹ MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 358, para. 3 (5th ed. 1982).

⁵⁰ 529 F. Supp. at 875 n.11. Judge Becker noted further that "the parties had long since gone far beyond erring on the side of caution and had stamped 'confidential' on their submissions and discovery materials almost as a matter of course." *Id.* at 878.

⁵¹ According to the brief for the United States in opposition to the petition for certiorari in *AT&T v. MCI Communications Corp.*, AT&T not only treated all documents produced as confidential but also designated every page of every deposition as confidential, often before the deposition had commenced. *See* Brief for the United States In Opposition to Petition for Certiorari at 4, *AT&T v. MCI Communications Corp.*, 695 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

⁵² *See* *United States v. IBM*, 415 F. Supp. 668 (S.D.N.Y. 1976) (rejecting defendant's

shields such investigation from discovery;⁵³ not even the adverse party, much less the general public, has a right to information obtained through prediscovery investigation.⁵⁴

Formal discovery under the Federal Rules is often no more public than the investigation process. Indeed, the principal distinction between investigation and formal discovery is that investigation is carried on without notice to the other parties to the lawsuit. The private character of formal discovery is the result of two factors. First, reliable public notice about the actual time and place of pretrial discovery is rare. Although the rules authorize the parties to initiate formal discovery by filing notices in court,⁵⁵ much discovery, particularly by deposition, is often scheduled informally without any filing. Even when the parties have filed a notice, discovery is often rescheduled to accommodate the calendars of the lawyers, the parties, or the witnesses.

Second, and more significantly, pretrial discovery usually takes place in law offices or on other private property.⁵⁶ Document inspection and depositions lie at the heart of the pretrial preparation process. Both of these activities ordinarily occur either in the lawyer's offices, on the producing party's business premises, or at some other private place. Although the deposing party must obtain a court order to exclude the other party from a deposition,⁵⁷ no court order is required to exclude nonparties who simply evince an interest in observing the deposition. Thus, even if a newspaper reporter or some other nonparty were to present himself at the right time and place, the parties could legally refuse to

argument that interviews conducted on plaintiff's behalf using FBI agents are "virtually depositions").

⁵³ The protection is implicit in the work product doctrine for, as Justice Jackson put it, "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

⁵⁴ There are circumstances, however, where discovery is allowed for the fruits of investigation. *See* FED. R. CIV. P. 26(b)(3) (allowing discovery of some witness statements and, on a showing of substantial need, other work product); FED. R. CIV. P. 26(b)(4)(B) (allowing discovery of facts known or opinions held by an expert employed in anticipation of litigation but not expected to testify (i.e., for investigative purposes) only under "exceptional circumstances").

⁵⁵ *See* FED. R. CIV. P. 30-34.

⁵⁶ This observation, of course, applies only to depositions and document inspection and is not true with respect to written discovery mechanisms such as interrogatories and requests for admissions. But interrogatories and requests for admissions tend by their very nature to be so general or so specific that they do not set forth or explain the really significant details unearthed by the other forms of discovery.

⁵⁷ *See* *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491 (E.D. Va. 1970). Several courts have held that rule 615 of the Federal Rules of Evidence is applicable to an attempt to exclude a party's retained expert from a deposition. *See, e.g., Williams v. Elec. Control Systems, Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975).

admit him. Public access to document inspections, which often occur on the producing party's business premises, is similarly limited.

According to the Federal Rules, then, the public has neither the opportunity nor the right to observe discovery. For some discovery activities, however, the Federal Rules appear to require a public record of the fruits of the activity. That appearance, however, is largely misleading. Document inspection, despite its central importance to pretrial preparation, produces no public record.⁵⁸ Instead, the inspecting party normally obtains copies of the documents it deems relevant for future use in the case. These documents are not filed in court, and no record is made of the documents not copied. Although the Federal Rules have traditionally required that the parties file interrogatory answers, responses to requests for admissions, and deposition transcripts, under the 1980 amendments courts may order that these materials not be filed.⁵⁹ Even before the amendments, a Federal Judicial Center study showed that the parties neglected to record twenty-five percent of all discovery activity.⁶⁰ As a result of the 1980 amendments, which were designed as a space saving measure, there may be no public record of such discovery materials even though no party has alleged that they contain confidential information. Indeed, many district courts have adopted local rules that eliminate filing of some or all of these discovery materials.⁶¹ In

⁵⁸ A deposition may be taken in connection with the production of documents by a third party. *See* FED. R. CIV. P. 45(b). Even then, however, a substantial public record very rarely is generated.

⁵⁹ In 1980, rule 5(d) was amended to provide that a "court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court." The Section of Litigation of the American Bar Association had urged a change in the mandatory filing provisions which would have amended rule 5(d) to forbid filing except by court order. *See* ABA SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977), reprinted in 92 F.R.D. 149, 156-57 (1977). Several states have such a rule. *See, e.g.,* CAL. CIV. PROC. CODE § 2030 (West Supp. 1983). The shift to a rule of nonfiling excited some opposition, however. *See* REPORT OF THE AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION TO THE SEVENTH CIRCUIT JUDICIAL COMMITTEE AND THE BAR ASSOCIATION OF THE SEVENTH FEDERAL CIRCUIT (1979), reprinted in 86 F.R.D. 267, 284-85 (1979) (arguing that having discovery on file assists court in keeping tabs on parties' progress in discovery). The amendment was, thus, a compromise, requiring action to terminate the filing requirement rather than action to reinstate it. The Advisory Committee on the Federal Rules noted that "such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." FED. R. CIV. P. 5(d) advisory committee note. One commentator has labeled the amendment "misguided" precisely because it will impair public access to discovery materials. *See* Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1095 n.51 (1981).

⁶⁰ P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 27 (1978); cf. *Brown v. Felsen*, 442 U.S. 127, 128 (1979) ("Because the case was settled, respondent's sworn deposition was never made part of the court record.").

⁶¹ Many district courts have adopted local rules providing that the parties are not to file

addition, where deposition transcripts are filed, many district courts have local rules that either prohibit public access to the materials or keep them under seal until the court orders them unsealed or until one of the parties formally requests that the court make them available to the public.⁶² Even where the local rules provide that deposition transcripts shall be kept in an open file, access to the records is still effec-

some or all discovery materials in court unless so ordered by the court or if the materials are needed in connection with motion proceedings. *See, e.g.*, C.D. CAL. R. 6(d) (all discovery); S.D. CAL. R. 230-4 (interrogatories, requests for admissions), 231-7 (depositions); M.D. FLA. R. 3.03(c) (interrogatories), 3.03(d) (depositions); N.D. GA. R. 181.2 (all discovery), 211.1 (depositions); C.D. ILL. R. 17 (all discovery); S.D. ILL. R. 16 (all discovery); N.D. & S.D. IOWA R. 2.3.33 (interrogatories); D. MINN. R. 8B(d) (all discovery); D. MONT. R. 8(c) (all discovery); D.N.H.R. 39 (all discovery); S.D.N.Y. CIV. R. 19 (all discovery); E.D.N.C.R. 3.09 (all discovery); D. OR. R. 120-4(a) (all discovery); D.P.R.R. 10 (all discovery); D.R.I.R. 13(a) (interrogatories, requests for documents, requests for admissions), 14(b) (depositions); D.S.C. Order of June 12, 1978, re Filing of Discovery (all discovery); M.D. TENN. R. 9(c)(1) (only depositions to be used in evidence, all interrogatories, requests for admissions, requests for documents); W.D. TEX. R. 300-6 (interrogatories, requests for documents, requests for admissions); W.D. WASH. CIV. R. 33(e) (interrogatories, requests for documents). For analogous state provisions, see CAL. CIV. PROC. CODE §§ 2019(f)(1), 2030(b) (West Supp. 1983).

It appears that the courts promulgated these rules to save space; several of the rules explicitly state that as their purpose. Only one, however, has made any provision for assuring the public some access to unfiled discovery materials: "During the pendency of any civil proceeding, any person may, with leave of court obtained after notice served on all parties to the action, obtain a copy of any deposition or discovery documents not on file with the court upon payment of the expense of the copy." D. OR. R. 120-4(b). The rule gives no indication of the showing, if any, that a person must make to justify the granting of such leave of court. Nonetheless, it is noteworthy that access is only by leave of court because such permission presumably would be unnecessary if the nonparty had an absolute right to obtain a copy of the materials.

⁶² Many courts have special rules limiting public access to deposition transcripts that are on file. These rules generally provide that the transcripts will remain sealed even though they are on file. *See, e.g.*, D. ALASKA R. 8(A) (public inspection allowed only on order of court); S.D. CAL. R. 231-6 (clerk shall reseal the deposition after filing); D. CONN. R. 8(b) (depositions withheld from public inspection); C.D. ILL. R. 16 (deposition opened only at request of party or order of court); N.D. IND. R. 20 (unless otherwise ordered by the court, deposition opened only at request of party, judge, or member of judge's staff); D. KAN. R. 17(c) (deposition opened at request of attorney of record); D. MASS. R. 14(b) (deposition opened at request of attorney of record); D.N.D.R. 13 (deposition opened only on order of court); S.D. OHIO R. 4.6.2 (deposition opened only at direction of court or request of attorney of record); E.D. OKLA. R. 14 (deposition opened by order of court or written application by attorney of record), N.D. OKLA. R. 15 (deposition opened by order of court or on written application by attorney of record); W.D. OKLA. R. 15 (deposition opened by order of court or on written application by attorney of record); S.D. TEX. R. 10E (deposition opened on application by counsel of record or order of court); S.D. W. VA. R. 2.08 (deposition opened on order of court or written request of party); W.D. WIS. R. 19 (deposition opened only on request of party); D. WYO. R. 7(c) (deposition opened on application by attorney of record, then immediately resealed).

Arguably these limitations are inconsistent with rule 30(f). According to Professors Wright and Miller, "[u]pon filing the deposition should be immediately opened by the clerk, and made available for public inspection, unless the court has made a protective order that the deposition remain sealed." 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2119, at 438 (1970) (footnotes omitted). For a case overturning a local rule limiting access to filed deposition transcripts under an analogous state procedure, see *Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867 (Fla. Dist. Ct. App. 1979).

tively limited because the filing occurs only after the deposition is completed.⁶³ Furthermore, the public access is restricted to reading the transcript in the clerk's office; such access does not include the right to copy the transcript.⁶⁴

Even in the absence of a protective order, then, the filing provisions provide little reliable access to any discovery materials prior to trial. The actual privacy afforded pretrial proceedings is further buttressed by the entry of customary umbrella protective orders authorizing the filing under seal of confidential materials.⁶⁵

In sum, discovery is not a public process. The public has no reliable method for determining when or where discovery proceedings will take place and no absolute right to attend them even if aware of the time and place. The fruits of discovery are often not filed in court, and, even when they are, the public may not have access to them. All of this is consistent with the underlying assumption of the litigants and the courts that discovery compels the disclosure of information solely to assist preparation for trial. This assumption, in turn, regularly leads parties to agree, and courts to order, that such information be put to no other use. The reality against which constitutional and common law issues should be assessed is, therefore, a reality of confidentiality—one that is inherent in the discovery process and essential if parties are to avoid the unwarranted harm that may result from the intrusiveness of modern discovery.

II

THE POTENTIAL IMPACT ON REALITY OF THE RIGHT OF ACCESS APPROACH

The cases endorsing a public right of access to discovery materials or emphasizing the parties' first amendment right to disseminate those materials offer a picture of the discovery process dramatically different from the reality described above. Rather than emphasizing the speedy resolution of private disputes, these courts suggest that litigation is imbued with a public interest that warrants access to all phases of the litigation process. Before addressing the potential impact of these decisions

⁶³ Indeed, in some places even then the reporter may not file the deposition transcript. *See C.P.C. Partnership Bardot Plastics, Inc. v. P.T.R., Inc.*, 96 F.R.D. 184, 185 (E.D. Pa. 1982) (noting that practice in Eastern District of Pennsylvania is for reporter to give deposition transcript to deposing attorney, leaving it to attorney to file transcript himself).

⁶⁴ *See* FED. R. CIV. P. 30(f)(2) (requiring that reporter furnish copy of transcript to deponent or any party upon payment of reasonable charge). At best, the public has an opportunity to read the original in the clerk's office.

⁶⁵ *See* MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 359, para. 5 (5th ed. 1982). *But cf.* *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that district court order sealing all files "impermissibly reverse[d] the 'presumption of openness' that characterizes criminal proceedings").

on existing reality, it is useful to note the assumptions on which these courts have based their opinions.

Courts that reject requests for protective orders frequently assert that "pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings."⁶⁶ In addition, these courts emphasize the role that litigation plays in the resolution of major social issues while down-playing its function in resolving private disputes. In *Halkin*, for example, the majority stated that "[l]itigation itself is a form of expression protected by the First Amendment."⁶⁷ Other courts have emphasized the utility of litigation as a device for unearthing wrongs. The Seventh Circuit noted that

many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.⁶⁸

Similarly, the Ninth Circuit has implied that discovery serves in part to "force a full disclosure" to the public⁶⁹ and the District of Columbia Circuit in *Halkin* viewed with equanimity the possibility of using civil litigation as an alternative to the Freedom of Information Act to obtain information in the government's possession.⁷⁰ At least one commentator has ventured to posit situations in which "even though the litigants may be perfectly willing to keep the facts of the litigation to themselves, the public interest requires that they not be permitted to do so."⁷¹ The

⁶⁶ *AT&T v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *see also Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979) ("[S]ecrecy is the exception, not the rule."); *Davis v. Romney*, 55 F.R.D. 337, 340 (E.D. Pa. 1972) ("[P]re-trial proceedings of the federal judicial system are conducted in public . . ."); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969) ("[A]s a general proposition, trial and pre-trial proceedings of the federal judicial system are ordinarily conducted in public.").

⁶⁷ 598 F.2d at 187 (citing *In re Primus*, 436 U.S. 412, 431 (1978) and *NAACP v. Button*, 371 U.S. 415, 429-31 (1963)). *Primus* and *Button* both addressed the propriety of invoking the rules of professional conduct to restrict lawyers' use of litigation as a device to achieve social or political ends. For a discussion of the special problems that arise from the use of protective orders in public interest litigation, see *infra* text accompanying notes 282-87. For the present, it is sufficient to note that in each such case the goal sought by public interest litigation was judicial relief, rather than court-assisted access to otherwise unavailable information.

⁶⁸ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Although the quoted comments were generally directed toward rules restricting attorney comment in all cases, other courts have relied on them in protective order cases. *See, e.g., In re Halkin*, 598 F.2d at 187.

⁶⁹ *See Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964).

⁷⁰ Thus, Judge Wilkey observed in dissent that the plaintiffs could have used the Freedom of Information Act, 5 U.S.C. § 552 (1982), to obtain the materials in question. *See* 598 F.2d at 207 n.30 (Wilkey, J., dissenting).

⁷¹ *Dore, supra* note 25, at 15.

prospect exists, then, that a court may find that the public interest compels dissemination of discovered materials even over the objections of all the parties, an odd inversion of the litigants' first amendment rights of free expression.

In evaluating the first amendment rights of the parties to disseminate information obtained through discovery, those courts that endorse broad access to discovery materials begin with the presumption that the public has a right to such access. The public's alleged right to access, therefore, serves as an important backdrop against which these courts evaluate the litigants' first amendment rights to disclose discovered materials. These courts counter the contention that discovery exists solely for trial preparation by asserting that the Federal Rules presume unfettered use of discovery materials not covered by protective orders, thereby undercutting further the propriety of disclosure restrictions.

To protect both the alleged public interest in access and the first amendment rights of the litigants, these courts insist that the party seeking limitations on dissemination make a detailed showing of need and that judges rigorously scrutinize that showing. Consequently, these courts view protective orders as the exception, rather than the rule, even in complex cases in which protective order litigation is most burdensome to both the courts and the parties.

This approach not only disregards the realities of discovery and the current use of protective orders, but also threatens to exert a "pernicious effect on the smooth functioning of the discovery system."⁷² Recognition of a first amendment right of access to discovered information would undermine litigants' confidence in protective orders. If one takes these decisions at face value, the party that produces information under shield of a protective order must realize that the continued confidentiality of the information depends more on the opposing litigant's whim in exercising his first amendment "right" to disclose the information than on the court's power to limit dissemination. This atmosphere of uncertainty is combined with the formidable burden of establishing a record sufficient to justify entry of a protective order. Together, mistrust of protective orders and the extensive record that the party requesting the order must compile threaten to eliminate stipulated protective orders, increase the risk that the parties will not disclose relevant information, impose substantial but unnecessary burdens on the litigants and the courts, and, in at least some cases, imperil the ability of the parties to reach settlements contingent on continued confidentiality. Courts that

⁷² *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 477 (S.D.N.Y. 1982); see also *In re San Juan Star Co.*, 662 F.2d 108, 115-16 (1st Cir. 1981); Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 436 & n.167 (1983) (describing uncertainty of protective orders and noting impact of *Halkin*).

endorse the right of access, however, neglect to address these potential consequences.

A. Stipulated Orders

The proliferation of stipulated protective orders enabled litigants to proceed with litigation and relieved courts of the burden of resolving discovery disputes. In view of the current trend, one must ask whether courts can continue to enter, and litigants continue to rely on, protective orders. The answers are unclear but ominous. Protective orders obviously are of little value if parties cannot rely on them. Yet the suggestion that the public interest in access to discovery materials may outweigh the parties' desire that these materials remain confidential certainly calls into question the parties' ability to stipulate to protective orders barring public access. Stipulated orders are, therefore, inherently inconsistent with right of access cases. To the degree that one accepts the broader assertions of those cases, stipulated orders may be ineffective against nonparties.

Of more practical importance is the view that the first amendment interests of the litigants preclude entry of protective orders absent a detailed showing that a compelling need for confidentiality exists. Arguably, a court must actually scrutinize the allegedly confidential materials before it issues an order, but courts do not follow this procedure in stipulated order situations. Although Judge Bazelon acknowledged in *Halkin* that umbrella orders might be appropriate in some cases,⁷³ the hurdles placed in the way of such orders may effectively make them unavailable.

One could attempt to avoid the constitutional and common law conflicts posed by this problem by asserting that conventional stipulated protective orders are not actually restraints on expression. Such orders do not purport to represent a judicial determination that certain materials are so confidential as to warrant restrictions on expression.⁷⁴ Usually, they permit any party to challenge the confidentiality designation and obtain a ruling on the issue.⁷⁵ At that point the burden of showing that the designated materials are confidential falls on the producing party.⁷⁶ Until a court invalidates a party's designation of materials as confidential, however, the order genuinely restricts disclosure and repre-

⁷³ See 598 F.2d at 196 n.47 (noting that such "flexibility" may be appropriate in cases "where the discovery embraces a large quantity of documents").

⁷⁴ See *supra* note 45. The party makes the designation, not the court, and may do so according to standards that appear broader than rule 26(c)(7).

⁷⁵ As indicated, *supra* note 45, this is not always so; the sample order in the *Manual for Complex Litigation* contains no such provision. MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 357 (5th ed. 1982). *Halkin* implies, however, that it is constitutionally required. See 598 F.2d at 196 n.47.

⁷⁶ *Halkin* implies that the Constitution requires the producing party to bear the burden of proving confidentiality. See also *Tavoulareas v. Piro*, 93 F.R.D. 24, 29 n.3 (D.D.C. 1981).

The central point is not that any of these courts erred in denying protection to the materials before them, but rather that the courts and litigants expended a great deal of energy on activities that did not advance the resolution of the litigation on the merits. Indeed, it appears that the courts that slavishly adhere to the *Halkin* requirements have made the requisite showing so difficult that it is often virtually impossible to obtain protective orders. Thus, the courts, after expending large amounts of time reviewing the matter, regularly deny protective order motions. This trend only increases the likelihood that parties seeking discovery who would previously have stipulated to protective orders will refuse, thereby compounding the burden on the courts of resolving matters irrelevant to the merits of the litigation.

D. Disclosure as an Impediment to Settlements

Far more cases are settled than tried. Commentators and judges increasingly recognize that facilitating settlements is a legitimate and desirable goal for courts to pursue.¹¹¹ The right of access approach imperils settlement efforts in two ways.

First, by undercutting the court's ability to assure a full exchange of information by entering an umbrella protective order, the stringent view of protective orders inhibits the untrammelled exchange of information between the parties. Although there is some question as to whether the exchange of information actually increases the likelihood of settlements,¹¹² many judges have concluded that it does.¹¹³ Attempting to verify the intuitive and reasonable conclusion of judges that full disclosure aids the settlement process as it does the litigation process is proba-

¹¹¹ Thus, the recent amendment to rule 16 explicitly directs that the pretrial hearing include discussion of "the possibility of settlement." FEDERAL RULES OF CIVIL PROCEDURE, reprinted in 97 F.R.D. 165, 170 (1983). The Advisory Committee notes suggest further that the court may "urge" the parties to explore private dispute resolution possibilities. Similarly, rule 68, relating to offers of judgment, provides an incentive to parties to accept formal settlement offers by imposing costs on them unless the ultimate judgment is more favorable than the offer. In August 1983, the Advisory Committee on the Civil Rules of the Judicial Conference of the United States proposed amendments to strengthen rule 68 as a device to promote settlements. See *Preliminary Draft of Proposed Amendments*, 712 F.2d xci, cxiii (1983). For a general discussion of the role of judges in the settlement process, see Tone, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 57 (1975).

¹¹² Thus, in recommending amendments to rule 26 in 1970, including addition of subsection 26(c), the Advisory Committee on the Civil Rules relied on the field survey of the Project for Effective Justice of Columbia Law School for the following: "Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement." *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 485, 489-90 (1970).

¹¹³ See, e.g., *Krause v. Rhodes*, 671 F.2d 212, 214 (6th Cir.) ("[T]he need for trial frequently disappears once both sides have a full and complete understanding of the facts."), cert. denied, 103 S. Ct. 54 (1982).

bly not worthwhile. Nonetheless, as long as there is even a possibility that those judges are right, it is counterproductive to foreclose attempts to facilitate settlement by invalidating or undercutting protective orders.

Second, the *Halkin* approach reduces or eliminates the possibility that effective limitations on disclosure can be made a part of a settlement package. A party may desire a settlement in part to avoid a trial at which confidential information will be disclosed. Such a party is likely to condition his willingness to settle upon the entry of a court order prohibiting the disclosure of the terms of the settlement or of information obtained through discovery. Indeed, the customary requirement that the discovering party return materials deemed confidential at the end of the litigation¹¹⁴ assumes that post-litigation disclosure is forbidden. Such settlements may substantially reduce the burden on the courts. The Second Circuit, for example, recently affirmed a secrecy order entered to effect a settlement by the Federal Deposit Insurance Corporation in a suit against an accounting firm arising out of the failure of Franklin National Bank.¹¹⁵ The court reasoned that the order was necessary to prevent a lengthy, bitterly contested trial,¹¹⁶ and therefore rejected a public interest group's request to set aside the order. But if a court must justify judicial limitations on free expression by detailed findings, how much weight should be accorded the interest in avoiding such a trial? Is the waste of judicial resources resulting from disclosure a harm sufficient to justify the order? Unless the settling parties can assume that protective orders will not be subject to later attack by outsiders or adverse litigants, this avenue of settlement may also be blocked.¹¹⁷

¹¹⁴ See *supra* text accompanying note 48.

¹¹⁵ *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982) (per curiam). The challenge to the order was based on the Freedom of Information Act, not the constitutional or common law right of access.

¹¹⁶ *Id.* at 231.

¹¹⁷ In this connection, some mention should be made of two popular arguments that threaten to undermine further the ability of courts to enter confidentiality orders to effect settlement. First, courts often take a "dated matter" approach to material for which protection is sought. Essentially, courts employing this approach hold that if so much time has passed that once-confidential material no longer appears highly sensitive, the passage of time precludes a showing of good cause to justify the issuance of a protective order. Although this analysis makes sense in the initial determination whether to issue the order, it threatens mischief in the context of a motion to modify such an order because the party seeking disclosure can then argue that passage of time since production renders continued protection inappropriate. This logic would seem to undermine almost all confidentiality orders entered as part of a settlement package because a party could certainly assert that the passage of time had obviated the need for continuing protection of the materials. Thus, courts should apply the "dated matter" approach only to the initial determination of whether to issue a protective order *ab initio*.

Second, some courts point toward the prospect of disclosure at trial as a ground for limiting protective orders, reasoning that if the information will be disclosed at trial, the additional harm that results from earlier disclosure is insignificant. But the court cannot be sure in advance precisely which material will be admissible at trial. More significantly, this

III REJECTING THE MYTH OF PUBLIC ACCESS

Many of the most troubling consequences of the public access approach result from the assumption that nonparties have some right to obtain discovery materials. This attitude is likely not only to foster litigation over protective orders and preclude settlements, but also to sanction lawsuits designed to obtain information rather than judicial relief. Part I demonstrated that the notion that all discovery takes place in public contradicts reality. This Part will show that the public access approach is also unsupported by legal authority. Accordingly, courts should reject the myth of general public access to discovery materials. In its place, this Part identifies the specific situations that justify non-party access.

A. The "Public" Nature of Discovery

It is insufficient to demonstrate that discovery is not, in fact, public. Instead, resolution of the right to access issue requires analysis of recent decisions expounding a constitutional and common law right of access to proceedings and judicial records.¹¹⁸ Although such an analysis does not demarcate the exact contours of these emerging doctrines, it does demonstrate that there is no persuasive legal support for an unfettered constitutional or common law right of general public access to civil discovery materials. Accordingly, there is no occasion to jettison reality in deference to new constitutional constructs.

The uncertain landmark in the area is *Richmond Newspapers, Inc. v. Virginia*,¹¹⁹ in which the Supreme Court held an order excluding the public from a criminal trial invalid on first amendment grounds. Although the holding is relatively clear, discerning the rationale behind it is a difficult task in view of the six separate opinions filed in the decision—none of which commanded the support of more than three Justices. Some of the opinions argued that the Court had recognized a first amendment right for "the acquisition of newsworthy matter"¹²⁰ or a "privilege of access to governmental information,"¹²¹ but the only cer-

argument disregards the fact that most cases do not go to trial; if the standard is whether information would be secretly received in evidence at trial, rule 26(c) would be entirely swallowed by another set of standards relating to closing the trial itself.

¹¹⁸ The distinction between the common law and constitutional rights, however much addressed, is somewhat ambiguous. The common law right is said to antedate the Constitution, whereas the first amendment right is of rather recent vintage. Yet, the latter is based on historical tradition. To avoid unnecessary complexity, this article will use them interchangeably.

¹¹⁹ 448 U.S. 555 (1980).

¹²⁰ *Id.* at 582 (Stevens, J., concurring). Professor Archibald Cox explains Justice Stevens's assertion as "wishful thinking." Cox, *Freedom of the Press*, 1983 U. ILL. L. REV. 3, 19

¹²¹ *Id.* at 586 (Brennan, J., concurring in judgment).

tain principle emerging from the decision is the Court's holding that the first amendment guarantees the public and, derivatively, the press the right to attend criminal trials except where compelling reasons require that the trial be closed.

Globe Newspaper Co. v. Superior Court,¹²² a 1982 decision in which the Court held that the public was improperly excluded from a trial of a sex offense during the testimony of the minor victim, provides useful insight into *Richmond Newspapers*. In *Globe Newspaper*, the trial court ordered the trial closed pursuant to a Massachusetts statute designed in part to encourage young victims to come forward with evidence of crimes. The Massachusetts Supreme Judicial Court held that the statute required that the trial be closed in every sex offense case during the victim's testimony. The court rejected a case-by-case analysis, asserting that a non-mandatory rule could undermine the statute's purpose because prospective complainants would not be assured the protection of the statute when deciding whether to come forward.¹²³

The Supreme Court, emphasizing the state court's insistence on mandatory application of the statute, reversed.¹²⁴ Speaking through Justice Brennan, the Court synthesized the essence of *Richmond Newspapers* as follows:

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. . . .

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. [It] enhances the quality and safeguards the integrity of the factfinding process. . . . fosters an appearance of fairness . . . [and] permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.¹²⁵

Having thus explained the import of *Richmond Newspapers*, the Court in *Globe Newspaper* found that the state had failed to substantiate its interest in encouraging minor victims to come forward with evidence, in part because it did not introduce sufficient supporting empirical evidence.¹²⁶ In a passage particularly significant for civil protective orders,

¹²² 457 U.S. 596 (1982).

¹²³ *Globe Newspaper Co. v. Superior Court*, 1981 Mass. Adv. Sh. 1493, 1502-03, 423 N.E.2d 773, 779-80 (1981), *rev'd*, 457 U.S. 596.

¹²⁴ The majority opinion was joined by five Justices. Chief Justice Burger, Justice Rehnquist, and Justice Stevens dissented. Justice O'Connor concurred in the judgment.

¹²⁵ 457 U.S. at 605-06 (footnote omitted) (emphasis in original).

¹²⁶ *See id.* at 609-10. The Court also noted that the supposed state interest was contradicted by the fact that the press had access to the transcript of the victim's testimony. Com-

Justice Brennan suggested that the interests in promoting full disclosure probably could not outweigh the constitutional right of access in any event because "that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward."¹²⁷ Consequently, the Court concluded that the state's argument "proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, 'that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.'"¹²⁸ Because the policy underlying protective orders—encouraging full disclosure by persons from whom information is sought in civil cases—is hardly more important than the societal interest in having crimes reported to the authorities, this reasoning bodes ill for the continued position of protective orders vis-a-vis the first amendment right of public access.

The critical issue, therefore, is whether the same right of access arguments apply to civil proceedings and, if so, whether these arguments are applicable to pretrial discovery as well as trial proceedings. At least one Justice believes that *Richmond Newspapers* applies only to criminal trials,¹²⁹ but there are many reasons to doubt this conclusion. Both features of the criminal justice system that the Court emphasized in *Globe Newspaper* are characteristic, to a substantial degree, of civil litigation as well. Civil trials, as Chief Justice Burger noted in his plurality opinion in *Richmond Newspapers*,¹³⁰ have traditionally been open to the public. More significantly, many of the societal interests said to support access to criminal trials are also implicated in civil trials. Although criminal justice admittedly plays a different and more newsworthy role in society than civil litigation, which is designed to resolve private disputes, the integrity of the factfinding process and public respect for the judicial process are important in the civil context as well. Some courts have

pare Justice Brennan's opinion in chambers in *Capital Cities Media, Inc. v. Toole*, 103 S. Ct. 3524, 3526 (1983) (Brennan, J., in chambers), where he granted a stay of a state court order that prohibited disclosure of information about jurors in a criminal case: "I assume, for purposes of argument only, that the State has a compelling interest in keeping personal information about jurors confidential in an appropriate case, either to assure the defendant a fair trial or to protect the privacy of jurors." (citations omitted).

¹²⁷ 457 U.S. at 610.

¹²⁸ *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 573).

¹²⁹ Concurring in the judgment in *Globe Newspaper*, Justice O'Connor announced that she would "interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." *Id.* at 611.

¹³⁰ See 448 U.S. at 567-68 (citing 17th century writers who argued that all courts should be open for civil as well as criminal trials), 580 n.17 ("[H]istorically both civil and criminal trials have been presumptively open."); see also *id.* at 596 (Brennan, J., concurring in judgment) (analogizing "miscarriage of justice that imprisons an innocent accused" to "mistakes of fact in civil litigation"). For a more detailed exposition of the proposition that "the historical analysis [as to rights of access] . . . is equally applicable to civil and criminal cases," see *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).

therefore concluded that *Richmond Newspapers* also establishes a right to attend civil trials.¹³¹

That conclusion does not mean that the Court would find the good cause standard an inadequate justification for pretrial protective orders. Indeed, the actual holding in *Globe Newspaper* suggests the contrary. In *Globe Newspaper*, the Court was most troubled by the automatic exclusion of the public under the Massachusetts court's interpretation of the state statute. Rejecting any automatic exclusion policy, the Court held that exclusion must be based upon an examination of the particular circumstances of the case in question.¹³² That kind of individualized analysis is, of course, precisely what the rule 26(c) good cause standard is designed to promote.¹³³ Thus, the holding of *Globe Newspaper* appears to authorize a procedure similar to that employed for contested protective orders.

The interests the Court has cited as justifying public access to criminal trials also appear inapplicable to pretrial discovery in a civil case. Even in the criminal context, the Court permits limitations on public access to anything more than proceedings in open court during trial. In *Nixon v. Warner Communications*,¹³⁴ for example, the Court upheld Judge Sirica's refusal to allow various recording companies access to a number of Watergate tapes even though the government had introduced the tapes into evidence and played them during the criminal trial of John Mitchell and a variety of former White House officials. The Court concluded that the first amendment does not provide a right of access to evidence and held that courts can limit the common law right of access if it threatens to become a "vehicle for improper purposes."¹³⁵ Among

¹³¹ See, e.g., *Newman v. Graddick*, 696 F.2d 796, 800-01 (11th Cir. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 896 (E.D. Pa. 1981); Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430 (1981); Note, *The First Amendment Right of Access to Government-Held Information: A Re-Evaluation After Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292, 328 (1982); Recent Development, *The Public and Press Have a Right of Access to Criminal Trials Absent an Overriding Interest Articulated in Findings*, 26 VILL. L. REV. 183, 202 (1980).

The Court has already faced one abortive attempt to obtain a ruling that *Richmond Newspapers* requires public access to pretrial proceedings in civil cases. In *Cox Enters., Inc. v. Vascocu*, No. C-719 (Tex. Sept. 24, 1981), cert. denied, 455 U.S. 994 (1982), the trial court in a civil case initially closed a pretrial hearing to avoid prejudicial publicity. See *Petition for Writ of Certiorari to the Supreme Court of Texas at 3, Cox Enters., Inc. v. Vascocu*, No. 81-1154 (1982). The trial court thereafter reopened the proceedings, apparently mooting the issue. See *Brief in Opposition at 3-4, Cox Enters., Inc. v. Vascocu*, No. 81-1154 (1982).

¹³² See 457 U.S. at 608 & n.20.

¹³³ See *supra* notes 5-9 and accompanying text.

¹³⁴ 435 U.S. 589 (1978).

¹³⁵ *Id.* at 598. The Court cited a number of state court decisions, described *infra* note 136, that it characterized as legitimately denying access to public records that might be "used to gratify private spite," "serve as reservoirs of libelous statements for press consumption" or "as sources of business information that might harm a litigant's competitive standing." 435 U.S. at 598. Although the contours of this power to limit access are unclear, the

the examples of such limitations the Court cited with apparent approval was a 1917 state court decision sealing a deposition and enjoining disclosure of the contents.¹³⁶ Thus, one may infer that the Court implicitly authorized the sealing of discovery materials, as well as restraints on the disclosure of discovered information, in certain circumstances.

In *Gannett Co. v. DePasquale*,¹³⁷ a 1979 decision, the Court upheld the closing of a pretrial suppression hearing in a criminal case to protect

litany of examples the Court provided is certainly informative by way of analogy for interpretation of rule 26(c). If there is an accepted history that would allow limitations on access even to public records in such circumstances, it would seem that the power to restrict access to discovery materials must be equally broad.

¹³⁶ *King v. King*, 25 Wyo. 275, 168 P. 730 (1917). The court there entered its order after the deposition was filed as part of a stipulated judgment. *Id.* at 280, 168 P. at 731. The other cases cited by the Court, 435 U.S. at 498, were: *C. v. C.*, 320 A.2d 717, 723 (Del. 1974) (court, noting that "civil litigation is not infrequently merely a means to resolve private disputes . . . [but that] [s]uch cases or portions of such cases may or may not be of legitimate and reasonable public interest," reversed trial court's decision allowing newspaper to obtain access to sealed file in divorce case after completion of closed trial); *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E.2d 5, 6 (1945) (court, noting that under Massachusetts law "the right to report proceedings in the courts does not extend to reporting accusations contained in papers filed by a party and not yet brought before a judge or magistrate for official action," sustained libel action for newspaper report of accusations contained in pleadings); *Schmedding v. May*, 85 Mich. 1, 4, 48 N.W. 201, 202 (1891) (court, in denying application by newspaper for access to pleadings in civil cases sealed by court order, distinguished between reports relating to final judgments and pretrial matters, emphasizing that "[t]hese suits involve private dealings between private parties"); *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888) (libel claim against newspaper for erroneous report concerning bastardy proceeding upheld); *Flexmir, Inc. v. Herman*, 40 A.2d 799, 800 (N.J. Ch. 1945) (court removed sensitive matter from court file in action to enjoin misuse of secret processes); *Munzer v. Blaisdell*, 268 A.D. 9, 48 N.Y.S.2d 355 (1944) (court indicating that complaint reciting libelous assertions could be sealed); *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893) (reporter denied access to record in divorce case).

Finally, in *Cowley v. Pulsifer*, 137 Mass. 392 (1884), the Massachusetts court refused to allow a newspaper sued for libel for reporting charges made against the plaintiff in a petition filed in court to rely on the privilege of reporting judicial proceedings. Speaking through Justice Holmes, it emphasized the distinction between the reporting of trial and pretrial matters:

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice.

Id. at 394.

In sum, the cases cited by the Court in *Nixon v. Warner Communications* confirm the general understanding set forth in Part I that pretrial proceedings are analytically distinct from actual trial proceedings for purposes of public disclosure and that material disclosed in private litigation, even if filed in court, is not presumptively public.

¹³⁷ 443 U.S. 368 (1979).

the defendant's interest in a fair trial. The central argument for access was based on the sixth amendment right to a public trial in criminal cases, and the Court rejected the sixth amendment argument while reserving ruling on first amendment issues.¹³⁸ The case nevertheless is important in evaluating access to pretrial discovery in civil cases. The Court reasoned that "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."¹³⁹ With respect to the common law right of access, the Court emphasized that "pretrial proceedings . . . were never characterized by the same degree of openness as were actual trials."¹⁴⁰ Even with respect to criminal trials, then, the Court has upheld limitations on access to evidence introduced at trial and found even highly important pretrial proceedings involving critical judicial decisions¹⁴¹ subject to lesser rights of access than the actual trial itself.

In addressing another aspect of the criminal justice system, the Court has more readily denied a public right of access. Three times recently it has held that the press and public have no first amendment right of access to prisons to observe or report on conditions there.¹⁴²

¹³⁸ The court held that even if such a right exists, the trial judge—who acted under such an assumption—had made findings sufficient to justify closure. *See id.* at 392-93. In *United States v. Edwards*, 430 A.2d 1321, 1344-45 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982), the court held that *Richmond Newspapers* recognized a first amendment right to attend pretrial hearings in court in criminal cases; *see also* *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (reversing trial court order sealing all pretrial documents in widely publicized narcotics prosecution); *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) (finding district court erred in closing pretrial suppression hearing but that error did not merit mandamus); *United States v. Dorfman*, 550 F. Supp. 877, 884-86 (N.D. Ill. 1982) (public has right to review documents sealed during pretrial suppression hearing); *State v. Williams*, 459 A.2d 641, 647-51 (N.J. 1983) (public has right of access to bail hearing and to probable cause hearing).

¹³⁹ 443 U.S. at 384.

¹⁴⁰ *Id.* at 387-88. Chief Justice Burger was even more definite on the question of discovery in his concurring opinion:

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence.

Id. at 396 (Burger, C.J., concurring).

¹⁴¹ As Justice Powell noted in his concurring opinion, "[i]n our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow In view of the special significance of the suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself." *Id.* at 397 n.1 (Powell, J., concurring). It is difficult to rebut this argument if one emphasizes the importance of observing the judiciary at work. The situation is, however, vastly different with pretrial civil discovery. *See infra* text accompanying notes 169-70.

¹⁴² In each case the principal argument advanced in support of the claimed right of access was that the first amendment gave the press, as a representative of the public, a right to gather information in public possession in order to facilitate reporting on governmental activities to the public. In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (4-3 decision), a broadcasting station claimed the right to bring cameras into a county jail. The Court held that the

Even though prisons are also a part of the criminal justice system, the Court concluded that such facilities, unlike courtrooms, have not traditionally been open to the public.¹⁴³ As in *Richmond Newspapers*, these cases fragmented the Court; none offered a majority opinion to which five Justices subscribed, and in each there was a vigorous dissent. The dissents, however, provide no grounds for implying a constitutional right of public access to civil pretrial discovery. Instead, they argued that prisons are public institutions, giving the public a legitimate interest in being informed about what goes on inside them,¹⁴⁴ particularly when the information sought is not confidential.¹⁴⁵ More significantly, these dissents emphasized the role prisons play in the judicial system as the ultimate destination of many defendants after criminal trials to which the public does have a right of access.¹⁴⁶ Despite these interests, emanating in part from the connection between prisons and criminal trials, the Court in each instance rejected the claim that the first amendment created a public right of access. Although some may question the rea-

press, similar to the rest of the public, had no such right. In *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the Court upheld the refusal of federal prison officials, pursuant to the Policy Statement of the Federal Bureau of Prisons, to grant the media interviews with specified prisoners. In *Pell v. Procunier*, 417 U.S. 817 (1974), the Court upheld a similar provision in the regulations of the California Department of Corrections.

¹⁴³ See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974). In *Richmond Newspapers*, Chief Justice Burger's plurality opinion distinguished these cases on the ground that "they were concerned with penal institutions which, by definition, are not 'open' or public places." 448 U.S. at 576 n.11; cf. *Greer v. Spock*, 424 U.S. 828 (1976) (exclusion of civilian from military base); *Adderley v. Florida*, 385 U.S. 39 (1966) (affirming convictions of persons who staged demonstration in nonpublic part of jail).

¹⁴⁴ See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 37-38 (1978) (Stevens, J., dissenting) (asserting that "[s]ociety has a special interest in ensuring that unconvicted citizens are treated in accord with their status" and emphasizing "the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 861 (1974) (Powell, J., dissenting) (observing that because federal prisons are public institutions, their internal administration, "the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern"); *Pell v. Procunier*, 417 U.S. 817, 840 (1974) (Douglas, J., dissenting) ("Prisons, like all other public institutions, are ultimately the responsibility of the populace The public's interest in being informed about prisons is thus paramount.")

¹⁴⁵ See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 861 (1974) (Powell, J., dissenting) ("Respondents do not assert a right to force disclosure of confidential information . . .").

¹⁴⁶ See *Houchins v. KQED, Inc.*, 438 U.S. 1, 36-37 (1978) (Stevens, J., dissenting) (footnotes omitted):

The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. Not only are they public institutions, financed with public funds and administered by public servants, they are an integral component of the criminal justice system It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation.

soning of these cases,¹⁴⁷ they hardly portend the unveiling of a constitutional right of access to civil discovery.

The Court has shown no inclination to take a broader view of first amendment or common law rights of access in civil cases. To the contrary, it has raised no objections to the protective orders it has encountered in the civil litigation arena. In one civil case, the Court did not object to a restrictive protective order that may even have been significant to the Court's decision not to grant mandamus to overturn the discovery ruling at issue.¹⁴⁸ Even Justices Douglas and Brennan, two of the most energetic advocates of first amendment freedoms, have relied on the availability of protective orders as a basis for refusing to stay lower court orders compelling discovery.¹⁴⁹ Thus, Supreme Court holdings do

¹⁴⁷ Professor Van Alstyne, for example, has argued that *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), is based on "rather unconvincing administrative objections to press access." Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 2 (1980).

¹⁴⁸ *Kerr v. United States Dist. Court*, 426 U.S. 394 (1976). Plaintiff state prisoners challenged the length of detention by the California Adult Authority and sought production of various materials about members and employees of the Adult Authority. Although the defendants claimed that the materials were confidential, the district court ordered the materials produced subject to a protective order that limited access to counsel of record for the plaintiffs. *Id.* at 398. The Ninth Circuit refused to overturn the district court's ruling on petition by defendants for a writ of mandamus. Even though the plaintiffs withdrew their request for the materials in question before the Supreme Court issued its decision, *id.* at 401 n.5, the Court nonetheless proceeded with the case and affirmed the Ninth Circuit's ruling. The Court's reasoning focused on the possibility that a lower court could conduct an in camera review of the documents. It felt that such a procedure would avoid unneeded disclosure of the documents. *See id.* at 405-06. One suspects that it would indeed have surprised the Court to suggest that the protective order did not afford protection even the defendants deemed inadequate; in all likelihood, the Court would have more favorably considered the petition under those circumstances.

The possibility that the protective order in *Kerr* would be invalid under *Halkin* is not fanciful, however. In *Phillips v. District of Columbia*, No. 80-2171, slip op. (D.C. Cir. Jan. 11, 1983), the court invalidated a protective order under similar circumstances. The plaintiffs in *Phillips* were also prisoners challenging their conditions of confinement. They objected to discovery sought by the defendant corrections officials on the ground that the officers at the institution might learn of the information thereby exposing them to the risk of reprisal. *Id.* at 3-4. The trial court ordered responses to the discovery but issued a protective order limiting the availability of the information to counsel. On appeal from a judgment for the plaintiffs, the court held that the order was impermissible under *Halkin* because it interfered with communication between the defendants and their attorneys. The court noted that an order forbidding disclosure of the information to guards or inmates would have sufficed. *Id.* at 10.

¹⁴⁹ In *Reproductive Servs., Inc. v. Walker*, 439 U.S. 1307, 1309 (1978) (Brennan, J., in chambers), Justice Brennan dissolved a stay of discovery seeking the identity of other abortion patients in a malpractice action "on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics." Similarly, in *Chamber of Commerce v. Legal Aid Soc'y*, 423 U.S. 1309, 1312 (1975) (Douglas, J., in chambers), Justice Douglas denied an application for a stay of an order compelling production of certain documents in part because a protective order had been entered: "Applicant will not suffer irreparable injury from disclosure of the documents because the District Court has entered a protective order permitting only attorneys for the Legal Aid Society to examine the assertedly privileged documents."

not directly support employing the first amendment as an impediment to the entry of protective orders in civil discovery. To the contrary, the only Supreme Court decision directly considering the impact of the first amendment on discovery in a civil case held that, far from requiring access, the first amendment prohibited compelled disclosure of the membership lists of the NAACP because that would chill freedom of association.¹⁵⁰

Although dicta in the Supreme Court's first amendment right of public access cases thus provide some ammunition to those seeking public access to pretrial discovery in civil cases, the Court's actual decisions belie that result. The Court has rested its decisions upholding the right of access to criminal trials on the two prongs: the tradition of public access and the value of access as a means of heightening public respect for the judicial process and permitting public scrutiny of judicial performance. An analysis of these two prongs confirms that these cases do not apply to civil discovery.

First, as demonstrated in Part I, there simply is no tradition of public access to discovery; in reality, the practice is to the contrary. Legal authority provides little guidance and in no way undercuts the reality of privacy. Two of the Federal Rules of Civil Procedure are pertinent. Rule 43(a) provides that, except in extraordinary circumstances, "[i]n all trials, the testimony of witnesses shall be taken orally in open court."¹⁵¹ This rule was a reaction to the closing of depositions in equity practice, where the parties frequently substituted depositions for the trial testimony of the witness.¹⁵² The provisions of rule 43(a) obviously render the question of a constitutional right to attend civil trial in federal court academic, but other trial related proceedings, such as discussions of the law between court and counsel, may still be private.¹⁵³ Certainly, rule 43(a) implies nothing about pretrial discovery. Although

¹⁵⁰ In *NAACP v. Alabama*, 357 U.S. 449 (1958), the lower court ordered the NAACP to produce various records, including membership lists, in connection with a proceeding filed by the Alabama Attorney General that asserted that some NAACP-sponsored activities had violated Alabama law. *Id.* at 453. When it refused to produce the membership lists, the court held the NAACP in contempt. The Supreme Court reversed on the ground that compelled disclosure of membership lists would violate the members' first amendment freedom of association. For a more recent decision holding that civil discovery violates the first amendment, see *Britt v. Superior Court*, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978) (order compelling disclosure of plaintiff's private associational affiliations and activities infringed on his first amendment rights). For a discussion of the use of protective orders to guard against invasion of protected rights of association, see Steinmann, *Privacy of Association: A Burgeoning Privilege in Civil Discovery*, 17 HARV. C.R.-C.L. L. REV. 355, 429-34 (1982).

¹⁵¹ FED. R. CIV. P. 43(a). Similar provisions existed in federal law before the promulgation of the Federal Rules. See Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 88.

¹⁵² See 9 C. WRIGHT & A. MILLER, *supra* note 2, § 2407 (1971).

¹⁵³ Cf. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 605 (3d Cir. 1969) (conferences between court and counsel outside presence of jury); *People v. Teitlebaum*, 163 Cal. App. 2d 184, 206-07, 329 P.2d 157, 171-72 (1958) (same), *cert. denied*, 359 U.S. 206 (1959).

some courts rejecting protective order arguments have cited rule 43(a) as indicative of the public nature of discovery,¹⁵⁴ the rule is actually nothing more than a statement of the public nature of the trial itself.

More significantly with respect to pretrial discovery, rule 77(b) provides that, while trials on the merits shall be in open court, "[a]ll other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district."¹⁵⁵ As to any judicial act other than a trial on the merits, then, the judge may exclude the public and proceed in chambers. The judge may make any interlocutory order, based on such nonpublic proceedings, in his chambers as well.¹⁵⁶ In *Zenith*, for example, Judge Becker closed part of a preliminary evidentiary hearing and excluded a spectator from another pretrial hearing.¹⁵⁷ More generally, courts conduct critical pretrial hearings by telephone with increasing frequency.¹⁵⁸ Such procedures obviously foreclose public access. If the rules authorize the court to exclude the public from pretrial hearings that result in judicial action, one cannot seriously contend that there is a tradition of public access to deposition proceedings in lawyers' offices that involve neither public notice nor judicial involvement.

The Publicity in Taking Evidence Act of 1913,¹⁵⁹ the only authority dealing directly with access to deposition proceedings, confirms this

¹⁵⁴ See, e.g., *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964), cert. denied, 379 U.S. 900 (1966); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969).

¹⁵⁵ FED. R. CIV. P. 77(b).

¹⁵⁶ See 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 77.03 (2d ed. 1972); 12 C. WRIGHT & A. MILLER, *supra* note 2, § 3082 (1973).

¹⁵⁷ 529 F. Supp. at 879 & n.19; see also *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273 (S.D.N.Y. 1982) (closing portion of hearing on motion for preliminary injunction); cf. *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (ordering press access to pretrial hearings in civil rights action challenging overcrowding in prison).

¹⁵⁸ For a description of Judge Becker's use of telephonic pretrial hearings in the *Zenith* case, which he labeled "[t]he principal vehicle for getting this case organized for trial," see Becker, *Organization for Trial in Antitrust Cases*, 51 ANTITRUST L.J. 239, 241 (1982). Courts may use telephone conferences to resolve a variety of critical pretrial matters. See, e.g., *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 275 (3d Cir.) (noting that trial court had decided motion to enjoin shareholder vote during telephone conference), cert. denied, 409 U.S. 874 (1972). Consistent with this trend, rule 16 now provides that a judge may schedule discovery after telephone consultation with the parties. See FEDERAL RULES OF CIVIL PROCEDURE, reprinted in 97 F.R.D. 165, 168 (1983).

¹⁵⁹ Act of March 3, 1913, ch. 114, 37 Stat. 731 (codified at 15 U.S.C. § 30 (1982)). For another example of a special rule designed to enhance the government's ability to enforce federal regulatory laws, see § 21(e) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 900 (codified as amended at 15 U.S.C. § 78u(d) (1982)), which provides that the SEC may share information in its possession with the Attorney General. Some courts have held that this provision precludes entry of a rule 26(c) protective order forbidding such transmittal of information to the Attorney General. See, e.g., *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1384-87 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980); *SEC v. Rubinstein*, 95 F.R.D. 529 (S.D.N.Y. 1982).

impression. This little-known statute provides that depositions in anti-trust suits brought by the United States "shall be open to the public as freely as are trials in open court." A review of the origin and history of the Act undercuts the argument that there is a traditional right of public access to depositions. The statute was prompted by a 1912 district court decision granting the defendant's motion to exclude outsiders from a deposition on the ground that "by common understanding of the bar and bench the taking of depositions is a private and not a public proceeding."¹⁶⁰ The Attorney General proposed the statute in response to that decision. The bill passed after vigorous debate.¹⁶¹ At that time, however, depositions were permitted only in unusual circumstances as a substitute for live testimony at trial. The House Report in support of the bill explained that "the master is, in effect, a travelling court."¹⁶² This practice prompted rule 43(a)'s requirement that testimony at trial be public; the statute was not designed to ensure public access to genuine discovery depositions, which were not generally available in 1913.¹⁶³ More significantly, the proponents of the bill acknowledged that the 1912 district court decision was within the court's power and did not claim that the court had erred in its characterization of the "common understanding of the bar and bench" that depositions are private.¹⁶⁴

Not surprisingly, courts have rarely invoked the statute since 1913. It applies only in antitrust proceedings when the government is the

¹⁶⁰ *United States v. United Shoe Mach. Co.*, 198 F. 870, 874 (D. Mass. 1913). For a more recent expression of this view see *State v. Dolen*, 390 So. 2d 407, 409 (Fla. Dist. Ct. App. 1980) (court denied access to defendant to deposition of complaining witness in criminal case, noting that "[t]he scope of the 'trial' has not been extended to discovery depositions as they are not true judicial proceedings") (footnote omitted); *Oclala Star Banner Corp. v. Sturgis*, 388 So. 2d 1367, 1371 (Fla. Dist. Ct. App. (1980)) ("The taking of a deposition itself can hardly be categorized as a 'judicial proceeding' for the simple reason that no judge is present, and no rulings or adjudications of any sort are made by judicial authority.").

¹⁶¹ Some representatives made statements urging the House to permit access in all cases. See 49 CONG. REC. 2511 (1913) (remarks of Rep. Mann) ("I would like to encourage the Supreme Court to make rules all along the line of procedure and provide a rule that would not only prevent depositions under the trust law being secret, but prevent the taking of any depositions in secret.") Others opposed any mandatory openness. See *id.* at 4622 (remarks of Rep. Kahn) ("The consequence will be that a shrewd attorney can worm out trade secrets, can worm out secret processes of manufacture from a willing or indifferent witness") The debate became rather excited. See *id.* at 4626 (remarks of Rep. Mann) ("There can be no valid objection to the passage of this bill [applause] except by some one who fears he will be injured by it, not because he ought not to be injured, but because he hopes to derive some benefit from sneaking in the dark. [Applause] [Cries of 'Vote!']") Ultimately the bill passed as requested by the Attorney General.

¹⁶² H.R. REP. NO. 1356, 62d Cong., 3d Sess. 1 (1913); see also 49 CONG. REC. 2511 (1913) (remarks of Rep. Norris) ("Almost universally in these cases practically all of the evidence is taken by the master and taken at various places.").

¹⁶³ See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.1 (2d ed. 1977).

¹⁶⁴ See 49 CONG. REC. 4621 (1913) (remarks of Rep. Norris) ("There is no doubt from the reading of the briefs, and from the opinion of the court, that the court had the right under the law to decide in its discretion as it did. It was not error.").

plaintiff,¹⁶⁵ and only to depositions.¹⁶⁶ Even where the statute does apply, courts have held that it permits an order closing depositions involving allegedly confidential matter,¹⁶⁷ and allows protective orders sealing the record of government antitrust actions.¹⁶⁸ Far from substantiating the traditional openness of pretrial civil discovery, the history and application of the statute prove the reverse.

Second, the Court also has stressed access as a means of heightening public respect for the judicial process and permitting public scrutiny of judicial performance. This concern has little application in the pretrial discovery context. Indeed, one objection to allowing public access to pretrial discovery is that in most cases no judge is present to rule on the propriety of the inquiry being pursued.¹⁶⁹ Instead, the interrogator is allowed to range far afield; some courts even have held that an attorney may be sanctioned for trying to stop inquiry into irrelevant areas by instructing the witness not to answer.¹⁷⁰ A person observing a deposition would garner only minimal insight into judicial decisionmaking. Indeed, allowing public access might undermine public respect for the process. There is thus no persuasive argument that this prong of the Supreme Court's analysis justifies granting the public access to pretrial discovery.

Upon close analysis, then, the evolving constitutional and common law doctrines of right of access to certain judicial proceedings simply do not and should not apply to pretrial discovery in civil cases. As Justice Stewart observed in a 1974 speech: "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."¹⁷¹ There is no

¹⁶⁵ See *D'Ippolito v. American Oil Co.*, 272 F. Supp. 310, 312 (S.D.N.Y. 1967).

¹⁶⁶ See *United States v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969). *But cf.* *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964) ("While this statute does not expressly apply to the acquisition of information by means of interrogatories or subpoenas duces tecum, the policy behind the enactment is equally applicable to these forms of discovery."), *cert. denied*, 379 U.S. 900 (1965).

¹⁶⁷ See *United States v. IBM*, 67 F.R.D. 40, 43 (S.D.N.Y. 1975). In such cases, the court makes a later determination of whether to release the transcript to the public.

¹⁶⁸ See *United States v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969). Some district courts have exercised their discretionary authority by issuing protective orders to seal some or all of the record in such actions. See *United States v. American Optical Co.*, 39 F.R.D. 580 (N.D. Cal. 1966); *United States v. Lever Bros. Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961), *appeal dismissed*, 371 U.S. 207 (1962).

¹⁶⁹ See, e.g., *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) ("[A] judicially-powered process compelling information that has not yet passed through the adversary-judicial filter for testing admissibility does not create communications that deserve full [first amendment] protection."); *cf.* 49 CONG. REC. 4622 (1913) (remarks of Rep. Kahn) ("[A]lthough the attorney upon the other side may make an objection against any particular question . . . still the witness is bound to answer.").

¹⁷⁰ See *supra* note 35 and accompanying text.

¹⁷¹ Stewart, *Or Of the Press*, 26 HASTINGS L.J. 631, 636 (1975), quoted in *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978); see also *Krause v. Rhodes*, 535 F. Supp. 338, 348 (N.D. Ohio 1979) ("The policy of 'open file' discovery was not intended to serve as a vehicle to enlarge the public domain, laudable though that goal is. To permit the discovery process to

reason for perpetuating the myth that pretrial discovery is public. To the extent that any decision concerning the availability of a protective order depends upon that myth, it is flawed.

B. Situations Warranting Nonparty Access to Discovery Materials

Although no basis exists for unrestrained public access to discovery materials, there are situations that justify nonparty access, and sometimes even general public access. Specifically, such access may be justified when litigants seek to obtain evidence relevant to other litigation, when a court bases pretrial decisions on discovery materials, and, in certain extraordinary cases, when there is a strong public interest in the alleged governmental misconduct that is the subject of the suit. Despite their broad language, almost all cases that authorize nonparty access to materials produced under protective orders fall into one of these categories. That the categories can be narrowly drawn, and that cases falling within these categories do not automatically warrant disclosure, confirm that unrestrained public access is actually a myth.

1. Use in Other Litigation

By far the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation. The issue generally arises when a nonparty asks the court that entered a protective order¹⁷² to modify the order to permit disclosure to him. Under these circumstances, modification furthers, rather than undermines, the policies underlying rule 1. The Supreme Court recognized the propriety of granting access to material covered by a protective order for use in other litigation in 1915 in *Ex parte Uppercu*.¹⁷³ The petitioner in *Uppercu* claimed a right of access to depositions sealed as part of the settlement decree in an earlier case, intending to use them to defend himself in a related action. The Court, speaking through Justice Holmes, agreed: "So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . however proper and effective the sealing may have been as against the public at large."¹⁷⁴ The wisdom of this approach is confirmed by the

serve that extraneous purpose would not encourage its acceptance or improve the functioning of the discovery process.'"), *aff'd*, 671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982).

¹⁷² Generally, the nonparty must obtain a modification of the order from the court that entered the order, rather than seeking to have another court order disclosure of the information. *See* *United States v. ARA Servs., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,250 (E.D. Mo. 1978) (refusing to order production of all materials covered by protective order entered by another court); *cf. Douglas Oil Co. v. Petrol Shops Northwest*, 441 U.S. 211 (1979) (requiring that application for access to grand jury transcripts under Federal Rule of Criminal Procedure 6(e) be passed on by court that impaneled grand jury and court in which collateral civil action pending).

¹⁷³ 239 U.S. 435 (1915).

¹⁷⁴ *Id.* at 440.

large number of cases granting nonparties access to discovery material pertinent to their litigation.¹⁷⁵ Indeed, in some products liability cases plaintiffs' attorneys have formed attorneys' information exchange groups;¹⁷⁶ at least one court has approved the sale of such information to other plaintiffs, albeit only under court supervision.¹⁷⁷ The *Manual for*

¹⁷⁵ See *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) ("[N]othing [is] inherently culpable about sharing information obtained through discovery."); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973); *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 32 (S.D.N.Y. 1970) ("no merit to the . . . contention that the fruits of discovery in one case are to be used in that case only"); see also *C & C Prods., Inc. v. Messick*, 700 F.2d 635 (11th Cir. 1983); *Olympic Ref. Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), *cert. denied*, 379 U.S. 900 (1965); *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 92 F.R.D. 67 (S.D.N.Y. 1981); *United States v. Hooker Chems. & Plastic Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981). *But cf.* *Short v. Western Elec. Co.*, 36 FED. R. SERV. 2d (Callaghan) 132 (D.N.J. 1982) (court denies request by newspaper to unseal deposition); *Govatos v. Weis Secs., Inc.* [1982 Decisions Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,785 (S.D.N.Y. July 29, 1982) (summarizing opinion) (compelled disclosure denied where party seeking disclosure had earlier been offered opportunity to acquire information but had never attempted to reach agreement to share expert's reports before protective order was entered); *Pensfield v. Venuti*, 93 F.R.D. 364 (D. Conn. 1981) (state criminal records erasure statute does not insulate information against discovery in civil case). In *In re GAF Corp.*, No. 83-3020 (2d Cir. Apr. 27, 1983), the court of appeals directed that GAF, which was challenging the proxy materials sent out by insurgent Samuel Heyman, was entitled to access to materials under seal in connection with a Connecticut lawsuit between Mr. Heyman and his sister. The district court subsequently held that the withheld information was material and that Heyman would have to resolicit. See *Litigation Undisclosed, Resolicitation Ordered by Court in GAF Proxy Battle*, 15 SEC. REG. & L. REP. (BNA) No. 26, at 1260 (July 1, 1983) (reporting GAF decision).

¹⁷⁶ See *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982); see also *Kuiper v. District Court*, 632 P.2d 694, 696 (Mont. 1981) (documents from earlier unrelated products liability case were "widely disseminated"). Some plaintiffs' lawyers argue that in toxic tort cases plaintiffs should resist provisions in settlements that require confidentiality for information produced through discovery. See *Lempert, Seeds of Technology Sprout into Complex Litigation*, *Legal Times*, June 13, 1983, at 16, col. 1, at 30, col. 3. Moreover, plaintiffs' lawyers in these cases are beginning to organize before the litigation begins. See *Dioxin Task Force Forming; Massive Litigation Predicted*, *Nat'l L.J.*, July 4, 1983, at 3, col. 2 (reporting that "task force" of plaintiffs' lawyers planned to gather at annual meeting of Association of American Trial Lawyers to share information and coordinate litigation). Such activity is not new. See *Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 122 (1968) (describing meeting of plaintiffs' lawyers at ATLA meeting in 1963 to discuss coordinated strategy in products liability cases involving anti-cholesterol prescription drug MER/29).

¹⁷⁷ *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482 (E.D. Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981). It is perilous, however, to sell such information without court approval. Thus, in *Kehm v. Procter & Gamble Mfg. Co.*, No. 80-119 (N.D. Iowa, June 29, 1982), the court held counsel for the plaintiff in a products liability action in contempt and ordered him to pay the defendant \$10,000. The plaintiff had won a \$300,000 judgment for Toxic Shock Syndrome (TSS) which was on appeal. During this period, plaintiff's attorney Riley found selling the trial transcript to be an effective way to raise money. The district court found as follows in holding him in contempt:

Shortly after judgment Riley began soliciting orders from plaintiffs' lawyers in other TSS cases and sold them packets containing a transcript of the trial and all briefs, defendants' answers to interrogatories and exhibits marked by plaintiff in the final pre-trial conference order, including all exhibits covered by the protective order. . . . The original price was \$2,000.00 for both

Complex Litigation also endorses a flexible approach, citing the sharing of discovery, in appropriate circumstances, to avoid duplicative efforts.¹⁷⁸ The Judicial Panel of Multidistrict Litigation has even denied the transfer of related litigation on the assumption that information-sharing will occur without transfer.¹⁷⁹

The popularity of such sharing does not mean that courts should automatically grant nonparty access. Indeed, one court held that the fact the plaintiff's counsel said she would share information, standing alone, provided good cause for entry of a protective order.¹⁸⁰ Although sharing discovery information increases efficiency, it also increases the risk that parties fearing repeated claims may fight discovery more vigorously. More generally, a rule of automatic access could undermine confidence in protective orders and result in many of the undesirable consequences described in Part II.

To date the courts have not developed a consistent accommodation of these interests. Some have suggested that when a party has relied on a protective order, the court should modify it to grant access to others only in exceptional circumstances,¹⁸¹ but that at least one of the courts that initially adopted this approach has since repudiated it.¹⁸² More workable guidelines exist. First, in order to obtain access to materials produced under a protective order in litigation number one, the party involved in litigation number two should demonstrate that he would have the right to obtain them in the second action.¹⁸³ Otherwise one

packages but was later reduced to \$450.00 for the first package and \$750.00 for the transcript. The proceeds from the sale of both packages amounting to \$67,618.10 have been used for plaintiff's benefit to reduce the cost of this litigation.

Findings of Fact and Conclusions of Law, *Kehm v. Proctor & Gamble Mfg. Co.*, No. 80-119, at 3 (N.D. Iowa June 23, 1983) (on file with *Cornell Law Review*).

¹⁷⁸ MANUAL FOR COMPLEX LITIGATION, pt. I, § 3.11, pt. II, § 3.11 (5th ed. 1982)

¹⁷⁹ See *In re Chiropractic Antitrust Litig.*, 483 F. Supp. 811, 813 (J.P.M.D.L. 1980). When the district court in which the earlier action was pending refused to modify its protective order, the Seventh Circuit vacated and remanded, putting the burden on the parties opposing modification to establish that the materials sought would be immune to discovery in the later action. See *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980).

¹⁸⁰ *Milsen Co. v. Southland Corp.*, 1972 Trade Cas. (CCH) ¶ 73,865 (N.D. Ill. 1972).

¹⁸¹ See, e.g., *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982); *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir.), cert. denied, 440 U.S. 971 (1979); cf. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954-55 (8th Cir.) (granting writ of mandamus to overturn trial court's decision modifying protective order where there had been no "showing that intervening circumstances had in any way obviated the potential prejudice to [plaintiff]"), cert. denied, 441 U.S. 907 (1979); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 297 (2d Cir. 1979) (Medina, J., concurring) (arguing that an agreement not to disclose discovery information "should be honored without doing any balancing as to the benefits to be derived from disregarding it").

¹⁸² In *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980), the court rejected the "exceptional considerations" language it had endorsed in *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir.), cert. denied, 440 U.S. 971 (1979), calling that an "unfortunate choice of words."

¹⁸³ This consideration was apparently a critical consideration in *Wilk v. American Medi-*

risks subverting the substantive policies justifying nondisclosure in litigation number two.¹⁸⁴ But if the party to litigation number two has a right to obtain such materials in that case, denying him access simply increases his expense. Second, a court should ordinarily deny nonparty access if all the parties to litigation number one oppose it, even though it may increase the nonparty's expenses. Finally, a court should set aside confidentiality orders entered in connection with settlements only in extraordinary circumstances. This is a form of party autonomy that is critical to the reliability of such orders; in most situations they should not be disturbed. *Ex parte Uppercu* presented such extraordinary circumstances. Rather than show that there was a generalized overlap between the lawsuits, the petitioner alleged that specified testimony during the first case by the plaintiff in the second action directly contradicted his position in the second action.¹⁸⁵ Such a showing will be rare.

Some courts have erected special barriers to access where the nonparty seeking information is the government, although the public interest in access may well be stronger in such cases. In the leading case, Judge Marvin Frankel stressed the manifold investigative powers of the government: "The government as investigator has awesome powers, not lightly to be enhanced or supplemented by implication."¹⁸⁶ Other courts have agreed.¹⁸⁷ Although the government is in a stronger investigative position than are products liability plaintiffs,¹⁸⁸ the argument

cal Ass'n, 635 F.2d 1295 (7th Cir. 1980), where the court suggested that it would make modification almost mandatory, denying modification only where it would "tangibly prejudice substantial rights of the party opposing modification." *Id.* at 1299.

¹⁸⁴ Use of discovery material from litigation number one in litigation number two can also threaten to subvert the substantive interests involved in litigation number one. In *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961), the plaintiff initially sued several former employees in federal court alleging theft of trade secrets. The district court allowed the plaintiff to complete its discovery before responding to all but one of the defendants' interrogatories, subject to a protective order limiting the plaintiff's use of information derived from discovery to the litigation between the parties. Upon completing that discovery, the plaintiff filed an action in state court against its former employees and a nondiverse defendant and requested a preliminary injunction against the defendants' activities. The federal court then enjoined the plaintiff from using the fruits of federal discovery in the state court proceeding. Finding that the injunction was necessary to protect the federal scheduling order giving plaintiff priority in discovery from abuse, the Second Circuit affirmed. *See id.* at 248-49.

¹⁸⁵ *See* 239 U.S. 435, 438-40 (1915).

¹⁸⁶ *GAF Corp. v. Eastman Kodak Corp.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976).

¹⁸⁷ *See, e.g.*, *Martindell v. International Tel. & Tel. Corp.*, (1915), 594 F.2d 291, 296 (2d Cir. 1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 1978-1 Trade Cas. (CCH) ¶ 61,961 (E.D. Pa. 1976) (denying International Trade Commission leave to inspect or copy documents involved in private antitrust suit on grounds that Commission had appropriate discovery powers of its own); *see also* *United States v. ARA Servs., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,250 (E.D. Mo. 1978) (rejecting government's motion to discover documents produced by ARA Services in a related private civil antitrust action against ARA).

¹⁸⁸ An area of particular concern to some is the problem of waiver of fifth amendment privileges by corporate employees who testify under a protective order. The government could not, of course, force them to testify. At the same time, however, corporate parties have no fifth amendment rights, *see* *United States v. White*, 322 U.S. 694, 699 (1944) (privilege

proves too much. If the government actually has such awesome investigative powers that it really does not need to take advantage of the labors of others, willing though they may be, the prospect that the government may nevertheless subsequently obtain that information provides little additional incentive for the opposing party to resist discovery in litigation number one. Thus, the primary concern that granting access may encourage resistance to discovery seems unfounded. Ironically, Judge Frankel's case illustrates the point. After failing to obtain a modification of the protective order, the government used, and the court enforced, a Civil Investigative Demand to obtain the very same information.¹⁸⁹ Thus, a special rule denying the government access is inefficient as well as unjustified.

To the contrary, some cases in which the government has sought access to discovery materials obtained by others suggest that the parties involved have resisted discovery very energetically with the goal of imposing costs on governmental agencies less capable of bearing litigation expense. Probably the best example of such behavior involves American Telephone & Telegraph Company (AT&T) which defended simultaneously a private antitrust action brought by MCI Communications and a governmental proceeding. In the private litigation, MCI had, at great expense, winnowed approximately 2.5 million pertinent documents from among some 12 million produced by AT&T.¹⁹⁰ Rather than undertaking the same task, the government proposed to use MCI's effort by obtaining a copy of its computerized analysis of AT&T documents. Although MCI did not object, AT&T did and litigated the matter as far

against self-incrimination is personal and cannot be utilized "by or on behalf of" corporation), and both corporate and individual parties are subject to sanctions such as dismissal or default for refusing to respond to discovery on fifth amendment grounds. The protective order offers a way to avoid this dilemma in litigation between private parties, but it is ineffective if the government can have the order modified. *See generally* Note, *Modification of Protective Orders: Balancing Practical Considerations and Addressing Constitutional Rights*, 14 *SUFFOLK U.L. REV.* 1011 (1980) (courts should permit individual defendants to assert retroactively their privilege against self-incrimination when government seeks access to protected depositions); *cf.* Heidt, *The Conjuror's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 *YALE L.J.* 1062, 1095-99 (1982) (protective orders generally limit circulation of incriminating statements only temporarily). The real difficulty that troubles these critics, it seems, is that in civil litigation the fifth amendment right is limited to natural persons and, when invoked, can cause a court to enter sanctions against the "innocent" corporate employer. Although the benefit of added information that would otherwise be unavailable is a legitimate concern, this problem does not merit critical weight in the decision whether to permit the government access to deposition testimony given under protective order. It is merely another consideration that a court should weigh in deciding whether to grant modification.

¹⁸⁹ *See* *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979). The court found it "unlikely that private litigants will hold back discovery in what are already serious treble damage suits merely because of an additional threat of a CID directed to an adversary for discovery by the Antitrust Division." *Id.* at 15.

¹⁹⁰ *See* *United States v. AT&T*, 461 F. Supp. 1314, 1338-39, 1339 n.75 (D.D.C. 1978). In *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979), it was reported that the process of analyzing Kodak's documents had cost GAF \$2 million. *Id.* at 17 (Mulligan, J., dissenting).

as the Supreme Court only to be denied certiorari.¹⁹¹ In view of the reported expense of AT&T's defense against the government's suit,¹⁹² it seems specious to argue that its efforts will be redoubled unless the government is unable to profit from MCI's discovery. Indeed, as the National Commission for the Review of the Antitrust Laws concluded: "Potential defendants have no legitimate interest in wasting the government's time and taxpayers' money in the interest of gamesmanship . . . except upon a judicial determination that it would be grossly unfair or unjust to do otherwise."¹⁹³

In sum, the cases that actually decide the question of nonparty access to protected discovery materials almost universally deny such access unless intended to garner information for use in other litigation.¹⁹⁴ Even where the nonparty wants to use the information in litigation, the courts are evolving rules that protect those who rely on protective orders. Although the ultimate outcome of this development is unclear, it shows that the courts realistically assess the needs of the discovery system, rather than the theoretical advantages of public disclosure, in modifying protective orders.

2. *Discovery Materials Involved in Pretrial Rulings*

Although few cases actually go to trial, pretrial rulings in many cases involve materials obtained through discovery, sometimes including materials covered by a protective order. Maintaining the confidentiality of such materials may be inappropriate after they are the subject of a judicial ruling. Ordinarily, discovery materials subject to judicial ruling would become part of the public record. If the discovery materials are filed under seal, however, the public may not have access to them. As the Supreme Court recently stated: "The operations of the courts and

¹⁹¹ *AT&T v. Grady*, 594 F.2d 594 (7th Cir.), cert. denied, 440 U.S. 971 (1979).

¹⁹² Even before the trial began, AT&T reportedly had spent \$250 million defending the antitrust action brought by the government. See *Long Lines Drawn as Curtain Rings U.p.*, Nat'l L.J., Feb. 2, 1981, at 13, col. 1.

¹⁹³ *Report of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509, 551 (1979). For a more general argument favoring sharing of discovered information, see Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 284-91 (1983). For arguments that federal agencies should be granted access to grand jury materials to reduce their burden of gathering information, see Note, *Federal Agency Access to Grand Jury Transcripts Under Rule 6(e)*, 80 MICH. L. REV. 1665 (1982); Note, *Facilitating Administrative Agency Access to Grand Jury Material*, 91 YALE L.J. 1614 (1982). The courts appear to be responding to such concerns. See, e.g., *United States v. Davis*, 702 F.2d 418 (2d Cir. 1983) (upholding grand jury subpoena for materials held under protective order).

¹⁹⁴ See, e.g., *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir. 1969), cert. denied, 396 U.S. 820 (1970); *Times News Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189 (C.D. Cal. 1974), *cf.* *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273 (S.D.N.Y. 1982) (refusing newspaper access to sealed portion of trial transcript). For a discussion of those extraordinary cases that justify public access, see *infra* Part III (c)(3).

the judicial conduct of judges are matters of utmost public concern."¹⁹⁵ To evaluate a judicial ruling, the public may need access to the sealed materials on which it is based. Thus, there are rights independent of the public interest in the substance of discovery materials themselves that come into play when a judge enters an order based on them. The question is whether this interest warrants public access.

To some extent, every judicial decision is of interest to the public because it is part of the mosaic of judicial resolution. As a test for access to otherwise confidential materials, this perspective is obviously too broad. Because a court is not obliged to hold pretrial hearings in open court,¹⁹⁶ the public does not necessarily have access to the decisionmaking process. More significantly, granting the public access to all materials upon which orders are based could undermine very significant interests. To take an extreme case, when a party moves to compel production of documents allegedly protected by the attorney-client privilege, the court may review the documents *in camera* to determine whether the privilege applies. If after that review the court denies the motion on the basis that the privilege applies, it would be difficult to evaluate the judge's performance without seeing the documents. Indeed, to permit an appellate court to review the judge's performance, the documents presumably must become part of the record.¹⁹⁷ Granting the public access, however, would undermine the privilege.¹⁹⁸ Thus, the public's interest is outweighed by other interests.

At the opposite extreme, final decisions on the merits of a case are peculiarly imbued with public interest. Thus, when a court actually relies on certain documents as grounds for granting a motion for summary judgment, as in *Zenith*, the documents attain such significance that public access is presumed.¹⁹⁹ In the same vein, the Second Circuit recently indicated that when a derivative action is dismissed on the basis of the

¹⁹⁵ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

¹⁹⁶ *See supra* notes 155-58 and accompanying text.

¹⁹⁷ *Cf.* FED. R. EVID. 612 (providing that when portion of document used by witness to refresh recollection is withheld over objections after examination *in camera*, it "shall be preserved and made available to the appellate court in the event of an appeal"). In the same vein, where a court reviews documents *in camera* to determine if they are covered by an exemption to the Freedom of Information Act, 5 U.S.C. § 552 (1982), the reviewing court must have access to the documents also. *See, e.g., Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) ("An appellate court . . . must conduct its own investigation into the document.").

¹⁹⁸ *See United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), where the court denied access to materials that were the subject of a motion to suppress on the ground that they were illegally seized. The court noted that "it would be ironic indeed if one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those interests simply to vindicate them." *Id.* at 321 (footnote omitted); *cf. Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980) (court places briefs discussing privileged materials under seal).

¹⁹⁹ *See Cianci v. New Times Publishing Co.*, 88 F.R.D. 562 (S.D.N.Y. 1980) (summary judgment); *cf. Lec Tec Corp. v. Johnson & Johnson*, 1982-2 Trade Cas. (CCH) ¶ 64,942 (D

decision of a special litigation committee of the board of directors, the public should have access to the materials relied on in making that decision.²⁰⁰

Between these two extremes it is more difficult to determine whether public access is justified. Cases in which courts have denied access to the documents used in deciding motions for preliminary injunctions²⁰¹ demonstrate that a determination on the merits is not the dispositive factor. In *Zenith*, Judge Becker adopted an ad hoc balancing test to determine which materials to disclose because of their impact on the summary judgment proceedings. He held that the public interest applied to all materials offered in evidence in good faith—even those ruled inadmissible by the court—on the ground that the public has an interest in evidentiary rulings, “especially in situations where, as here, [the] evidentiary rulings are critical to the ultimate disposition of the case.”²⁰² He also found that the public had an interest in materials referred to in good faith during the hearing of the motion. After examining the interests against disclosure,²⁰³ he granted access to all materials prepared by the parties and submitted in connection with the summary judgment motion,²⁰⁴ but refused to allow disclosure of certain economic data and discovery materials filed under seal.

Judge Becker’s approach in *Zenith* is troubling. His emphasis on the public interest in evidentiary rulings comes dangerously close to the extreme example of a motion to compel disclosure of privileged materials suggested above. It is unclear whether the good faith limitation can effectively limit efforts to inject confidential but irrelevant materials into judicial proceedings. In the context of a successful motion for summary judgment, however, an expansive view may be appropriate, particularly where, as in *Zenith*, “evidentiary rulings are critical to the ultimate disposition of the case.”²⁰⁵ More generally, the dividing line is in the process of evolution.²⁰⁶ Even with respect to motions for summary

Minn. 1982) (court found public interest in documents on which punitive damages verdict was based exceeded interests in confidentiality).

²⁰⁰ *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), cert. denied, 103 S. Ct. 1498 (1983).

²⁰¹ See *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273, 1277-78 (S.D.N.Y. 1982); *Ronson Corp. v. Liquifin Aktiengesellschaft*, 370 F. Supp. 597, 600-01 (D.N.J.), aff'd, 497 F.2d 394 (3d Cir.), cert. denied, 419 U.S. 870 (1974).

²⁰² 529 F. Supp. at 899; accord *United States v. Hubbard*, 650 F.2d 293, 299 n.11 (D.C. Cir. 1980).

²⁰³ See 529 F. Supp. at 901-05 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). For a discussion of *Nixon v. Warner Communications*, see *supra* notes 134-36 and accompanying text. The showing needed to justify denying access to such materials would have to be stronger than the showing needed to provide good cause for a protective order because the public interest in materials involved in judicial decisions is much greater than the corresponding interest in routine discovery materials.

²⁰⁴ 529 F. Supp. at 905-08.

²⁰⁵ *Id.* at 899.

²⁰⁶ Particularly difficult problems may arise in class actions because of a court's substan-

judgment, however, there may be substantial reasons to deny access to these materials when the court denies the motion. The requisite legal determination for denial of a motion for summary judgment—the existence of a genuine dispute as to a material fact—provides little insight into the decision on the merits. Rather, such a decision is properly characterized as a refusal to decide the merits. Given the frequency and ease with which parties move for summary judgment, oftentimes as a pretext for public dissemination of discovery materials, a good faith rule provides inadequate protection. Moreover, a ruling that a party must disclose to the public all materials offered in connection with a motion for summary judgment that is ultimately denied could preclude later settlement conditioned on confidentiality.

Accordingly, the better course is to limit this ground for public access to materials forming the basis for the decision on the merits. The critical point is that public access is justified by the special interest in overseeing judicial action and not by the general public interest in the discovery materials themselves. Regardless of the future contours of this ground for access, the fact that some interest other than the mere production of materials through the discovery process serves as the justification for disclosure belies a generalized right of nonparties to obtain access to the fruits of discovery.

trial duty to supervise these lawsuits. The Supreme Court has recently intimated that the first amendment circumscribes a court's power to limit communications with class members. *See* *Gulf Oil Corp. v. Gilbert*, 452 U.S. 89 (1981). The Fifth Circuit's decision in the case, which the Court affirmed, had treated these orders as prior restraints. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 466-78 (5th Cir. 1980). The Supreme Court did not, however, resolve the case on constitutional grounds. *See* 452 U.S. at 101-02. Thus, there are first amendment limits on the exercise of a court's power.

In exercising the power to supervise class actions, courts make decisions that implicate public interests, thereby creating a basis for public access. Particularly difficult problems may result from a court's duty under rule 23(e) to approve any settlement of a class action. To do so, a court must conclude that the settlement is "fair, reasonable and adequate." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217 (5th Cir. 1981), a process that requires some assessment of the evidence unearthed by the parties. If that material is covered by a protective order, the court's process of assessment may provide a basis for vacating the order. Yet disclosure might preclude a settlement contingent on confidentiality. In addition, the court must give the class members notice to allow them to decide whether to object to the settlement; the class members are entitled to pursue discovery regarding the merits of the settlement. *Cf.* *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 464 (2d Cir. 1974) (limiting discovery available to objecting class members in light of available data). In view of the extent of disclosure and judicial evaluation of the merits, it is questionable whether class actions can often be settled on a confidential basis. For an example of the difficulty of maintaining confidentiality in the class action settlement context, see *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976). In the *Corrugated Container* cases, the Fifth Circuit eventually upheld the trial court's reliance on sealed materials in approving the class settlement on the ground that the publicly articulated findings gave sufficient notice of the basis for the court's action. *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1326-27 (5th Cir. 1981), *cert. denied*, 456 U.S. 1012 (1982).

3. *Public Interest in Governmental Acts*

There are rare cases in which alleged governmental misconduct justifies access. *Halkin* was one such case. The court there observed that the discovered information about CIA activities "lies near the heart of . . . the first amendment."²⁰⁷ In another recent protective order case, the court described the governmental behavior as "one of the most controversial and well-publicized events in recent Puerto Rico history."²⁰⁸ Similarly, the Sixth Circuit recently upheld a trial court's order vacating its longstanding protective order covering the discovery materials developed in civil actions arising from the shooting deaths of students during the May 1970 demonstrations on the campus of Kent State University.²⁰⁹ In these cases, it is the substance of the discovered information, rather than its role in judicial decisionmaking, that is critical.

These cases prompt two significant observations. First, they are very rare. The Supreme Court's right of access cases involving prison conditions²¹⁰ demonstrate that the fact that information is sought about governmental activity does not ensure automatic public access. Indeed, in one case involving prison conditions the Court appeared to view a protective order as a useful tool.²¹¹ Even a case involving matters of historical importance does not automatically merit publicity. For example, in deciding whether to enter a protective order covering a settlement agreement reached by the Federal Deposit Insurance Corporation in an action against certain accountants involved in the failure of Franklin National Bank, the court considered the "historical importance of the FNB failure," but decided that avoiding a six-month trial nevertheless justified entry of a confidentiality order.²¹² When disclosure is appropriate, moreover, a court should strive to preserve confidences that

²⁰⁷ 598 F.2d at 188.

²⁰⁸ *In re San Juan Star Co.*, 662 F.2d 108, 110-11 (1st Cir. 1981).

²⁰⁹ *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.), cert. denied, 103 S. Ct. 54 (1982). Another recent example is *McSurely v. McAdams*, 502 F. Supp. 52 (D.D.C. 1980), in which former antipoverty workers asserted that a United States Senator and various congressional officials had violated their constitutional rights by allegedly arranging a raid on the plaintiffs' house as part of a pattern of harassment. See *Civil Damage Suit Won By M'Surveys*, N.Y. Times, Jan. 8, 1983, at 9, col. 1 (city ed.). Even in this case, the court entered a protective order. See *McSurely v. McAdams*, 1982-1 U.S. Tax Cas. (CCH) ¶ 9158 (D.D.C. 1982); see also *ACLU v. Finch*, 638 F.2d 1336, 1345 (5th Cir. 1981) (in suit alleging illegal surveillance by Mississippi Sovereignty Commission, court held that although Mississippi Legislature could not seal files of Commission against discovery to allow "old wounds to heal," court could issue an appropriate protective order to accommodate defendants' interests); *United States v. Dorfman*, 550 F. Supp. 877, 879 (N.D. Ill. 1982) (court granted public access to materials received in pretrial suppression hearing, noting that charges included attempt to bribe United States Senator and case involved "the most pervasive wiretap in the history of the federal wiretap statute").

²¹⁰ See *supra* notes 142-47 and accompanying text.

²¹¹ See *supra* note 148.

²¹² See *In re Franklin Nat'l Bank Secs. Litig.*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981), *aff'd sub nom.* *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).

need not be revealed. Thus, in the Kent State cases, the trial court kept *all* discovery material sealed until the cases were settled in an attempt to promote settlement. After settlement, the court ordered the redaction of all material that would invade privacy before vacating its protective order.²¹³ Even when governmental activity is involved, then, general public access to confidential materials will only rarely be appropriate. The mere presence of the government as one of the litigants should not be controlling in most cases.²¹⁴

Second, this public interest exception applies only to governmental activity; it does not apply to purely private activity that has generated great public interest. This conclusion follows from the observation in *Nixon v. Warner Communications* that courts may deny access to matters in the public record after trial in divorce cases and other cases involving purely private interests.²¹⁵ Problems are likely to arise, however, in situations in which private litigants are dealing with matters that involve a substantial public interest. One commentator has argued, for example, that there is a substantial public interest in the actions of large private enterprises.²¹⁶ Furthermore, it is easy in our highly regulated society to hypothesize a governmental role, even if only by emphasizing government inaction. For example, the Seventh Circuit used the following hypothetical to justify its decision to overturn a local rule gagging attorneys: "[I]n an airplane crash case an attorney who discovered that unsafe flight procedures were in effect and were being condoned by governmental regulatory agencies could not impart this vital knowledge to the public"²¹⁷ Part IV of this article addresses the difficult problems presented by the rights of the litigants and their attorneys to discuss the case. This Part addresses only the public's right of access.

²¹³ *Krause v. Rhodes*, 671 F.2d 212, 217 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982). For examples of similar redaction of taped evidence before release to the press, see *In re National Broadcasting Co.*, 653 F.2d 609, 620 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1981).

²¹⁴ Brief reflection on the number of mundane cases in which the government is a party should suffice to demonstrate that, in most such cases, there is no significant public interest. Consider, for example, all the simple tort claims brought under the Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.). Rarely will a collision with a mail truck involve issues analogous to CIA surveillance of civilians. Furthermore, other cases in which the government is a party might involve archetypal trade secret information. Consider, for example, a suit by NASA alleging that a supplier had provided a defective part for the space shuttle where the design of the part became an important issue. As in this example, the bulk of the lawsuits in which the government is a party involve private disputes where one party merely happens to be the government. These suits hardly invoke the public interest to the same degree as did *Halkin*.

²¹⁵ See *supra* notes 135-36 and accompanying text.

²¹⁶ See Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1656 (1980) (equating information about government with information about large private corporations).

²¹⁷ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

With respect to the public right of access, the hypothetical government noninvolvement is insufficient to justify access in the airplane crash case just as it is insufficient in a divorce case, although there may be an actual public interest in both.

In so concluding one must acknowledge that the public interest may appear strong in some situations. Appropriately, an actual airplane crash case provides a good example. In 1974, a DC-10 crashed near Paris, killing all 350 persons on board. The crash spawned a multitude of wrongful death lawsuits in this country, all of which were ultimately consolidated before Judge Pierson Hall, who ordered all depositions sealed. The publisher of the *London Times* sought a declaratory judgment establishing its right to send a reporter to the depositions. Noting that depositions are not part of the trial, Judge Hall rejected *The Times's* arguments and dismissed the action.²¹⁸ Meanwhile, the discovery process uncovered documents indicating that the manufacturer may have known of the alleged design defect that caused the disaster before the plane went into production. After this disclosure, the manufacturer stipulated to liability on the condition that all discovery remain confidential and Judge Hall so ordered.²¹⁹ Thus, the evidence relating to the alleged design defect was never publicly examined or discussed.

The result is troubling from the perspective of other potential passengers on DC-10s. There has, after all, been another DC-10 disaster since.²²⁰ Should the judge have insisted on some change in design or a warning to the airlines as a condition for continued confidentiality? The answer ultimately depends on the assumption that lawsuits are designed to resolve private claims, not to generate information for public consumption. Surely it would be odd to force the parties to proceed with litigation by denying them the confidentiality they had agreed upon as a condition for settlement. The information involved would not have been revealed but for the initiative of the plaintiffs, and was provided to them only for use in connection with their litigation. Once that objective was accomplished, the information should not become an impediment to resolving the case.

In sum, there are reasons for limiting the public interest notion to a

²¹⁸ *Times Newspapers Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189 (C.D. Cal. 1974); accord *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983) (holding that CBS does not have standing to challenge protective order to which parties did not object). In the *Agent Orange* litigation, the court later decided, however, to allow disclosure of certain materials covered by the protective order. See *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y. 1983).

²¹⁹ This description of the negotiation of stipulation to liability is based on a presentation by Professor Andreas Lowenfeld of New York University Law School at the program of the Civil Procedure Section of the American Association of Law Schools in Philadelphia, Pa., on January 7, 1982. See 1982 Meeting of the Association of American Law Schools, Cassette No. 44B (1982).

²²⁰ See *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 90 F.R.D. 613 (N.D. Ill. 1981).

narrow group of cases involving governmental actions in which there is a substantial public interest. Most cases do not, however, fall into this category. Thus, general dissemination of discovered information is the exception rather than the rule.

IV REASSESSING THE FIRST AMENDMENT RIGHTS OF LITIGANTS

The more difficult task of properly assessing the first amendment rights of the litigants and lawyers remains. Unlike the public at large or other parties involved in related litigation, these people receive information generated through discovery whether or not it is covered by a protective order. Here again, however, one confronts the myths underlying the *Halkin* analysis. Beyond assuming that discovery information is a part of a public process, Judge Bazelon predicated his analysis of the rights of litigants on the conclusion that the Federal Rules of Civil Procedure generally contemplate free disclosure of discovered information. Part I of this article demonstrated that lawyers and judges actually assume the contrary. This Part argues that *Halkin's* premise is also contrary to established precedent about the proper purposes of discovery. Courts should reject this premise as well as the myth that discovery is public and recognize that substantial restrictions on the dissemination of confidential information obtained through discovery are warranted to guard against undermining the civil discovery system.

A. Proper Purposes for Discovery and Unfettered Use of Discovered Information

Halkin assumes that the Federal Rules allow any use of discovered information in the absence of a protective order. Pushed to its logical conclusion, the *Halkin* approach establishes civil litigation as an alternative to the Freedom of Information Act²²¹ for obtaining information.²²² What Justice Stewart maintains the Constitution does not do,²²³ *Halkin* finds in the interstices of the Federal Rules.

It is astonishing in this era of litigation boom and discovery crisis to suggest that information-gathering is a legitimate purpose for litigation. The more sensible response is reflected in a number of pleading cases, in which the courts have denied plaintiffs access to discovery even for the

²²¹ 5 U.S.C. § 552 (1982).

²²² See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). In *Halkin*, for example, it appears that the materials at the heart of the controversy could have been obtained under the Freedom of Information Act. See 598 F.2d at 207 n.30 (Wilkey, J., dissenting); cf. *Energy Conservation, Inc. v. Heliodyne, Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,179 (9th Cir. 1983) (upholding antitrust claim alleging defendants brought lawsuit solely to generate publicity adverse to competitor).

²²³ See *supra* text accompanying note 171.

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Janet L. Eifert*

RECENT DEVELOPMENT

Public Access to Civil Court Records: A Common Law Approach

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I. INTRODUCTION

Courts have long recognized a general common law right of access to courtroom proceedings¹ and court records.² Recently, however, courts have begun to consider whether the first amendment of the Constitution³ protects this right of access. In 1980 the United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia*⁴ held that the press and the public have a first amendment right to attend criminal trials.⁵ The Supreme Court found this right implicit in the various clauses of the first amendment.⁶

Although the Supreme Court has taken few opportunities since *Richmond Newspapers* to define precisely the contours of the first amendment right of access,⁷ the United States Courts of Appeals have expressed a willingness to extend this right beyond its application to the criminal courtroom. One circuit has expressly concluded that the first amendment protects the right of access to criminal court records.⁸ Circuit courts also have held that the first amendment protects the public's right to attend civil trials.⁹ More recently, several circuits have extended first amendment protections even further to cover the right of access to civil court records.¹⁰

1. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980).

2. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 & n.8 (1978). See generally Annotation, *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R.3d 598 (1978); Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 (1948) (discussing cases concerning access to judicial records).

3. The first amendment states in part: "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. CONST. amend. I.

4. 448 U.S. 555 (1980).

5. *Id.* at 580; see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (same holding in rape trial). For a discussion of both cases, see *infra* notes 56-83 and accompanying text.

6. *Richmond Newspapers*, 448 U.S. at 580; *Globe Newspaper*, 457 U.S. at 604.

7. See *Press-Enterprise Co. v. Superior Court*, 54 U.S.L.W. 4869 (U.S. June 30, 1986) (extending first amendment right of access to criminal preliminary hearing); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511-13 (1984) (extending first amendment right of access to voir dire examination of jurors); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-34 (1984) (denying existence of first amendment right to disseminate information gained through pretrial discovery).

8. *Associated Press v. District Court*, 705 F.2d 1143 (9th Cir. 1983). For a discussion of *Associated Press*, see *infra* notes 85-98 and accompanying text.

9. See *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984).

10. *Wilson v. American Motors Corp.*, 759 F.2d 1563 (11th Cir. 1985); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 485 U.S. 1100 (1984). But see *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985).

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This Recent Development considers whether the first amend-
 ment grants to the press and the public a right of access to civil
 court records. Part II examines the cases that led to the current
 debate over the constitutional right to inspect and copy civil court
 records. Part III discusses the five recent circuit court opinions
 that have considered whether the press and the public have a first
 amendment right of access to civil court records. Part IV argues
 that this recent trend adopted by the majority of circuit court
 opinions is inappropriate in light of current constitutional theory.
 Finally, Part V suggests a common law balancing approach for
 courts to apply when considering access questions.

II. LEGAL BACKGROUND

The right to inspect and copy judicial records is an ancient
 doctrine under English common law.¹¹ In England the common law
 allows both a person who has a proprietary interest in a document
 and a person who needs a document as evidence to enforce a right
 of access in court.¹² In the United States the right of access to judi-
 cial records is even broader.¹³ American courts have interpreted
 the common law as allowing all citizens the right of access to judi-
 cial records.¹⁴ This right stems from the conviction that all persons
 should be able to view the government in operation and to learn
 how it functions.¹⁵ Despite this accepted doctrine, however, few
 courts have had the opportunity to examine and define the scope

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 & Williamson Tobacco Corp. v.
 S. 1100 (1984). But see *In re*
 (D.C. Cir. 1985).

11. As early as 1372 the English Parliament enacted laws governing the right of access
 to court records. 46 Edw. 3 (1372), reprinted in 2 ENGLISH STATUTES AT LARGE 191, 196-97
 (1341-1411). See generally Note, *The Common Law Right to Inspect and Copy Judicial*
Records: In camera or On Camera, 16 GA. L. REV. 659, 660-66 (1982) (discussing the history
 of the English common law concerning judicial records).

12. See, e.g., *Hewitt v. Pigott*, 131 Eng. Rep. 155 (C.P. 1831); *Browne v. Cummings*,
 109 Eng. Rep. 377 (K.B. 1829).

13. See 1 S. GREENLEAF, TREATISE ON THE LAW OF EVIDENCE §§ 471-73 (Boston 1842).
 See generally Note, *All Courts Shall Be Open: The Public's Right to View Judicial*
Proceedings and Records, 52 TEMP. L.Q. 311, 337-43 (1979) (discussing the history of the
 American common law concerning judicial records); Note, *supra* note 11, at 666-72 (same).

14. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978); *Ex parte*
Uppercu, 239 U.S. 435 (1915); *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894).

15. *Warner Communications*, 435 U.S. at 597-98. Justice Holmes remarked in *Crowley*
v. Pulsifer, 137 Mass. 392 (1884):

It is desirable that the trial[s] . . . should take place under the public eye, not because
 the controversies of one citizen with another are of public concern, but because it is of
 the highest moment that those who administer justice should always act under the
 sense of public responsibility, and that every citizen should be able to satisfy himself
 with his own eyes as to the mode in which a public duty is performed.

Id. at 394; see also *Drawbaugh*, 2 App. D.C. at 407-08.

and characteristics of this common law right of access to judicial records. This part of the Recent Development examines the cases that set the stage for the current discussion of whether the press and the general public have a right of access to court records and, if so, whether that right is of constitutional magnitude.

A. *Warner Communications and Progeny: Common Law Right of Access to Criminal Court Records*

In the early 1980s several United States Courts of Appeals, spurred by an important Supreme Court decision,¹⁶ began to consider whether the press and the general public have a common law right to inspect and copy judicial records in criminal trials.¹⁷ The courts split on the question. A number of the circuits concluded that trial courts should deny the press and public the right of access to court records only in exceptional circumstances.¹⁸ Another circuit, giving great discretion to the trial judge, viewed the common law presumption of access as just one factor of many that a trial court should consider in resolving the matter.¹⁹

In *Nixon v. Warner Communications*²⁰ the Supreme Court examined the media's right to copy audiotapes that the prosecution had introduced into evidence during public proceedings of the Watergate trial.²¹ Although deciding against the media on the basis

16. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

17. See *United States v. Edwards*, 672 F.2d 1289 (7th Cir. 1982); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981) (referred to by commentators as "the Jenrette case"); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945 (2d Cir. 1980).

18. *Criden*, 648 F.2d at 823; *Myers*, 635 F.2d at 952; *National Broadcasting Co.*, 653 F.2d at 613.

19. *Belo Broadcasting*, 654 F.2d at 430.

20. 435 U.S. 589 (1978).

21. *Id.* at 591. The Watergate trial concerned the prosecution of four former presidential aides for conspiring to obstruct justice by concealing the identities of individuals responsible for the Watergate break-in. During the trial, the special prosecutor publicly introduced into evidence edited tape recordings of the President's conversations. Numerous parties, including three national television networks, requested access to the tapes to inspect and copy the contents. *United States v. Mitchell*, 551 F.2d 1252, 1254-55 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In *Warner Communications*, the United States District Court for the District of Columbia had refused to allow the requested access, fearing the prejudicial impact that the broadcast of the tapes might have on the defendants' ability to obtain a fair trial. *United States v. Mitchell*, 397 F. Supp. 186, 188 (D.D.C. 1975), *rev'd*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed. *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976). The court alluded to the possibility of a constitutional right of access to the requested material. *Id.* at

of access to judicial records examines the cases of whether the press has access to court records and, if so, the magnitude.

Common Law Right to Access Judicial Records

Courts of Appeals, beginning with the Second Circuit,¹⁶ began to conclude that there should be a common law right to access to criminal trials.¹⁷ The other circuits concluded that there was a public right of access to judicial records in certain circumstances.¹⁸ Another court, viewed the common law right as a factor of many that a court should consider in a particular matter.¹⁹

The Supreme Court expressed concern that the prosecution of criminal proceedings of the type that the media on the basis

of a federal statute that specified the time and procedure for release of the Watergate tapes,²² the majority discussed the common law sources of the presumption of access to judicial records.²³ The Court acknowledged the existence of a general common law right to inspect and copy judicial records.²⁴ The Court found support for this right in the public's desire to monitor the judicial process²⁵ and in the public's need for information about the operation of government.²⁶ The Court noted, however, that this general right of access was not absolute.²⁷ For example, the Court would not allow the use of judicial records either to satisfy "private spite or [to] promote public scandal"²⁸ or as a "source of business information that might harm a litigant's competitive standing."²⁹ Finally, the Court indicated that the decision whether to allow access to judicial records generally is best left to the sound discretion of the trial judge³⁰ because of his ability to weigh all the relevant factors in light of the facts of a particular case.³¹

Addressing the constitutional issues, the Court rejected the argument that the first amendment requires that the media be al-

1263 n.52, quoted in *Warner Communications*, 435 U.S. at 596. (The "court's power to control the uses to which the tapes are put once released . . . is sharply limited by the First Amendment.") (emphasis in original). The court, however, relied on the common law presumption in favor of public access to judicial records to hold that the broadcasters had a right to copy the audiotapes. *Id.* at 1260-63; see *Warner Communications*, 435 U.S. at 596.

22. *Warner Communications*, 435 U.S. at 603-08 (citing Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (note following 44 U.S.C. § 2107 (1982))).

23. *Warner Communications*, 435 U.S. at 597-99.

24. *Id.* at 597. For example, the Court stated that the District of Columbia has recognized a right of access to judicial records since 1894. *Id.* at 597 n.8; see *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894).

25. *Warner Communications*, 435 U.S. at 598 (citing *State ex rel. Colscott v. King*, 154 Ind. 621, 621-27, 57 N.E. 535, 536-38 (1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-39 (N.J. 1879)).

26. *Warner Communications*, 435 U.S. at 598 (citing *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 677, 137 N.W.2d 470, 472 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N.W.2d 241 (1966) (per curiam)).

27. *Warner Communications*, 435 U.S. at 598.

28. *Id.* The Court used as an example "the painful and sometimes disgusting details of a divorce case." *Id.* (quoting *In re Caswell*, 18 R.I. 835, 836, 29 A. 259, 259 (1893), and citing *King v. King*, 25 Wyo. 275, 168 P. 730 (1917)). The Court also noted that courts have refused to "permit their files to serve as reservoirs of libelous statements for press consumption." *Id.* (citing *Cowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.)).

29. *Warner Communications*, 435 U.S. at 598 (citing *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891)).

30. *Warner Communications*, 435 U.S. at 599.

31. *Id.*; cf. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470, 474-75 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N.W.2d 241 (1966) (per curiam).

19 (1973).

Cir. 1992; *Belo Broadcasting Corp. v. National Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1980) (en banc) (en banc case). *United States v. National Broadcasting Co.*, 653 F.2d 945 (2d Cir. 1980).

disclosure of four former presidential aides' identities of individuals involved in the special prosecutor publicly inquired into the president's conversations. Numerous courts have granted access to the tapes to inspect the contents. *Id.* 252, 1254-55 (D.C. Cir. 1976). *Warner Communications, Inc.*, 435 U.S. 589 (1978). The District Court for the District of Columbia found that the prejudicial impact that the disclosure would have on the defendant's ability to obtain a fair trial. *United States v. National Broadcasting Co.*, 551 F.2d 1252 (D.C. Cir. 1976). *Warner Communications, Inc.*, 435 U.S. 589 (1978). The District of Columbia Court of Appeals granted the defendant's request for the requested material. *Id.* at

lowed to inspect and copy the Watergate tapes.³² The Court found that the press did not have a constitutional right superior to that of the public, who in this instance had not been given physical access to the tapes.³³ According to the majority, the Court satisfied the media's first amendment rights by allowing the press to attend the trial, listen to the tapes, and read the transcripts — the same degree of access available to the public.³⁴

Because the Supreme Court based its decision in *Warner Communications* on a federal statute, the Court did not examine fully the scope of the common law right to inspect and copy court records in criminal trials. Consequently, subsequent judicial considerations of whether to allow public access to court records have resulted in inconsistent rationales and holdings. Three federal circuits have upheld claims of a common law right to inspect and copy evidentiary material in criminal trials. In *United States v. Myers*³⁵ the United States Court of Appeals for the Second Circuit affirmed a district court decision allowing the general public access to the Abscam videotapes³⁶ shown at the trial.³⁷ The court recognized a strong presumption in favor of public access.³⁸ According to the Second Circuit, "only the most compelling circumstances should prevent contemporaneous public access to [judicial records]."³⁹

In *United States v. Jenrette*⁴⁰ and *United States v. Criden*⁴¹

32. *Warner Communications*, 435 U.S. at 608 ("Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion."). Courts are not in complete agreement on this conclusion. For an alternative interpretation of the Supreme Court's holding, see *infra* notes 191-98 and accompanying text.

33. *Warner Communications*, 435 U.S. at 609; see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that the first amendment prohibited state action designed to prevent the publication of the names of rape victims when official court records already had placed the information in the public domain).

34. *Warner Communications*, 435 U.S. at 609.

35. 635 F.2d 945 (2d Cir. 1980).

36. Abscam was an F.B.I. operation designed to expose certain government officials who were accepting bribes. The F.B.I. recorded the "sting" operations on videotape and submitted the incriminating information as evidence during the trial proceedings. National television networks requested the right to inspect and copy the tapes for broadcast to the public. See *Myers*, 635 F.2d at 947-49, for a complete history of the case.

37. *Id.* at 947.

38. *Id.* at 949-50. Because this case concerned exclusively the scope of the common law right to inspect and copy court records, the Second Circuit relied heavily on the D.C. Circuit's opinion in *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, *Warner Communications*, 435 U.S. 589.

39. *Myers*, 632 F.2d at 952.

40. 653 F.2d 609 (D.C. Cir. 1981).

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³² The Court found that superior to that on given physical access, the Court satisfied the press to attend transcripts — the same

decision in *Warner* the court did not examine inspect and copy court frequent judicial court records have. Three federal circuit right to inspect and. In *United States v.* or the Second Circuit general public access. ³⁷ The court recognize access. ³⁸ According selling circumstances access to [judicial

*ed States v. Criden*⁴¹

ents that release of the freedom of the press and the respondents' conclusion."). an alternative interpretation accompanying text.

Broadcasting Corp. v. Cohn, cited state action designed to social court records already had

ertain government officials operations on videotape and the trial proceedings. National the tapes for broadcast to the of the case.

the scope of the common law applied heavily on the D.C. Cir. (C. Cir. 1976), *rev'd on other*

the United States Courts of Appeals for the District of Columbia Circuit and the Third Circuit reversed lower court decisions that had denied broadcasters the right to copy Abscam videotapes. In *Jenrette* the D.C. Circuit indicated that a district court should deny public access only if, after weighing the interests of the parties and the public, the court concludes that "justice so requires."⁴² In *Criden* the Third Circuit undertook its own analysis of the parties' interests, giving little deference to the discretion exercised by the trial court.⁴³

In contrast to the three Abscam cases, in *Belo Broadcasting Corp. v. Clark*⁴⁴ the United States Court of Appeals for the Fifth Circuit affirmed a lower court decision denying the media the right to inspect and copy audiotapes that the prosecution had used as evidence in the Brilab trial.⁴⁵ The Fifth Circuit diverged from the D.C., Second, and Third Circuit decisions for two reasons. First, the court found no language in the Supreme Court's *Warner Communications* opinion to justify the D.C. Circuit's and the Second Circuit's strong presumption in favor of public access.⁴⁶ The Fifth Circuit held that the presumption in favor of access to criminal court records should be only one of several factors courts should consider when examining the media's interests.⁴⁷ Second, the Fifth Circuit noted that an appellate court may reverse a trial court's conclusions of law only for abuse of discretion.⁴⁸ Unlike the Third Circuit in *Criden*, the Fifth Circuit emphasized that the trial court

41. 648 F.2d 814 (3d Cir. 1981).

42. *Jenrette*, 653 F.2d at 613 (citing *Mitchell*, 551 F.2d at 1260).

43. *Criden*, 648 F.2d at 818. The Third Circuit undertook a de novo evaluation of the competing values of the parties. The court concluded that the trial court could have used a less drastic measure than denial of access. *Id.* at 829; see also *United States v. Martin*, 746 F.2d 964 (3d Cir. 1984). In *Martin*, the Third Circuit held that the press had a common law right of access to transcripts of tape recordings that the jury had used in a criminal trial. Although the transcripts were never submitted into evidence, the court concluded that the strong presumption in favor of access applied to all "judicial records and documents." *Id.* at 968.

44. 654 F.2d 423 (5th Cir. 1981).

45. *Id.* at 425. The Brilab trial concerned an F.B.I. "sting" operation that led to the indictment of the speaker of the Texas House of Representatives and three other individuals for alleged bribery. Audiotapes of various transactions implicating the defendants were submitted at public trial as evidence. Two Dallas broadcasting stations requested access to the tapes. *Id.*

46. *Id.* at 433-34.

47. *Id.* at 434.

48. *Id.* at 430-33. The Fifth Circuit read the *Warner Communications* decision as holding that only the most egregious abuse of discretion by the trial court could merit reversal. *Id.* at 430-431; see *Warner Communications*, 435 U.S. at 613-14 (Stevens, J., dissenting).

has supervisory power over its own records and has freedom to make a sound choice based on all relevant factors.⁴⁹ In sum, the Fifth Circuit was concerned that the other circuits were creating a presumption of constitutional, rather than of common law, proportion.⁵⁰

Finally, in *United States v. Edwards*⁵¹ the United States Court of Appeals for the Seventh Circuit upheld a lower court decision that denied reporters access to audiotapes used in a public trial.⁵² The Seventh Circuit, however, did not adopt the Fifth Circuit's rationale in *Belo Broadcasting*. Rather, after evaluating the earlier decisions, the court adopted a strong presumption in favor of public access to this type of evidentiary material.⁵³ Nevertheless, the court acknowledged that this presumption was not absolute⁵⁴ and in this instance the Seventh Circuit gave considerable deference to the trial court's judgment that public access would affect adversely the defendant's pending second trial.⁵⁵

B. *Richmond Newspapers and Progeny: First Amendment Right of Access to Criminal Court Proceedings*

In *Richmond Newspapers, Inc. v. Virginia*⁵⁶ the Supreme Court held that the press and the public have a first amendment

49. *Belo Broadcasting*, 654 F.2d at 430.

50. *Id.* at 434.

51. 672 F.2d 1289 (7th Cir. 1982).

52. *Id.* at 1290, 1296. The case concerned charges that the president pro tempore of the Indiana Senate accepted money from a private businessman in exchange for legislative favors. Law enforcement agents had recorded a telephone conversation between the two defendants and had presented this recording as evidence at trial. *Id.* at 1290-91.

53. *Id.* at 1290. The Seventh Circuit, however, noted that it did not consider the presumption in favor of access to be as strong as the Second Circuit had claimed. *Id.* at 1294.

54. *Id.* at 1294.

55. *Id.* at 1295.

56. 448 U.S. 555 (1980). *Richmond Newspapers* began with the trial of John Stevenson for the murder of a hotel manager. Facing his fourth trial for the same charge, the defendant moved to close the courtroom from the public to insure that witnesses and jurors would not receive information about the trial from outside sources. *Id.* at 559-63. The prosecutor raised no objection and the trial court granted the motion without a hearing. *Id.* The trial judge based the authority to close the proceeding on a Virginia statute. The statute gave the court discretion to exclude any party whose presence might hinder the possibility of a fair trial, as long as the court did not violate the defendant's right to a public trial. VA. CODE § 19.2-266 (1983); see *Richmond Newspapers*, 448 U.S. at 560.

Two reporters for *Richmond Newspapers* moved for a hearing to vacate the closure order. *Richmond Newspapers*, 448 U.S. at 560. The trial court denied the motion based on its desire to guarantee a fair trial for the defendant. *Id.* at 561. The trial continued in secrecy and the defendant was acquitted. The Virginia Supreme Court, finding no reversible error, denied *Richmond Newspapers'* petitions for mandamus, prohibition, and leave to ap-

and has freedom to fact.⁵⁷ In sum, the recruits were creating a new form of common law,

the United States held a lower court deposes used in a public trial to adopt the Fifth Circuit, after evaluating the presumption in favor of the defendant.⁵⁸ Nevertheless, the presumption was not absolute.⁵⁹ The considerable deference to the defendant would affect the trial.⁶⁰

First Amendment Proceedings

Virginia⁶¹ the Supreme Court gave a first amendment

right to attend criminal trials.⁵⁷ Although the Court addressed only the right to attend criminal trials, this decision began a revolution in access analysis and had a tremendous impact on all decisions relating to the rights of the press and public to obtain information from judicial proceedings. The plurality opinion, written by Chief Justice Burger,⁵⁸ focused on the historical foundation that influenced the drafters of the Constitution in enacting the first amendment.⁵⁹ Specifically, the Chief Justice stressed the traditional presumption of openness that marked the history of the common law.⁶⁰ The Chief Justice noted that the right to attend criminal trials is implicit in the guarantees of the first amendment⁶¹ and plays a critical role in ensuring that the enumerated freedoms of the first amendment, which are designed to protect free communication about government, maintain their meaning.⁶² Similarly, the Chief Justice emphasized that open criminal trials serve a therapeutic purpose by allowing society to see its criminal laws in operation.⁶³

Justice Brennan's concurring opinion offered a structural, rather than an historical, justification for the first amendment right of access to criminal trials.⁶⁴ According to Justice Brennan, open discussion about the operation of our criminal system was vi-

peal. *Id.* at 562.

57. *Richmond Newspapers*, 448 U.S. at 580-81.

58. Justices Stevens and White joined the Chief Justice's plurality opinion, *id.* at 558, although both wrote separate concurring opinions. Justice Stevens found that the decision implied the existence of a first amendment right of access to other important government information. *Id.* at 583 (Stevens, J., concurring). Justice White noted that the sixth amendment was the proper source for the open trial rule. *Id.* at 581-82 (White, J., concurring). Justice Blackmun, who wrote a separate opinion concurring in the judgment, set forth a similar argument. *Id.* at 603-04 (Blackmun, J., concurring) (discussing *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979)). The Justices, however, were able to concur in the first amendment decision as a secondary position. *Id.* at 581-82, 604.

Justice Powell did not participate in the Court's decision. *Id.* at 581. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), however, Justice Powell had found a first amendment right of access to pretrial proceedings. *Id.* at 397-98. Justice Rehnquist dissented on the ground that nothing in the Constitution could be read to overturn state court decisions regarding closure. *Richmond Newspapers*, 448 U.S. at 606.

59. *Richmond Newspapers*, 448 U.S. at 569-71, 577-80 (plurality opinion of Burger, C.J.). According to the Chief Justice, the Bill of Rights was enacted against the backdrop of open trial proceedings. *Id.* at 577-80. The Chief Justice noted that this traditional common law right applied to both civil and criminal trials. *Id.* at 580 n.17.

60. *Id.* at 565-73. The Chief Justice viewed the common law history of open courtroom proceedings as "unbroken" and "uncontradicted." *Id.* at 573.

61. *Id.* at 580.

62. *Id.* at 576-77.

63. *Id.* at 570-73.

64. *Id.* at 587 (Brennan, J., concurring in the judgment).

the president pro tempore of the Senate in exchange for legislative immunity. The conversation between the two was a trial. *Id.* at 1290-91.

that it did not consider the pre-arrest hearing had claimed. *Id.* at 1294.

with the trial of John Steven-son for the same charge, the Court insured that witnesses and jurors were present. *Id.* at 559-63. The prosecution without a hearing. *Id.* The Court struck down a Virginia statute. The statute would have hindered the possibility of a defendant's right to a public trial. *Id.* 448 U.S. at 560.

a hearing to vacate the closure order. The court denied the motion based on the statute. *Id.* at 561. The trial continued in session. The Court, finding no reversible error, affirmed the conviction. The prohibition, and leave to ap-

tal in "securing and fostering our republican system of self-government."⁶⁵ Justice Brennan argued that the dissemination of information concerning criminal trials was necessary to promote meaningful and informed discussion about government.⁶⁶ From this reasoning, Justice Brennan suggested two guidelines for determining whether the first amendment protects a particular right of access.⁶⁷ First, the claim of access must enjoy a foundation in the traditions of self-governance.⁶⁸ Second, the right of access must play a particularly significant role in the judicial process and in government as a whole.⁶⁹ In this instance Justice Brennan concluded that a long tradition of openness in criminal trials existed⁷⁰ and that this openness afforded the public an opportunity to observe and evaluate the administration of our criminal laws.⁷¹

Although unanimous in concluding that the first amendment right of access was not absolute,⁷² none of the opinions in *Richmond Newspaper* offered a clear standard by which to determine what circumstances constitutionally justify closing a trial.⁷³ In

65. *Id.*

66. Justice Brennan relied in part on Professor A. Meiklejohn for development of this structural theory. *Id.*; see A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT* (1948); see also Brennan, *Address*, 32 *RUTGERS L. REV.* 173, 176-77 (1979) (explaining structural model of first amendment).

67. *Richmond Newspapers*, 448 U.S. at 588-89. Justice Brennan referred to these guidelines as "helpful principles" because the "judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning." *Id.* at 588; see also *Globe Newspaper*, 457 U.S. at 605-06 (using same two principles to reach holding for majority opinion).

68. *Richmond Newspapers*, 448 U.S. at 589.

69. *Id.*

70. Justice Brennan found that "[t]radition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that '[a] trial is a public event.'" *Id.* at 593 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

71. Justice Brennan listed other societal interests served by the open courtroom. The open criminal trial checks abuse in the system and promotes public confidence. The open trial also promotes accurate fact-finding and encourages unknown witnesses who may have valuable information to come forward. 448 U.S. at 594-97.

72. *Id.* at 581 n.18. (Burger, C.J., plurality opinion); *id.* at 598 n.24 (Brennan, J., concurring in judgment); *id.* at 600 (Stewart, J., concurring in judgment).

73. *Id.* at 581 n.18 (Burger, C. J., plurality opinion). The Chief Justice stated that an "overriding interest" would be necessary to justify closure. *Id.* at 581. The Chief Justice indicated that a trial judge may impose "reasonable limitations on access to a trial" in the "interest of the fair administration of justice." *Id.* at 581 n.18. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorally associated with resort to public places." *Id.* (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). The Chief Justice, however, failed to define the scope of "overriding interest," finding that closure was clearly unwarranted in this instance. The trial court had failed to make adequate findings of fact to justify closure and had failed to consider the available alternatives to closure. *Id.* at 580-81.

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*Globe Newspaper Company v. Superior Court*⁷⁴ the Supreme Court further defined the first amendment right to attend criminal trials and discussed the circumstances under which a trial court properly might order closure. Writing for the majority, Justice Brennan reiterated his structural argument in support of this first amendment right.⁷⁵ According to Justice Brennan, the first amendment serves a strategic role in promoting the participation of the public in "our republican system of self-government."⁷⁶ Consequently, by guaranteeing the public a first amendment right of access to criminal trials, courts ensure that the "constitutionally protected 'discussion of governmental affairs' is an informed one."⁷⁷ Justice Brennan then reiterated his two-part test,⁷⁸ noting that the right to attend criminal trials is both firmly rooted in history⁷⁹ and

Justice Brennan refused to address the issue, arguing that the statute unconstitutionally gave the trial judge unlimited discretion. *Id.* at 598. In two footnotes, Justice Brennan mentioned that the interest in protecting courtroom decorum and national defense secrets may outweigh the presumption of openness. *Id.* at 598 nn.23, 24. Finally, Justice Stewart noted that the trial judge has the authority to reasonably limit access to the courtroom by the press and public. *Id.* at 600. According to Justice Stewart, these limitations need not be constitutional to justify closure. Justice Stewart mentioned such exceptions as the preservation of trade secrets and the protection of youthful witnesses. *Id.* at 600 n.5.

74. 457 U.S. 596 (1982). The case arose when a trial court in Massachusetts denied the local media access to a criminal trial concerning the rape of three minors. *Id.* at 598. The lower court based its decision on a state statute that required the trial judge to ban access by the press and public to the courtroom during testimony of rape victims under the age of eighteen. *Id.* at 598-600; see MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981). In this instance, the Supreme Court reversed the decision of the Massachusetts Supreme Judicial Court and held that the statute effected an unconstitutional infringement of the public's right of access to attend criminal trials. *Id.* at 602, 610-11.

The Supreme Court had heard the *Globe Newspaper* case once before. The Court had vacated an earlier judgment of the Massachusetts Supreme Judicial Court that dismissed the newspaper's appeal from the initial closure order. The Court remanded the case to allow the lower court to reconsider its decision in light of *Richmond Newspapers*, 448 U.S. at 555. On remand, the Massachusetts Supreme Judicial Court again dismissed the suit, concluding that the statute was constitutionally sound under the *Richmond Newspapers* standards. *Globe Newspaper*, 457 U.S. at 600.

75. *Globe Newspaper*, 457 U.S. at 604. Justice Brennan also emphasized the long tradition of open trials under the common law. *Id.* at 605. In dissent, Chief Justice Burger, joined by Justice Rehnquist, accused the majority of ignoring "the weight of historical practice," noting that "[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors." *Id.* at 614 (Burger, C.J., dissenting). According to the Chief Justice, absent this historical openness, the Massachusetts statute did not violate the first amendment. *Id.* at 614-16.

76. *Id.* at 604; see *supra* notes 65-66 and accompanying text.

77. *Globe Newspaper*, 457 U.S. at 605 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

78. See *supra* text accompanying notes 68-69.

79. *Globe Newspaper*, 457 U.S. at 605.

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serves a significant role in the functioning of the judicial process.⁸⁰

The majority opinion then provided a standard of review for future decisions concerning the right of access to criminal proceedings. The Court asserted that even when a first amendment right of access attaches, that right is not absolute.⁸¹ This qualified right of access may be overcome if a closure order is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."⁸² In the instant case the Court found that the justification for the Massachusetts statute—the desire to protect young rape victims from further trauma and embarrassment—did not meet this test and, therefore, was unconstitutional.⁸³

Although in *Richmond Newspapers* and *Globe Newspaper* the Court discussed only the right to attend criminal trials, several federal courts quickly expanded the Supreme Court's reasoning to provide constitutional protection for access rights to pretrial suppression hearings, entrapment hearings, and *voir dire* proceedings.⁸⁴ More significantly, the United States Court of Appeals for the Ninth Circuit, in *Associated Press v. District Court*,⁸⁵ held that the first amendment required that a court provide access to pretrial documents filed in the highly publicized narcotics trial of John Z. DeLorean.⁸⁶ To ensure that the court did not violate either the defendant's sixth amendment right to a fair trial or the public's first amendment access right,⁸⁷ the trial judge placed all documents filed in the case under seal until the court could make an adequate determination concerning the appropriateness of

30. *Id.* at 606.

31. *Id.*

32. *Id.* at 606-07.

33. *Id.* at 607-11. First, the Court found unconvincing Massachusetts' argument that the statute was necessary to protect minor victims from trauma and embarrassment. *Id.* at 607-08. The Court emphasized the benefits of a case-by-case analysis over a mandatory closure order. *Id.* Second, the Court was unpersuaded by Massachusetts' argument that closed trials encourage more victims to come forward and testify. *Id.* at 609-10. The state had failed to support its position with any empirical evidence. *Id.* Furthermore, the trial court's release of verbatim transcripts nullified the effect of closure.

34. See *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (pretrial suppression, due process, and entrapment hearings); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982) (*voir dire* proceeding).

35. 705 F.2d 1143 (9th Cir. 1983).

36. The authorities indicted DeLorean and two other defendants for violating federal narcotics statutes. *Id.* at 1144.

37. *Id.* The authorities indicted the defendants in October 1982. Between that time and December 22, 1982, when the district court issued the closure order, the court allowed the press and public to inspect the records and files of the court openly. *Id.*

the judicial process.⁸⁰ The order of review for the blanket closure order to criminal proceedings violated the public's first amendment right to inspect criminal records.⁸¹ This qualified right to inspect criminal records was "necessitated by a public interest in the fair trial of criminal trials, several of which were suppressed by the district court's reasoning to pretrial suppression of documents." The court found that the justification to protect young people from embarrassment—did not justify the closure order.⁸² The *Globe Newspaper* rationale, which the Supreme Court had used to justify the first amendment right to attend criminal trials, was equally applicable to pretrial documents for two reasons.⁸³ First, the court noted the common law history of allowing access to pretrial documents.⁸⁴ Second, the court indicated that pretrial documents "are often important to a full understanding of the way in which the judicial process and the government as a whole are functioning."⁸⁵ The court, therefore, concluded that filing a document under seal, regardless of the length of time, impermissibly undermined the first amendment presumption of access to criminal proceedings.⁸⁶

disclosure.⁸⁸

On appeal,⁸⁹ the Ninth Circuit directed the lower court to vacate its blanket closure order.⁹⁰ The court held that the order violated the public's first amendment right to inspect criminal records.⁹¹ Relying on an earlier Ninth Circuit decision,⁹² the court found no reason to distinguish between a first amendment right of access to documents filed in pretrial proceedings and the proceedings themselves.⁹³ The court found that the *Globe Newspaper* rationale,⁹⁴ which the Supreme Court had used to justify the first amendment right to attend criminal trials, was equally applicable to pretrial documents for two reasons.⁹⁵ First, the court noted the common law history of allowing access to pretrial documents.⁹⁶ Second, the court indicated that pretrial documents "are often important to a full understanding of the way in which the judicial process and the government as a whole are functioning."⁹⁷ The court, therefore, concluded that filing a document under seal, regardless of the length of time, impermissibly undermined the first amendment presumption of access to criminal proceedings.⁹⁸

III. RECENT DEVELOPMENTS

Following the Ninth Circuit's decision in *Associated Press*, which concerned the right of access to documents used in a criminal trial, the district court denied the motion. *Id.* at 1145. The court left in effect its order that all documents be filed under seal. The court, however, modified the procedure for access to sealed documents. The court allowed all parties, including the press, upon receipt of notice, to make comments within forty-eight hours concerning the propriety of sealing specific documents to which the party desired access. *Id.* The *Associated Press* and several other news organizations appealed. *Id.*

88. *Id.*

89. The media requested that the court reconsider its blanket closure order, but the district court denied the motion. *Id.* at 1145. The court left in effect its order that all documents be filed under seal. The court, however, modified the procedure for access to sealed documents. The court allowed all parties, including the press, upon receipt of notice, to make comments within forty-eight hours concerning the propriety of sealing specific documents to which the party desired access. *Id.* The *Associated Press* and several other news organizations appealed. *Id.*

90. *Id.* at 1147.

91. *Id.* The *Associated Press* court was not the only court to reach this conclusion. In 1981 a federal district court, in *United States v. Carpenter*, 526 F. Supp. 292 (E.D.N.Y. 1981), *aff'd*, 689 F.2d 21 (2d Cir. 1982), held that the public had a first amendment right to inspect evidence that a party had submitted in a public sentencing hearing. *Id.* at 294-95. The court based this conclusion on what the court perceived as the growing trend exemplified by *Richmond Newspapers*. *Id.*

92. *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982) (enumerating the tests for deciding whether the press and public have a right of access to criminal proceedings).

93. *Associated Press*, 705 F.2d at 1145.

94. *Globe Newspaper*, 457 U.S. at 605-06. For a discussion of the *Globe Newspaper* rationale, see *supra* notes 74-83 and accompanying text.

95. *Associated Press*, 705 F.2d at 1145.

96. *Id.* (relying on *Nixon v. Warner Communications*, 435 U.S. 589, 597-98 (1978)).

97. *Associated Press*, 705 F.2d at 1145 (quoting *Globe Newspaper*, 457 U.S. at 606).

98. *Associated Press*, 705 F.2d at 1147; see *Richmond Newspapers*, 448 U.S. at 573.

nal pretrial proceeding, the Third, Sixth, Seventh, Eleventh, and D.C. Circuits considered the question of access to documents filed in *civil* proceedings.⁹⁹ Four of the circuit courts have adopted a strong presumption in favor of access to civil court documents.¹⁰⁰ The Sixth, Seventh, and Eleventh Circuits found the presumption to be of constitutional magnitude.¹⁰¹ According to these three courts, only exceptional circumstances could justify a claim of confidentiality.¹⁰² In each circuit the courts relied heavily on the Supreme Court's *Richmond Newspapers* and *Globe Newspaper* decisions as support for their holdings.¹⁰³ The Third, Sixth, Seventh, and Eleventh Circuits did not hesitate to apply the standards enunciated in the Supreme Court decisions regarding criminal proceedings to the civil setting.¹⁰⁴ Only the D.C. Circuit held that the press and the public do not have a first amendment right of access to civil court records.¹⁰⁵ This part of the Recent Development examines these decisions.

A. *Brown & Williamson Tobacco Corp. v. F.T.C.*

The United States Court of Appeals for the Sixth Circuit, in *Brown & Williamson Tobacco Corp. v. F.T.C.*,¹⁰⁶ was the first circuit to address the right of access question in a civil proceeding. The plaintiff brought suit to prevent the Federal Trade Commission (F.T.C.) from publishing damaging commercial information in

99. See *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Wilson v. American Motors Corp.* 759 F.2d 1568 (11th Cir. 1985); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). The Third Circuit's decision in *Publicker Indus.* is associated primarily with the conclusion that the press enjoys a first amendment right of access to *civil trials*. The decision, however, did discuss, and has a tremendous impact on, the question of a constitutional right of access to civil court documents. This Recent Development, therefore, will discuss *Publicker Indus.* together with the recent decisions that have addressed specifically the issue of access to civil court documents.

100. See *Brown & Williamson*, 710 F.2d at 1179; *Continental Ill.*, 732 F.2d at 1308; *Publicker Indus.*, 733 F.2d at 1070; *Wilson*, 759 F.2d at 1570.

101. *Brown & Williamson*, 710 F.2d at 1178; *Continental Ill.*, 732 F.2d at 1314; *Wilson*, 759 F.2d at 1571.

102. *Brown & Williamson*, 710 F.2d at 1179; *Continental Ill.*, 732 F.2d at 1314; *Wilson*, 759 F.2d at 1571.

103. See *Brown & Williamson*, 710 F.2d at 1177-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-70; *Wilson*, 759 F.2d at 1569-71.

104. See *Brown & Williamson*, 710 F.2d at 1178-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-70.

105. *Reporters Comm. for Freedom of the Press*, 773 F.2d at 1339.

106. 710 F.2d 1165 (6th Cir. 1983).

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Continental III., 732 F.2d at 1308-
F.2d at 1339.

the Federal Register.¹⁰⁷ The district court dismissed the action, but placed the administrative records and other documents filed by the F.T.C. under seal pending appeal.¹⁰⁸ On appeal, the Sixth Circuit upheld the lower court's decision to dismiss, but reversed the decision to place the documents under seal.¹⁰⁹

In deciding to reverse the district court's order placing the documents under seal, the court first determined the level of discretion to give to the lower court's decision.¹¹⁰ Following *Warner Communications* the Sixth Circuit acknowledged that the trial court had supervisory power over its own records and files, and that appellate courts were to give considerable discretion to the trial judge's decision concerning the right of access to these materials.¹¹¹ The court, however, emphasized that the lower court's supervisory power must be governed by standards.¹¹² According to the court, both the first amendment and common law limited the trial court's discretion.¹¹³

In determining the appropriate standard of review for right of access cases, the Sixth Circuit adopted Justice Brennan's two-part test enunciated in the *Richmond Newspapers* and *Globe Newspa-*

107. *Id.* at 1168-69. The F.T.C. operates a testing and reporting program designed to determine the tar and nicotine level of cigarettes. *Id.* at 1168. The F.T.C. designed the test to provide consumers with a means of comparing the many brands of cigarettes on the market. *Id.* After a complaint from a competitor of Brown & Williamson, the F.T.C. reevaluated the testing procedure for Brown & Williamson's Barclay cigarette. *Id.* Because of its unique filter system, which the knowledgeable smoker could render ineffective, the F.T.C. made an announcement that Brown & Williamson could no longer rely on and disseminate "misleading information" based on data from the old testing procedure. *Id.* The F.T.C. also announced that it was going to run new tests on the Barclay cigarette. *Id.* at 1169. Finally, the F.T.C. announced that it was going to publish this news in the Federal Register. *Id.* at 1168-69.

108. *Id.* at 1169.

109. *Id.* Concerning the seal, the Sixth Circuit addressed the issue on the court's own motive. A nonprofit consumer organization called The Public Citizen Health Research Group filed a comprehensive amicus curiae brief. The Group's objective was to persuade the Sixth Circuit to lift or modify the seal placed on the documents. The organization argued that the Freedom of Information Act, the first amendment, and the common law gave the public a right of access to the court records. According to the Sixth Circuit, Brown & Williamson "aptly defended" against this request for disclosure. *Id.*

110. *Id.* at 1177.

111. *Id.*

112. *Id.* The Sixth Circuit noted that "the trial court's discretion is circumscribed by a long-established legal tradition." *Id.* Citing John Locke, the court emphasized that "[t]he English common law, the American constitutional system, and the concept of 'the consent of the governed' stress the 'public' nature of legal principles and decisions." *Id.*; see J. LOCKE, TREATISE OF CIVIL GOVERNMENT, §§ 124, 136-137 (1690).

113. *Brown & Williamson*, 710 F.2d at 1177.

per decisions.¹¹⁴ The court noted that, historically, both civil and criminal trials have been presumptively open¹¹⁵ and the court found the open courtroom to be fundamental to the American judicial system.¹¹⁶ The court also emphasized the functional benefits derived from open court proceedings.¹¹⁷ First, open proceedings provide an outlet for community concerns and emotions.¹¹⁸ Second, open trials give the public a means of critiquing the judicial system.¹¹⁹ Last, public trials encourage the pursuit of truth and accuracy in the fact-finding process.¹²⁰ The court found these policy considerations applicable to both civil and criminal cases because just resolution of private disputes frequently involves issues in which third parties and the general public have an interest.¹²¹ The court, therefore, found that a strong presumption in favor of access attached to judicial records used in civil proceedings.¹²²

As a last step of analysis, the Sixth Circuit examined countervailing interests that might outweigh the strong presumption in favor of access.¹²³ The court noted that time, place, and manner restrictions,¹²⁴ and content-based exceptions may provide a legitimate means of protecting a party's desire for confidentiality.¹²⁵ In the latter category, the court borrowed from *Warner Communications*, mentioning privacy rights of participants or third parties, trade secrets, and national security as types of interests that might preclude disclosure.¹²⁶ In the instant case the court refused to ac-

114. *Id.* at 1177-79; see *Richmond Newspapers*, 448 U.S. at 589-97; *Globe Newspaper*, 457 U.S. at 605-07.

115. *Brown & Williamson*, 710 F.2d at 1169; see *Richmond Newspapers*, 448 U.S. at 569 (recognizing that criminal trials have been presumptively open); see also *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (concluding that historical support for access to criminal trials applies equally to civil trials).

116. *Brown & Williamson*, 710 F.2d at 1177.

117. *Id.* at 1178-79.

118. *Id.* at 1178.

119. *Id.* at 1178-79. "In either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* at 1179.

120. *Id.* at 1178-79.

121. *Id.* The court noted that the "community catharsis" is necessary at civil trials, especially when involving such important public issues as discrimination, voting rights, anti-trust issues, government regulation, and bankruptcy. *Id.* at 1179.

122. *Id.* The court, however, noted that this strong presumption is not absolute and may be overcome by certain "distinct, but limited, common law exceptions." *Id.*

123. *Id.*

124. *Id.* For the origin of the three-part test, see *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

125. *Brown & Williamson*, 710 F.2d at 1179.

126. *Id.*; see *Warner Communications*, 435 U.S. at 598. In *In re Knoxville News-Senti-*

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cept the argument that ~~the plaintiff had a legitimate interest in protecting a trade secret.~~¹²⁷ The court believed that this argument was really nothing more than an attempt to shield the company's operation and protect the company's reputation.¹²⁸ For the court, the mere assertion that this information qualified as a trade secret was not enough.¹²⁹ Because other companies had access to the information, and because the plaintiff willingly submitted the reports to the F.T.C., the court concluded that sealing of the documents was unjustified.¹³⁰

B. *In re Continental Illinois Securities Litigation*

In *In re Continental Illinois Securities Litigation*¹³¹ the Seventh Circuit affirmed the district court's grant of access to the defendant corporation's special litigation committee report submitted into evidence as part of a shareholder derivative suit.¹³² As the Sixth Circuit did in *Brown & Williamson*,¹³³ the Seventh Circuit concluded that the public was entitled to the report. The court reached this decision by examining the presumption of access to civil court records and balancing this presumption against Conti-

nel Co., 723 F.2d 470 (6th Cir. 1983), the Sixth Circuit applied this exception concerning the privacy interest of third parties. In this instance the court allowed the bank to remove from the court files documents containing personal financial records of the bank's customers. *Id.* at 474, 476-78.

127. *Brown & Williamson*, 710 F.2d at 1180.

128. *Id.* at 1179-80; see *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983) (holding that the report of a bank's special litigation committee, disclosure of which would supposedly affect the bank and community, should not be placed under court seal).

129. *Brown & Williamson*, 710 F.2d at 1190.

130. *Id.* at 1180-81.

131. 732 F.2d 1302 (7th Cir. 1984).

132. *Id.* at 1304, 1316. The shareholders of Continental Illinois Corporation brought a derivative suit to compel the corporation to assert claims it may have had against third parties. Continental established a special litigation committee ("SLC") to evaluate the potential of each suit. The SLC, after conducting more than eighty interviews and reviewing extensive paperwork assembled by Continental's previous counsel, submitted a 158 page report consisting of a "full and candid discussion of all the SLC's significant factual findings, its understanding of the applicable law, and its conclusions." *Continental Ill.*, 732 F.2d at 1305, (citing from Brief of Appellants at 8). The SLC's report determined that all but one of the claims should be dismissed; Continental then sought approval of this decision from the district court. *Continental Ill.*, 732 F.2d at 1304-05. Upon order of the district court, Continental admitted the report of the SLC into evidence in connection with the motion to terminate the claims. *Id.* at 1305. At these proceedings reporters requested access to the report. The district court determined that because the court relied on the report in reaching its decision, the newspapers were entitled to access to the SLC's findings. Continental appealed. *Id.* at 1306-07.

133. 710 F.2d 1165 (6th Cir. 1983).

mental's interest in confidentiality.¹³⁴ The court found that, historically, a strong presumption in favor of access to court records applied to both criminal and civil documents.¹³⁵ According to the court, this presumption was of "constitutional magnitude."¹³⁶ Similarly, following *Brown & Williamson*,¹³⁷ the court had no difficulty in applying this strong presumption to civil cases. Like the Sixth Circuit, the court found that the policies considered in granting access to civil proceedings should be the same as those considered in criminal cases.¹³⁸ These policies included the public's right to "monitor the functioning of [the] courts, thereby insuring quality, honesty, and respect for [the] legal system."¹³⁹

In reaching this conclusion, the Seventh Circuit addressed the defendant's argument that the courts previously had not recognized a right of access to pretrial proceedings in civil cases.¹⁴⁰ The defendant relied on a D.C. Circuit decision¹⁴¹ that interpreted *Warner Communications* to mean that neither the first nor the sixth amendment grants a constitutional right of access to judicial records or evidence used at trial.¹⁴² The Seventh Circuit claimed that the D.C. Circuit had read *Warner Communications* too broadly.¹⁴³ According to the court, *Warner Communications* did not imply a general denial of the right of access.¹⁴⁴ Rather, the Supreme Court merely had held that the press' constitutional right of access was no greater than that of the public.¹⁴⁵ Refuting the de-

134. *Continental Ill.*, 732 F.2d at 1308-09.

135. *Id.* (quoting from *United States v. Mitchell*, 551 F.2d 252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)).

136. 732 F.2d at 1308; see *United States v. Dorfman*, 690 F.2d 1230, 1233-34 (7th Cir. 1982); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

137. 710 F.2d 1165 (6th Cir. 1983).

138. *Continental Ill.*, 732 F.2d at 1308.

139. *Id.*; see *id.* n.9.

140. *Id.* at 1309. Although the Seventh Circuit addressed the constitutional ramifications of *Continental's* argument in a footnote, the court based its holding on the status of the motion to terminate. The court considered the motion to terminate equivalent to a "hybrid summary judgment motion." *Id.* (citation omitted). *Zapata Corp. v. Maldonado*, 430 A.2d 779, 787 (Del. 1981). The Court, therefore, concluded that "the presumption of access applie[d] to the hearings held and evidence introduced in connection with *Continental's* motion to terminate." *Continental Ill.*, 732 F.2d at 1309.

141. *Tavoulareas v. The Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984).

142. *Id.* at 1017; see *Warner Communications*, 435 U.S. at 608-10; see also *supra* notes 20-34 and accompanying text for discussion of *Warner Communications*.

143. *Continental Ill.*, 732 F.2d at 1309 n.11.

144. *Id.* The court noted that the only right denied the press in *Warner Communications* was the right to copy the Watergate tapes. *Id.*

145. *Id.*; see *Warner Communications*, 435 U.S. at 609.

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defendant's argument, the Seventh Circuit held that the presumption of access applied to pretrial hearings and to evidence introduced in connection with those hearings.¹⁴⁶

After determining that a strong presumption in favor of access attached to civil court records, the court balanced this presumption against the defendant's interest in confidentiality.¹⁴⁷ The defendant argued that the attorney-client privilege, work-product immunity, effective functioning of special litigation committees, and maintenance of high standards of accountability and confidence in the banking industry were valid reasons to prevent disclosure.¹⁴⁸ The court disagreed,¹⁴⁹ asserting that only under exceptional circumstances could a court refuse disclosure for material used in actual adjudication.¹⁵⁰ The Seventh Circuit found that when courts have relied on documents as part of the decision-making process, a strong presumption arises that the party who admits the documents has surrendered the right to confidentiality of information relating to matters of public interest.¹⁵¹

C. *Publicker Industries, Inc. v. Cohen*

In *Publicker Industries, Inc. v. Cohen*¹⁵² the Third Circuit reversed a district court decision to seal sensitive documents filed in

146. *Continental Ill.*, 732 F.2d at 1309.

147. *Id.* at 1313.

148. *Id.*

149. *Id.* at 1314; see also *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). In *Joy v. North* the Second Circuit reversed a district court decision to seal a special litigation report used in the adjudication stages of a derivative action. 692 F.2d at 894. The court noted that only "the most compelling reasons" could justify sealing this type of document because the district court had relied on the report in making its decision to dismiss the action. *Id.* at 893. Despite this strong language, the Second Circuit based its decision to reverse on the common law presumption of openness. The court, however, did indicate that the sealing of such documents may "create serious constitutional issues." *Id.*

150. *Continental Ill.*, 732 F.2d at 1315.

151. *Id.* at 1314-16. In *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), the Second Circuit held that the party had waived the attorney-client privilege and work product immunity by submitting the special litigation report as evidence for the motion to dismiss. 692 F.2d at 894. In general, courts will honor these privileges only when the party seeking to prevent disclosure has maintained the confidentiality of the materials. See *Periman Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981); *United States v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). The Seventh Circuit, in this instance, found it unnecessary to decide whether *Continental* had waived these privileges, but noted that "[t]here [was] little interest in the confidentiality of documents which [had] been publicly discussed by their custodian." *Continental Ill.*, 732 F.2d at 1314.

152. 733 F.2d 1059 (3d Cir. 1984).

litigation concerning the control of the plaintiff corporation.¹⁵³ The court held that both the first amendment and common law secure for the public and press a right of access to civil trials and judicial records.¹⁵⁴ Concluding first that the media had a common law right of access to the desired information,¹⁵⁵ the court concentrated on first amendment issues to reach its holding. Following closely Justice Brennan's reasoning in *Globe Newspaper*,¹⁵⁶ the Third Circuit set forth an extensive historical¹⁵⁷ and structural¹⁵⁸ framework in

153. As part of the litigation, one of the parties presented to the district court sensitive information concerning the operation of a foreign subsidiary of the plaintiff. *Id.* The plaintiff's subsidiary had been using an enzyme in the production of scotch whiskey to help in the aging process. The plaintiff, however, had failed "to get approval for the introduction of the enzyme from Customs and Excise as required by the English Company Finance Act." *Id.* at 1064-65. The plaintiff desired to keep this information from its stockholders and the general public. *Id.* at 1063-65. Because the company illegally produced the whiskey, the company would be required to pull the whiskey off the world market. Such action would cause "irreparable financial loss to [the plaintiff] in the millions of dollars." *Id.* at 1065. The court held a hearing to determine whether the plaintiff would be required to disclose this information to its stockholders at its annual meeting. *Id.* at 1063-64. At the hearing, on the plaintiff's request, the trial judge excluded members of the local and national media from the courtroom because of the sensitive nature of the information and because the future confidentiality of this information was at issue before the court. *Id.* at 1063. The trial judge considered himself in a no-win situation. Acknowledging the press' interest in access, the trial court felt compelled to hinder disclosure to insure that the court's decision was of value. To have allowed the press access would have rendered the court's decision moot. *Id.* Pending a final decision on the issue of confidentiality, the trial judge sealed the transcript containing reference to the sensitive information. *Id.* at 1063-64. The media appealed, claiming that the trial court had violated their first amendment and common law rights of access to the civil trial and judicial records. *Id.* at 1064. The media also claimed that the trial court violated their due process rights. *Id.* at 1061, 1064.

154. *Id.* at 1064.

155. *Id.* at 1066. See *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (acknowledging that the existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute). The court had no difficulty applying this common law presumption to the civil courtroom. *Publicker Indus.*, 733 F.2d at 1066-67; see also *Gannett Co. v. DePasquale*, 443 U.S. at 386 n.15 (holding constitutional right to demand a public trial is equally applicable to civil and criminal cases).

156. *Publicker Indus.*, 733 F.2d at 1067.

157. The court quoted English legal historians, including Coke, Hale, Jencks, and Blackstone, to support the proposition that both criminal and civil trials traditionally have been open to the public under the common law. *Id.* at 1068-69; see 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed. 1681); M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 163 (C. Gray ed. 1971); E. JENCKS, THE BOOK OF ENGLISH LAW 73-74 (6th ed. 1967); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1773). The court also noted numerous statements from recent Supreme Court decisions indicating that under American tradition both criminal and civil trials presumptively have been open. *Publicker Indus.*, 733 F.2d at 1068-69; see *Richmond Newspapers*, 448 U.S. at 580 n.17 (Burger, C.J.) (plurality opinion); *Gannett*, 443 U.S. at 386 n.15; see also *Warner Communications*, 435 U.S. at 597 (recognizing a general right to inspect and copy judicial records).

158. *Publicker Indus.*, 733 F.2d at 1070. The court stated:

From these authorities we conclude that public access to civil trials "enhances the

corporation.¹⁵³ The court on law secure civil trials and judicial a common law right court concentrated on allowing closely Jus-¹⁵⁶ the Third Circuit aral¹⁵⁸ framework in

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support of the first amendment right of access to civil trials. The court emphasized that the public right of access to civil trials is fundamental to the democratic form of government.¹⁵⁹ According to the Third Circuit, public access to civil trials is crucial to guarantee free and informed discussion of governmental affairs.¹⁶⁰

Having found a first amendment right of access to civil court trials, the Third Circuit proceeded to formulate the appropriate standard of review.¹⁶¹ The court acknowledged that the first amendment right was not absolute, yet noted that, as with other fundamental rights, the right of access to civil trials deserved a strict standard of scrutiny.¹⁶² To limit the public's right of access to civil trials, therefore, the party opposing disclosure must show "that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."¹⁶³ In the immediate case, because the trial court neither articulated an overriding interest for sealing the transcripts nor considered whether a less restrictive means could keep the information from the public, the Third Circuit concluded that the trial court had abused its discretion.¹⁶⁴

Although the court's decision did not reach the merits of the access question, the court pointed out that this case did not concern the type of commercially sensitive information typically entitled to protection from disclosure.¹⁶⁵ This case, the court noted, simply concerned a matter of poor management.¹⁶⁶ The interest of investors in preventing financial loss and the interest of manage-

quality and safeguards the integrity of the fact-finding process." Access "fosters an appearance of fairness," and heightens "public respect for the judicial process." It "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs.

Id. (footnotes omitted).

159. *Id.* at 1069.

160. *Id.* at 1070; see also *Brown & Williamson*, 710 F.2d at 1177-79 (embracing first amendment right to civil trial to insure informed discussion of governmental affairs).

161. *Publicker Indus.*, 733 F.2d at 1070.

162. *Id.*

163. *Id.*; see *Globe Newspaper*, 457 U.S. at 606-07; see also *Brown & Williamson*, 710 F.2d at 1177-79 (holding that only exceptional circumstances warrant closing court records).

164. *Publicker Indus.*, 733 F.2d at 1079.

165. *Id.*; see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 n.42 (E.D. Pa. 1981) (listing cases in which business information was protected).

166. *Publicker Indus.*, 733 F.2d at 1074. "[P]otential harm . . . in disclosure of poor management in the past . . . is hardly a trade secret." *Id.* (quoting *Joy v. North*, 692 F.2d 880, 894 (2nd Cir. 1982)).

ment in avoiding embarrassment did not overcome the presumption of openness supported by the public interest in being protected from bad business practices.¹⁶⁷

D. *Wilson v. American Motors Corp.*

In *Wilson v. American Motors Corp.*¹⁶⁸ the United States Court of Appeals for the Eleventh Circuit considered whether a plaintiff should be permitted access to sealed records from an earlier federal court case involving the same defendant.¹⁶⁹ The court divided its opinion into two parts on the basis of the evidence sought by plaintiffs. The first part concerned the earlier court's "record of the proceedings."¹⁷⁰ The record consisted of the pleadings, docket entries, orders, filed depositions or affidavits, and the transcripts from the hearings and court proceedings.¹⁷¹ The second part concerned the exhibits that the parties had offered at trial.¹⁷² The court made this distinction because of the earlier *Belo Broadcasting*¹⁷³ opinion in which the Fifth Circuit had held that "the Constitution grants neither press nor public the right to physical access to courtroom exhibits."¹⁷⁴ Accordingly, the Eleventh Circuit held that the plaintiff was not entitled to access to the trial exhibits.¹⁷⁵

167. *Publicker Indus.*, 733 F.2d at 1074.

168. 759 F.2d 1568 (11th Cir. 1985).

169. The initial case, also styled *Wilson v. American Motors Corp.*, concerned a wrongful death claim arising from an accident involving an American Motors jeep. 759 F.2d at 1569. The initial *Wilson* case was settled. The parties reached an agreement, with the encouragement and assistance of the trial judge, following the jury's response to special interrogatories. *Id.* The plaintiff wanted the information to invoke offensive collateral estoppel in her state court action against the defendant. The state court suit, *Decker v. American Motors Corp.*, No. 474278, Superior Court of San Diego County, State of California, was also a wrongful death action arising from an American Motors jeep accident. *Id.* The federal district court denied the plaintiff's request for the documents, stating that in the defendant's earlier case, the court had sealed the records as an integral part of the negotiated settlement between the parties. *Id.* The Eleventh Circuit assumed that had the court been unwilling to seal the documents, the parties never would have agreed to settlement. *Id.*

170. *Id.* at 1569.

171. *Id.*

172. *Id.*

173. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981). The court considered *Belo Broadcasting* to be binding under the Eleventh Circuit opinion that adopted all previous Fifth Circuit opinions as binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (asserting that Eleventh Circuit adopts Fifth Circuit precedent prior to October 1, 1981).

174. 759 F.2d at 1570 (emphasis in original); see *Belo Broadcasting*, 654 F.2d at 428 (discussed *supra* at notes 44-50 and accompanying text).

175. *Wilson*, 759 F.2d at 1572.

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Concerning access to the record of the proceedings, the court found no binding precedent. Addressing a potential constitutional source for the right of access, the court noted that the Supreme Court had not yet decided whether the press and the public enjoy a constitutional right to attend civil trials.¹⁷⁶ The court was aware that the Third and Sixth Circuits had found a constitutional right of access to documents filed in civil proceedings,¹⁷⁷ but because of the lack of clear guidance, the court avoided the constitutional question and focused instead on the common law right of access.¹⁷⁸

The court decided that a common law right of access indisputably exists with respect to civil proceedings.¹⁷⁹ According to the court, under a common law analysis courts use an abuse of discretion standard on review.¹⁸⁰ The court indicated, however, that the common law presumption of open proceedings was not determinative in this case because different courts had taken different approaches to the question of access to records of court proceedings.¹⁸¹ After articulating the various approaches courts had taken on the access question, the court relied on an earlier Eleventh Circuit case and adopted a compelling interest test.¹⁸² Although the court asserted that not every hearing, deposition, conference, or trial need be open, the court required that closure be necessitated by a "compelling governmental interest, and [be] narrowly tailored to that interest."¹⁸³ Applying the newly articulated standard to this case, the Eleventh Circuit concluded that the defendant's desire to prevent the plaintiff from using the sealed information in the later suit was inadequate justification for sealing the court's records.¹⁸⁴

176. *Id.* at 1569.

177. *Id.* at 1569-70 (referring to *Publicker Indus.*, 733 F.2d at 1071, and *Brown & Williamson*, 710 F.2d at 1178-79).

178. *Wilson*, 759 F.2d at 1570.

179. *Id.* (quoting *Craig v. Harney*, 331 U.S. 367 (1947) ("What transpires in the courtroom is public property.")); see *Newman v. Graddich*, 696 F.2d 796, 803 (11th Cir. 1983).

180. *Wilson*, 759 F.2d at 1570.

181. *Id.* See *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980). See *supra* notes 35-39 and accompanying text for a discussion of *Myers*; see also *Belo Broadcasting*, 654 F.2d at 434 (rejecting the overwhelming presumption of openness). For a discussion of *Belo Broadcasting*, see *supra* notes 44-50 and accompanying text.

182. *Id.* at 1571; see *Newman*, 696 F.2d at 802.

183. *Wilson*, 759 F.2d at 1571. The court adopted the standard set forth by the Supreme Court in *Globe Newspapers*, 457 U.S. at 606-07. According to the court, this standard was less stringent than the standard the Sixth Circuit adopted in *Brown & Williamson* and the standard the Fifth Circuit condemned in *Belo Broadcasting*. *Wilson*, 759 F.2d at 1570-71.

184. *Wilson*, 759 F.2d at 1571. According to the court, the litigants in the first trial in

E. *In re* The Reporters Committee for Freedom of the Press

The D.C. Circuit, in *In re The Reporters Committee for Freedom of the Press*,¹⁸⁶ considered whether the district court had violated the press' and the public's first amendment rights of access to civil court records by delaying until after trial the right to examine documents submitted as part of the trial.¹⁸⁶ The D.C. Circuit affirmed the district court decision, holding that neither the press nor the public has a first amendment right of access to court records prior to judgment.¹⁸⁷

The D.C. Circuit began its constitutional analysis by considering Supreme Court precedent. The court noted that the Supreme Court had not yet decided whether the first amendment provided the public a right of access to court records in civil cases.¹⁸⁸ According to the court, the Supreme Court only recently had found in the first amendment a right to *observe criminal proceedings*.¹⁸⁹ The court indicated that, although the contours of this constitutional right were being elaborated on, "the [right] has not yet been applied to access to civil trials, much less to access to records in

federal court had no right to agree to seal what were actually public records. The Eleventh Circuit reminded the district court to "keep in mind the rights of a third party—the public, 'if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.'" *Id.* (quoting *Newman*, 696 F.2d at 803).

185. 773 F.2d 1325 (D.C. Cir. 1985).

186. *Id.* at 1325-26. In *Reporters Committee Mobil Oil Company*, a party to a complicated libel and slander suit, requested and received a protective order covering documents transferred during discovery. *Id.* at 1326. The district court entered the first protective order on November 1, 1981, on the basis of an affidavit filed by Mobil's vice-president. The affidavit described the adverse effects the material's release would have on Mobil's competitive standing. The affidavit also indicated that practical difficulties would arise in going through the documents one-by-one to determine which documents contained sensitive information. *Id.* Later, after the trial court had denied each of the parties' summary judgment motions, which contained a number of documents that had been labeled confidential, Mobil requested that the trial court continue the protective order through trial. *Id.* The district court denied the summary judgment motions one week before trial. See *Tavoulares v. Piro*, Nos. 82-1820, 82-1821 (D.C. Cir. July 30, 1982) (order). The trial court granted this request. *Reporters Committee*, 773 F.2d at 1327. At trial, the media moved to intervene and requested that the trial court reconsider its earlier protective orders. The trial court granted the reporters' motion to intervene, but refused to lift the seal from the confidential records. The trial court, however, did agree to reevaluate the need for the seal at the close of the trial. *Id.* The reporters appealed, raising only the constitutional argument that the first amendment required the court to grant the media access. *Id.* at 1326. The court, therefore, did not consider whether a common law right of access existed. *Id.* at 1330. *But see id.* at 1342 (Wright, J., dissenting) (chastising the majority for not considering common law right of access).

187. 773 F.2d at 1325.

188. *Id.* at 1330-31.

189. *Id.* at 1331 (citing *Richmond Newspapers*, 448 U.S. at 575).

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civil trials—or, for that matter, even records in criminal trials.”¹⁹⁰

The court indicated that the two Supreme Court cases that have considered rights of access to court records were not relevant to the instant case. First, the court indicated that *Warner Communications* was of little practical help because the Supreme Court had not considered whether the public possessed a first amendment right of access to the tapes.¹⁹¹ According to the D.C. Circuit, the Supreme Court's decision in *Warner Communications* was determinative only of the press' constitutional and common law rights of access.¹⁹² Second, the court indicated that the recent *Seattle Times v. Rhinehart*¹⁹³ decision had limited application to the instant case because in *Seattle Times* the Court discussed a litigant's constitutional right to disseminate information.¹⁹⁴ Similarly problematic, the information the newspaper sought to disseminate had not yet been filed with the court nor introduced into evidence.¹⁹⁵

Despite the lack of directly applicable Supreme Court precedent, the court undertook a constitutional analysis based on the general guidelines developed in the Supreme Court's earlier access cases.¹⁹⁶ The court began by examining the historical tradition of public access to court records.¹⁹⁷ Quoting extensively from *Warner Communications*, the court initially concluded that a tradition of public access to judicial documents existed, but that this right was not absolute.¹⁹⁸ The court then considered whether this tradition included “pre-judgment access” and concluded that, based on the historical evidence, no common law right of access to court records existed prior to judgment.¹⁹⁹ The court gave three reasons for this conclusion. First, the court examined several nineteenth century cases which seemed to indicate that, under the common law, no right of public access attached to prejudgment records in civil

190. 773 F.2d at 1331.

191. *Id.* at 1331.

192. *Id.*; see *Warner Communications*, 435 U.S. at 608-10. The court, however, did note that “[p]resumably the Court believed it was constitutional that the public had been denied access” because of the Court's “finding of no common law right of access.” *Reporters Committee*, 773 F.2d at 1331 (emphasis in original).

193. 467 U.S. 20 (1984).

194. *Reporters Committee*, 773 F.2d at 1331-32; see *Seattle Times*, 467 U.S. at 32-33.

195. *Reporters Committee*, 773 F.2d at 1332; see *Seattle Times*, 467 U.S. at 33.

196. See *supra* notes 67-69 and accompanying text (discussing the Supreme Court's two-part approach to access questions).

197. *Reporters Committee*, 773 F.2d at 1332.

198. *Id.* at 1332-33.

199. *Id.* at 1333-36.

cases.²⁰⁰ Second, the court noted the "natural connection" between the policy of nonaccess and the well-established common law "public records privilege."²⁰¹ The public records privilege did not extend to "'accusations contained in papers filed by a party and not yet brought before a judge or magistrate for official action.'"²⁰² Last, the court indicated that modern courts' practice of announcing a public right of access to civil cases without making the pre-judgment/postjudgment distinction does not constitute "an historic practice of such clarity . . . as to justify the pronouncement of a constitutional rule preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment."²⁰³

The court also undertook a functional analysis. The court began by listing the reasons the Supreme Court had given for opening criminal trials to the public.²⁰⁴ The D.C. Circuit determined that those reasons were not as relevant when considering access to civil proceedings between private parties.²⁰⁵ The court then noted that prejudgment access to documents did not promote the purposes of open trials.²⁰⁶ According to the court, third parties rarely request access to trial documents; consequently, denial of access to these documents rarely provokes the outcry associated with closing the trial itself.²⁰⁷ As a result, the court concluded that the lower court had acted properly in sealing the documents until after the close of trial.²⁰⁸

The dissent in *Reporter's Committee* disagreed with the majority's approach regarding the right of access to trial exhibits.²⁰⁹ According to the dissent, both the common law and the first amendment guarantee the press and the public a *contemporaneous*

200. *Id.* at 1333-34.

201. *Id.* at 1335. The "public records privilege" refers to the privilege against liability for defamation in the accurate reporting of public records. *Id.*

202. *Id.* at 1335. (quoting *Stanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158 61 N.E.2d 5, 6 (1945)). According to the court, "it would be strange, if not unthinkable, to assess civil liability for bringing to the public's attention government records which the public is entitled to see." *Reporters Committee*, 773 F.2d at 1335 (citing *Cowley v. Pulsifer*, 137 Mass. 392, 396 (1884)).

203. *Reporters Committee*, 773 F.2d at 1336 (emphasis in original).

204. *Id.* at 1336-37.

205. *Id.* at 1337.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1325, 1341 (Wright, J., dissenting). The dissent concurred with the majority's opinion with respect to the documents the district court considered in denying the summary judgment motion. *Id.*

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right of access to evidentiary exhibits in civil proceedings.²¹⁰ The dissent accused the majority of opening the door to abuses of confidential seals,²¹¹ fearing that litigants, on the basis of summary affidavits, could "make broad, unsubstantiated, claims of confidentiality and prevent public access to critical evidentiary exhibits until public interest in such documents ha[d] long faded."²¹² The dissent emphasized the importance of timing and acknowledged the "contemporaneous" nature of the right of access.²¹³ The dissent believed this contemporaneous right of access demanded, "at a minimum," that a party seeking a seal produce a document-by-document need for the seal.²¹⁴ In an historical analysis,²¹⁵ the dissent concluded that "a review of the common law precedent suggests a presumptive right of contemporaneous access to the records of civil proceedings."²¹⁶ To the degree that the common law limited the time at which such access might occur, common law courts have "shown a preference for access at the time the trial began, not at the time judgment was issued."²¹⁷ The dissent began its functional analysis by listing the benefits of open trials. Relying on the few Supreme Court cases that have addressed the issue in the criminal context, the dissent stated that open trials (1) "enhance the quality of fact finding," (2) "assume the appearance of fairness," (3) "play a cathartic role in permitting the community to observe justice being done," and (4) legitimize judicial proceedings.²¹⁸ The dissent expressly aligned itself with those circuits which have held that these functional arguments apply equally well to civil proceedings and to evidentiary exhibits.²¹⁹ Finally, the dissent disagreed with the majority's conclusion that the public can learn of the subtleties of the exhibits through a postjudgment investigation. According to the dissent, such an approach suppresses important news through delay.²²⁰

210. *Id.* at 1342.

211. *Id.*

212. *Id.*

213. *Id.* n.3.

214. *Id.* at 1344 (emphasis in original).

215. *Id.* at 1347. The dissent undertook an historical analysis only after criticizing the majority for placing considerable emphasis on the historical practice of the courts. According to the dissent, the most recent court decisions have come to rely almost entirely on functional arguments for determining the scope of the right of access.

216. *Id.* at 1347-51.

217. *Id.* at 1351.

218. *Id.*

219. *Id.*

220. *Id.* at 1353. The dissent then established its own standard, recognizing that the

IV. ANALYSIS

After the Supreme Court's decisions in *Richmond Newspapers* and *Globe Newspaper*, courts generally have accepted the existence of a first amendment right to attend civil trials.²²¹ Courts, however, still dispute both the existence and scope of a first amendment right of access to documents filed in civil proceedings. The Sixth and Seventh Circuits have stated that the first amendment does grant the press and the public a contemporaneous right of access to court records and have indicated that this right attaches to all records submitted for judicial consideration.²²² The Eleventh Circuit has concluded that the first amendment does not mandate the disclosure of trial exhibits, but that a constitutional presumption of openness applies to all other court records.²²³ The D.C. Circuit, on the other hand, has held that the first amendment does not grant to the press and the public a right of access to judicial records prior to final determination of the case on the merits.²²⁴ The first section of this Analysis argues that a first amendment right of access to court records is inappropriate in light of current constitutional theory. The second section of the Analysis suggests a common law balancing test for courts to apply when considering a right of access question.

A. *The Constitutional Right of Access*

Although the Supreme Court has not addressed directly the issue of access to civil court documents, lower courts have extrapolated various conclusions from *Warner Communications*. Initially,

first amendment generally requires a test of strict scrutiny. The dissent, however, argued that in evaluating a provisional seal a court need only use an intermediate level of scrutiny. The dissent would "require only that the trial court establish (a) that the provisional seal was justified by a substantial government interest, and (b) that there was no less restrictive means of achieving that interest." Finally, the dissent indicated that the government's interest in closure must be unrelated both to the content of the documents and the consequences of disclosure. *Id.* at 1353-55.

221. See *supra* notes 56-83 and accompanying text; see also *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981); Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. CR.-CL. L. REV. 415 (1981); Note, *After Richmond Newspapers: A Public Right to Attend Civil Trials?*, 4 COMM/ENT L.J. 291 (1982) [hereinafter Note, *After Richmond Newspapers*]; Note, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286 (1984) [hereinafter Note, *The First Amendment Right*].

222. See *supra* notes 106-51 and accompanying text.

223. See *supra* notes 168-84 and accompanying text.

224. See *supra* notes 185-220 and accompanying text.

the majority of courts and commentators construed *Warner Communications* broadly, finding that the Supreme Court expressly had denied a first amendment right to inspect and copy judicial records.²²⁵ More recently, courts have adopted a narrow approach, arguing that the Supreme Court's disposition of *Warner Communications* did not constitute a general denial of the right of access to judicial records.²²⁶ According to these courts, *Warner Communications* held only that the press' constitutional right of access was not superior to that of the public.²²⁷ Although these more recent interpretations of *Warner Communications* are technically correct—the Court did not expressly deny a first amendment right of access to judicial records—these decisions fail to recognize that the first amendment right of access question was not at issue before the Court.

More importantly, extrapolating a constitutional right of access from *Warner Communications* misinterprets the opinion. The Supreme Court did not even hint that a constitutional right of access exists. On the contrary, the Court gave every indication that the common law presumption in favor of access is not of constitutional magnitude. First, the Court listed several exceptions to the right to inspect and copy judicial records, exceptions that would not stand up under a strict standard of review.²²⁸ Interestingly, nowhere in the opinion did the Court mention the necessity of finding a compelling interest before concluding that the party seeking confidentiality has overcome the presumption of access. Rather, the Supreme Court indicated that the presumption is just one factor to be considered in the media's favor.²²⁹ The Court mentioned numerous privacy concerns as exceptions. For instance, courts are not to allow access to information that would promote public scandal, embarrass or discomfort divorce litigants, or serve as a

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addressed directly the courts have extrapolated from *Warner Communications*. Initially,

The dissent, however, argued for an intermediate level of scrutiny. (a) that the provisional seal placed there was no less restrictive than that of the government's seal on the documents and the conse-

Also *Newman v. Graddick*, 696 F.2d 1010, 1016 (D.C. Cir., 1982); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426-29 (5th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 913-14 (E.D. Pa. 1981); see also Note, *supra* note 13, at 329-43; Note, *supra* note 11, at 686-92.

225. See *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010, 1016 (D.C. Cir., 1984); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426-29 (5th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 913-14 (E.D. Pa. 1981); see also Note, *supra* note 13, at 329-43; Note, *supra* note 11, at 686-92.

226. See *Continental Ill.*, 732 F.2d at 1309 n.11; *Associated Press*, 705 F.2d at 1145; *In re Coordinated Pretrial Proceedings in Petroleum Product Antitrust Litig.*, 101 F.R.D. 34, 42 (C.D. Cal. 1984).

227. *Continental Ill.*, 732 F.2d at 1309 n.11. These courts contend that the only "right" the Supreme Court denied was the right to make copies of the tapes. The Court allowed the press to listen to the tapes, read and publish the transcripts of the tapes, and make comments about the tapes to the general public. *Id.*

228. *Id.*; see *supra* notes 21-34 and accompanying text.

229. *Warner Communications*, 435 U.S. at 598.

"reservoir[r] of libelous statements for press consumption."²³⁰

Second, the Court placed considerable emphasis on the trial court's discretion.²³¹ The Court gave no indication that the trial judge's discretion in closing the court records is limited to extraordinary circumstances. Rather, the Court stated that the trial court must weigh all the factors in light of "the relevant facts and circumstances of the particular case."²³² Last, many of the cases cited by the Supreme Court in its discussion of the common law suggest that material disclosed in the litigation process may not be presumptively open, particularly in civil trials.²³³ For these reasons, any reliance on *Warner Communications* as support for a constitutional right of access is clearly misplaced. A complete analysis of this issue, however, must distinguish between pretrial records and trial exhibits.

1. Pretrial Records

When conducting a first amendment analysis, courts generally determine whether the item of interest was historically available to the press and public.²³⁴ As *Warner Communications* clearly states, the courts of this country have long recognized a general right to inspect and copy judicial records.²³⁵ The Court in *Warner Communications* lists numerous nineteenth and twentieth century cases as authority for this proposition.²³⁶ Interestingly, an examination of these cases, and other early cases, reveals that the presumption of access to court records does not apply to pretrial documents.²³⁷ As one commentator concluded, "the cases cited by the Court in *Nixon v. Warner Communications* confirm the general understanding . . . that pretrial proceedings are analytically distinct from actual trial proceedings for purposes of public disclosure and that material disclosed in private litigation, even if filed in court, is not presumptively public."²³⁸

230. *Id.*

231. *Id.* at 599.

232. *Id.*

233. *Id.*

234. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982).

235. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069 (3rd Cir. 1984); see *Warner Communications*, 435 U.S. at 597.

236. *Publicker Indus.*, 733 F.2d at 1069; see *Warner Communications*, 433 U.S. at 597.

237. *Id.*; see *supra* notes 24-31 and accompanying text.

238. Marcus, *Myth and Reality in Protective Order Litigation*, 69 *CORNELL L. REV.* 1, 33 n.136 (1983). For example, in *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891), cited in *Warner Communications*, 435 U.S. at 598, the Michigan Supreme Court

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Strong functional reasons explain why pretrial records histori-
 cally have not been open to the public when the records have not
 been instrumental in a ruling that may be appealed. Courts are
 interested in maintaining the integrity of their records and pro-
 tecting private parties from unnecessary harm.²³⁹ Courts recognize
 that pretrial pleadings often contain "scurrilous charges which, al-
 though filed, may never come to hearing or trial."²⁴⁰ One court has
 pointed out that if pleadings can be published by anyone gaining
 access to them, then a party could cause great damage simply by
 filing pleadings containing false charges and having them pub-
 lished.²⁴¹ This fear is particularly well founded given that parties
 often move for summary judgment as a pretext for public dissemi-
 nation of discovery materials.²⁴² Finally, if a court opens to the
 public all the material submitted with a motion for summary judg-
 ment and that motion is subsequently denied, the court will have
 precluded the opportunity for settlement of the case conditioned
 on confidentiality.²⁴³

Those courts which have held that a presumptive right of ac-
 cess to pretrial records exists and attaches to all documents sub-
 mitted for judicial determination will contend that the foregoing
 arguments confuse the consideration of the presumptive right itself
 with the consideration of whether countervailing interests should

upheld a trial court ruling that denied a newspaper's request for access to the pleadings,
 emphasizing that civil suits are private rather than public affairs. Similarly, in *Cowley v.*
Pulsifer, 137 Mass. 392, 394 (1894), cited in *Warner Communications*, 435 U.S. at 598, Jus-
 tice Holmes stated that, although an open courtroom is necessary to protect the public's
 ability to oversee the judicial system, courts should not allow access to some written state-
 ments because exposure of those statements does not aid public oversight of judicial admin-
 istration. See also *Burton v. Reynolds*, 110 Mich. 354, 355-56, 68 N.W. 217, 217 (1896) (stat-
 ing that "it is not the absolute right of persons to make merchandise of the contents and
 allegations contained in the records of private actions and suits").

With regard to documents that have not been filed with the court, the Supreme Court
 recently has confirmed the pretrial document exception to the general access rule. *Seattle*
Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). In *Seattle Times* the Supreme Court had to
 decide whether the Constitution protected the defendant's right to disseminate information
 transferred from the plaintiff during discovery. *Id.* The Court held that the Constitution did
 not give the defendant this right, noting that "during the last 40 years in which the pretrial
 processes have been enormously expanded, it has never occurred to anyone . . . that a pre-
 trial deposition or pretrial interrogatories were other than wholly private to the litigants."
Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring), cited with
 approval in *Seattle Times v. Rhinehart*, 104 S. Ct. at 2208.

239. *Schmedding*, 85 Mich. at 4-6, 48 N.W. at 202.

240. *Id.*

241. *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N.W. 731, 734 (1888).

242. *Marcus*, supra note 238, at 49.

243. *Id.* & n.206 (discussing particular problems that arise in class action suits).

57 U.S. 596, 605 (1982).
 3 (3rd Cir. 1984); see *Warner*
Communications, 433 U.S. at 597.

tion, 69 CORNELL L. REV. 1,
 ch. 1, 5-6, 48 N.W. 201, 202
 the Michigan Supreme Court

overcome that right.²⁴⁴ These courts, stressing the need for contemporaneous review of judicial performance, will argue that only by allowing access to all records prior to a final decision can the public adequately assess the correctness of the judge's decision.²⁴⁵ This reasoning fails for two reasons. First, as the early decisions implicitly recognized, drawing a distinction between the presumption of openness and the countervailing interests is nearly impossible.²⁴⁶ A court, by determining that a first amendment or strong common law presumption of access attaches to a pretrial record, has practically destroyed any chance that a countervailing interest will prevail because the countervailing interest must be of a greater constitutional magnitude to outweigh the strong presumption.²⁴⁷ Second, by emphasizing the need for contemporaneous access to trial documents, the press and public are often doing nothing more than emphasizing that they are really interested in the contents of the materials requested. The press can oversee the correctness of a decision just as well after a proceeding as during the proceeding. Having the judge act as a screen does very little harm to this ability in relation to the invaluable protection this service affords the privacy and commercial interests of the litigants.

244. See *Brown & Williamson*, 710 F.2d at 1179-80; *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 43; see also *Reporter's Committee*, 773 F.2d at 1341-56 (Wright, J., concurring in part and dissenting in part).

245. See *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 43.

246. See, e.g., *Schmedding*, 85 Mich. at 3-4, 48 N.W. at 201-02; *Cowley v. Pulsifer*, 137 Mass. at 395.

247. The recent circuit court opinions in favor of access, by instituting a strict scrutiny standard consistent with a first amendment right, have rendered meaningless any exceptions to the general rule in favor of access. These courts should realize that the qualified nature of the tradition is as important as the general presumption of access. These courts may argue that the courts are aware that the right of access to court records never has been absolute and have acknowledged in their opinions that even the first amendment right to inspect and copy judicial documents is not absolute. See, e.g., *Brown & Williamson*, 710 F.2d 1165; *Continental Ill.*, 732 F.2d 1302; *Publicker Indus.*, 733 F.2d 1059. Analyzing the recent decisions reveals that this argument is seriously flawed. As the Eleventh Circuit states in *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985), the courts in favor of a first amendment right of access suggest that "the defendant's right to a fair trial, certain privacy rights of participants or third parties, trade secrets and national security, are virtually the only reasons which would justify total closure of public records." *Id.* (referring specifically to the Sixth Circuit's opinion in *Brown & Williamson*). Such a restrictive approach is not what courts and commentators have meant when they have indicated that the general right of access is not absolute. See, e.g., *supra* text accompanying notes 27 & 55.

2. Trial Exhibits

Unlike the dispute over access to pretrial records, the dispute over access to trial exhibits focuses more on the nature of the right of access than on the existence of a right of access. Although the D.C. Circuit questioned whether a general right of access attaches to trial exhibits prior to judgment,²⁴⁸ most courts have concluded that a contemporaneous right of access attaches to all exhibits submitted in open court proceedings.²⁴⁹ The principal question is whether this right of access is of a constitutional magnitude.

The right of access to documents filed with a court must play a significant role in the functioning of the judicial process if courts are to treat the right as constitutionally protected.²⁵⁰ Each of the four recent circuit court opinions that permitted the press and the public access to court records focused on this functional test in relation to *civil trials*.²⁵¹ These courts unanimously concluded that public access to civil trials was appropriate because access enhanced the fact-finding process, fostered an appearance of fairness, and served as a check on the judicial process.²⁵² Arguably, good reasons justify focusing on the functional test in relation to civil trials when considering the presumption of access to civil court documents. As the Sixth Circuit noted, "court records often provide important, sometimes the only, bases or explanations for a court's decision."²⁵³ As the Sixth Circuit opinion suggests, civil courts might give greater effect to the policies underlying public access to the courtroom when civil courts are subject to having their court records opened for inspection.²⁵⁴

These reasons supporting the general right of the press and public to inspect court records, although not entirely unpersuasive, are inadequate to justify a first amendment right of access in civil

248. See *Reporter's Committee*, 773 F.2d at 1333-40.

249. See, e.g., *Continental Ill.*, 732 F.2d 1302; *Brown & Williamson*, 710 F.2d 1165.

250. *Globe Newspaper*, 457 U.S. at 605-06.

251. *Brown & Williamson*, 710 F.2d at 1178-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-71.

252. *Brown & Williamson*, 710 F.2d at 1178-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-71.

253. See, e.g., *Brown & Williamson*, 710 F.2d at 1177.

254. One commentator notes:

[Judicial records] reflect what the parties and the court wished to expose to public view and afford an opportunity to analyze and authenticate the public's knowledge of its judicial system. Without records, no information of practical use would exist to explain why, after an extended period of time, a court acted in a particular fashion.

Note, *supra* note 13, at 343.

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cases. Unlike the open trial proceeding, access to civil court records does not sufficiently serve desired societal and judicial interests.²⁵⁵ First, the court's current access policies already satisfy the first amendment guarantees of freedom of speech and press. If a particular document is relevant and probative on the issue at trial, the parties concerned undoubtedly will reveal the information during the trial proceeding.²⁵⁶ Public access to documents, therefore, would neither enhance the quality of, nor add to the integrity of, a civil trial to any significant degree when the trial itself is completely open to the public.

Second, documents filed as part of the court proceeding generally are not critical to promoting an understanding of the trial. Consequently, denying access to the documents does not hinder the press from functioning in a meaningful fashion.²⁵⁷ Third, documents frequently may contain prejudicial and sensitive material that a court may find inadmissible at trial as evidence. Public access to these documents may mislead the public and compromise the integrity of the trial.²⁵⁸ Similarly, the prospect of public access might discourage the litigant from submitting relevant evidence for fear of exposing other facts contained in a document.²⁵⁹

Fourth, public access to court documents increases the chance that a party may not bring a suit or may be forced to settle a suit for reasons unrelated to the merits of the case. Logically, the greater the chance that a court will enable the press and public to gain access to documents containing sensitive, irrelevant information, the greater the chance a threatened party will avoid the embarrassing or harmful predicament litigation may pose. A potential plaintiff may hesitate to bring suit, or a defendant may be unwilling to fully litigate matters, if either believes that the opposition is likely to uncover and submit for judicial consideration documents that include sensitive and damaging, yet irrelevant, information which the party wishes to keep private. In such a situation, the press' and the public's rights of access greatly hinder, rather than contribute to, the integrity and effectiveness of the judicial process.

Last, most of the arguments advanced against a constitutional right of access to documents should be given even greater weight in

255. See generally *United States v. DeLorean*, 561 F. Supp. 797 (C.D. Cal. 1983) (rejecting constitutional right of access to judicial records).

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.*

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a civil suit than in a criminal one.²⁶⁰ In civil proceedings, the state is rarely a party to the action; rather, most civil suits concern private disputes between private parties. Arguably, the public plays less of a role in assuring the proper functioning of the courts in civil cases. In a criminal trial, the defendant is involuntarily thrust into a system in which he stands alone against the state. The system then entrusts the press and public with serving the essential function of assuring that the courts both administer justice and protect the individual's liberties. In a civil suit, the parties have chosen to bring their dispute before the court as a socially acceptable alternative to other private means of dispute resolution. The judiciary, by redressing wrongs and preventing undue hardships, merely provides a necessary service that allows society to function smoothly. Furthermore, the adversary system, an integral part of the civil suit, acts to guard the integrity of the fact-finding process and assure the fairness of the proceeding.

B. *The Common Law Right of Access: A Balancing Approach*

The foregoing analysis highlights the weaknesses of mechanically determining that the right to examine court records is of a constitutional magnitude. The arguments against finding a constitutional right, however, do not condemn the existence of a common law right to inspect and copy judicial documents. Indeed, this common law right has a strong historical basis²⁶¹ and plays some role in allowing the public to oversee the functioning of the judiciary. The strength of this common law right, however, remains unclear.

As indicated by the Supreme Court in *Warner Communications*, under the common law approach access decisions should be left to the trial judge.²⁶² This Recent Development argues that a trial judge should use a simple balancing formula, based on factors readily accessible to the court, in determining a third party's access rights. Under this test a court should balance the interests of the press and public to determine the strength of the presumption of openness. Courts then should balance this presumption against the competing interests of the litigants and the court. In weighing the interests of the press and public, a court should consider: (1) the public nature of the trial; (2) the type of information requested—pretrial discovery documents or trial exhibits; and (3) if

260. See Note, *After Richmond Newspapers*: *supra* note 221, at 311-12.

261. See *supra* notes 11-15 and accompanying text.

262. *Warner Communications*, 435 U.S. at 599.

a final determination has been made, the degree to which the trial court relied on the information in reaching its decision. Having determined the strength of the presumption of openness, the court should consider: (1) the burden the request will impose on the court and the litigants; and (2) the litigant's interest in closure.

1. The Presumption of Openness

The Supreme Court has indicated, and logic would dictate, that the greater the public interest in a trial's outcome, the greater the need for public access to the courtroom and the court's records.²⁶³ The first factor that courts should consider when determining the strength of the public's interest is the public nature of the trial. Courts should examine three subfactors in this regard: (1) the nature of the parties; (2) the nature of the cause of action; and (3) the subject matter of the suit. The nature of the parties to the civil proceeding is a crucial factor in determining whether the courtroom should be open. For example, the court should be less hesitant to open its records if one of the litigants is a government agency or a prominent public figure than if both litigants are private parties. The former instance is analogous to the criminal setting, where the government's presence is a driving force behind the trial proceedings and thus enhances the need for the press and public to play a substantial role in assuring the proper functioning of the court.²⁶⁴ In the latter instance, courts should be sensitive to the privacy interests of private citizens.²⁶⁵

As a second subfactor, courts should consider the nature of the cause of action. Whether the action is in contract, tort, or brought pursuant to a state or federal statute will affect the need for the public to oversee the application of law. In a contract dispute, for instance, the court will determine the outcome of the proceeding based on an agreement between the parties. Generally, the court should not have to look outside the parties' contract either to determine if a cause of action exists or to resolve the dispute. Thus,

263. See *Gannett Co. v. DePasquale*, 443 U.S. at 386-87; see also *Brown & Williamson*, 710 F.2d at 1180 (considering public interest in learning tar and nicotine content of cigarettes as important factor in determining whether order to seal administrative documents filed at trial was constitutional); *Newman v. Graddick*, 696 F.2d at 801-03 (noting importance of public interest in overseeing penal administration); *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 38-39 (noting that public interest in oil crisis necessitated seal in antitrust action).

264. See *supra* note 259 and accompanying text.

265. See *infra* notes 280-84 and accompanying text.

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the public has little interest in overseeing the court's resolution of the case. In a tort action, by contrast, the court must look to a body of established law that exists apart from the parties and their relationship, both to determine if a cause of action exists and to redress the harm. The public, therefore, has a greater interest in observing the law's application. Finally, with a federal or state statute, the court is applying law that society has expressly created and law in which society has a vested interest in seeing applied properly.

As a last subfactor, courts should consider the subject matter of the suit and the potential public impact of the court's decision. Courts should be more inclined to allow access in a lawsuit seeking to enjoin the destruction of a scenic landmark or a suit seeking to break up a large corporate merger than in a suit for a divorce. In the former instances courts' records are less likely to be used to gratify private spite or to promote public scandal.²⁶⁶ The courts have long indicated that they will not let their records serve merely as a means of satisfying curiosity or of facilitating the embarrassment and humiliation of a person.

Next, courts should consider the type of information requested when determining whether the court's records should be open for inspection. The courts historically have made distinctions between the parties' pretrial discovery documents and exhibits the parties present as part of the actual trial.²⁶⁷ Pretrial information, even if filed in court, generally has not been open for public inspection.²⁶⁸ Courts should protect this type of information from public disclosure because pretrial documents could contain sensitive information about matters that may never come before the tribunal.²⁶⁹ Trial exhibits, on the other hand, deserve less protection because they contain information relevant to the actual trial and, therefore, are of greater interest to the public. Last, in determining the strength of the presumption in favor of access, courts should consider the degree to which the trial court relied on the requested document in reaching its decision. Logically, the greater the reli-

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266. See *supra* notes 28-29 and accompanying text.

267. See *supra* notes 234-42 and accompanying text for a discussion of the distinction between pretrial and trial records.

268. See *id.*

269. See *Schmedding*, 85 Mich. at 4-6, 48 N.W. at 202. The courts, however, have indicated, as common sense would dictate, that the presumption of access greatly increases if the trial court makes a final determination at a pretrial ruling. See *Continental Ill.*, 732 F.2d at 1314; *Joy v. North*, 692 F.2d at 893.

ance on the document, the greater the need for the press and public to examine the evidence to gain an informed understanding of the trial.

Given the liberal discovery mechanisms of the Federal Rules of Civil Procedure, courts in complex civil cases can find themselves flooded with thousands of documents.²⁷⁰ Having the court conduct a review concerning the confidential nature of each document that the press or public requests, therefore, can place a great burden on the court. Courts should consider this burden as a competing interest in nondisclosure. Avoiding the time-consuming chore of document-by-document review may be well justified, especially if the court believes that further proceedings will filter the relevant information from the irrelevant documents.

2. The Litigant's Interest in Closure

Courts that have recently considered the right of access question have offered very few examples of competing interests sufficient to justify closing a trial proceeding or sealing a court's records. Courts have recognized the protection of trade interests,²⁷¹ the preservation of national security,²⁷² the protection of privacy interests,²⁷³ and the attorney-client privilege²⁷⁴ as potential competing interests in civil trials. Courts also have indicated that even these interests will not support a categorical rule of closure. Rather, the courts must consider each interest on a case-by-case basis to determine whether the interest is sufficient to justify nondisclosure.²⁷⁵ As courts undertake a more thorough balancing approach and realize that the public's interest in a civil court document may vary, courts should be more willing to give greater weight to other competing interests.

A litigant's interest in withholding sensitive commercial infor-

270. See, e.g., *Reporter's Committee*, 773 F.2d at 1326 ("designat[ing] approximately 3,800 pages of deposition and an unspecified number of documents as confidential"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. at 873-74 (designating 100,000 pages of discovery documents as confidential); see generally *Marcus*, supra note 238, at 11 n.51 (listing cases with tremendous document loads).

271. See *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Brown & Williamson*, 710 F.2d at 1180.

272. See *Brown & Williamson*, 710 F.2d at 1179.

273. See *id.*; *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983).

274. See *Continental Ill.*, 732 F.2d at 1313; *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 462 (10th Cir. 1980).

275. See *Continental Ill.*, 732 F.2d at 1313; *Brown & Williamson*, 710 F.2d at 1179-80. The courts consistently have placed the burden of persuasion on the party seeking closure. See *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 43-44.

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 Power's Corp. v. Dobbins, 616

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information is one competing factor courts should consider when a
 third party requests documents. Sensitive commercial information
 has enjoyed a long tradition of protection at common law.²⁷⁶
 Courts often have protected commercial information that may not
 be classified neatly as a trade secret—"the state of one's accounts,
 the amount of his bid for a contract, his sources of supply, his
 plans for expansion or retrenchment, and the like."²⁷⁷ Similarly,
 the Federal Rules of Civil Procedure provide that a litigant's inter-
 est in confidential commercial information outweighs the presump-
 tion of openness.²⁷⁸ The courts have used this provision to protect
 sensitive information from public disclosure in pretrial discov-
 ery.²⁷⁹ Finally, Congress, when enacting its open access laws, ex-
 pressed a willingness to protect a broad range of sensitive commer-
 cial information.²⁸⁰ Courts should give similar consideration to
 sensitive commercial information when balancing the interests at
 issue in an access question.

The litigant's interest in privacy is also a factor in some access
 determinations. The Supreme Court has held that the first amend-
 ment protects certain privacy interests.²⁸¹ A party with a constitu-
 tionally protected privacy interest should be protected from dis-
 closure. The more important issue, therefore, concerns those
 privacy interests that the Court has not deemed worthy of consti-
 tutional protection.

Although at least one commentator has argued that a litigant
 waives his privacy rights when he enters the courtroom,²⁸² the

276. See *Tavoulares*, 724 F.2d at 1018-19, for a thorough discussion of common law
 protection of sensitive commercial information.

277. *Id.* at 1018 n.18 (quoting RESTATEMENT OF TORTS § 759 comment b (1939)). The
 Restatement further provides: "there are no limitations as to the type of information
 included except that it relate to matters [of one's] business." *Id.*

278. See FED. R. CIV. P. 26(c)(7) (A court may order, upon a showing of good cause,
 that "a trade secret or other confidential research, development, or commercial information
 not be disclosed or be disclosed only in a designated way.").

279. *Tavoulares*, 724 F.2d at 1018 n.17 (citing *Centurion Indus., Inc. v. Warren
 Steurer & Assoc.*, 665 F.2d 323 (10th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec.
 Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981); *Liberty Folder v. Curtiss Anthony Corp.*,
 90 F.R.D. 80, 82-3 (D. Ohio 1981)).

280. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1982) (allowing
 agency not to disclose trade secrets and other confidential and financial information); Inter-
 nal Revenue Code, 26 U.S.C. § 6103 (1982) (prohibiting disclosure of business information
 given for tax collection purposes).

281. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381
 U.S. 479 (1965) (forbidding the use of contraceptive devices violated the right of marital
 privacy).

282. See Note, *The First Amendment Right*, *supra* note 221, at 310.

courts have not established such a principle. Rather, quite the contrary is true. As the Supreme Court noted in *Warner Communications*, courts historically have sought to prevent the disclosure of embarrassing or humiliating information concerning a litigant in a private lawsuit.²⁸³ Similarly, state legislatures have acknowledged that in certain civil proceedings, such as divorce actions, juvenile proceedings, will contests, or sensitive personal injury actions, the parties may present particularly sensitive information that demands recognition of the litigants' great privacy rights.²⁸⁴ These legislatures have given courts mandatory guidelines or discretionary power to exclude the press and public in these circumstances.²⁸⁵ Courts, therefore, must use discretion in determining when a litigant's right to privacy warrants protection from disclosure.

A litigant's interests in privacy and commercially sensitive information should be taken seriously. Courts should look beyond mechanical terminology, such as "trade secret," and consider the harm disclosure will have on the litigant. Even when a given document does not contain a trade secret or a constitutionally protected privacy concern, courts still should consider a litigant's legitimate interest in nondisclosure when conducting the foregoing balancing test. This balancing process best accommodates the interests of the parties, the press, the public, and the system as a whole.

V. CONCLUSION

This Recent Development argues that neither the press nor the public have a first amendment right of access to judicial records in civil proceedings. Rather, the press and public have only a common law right of access to such records. The courts, therefore, are not bound by a standard of strict scrutiny when determining whether to close court records. Under the common law, courts should conduct a balancing test that gives the trial court freedom

283. *Warner Communications*, 435 U.S. at 598; see *King v. King*, 25 Wyo. 275, 284-85, 168 P. 730, 732 (1917); *In re Caswell*, 18 R. I. 835, 836, 29 A. 259, 259 (1893). *But see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that publication of names of rape victims obtained from court records was not invasion of privacy). Note, *After Richmond Papers*, *supra* note 221, at 312, citing *In re Shortridge*, 99 Cal. 526, 534, 34 P. 227, 230 (1893) (which rejected the view that humiliation and embarrassment of divorce litigants warrant closure of courtroom).

284. Note, *After Richmond Newspapers*, *supra* note 221, at 312.

285. *Id.* at 318 (listing state statutes authorizing courts to close court proceedings).

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to weigh all the relevant factors in light of the facts and circum-
 stances of a particular case. In undertaking the balancing test,
 courts should weigh the common law presumption of open-
 ness—the belief that the press and public play a role in overseeing
 the function of the courts—against the litigants' interest in closure,
 the public nature of the trial, the degree to which the request for
 access will burden the court and the litigants, the type of records
 being requested, and the state of the proceedings. This approach
 attempts to implement the Supreme Court's only statement on the
 issue, the *Warner Communications* decision, a decision that repre-
 sents the most sensible approach to the question of access to judi-
 cial documents.

Ronald D. May

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New Rule Proposed Concerning Sealing Court Records

Section 22.010 of the Texas Government Code, effective Sept. 1, 1989 directed the Texas Supreme Court to establish guidelines for the Texas courts to use "in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." A subcommittee of the Texas Supreme Court Advisory Committee conducted public hearings on the matter on Nov. 18 and Dec. 15, 1989. On Feb. 16, 1990, the Supreme Court Advisory Committee adopted a proposed new rule, Rule 76a, Texas Rules of Civil Procedure, along with a companion amendment to Rule 166b(5).

Because of the importance of the rule, and because the rule would make major changes in the procedure used to protect confidential information, Justice Nathan Hecht, the Supreme Court's liaison to the Advisory Committee, has requested that the text of the rule be published, along with comments from various perspectives, in order to allow additional input from the Bar before the Supreme Court adopts a final rule. Comments may be directed to Justice Hecht at the Texas Supreme Court.

TRCP 76a. Sealing Court Records

A. Definitions.

1. **Compelling Need.** "Compelling Need" means the existence of a specific interest which, in the administration of justice, is substantial enough to clearly override the presumption that all court records are open to the general public. Specifically, a moving party must establish by a preponderance of the evidence all of the following:

- (a) a specific interest of the person or entity sought to be protected by the sealing of the court records clearly outweighs the interest in open court records and will suffer immediate and irreparable harm if the court records are not sealed;
- (b) no less restrictive alternative will adequately protect the specific interest of the person or entity sought to be protected;
- (c) sealing will effectively protect the specific interest of the

person or entity sought to be protected without being overbroad; and

(d) sealing will not restrict public access to information concerning matters related to public health or safety, or to the administration of public office or the operation of government.

2. **Court Records.** For purposes of this rule, the term "court records" shall include all documents and records of any nature filed in connection with any matter before any civil court in the State of Texas. This rule shall not apply to materials simply exchanged between the parties or to discovery made by a party pursuant to a discovery request and not filed with a court, or to documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents. The term "court records" also includes settlement agreements, whether or not filed of record, which restrict public access to matters concerning public health or safety or to information concerning the administration of public office or the operation of government; otherwise, the term "court records" does not include settlement agreements whether or not filed of record.

B. All orders of any nature and all opinions made in the adjudication of cases are specifically made public information and shall never be sealed. Unless provided to the contrary by statute, before a judge may seal any other court records, the following prerequisites must be satisfied:

1. **Hearing.** A hearing shall be held in open court, open to the public, at which any party, including any intervenor, may support or oppose the sealing of court records. Non-parties may intervene for the limited purpose of participating in the hearing. The court may conduct an in camera inspection of records where necessary to prevent disclosure of records sought to be protected. At the hearing, the court must consider all evidence presented, which may include affidavit evidence if the affiant is presented and available for cross examination.

2. **Notice.** The party seeking sealing shall file a written motion in support of the sealing request, which motion shall be open to public inspection. The moving party shall post a public notice

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at the place where notices for meetings of county governmental bodies are required to be posted, stating that a hearing will be held in open court on a motion to seal court records in the specific case, stating that any person has an opportunity to intervene and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the style of the case, and the case number. The notice shall also describe the type of case and the specific court records which are sought to be sealed. The written motion in support of the sealing request shall be filed and the public notice shall be posted at least fourteen days prior to the hearing. Immediately after posting such notice, the moving party shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas, stating that notice under this rule has been provided. The Clerk of the Supreme Court of Texas shall post the notice in a public place. The notice shall not be sealed, but shall remain open to public inspection.

3. **Temporary Sealing Order.** A temporary sealing order may be entered upon motion and notice to the other parties in the case pursuant to Rules 21 and 21a, but without holding a hearing or requiring public notice as provided for in paragraphs (B)(1) and (B)(2) above, upon a showing of compelling need from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing can be held as otherwise provided herein. Every temporary sealing order granted without posted notice or public hearing shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, shall contain the findings required by paragraph (B)(4) and state why the order was granted without notice, and shall expire by its terms, not to exceed fourteen days after signing, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the parties consent that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. If a temporary sealing order is granted without public notice and hearing, a motion for sealing order shall be filed, notice provided and a hearing set as elsewhere provided in these rules. On two days' notice to the party who obtained the temporary sealing order or on such shorter notice to that party as the court may prescribe, any person, whether or not a party to the lawsuit, may appear or intervene and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. When the motion for sealing or the motion to dissolve or modify a temporary sealing order comes on for hearing, the party who obtained the temporary sealing order shall proceed with the motion and, if he does not do so, the court shall dissolve the temporary sealing order. At any hearing on a sealing order held after the grant of a temporary sealing order, the burden of proof shall be upon the party requesting sealing to prove said party's right to the sealing order as fully and completely as if no temporary sealing order had been sought or entered.

4. **Sealing Order.** If, after considering all the evidence concerning sealing court records, the judge concludes that a Compelling Need as defined herein has been shown, the judge shall within three days sign a written order dividing the court records into two files: one kept open to public inspection and the other containing only those limited portions of the court records for which a Compelling Need for sealing exists. Such order, if granted, shall be specific, stating the case number, the style of the case, the specific findings demonstrating that a Compelling Need has been shown, made at or after the hearing, the conclusions of law, the specific portions of the court records which are to be sealed, and the time period for which the sealed portions of the court records are to be sealed. Under no circumstances may the written motion to seal or the sealing order be sealed; both must remain in the open, public portion of the file.

C. **Continuing Jurisdiction.** Any person may intervene as a matter of right at any time before or after judgment to request the court to seal or to unseal court records. The court has continuing jurisdiction before or after judgment to determine claims of access to court records, to seal court records and to enforce the Court's orders.

D. **Appeal.** Any order sealing court records and denying access to an intervenor finally disposes of the claim of the intervenor to have access to the records, severs the intervenor's claim from any other claim, and is appealable as a final judgment. Upon any such appeal, the trial court's failure to make the specific findings required in paragraph (B)(4) shall never be harmless error and shall be reversible error. The trial court's failure to comply with the notice and hearing requirements in paragraphs (B)(1) - (B)(3) shall render any sealing order void and of no force and effect.

E. No court records shall be withdrawn from the public file except as expressly permitted by specific statute or rule.

TRCP 166b(5). [Addition]

No protective order or agreement relating to protecting disclosure of information concerning matters of public health or safety or information concerning the administration of public office or the operation of government shall be valid unless the party seeking protection files the discovery or results of discovery with the clerk of the court and complies with Rule 76a.

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An Overview: Proposed Rule 76a

By John H. McElhañey
And Thomas S. Leatherbury

Background

The operation of the courts with public funds clearly subjects court records to public scrutiny. As the Seventh Circuit has held: "The public's right of access to judicial records has been characterized as 'fundamental to the democratic state[e].'"

The policy reasons for granting public access to criminal proceedings apply to civil cases as well. These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.¹

Unfortunately, not all Texas civil courts have given proper weight to the public's right of access to court records and the policy considerations underlying this right. In November 1987, *The Dallas Morning News* published a series of articles on the practice of sealing civil court records in Dallas County. During its investigation, *The Dallas Morning News* found that since 1980 more than 200 non-child-related cases had been partially or totally sealed. District judges had sealed court records at the mere request of one or more of the parties to the suit, without prior notice to the public, without any opportunity for the public to be heard, without any hearing, and without the required showing of proper and constitutionally permissible grounds for sealing. In many instances, Dallas County judges had entered sealing orders that were overbroad, sealing the entire file rather than only the material shown to justify sealing. Furthermore, the judges' sealing orders explaining the reasons, if any, for sealing the records, had often been sealed as well. In those instances when the sealing order had not been sealed, most of the sealing orders contained inadequate reasons or no reason at all to justify sealing. Finally, many court records had been improperly treated as sealed in perpetuity because the sealing orders did not state a length of time for which the records were to remain sealed.² There is no reason to believe that the Dallas County experience was unique or substantially different than that in other parts of the state. These practices and the disparate standards for sealing contained in various local rules throughout the state clearly indicated the need for a comprehensive, uniform rule governing the sealing of civil court records.

On June 14, 1989 Gov. Clements signed into law House Bill

1637, which had been introduced and sponsored by Rep. Orlando García of San Antonio, enacting Section 22.010 of the Texas Government Code. Effective Sept. 1, 1989, this legislation provides:

SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

The Texas Supreme Court submitted the issue to its Rules Advisory Committee for recommendation and Chairman Luther H. Soules, III appointed a subcommittee to propose a draft rule. The subcommittee, co-chaired by Charles M. Herring, Jr. and Charles "Lefty" Morris, conducted public hearings on Nov. 18, 1989 and Dec. 15, 1989 and also received substantial input at the Texas Supreme Court's public hearing on Nov. 30, 1989. More than 25 participants, including defense lawyers, plaintiffs' lawyers, and representatives of public interest and citizens' groups, attended and provided valuable information at the hearings. The subcommittee accumulated several hundred pages of draft proposals, court decisions, law review commentaries, and position statements from many diverse sources. The proposed rule is, of course, the product of the discussion, the debate, and the necessary compromises which are endemic to the open discussion and consideration of the sealing issue.

The Compelling Need Standard

The proposed rule begins with the indisputable presumption that all civil court records are open to the public.³ In those rare instances when civil court records should be sealed, the court must first satisfy certain substantive and procedural due process requirements. In paragraph (A) (1), the proposed rule defines the "compelling need" standard which the party seeking sealing must meet to obtain an order sealing "court records." The compelling need test has been recognized and applied by numerous federal circuit courts and state appellate courts as the appropriate standard in cases involving claims of access to court records.⁴

In order to establish that a compelling need for sealing exists, the movant must establish all of the following by a preponderance of the evidence:

a) a specific interest sought to be protected by sealing clearly outweighs the interest in open court records and will suffer immediate and irreparable harm if the court records are not sealed;⁵

b) no less restrictive alternative will adequately protect the specific interest sought to be protected;⁶

c) sealing will effectively protect the specific interest sought to be protected without being overbroad; and

d) sealing will not restrict public access to information concerning matters related to public health or safety,⁷ or to the administration of public office or the operation of government.⁸

Definition of Court Records

The definition of "court records" contained in paragraph (A) (2) was one of the most thoroughly discussed and debated provisions of this proposed rule. For the purpose of this proposed rule, the term "court records" includes "all documents and records of any nature filed in connection with any matter before a district or county court in any jurisdiction in the State of Texas," except for filed settlement agreements which do not "restrict public access to matters concerning public health or safety or to information concerning the administration of public office or the operation of government."⁹ The term "court records" does not include discovery material simply exchanged between the parties and not

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filed with a court, or documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents.¹⁰

Notice and Hearing Provisions

The notice and hearing provisions contained in paragraphs (B) (1) and (2) are designed to ensure that the public does not lose its right of access to civil court records without proper procedural safeguards.¹¹

The proposed rule requires the party seeking sealing to file a written motion in support of the sealing request, to obtain a hearing on the motion, and to post notice of the requested sealing at the place where notices for meetings of county governmental bodies are required to be posted. The rule details the specific information that must be contained in the notice and provides that the notice shall be posted at least 14 days prior to the hearing on the motion to seal. The movant must also file a verified copy of the posted notice with the clerk of the Supreme Court of Texas who, in turn, shall post the notice in a public place.

The rule further provides for a hearing in open court on the motion to seal and specifically provides that non-parties may intervene for the limited purpose of participating in this hearing. The proposed rule provides the court with discretion to conduct an *in camera* inspection of specific records "where necessary to prevent disclosure of records sought to be protected." Finally, the court may consider affidavit evidence at the hearing if the affiant is present and available for cross-examination.

Temporary Sealing Orders

Paragraph (B) (3) of the proposed rule provides for temporary sealing orders when a specific interest of the party seeking sealing will suffer immediate and irreparable injury before the party can comply with the notice and hearing provisions contained in paragraphs (B) (1) and (2). The temporary sealing order procedures draw upon the procedures used in obtaining temporary restraining orders under Tex. R. Civ. P. 680. After obtaining a temporary sealing order, the party seeking sealing must post notice and comply with the hearing provisions contained in the proposed rule. The proposed rule further provides that a party, including an intervenor, may seek a prompt dissolution or modification of any temporary sealing order.

Requirements for Sealing Orders

The proposed rule specifies prerequisites of any sealing order in paragraph (B) (4) and prohibits the sealing of any sealing order or motion to seal.¹² It is axiomatic that, for a sealing order to conform to the "least restrictive alternative" requirement, the order must contain the specific portions of the court records to be sealed, the specific findings of fact and conclusions of law, and the length of time the records are to remain sealed.¹³

Continuing Jurisdiction

The provisions concerning continuing jurisdiction in paragraph (C) of the proposed rule acknowledges and affirms the trial court's power to enforce, to modify, or to vacate its sealing orders.¹⁴ This provision also affirmatively recognizes the public's right to intervene before or after judgment in connection with sealing orders. If a trial court lost jurisdiction over an operative sealing order, interested third parties would be prevented from attacking the validity, length, or scope of the order, and all sealing orders would exist in perpetuity, never allowing for the possibility that, at some future date, the compelling need for sealing may have dissipated. Given the public's fundamental interest in open court proceedings, such a legal rule is unacceptable. The public must have the right to intervene before or after judgment, and a trial court must maintain the power to enforce, alter, or vacate

its sealing orders until such orders expire by their own terms or are vacated by the court.¹⁵

Appeal Rights

Because of the importance of plenary appellate review of trial court rulings concerning motions to seal, paragraph (D) of the proposed rule provides that such rulings shall be deemed severed and a final, appealable judgment. The appeal provisions reinforce the notice and hearing provisions and the trial court's obligation to make specific findings in sealing any court records by providing that the trial court's failure to comply with the notice and hearing provisions renders any sealing order void and of no force and effect and that the trial court's failure to make specific findings in the sealing order shall never be harmless error and shall be reversible error.

No Withdrawal of Court Records

Paragraph (E) of the proposed rule anticipates the possibility that a litigant would attempt to circumvent the strictures of this rule by simply withdrawing pleadings or other court records. The proposed rule prohibits the withdrawal of any court records "except as expressly permitted by specific statute or rule."¹⁶

1. *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) (citations and footnotes omitted); *accord*, *Houston Chronicle Publishing Co. v. McMaster*, 598 S.W.2d 864, 866-67 (Tex. Crim. App. 1980) (quoting *Shiras v. Britt*, 589 S.W.2d 18, 20 (Ark. 1979) ("the handling of the public's business in secret



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and behind closed doors not only causes the public to view the results with distrust, but it deprives the public of sufficient knowledge to make adjustment or reform in the law or the judiciary").

2. Additionally, in the two reported Texas cases involving post-judgment attacks on sealing orders, the courts had held that intervention was not proper after judgment and that the court which entered the sealing order lost jurisdiction over the case and the record when the judgment became final. See *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex. 1987); *Express-News Corp. v. Spears*, 766 S.W.2d 885 (Tex. App. — San Antonio 1989, no writ).
3. Paragraph (B) of the proposed rule provides that "[a]ll orders of any nature and all opinions made in the adjudication of cases are specifically made public information and shall never be sealed." See Tex. Rev. Civ. Stat. Ann. art 6252-17a (Vernon Supp. 1990). The presumption of access to other civil court records rests most squarely on the common law, see *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assn.*, 800 F.2d 339 (3d Cir. 1986), later appeal, 844 F.2d 1050 (3d Cir. 1988); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). The presumption of access also draws upon the First Amendment to the United States Constitution, see *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984), and Article I, §8 of the Texas Constitution. Cf. *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring) (the free speech and free press release clauses of Article I, §8 are even broader than those contained in the First Amendment); *Houston Chronicle Publishing Co. v. Shaver*, 630 S.W.2d 927 (Tex. Crim. App. 1982) (Article I, §8 guaranteed public's right to attend suppression hearing in criminal case even though precedent under First Amendment appeared unclear at the time). The proposed rule exempts from this presumption of access civil court records which are sealed by reason of specific statutes.

4. *Fed. Trade Comm'n v. Standard Fin. Management Corp.*, 830 F.2d 404, 410-12 (1st Cir. 1987); *Application of CBS, Inc.*, 828 F.2d 958, 960 (2d Cir. 1987); *Wilson v. American Motors, Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985); *In re Knoxville News-Sentinel*, 723 F.2d 470 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), cert. denied sub nom. *Citytrust v. Joy*, 460 U.S. 1051 (1983); *Goldberg v. Johnson*, 485 So. 2d 1386 (Fla. App. 1986); *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).
5. The proposed rule does not specify or define the interests which may, in exceptional circumstances, overcome the presumption of openness. Rather, the proposed rule is broad enough to encompass legitimate trade secrets, private sexual or medical matters, and other protected interests established on a case-by-case basis. However, it is axiomatic that the parties' desire to have their lawsuit conducted in private does not suffice to seal the records. See, e.g., *Fed. Trade Comm'n v. Standard Fin. Management Corp.*, 830 F.2d 404 (1st Cir. 1987); *Atlanta Journal v. Long*, 369 S.E.2d 755 (Ga. 1988). Moreover, a settlement stipulation to seal the court records does not justify sealing. *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985); *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).
6. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983); see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-03, (1979); *Application of National Broadcasting Co.*, 828 F.2d 340, 347 (6th Cir. 1987).
7. *In re "Agent Orange" Product Liability Litigation*, 98 F.R.D. 539, 547 (E.D.N.Y. 1983).
8. *Miami Herald Publishing Co. v. Collazo*, 329 So.2d 333 (Fla. App.), cert. denied, 342 So. 2d 1100 (Fla. 1976).
9. But see *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assn.*, 800 F.2d 339 (3d Cir. 1986), later appeal, 844 F.2d 1050 (3d Cir. 1988) (settlement agreement filed in connection with motion to enforce is "public component" of civil trial).
10. See *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th Cir. 1988), quoting *In re "Agent Orange" Product Liability Litigation*, 98 F.R.D. 539, 544-45 (E.D.N.Y. 1983).
11. *In re Knoxville News-Sentinel Co.*, 723 F.2d 470 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984) (criminal case); see generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).
12. See, e.g., *Globe Newspaper Co. v. Pokaski*, 684 F. Supp. 1132 (D. Mass. 1988), aff'd in pertinent part, 868 F.2d 497 (1st Cir. 1989).
13. See, e.g., *Atlanta Journal v. Long*, 369 S.E.2d 755 (Ga. 1988); *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983).
14. *Tyler v. St. Louis Southwestern Railway Co. of Texas*, 405 S.W.2d 330, 332 (Tex. 1966) ["jurisdiction [to modify judgment] lies with the trial court in which the case was pending when final judgment was rendered"]; *State v. Associated Metals & Minerals Corp.*, 616 S.W.2d 305, 310 (Tex. App. — Houston [14th Dist.] 1981), rev'd on other grounds, 635 S.W.2d 407 (Tex. 1982) ("courts undoubtedly have jurisdiction to modify their own injunctions"); see also *Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971) ("issuing court has continuing power to supervise and modify its injunctions in accordance with changed circumstances").
15. This provision overcomes the holdings in *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648 (Tex. 1987), and *Express-News Corp. v. Spears*, 766 S.W.2d 885 (Tex. App. — San Antonio 1989, no writ).
16. See, e.g., Tex. R. Civ. P. 75 and 75b.

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Proposed Rule 76a: A Radical Turning Point for Trade Secrets

By Gale R. Peterson

Proposed Rule 76a represents a revolutionary and radical change in the practice of trade secret and related intellectual property law litigation in the state courts of Texas. Adopting the proposed rule without explicit safeguards for trade secrets and sensitive commercial information will make it unusually difficult, and perhaps impossible, to properly protect and preserve valuable vested property rights. The rule, as presently drafted, will not only encourage but mandate costly battles far in advance of trial over whether there are protectable property interests at stake. The rule further raises the spectre that third parties, as well as litigants, will face court orders forcing the disclosure of valuable trade secret and commercial information under a pretext of public health or safety.

As Texas moves into a new decade of economic development by attempting to foster and attract new businesses devoted to commercialization of technologies, adopting such a rule is both ill-advised and poorly timed. The reputation the State of Texas currently enjoys in the technology community of effective, efficient protection for intellectual property rights will be tarnished, perhaps irreparably. Perhaps most troubling and saddening is that this importunate rule could be readily and easily revised to accommodate the justified needs of Texas intellectual property owners.

There can be little doubt that abuses exist and create a rational basis for adopting a rule limiting unfettered use of sealing orders. But a rule that goes too far will have the equally abusive effect of causing our Texas citizens to lose valuable rights for no just purpose. Such a result does not meet a public need and, in fact, can have far-reaching, unanticipated effects.

Although intangible property interests,¹ such as trade secrets, confidential and proprietary information, know-how, and show-how have long been important,² our current age of technology has created an even greater emphasis on protecting and preserving those rights. Tens of billions of dollars are spent each year on research and development. The federal government alone annually spends in excess of \$60 billion funding research and development. Developments created under those R&D investments are protected under both state and federal statutes, as well as the common law.

The feature common to all of those laws is the creation of a property interest. The creation of a property interest, in fact, lies at the very core of our system for protecting and preserving those interests. Property interests in *tangible* personal property are relatively easy to recognize and, to some extent, relatively easy to enforce. Misappropriating a new semiconductor chip or the designs for a new blowout preventor is not materially different than stealing other items of personal property, for example, one's automobile. Because such items are tangible, they can be protected by physical means such as keeping them under lock and key.

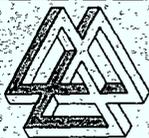
Intangible property interests on the other hand, are, by definition, more abstract and thus more difficult to preserve and protect. But they are no less property interests. And therein lies the crux of the problem with Rule 76a as presently proposed. The rule stems from a premise that there is no overriding, all-inclusive public right to access information subject to disclosure during litigation. But civil litigation is primarily intended to resolve a dispute between the litigating parties. Simply because two or more parties have a litigated dispute does not create a public right to have access to all information related to that dispute. Furthermore, neither the rule nor its premise distinguishes between public and private information. The companion amendment to Rule 166b (5), indeed, would preclude the entry of protective orders, now common in trade secret and intellectual property law litigation, unless the procedure dictated by proposed Rule 76a is followed. Thus, the premise of an overriding public right of access would apply to otherwise private information produced during discovery as well as that information made part of "Court Records" under the proposed rule's sweeping definition.

In analyzing the true effect of this rule, it is important to recognize that our rules on discovery, as well as our other procedural rules, apply not only to the parties, but to third parties as well who may have information or materials relevant to the dispute. Our current liberal discovery rules were intended for the sole purpose of assisting the parties in the preparation and trial, or the settlement, of litigated disputes. They were not intended as a vehicle to force disclosure of otherwise private information, or to, in effect, provide "free" discovery of a company's business, products, or finances. That is even more true with respect to third parties.

It is further important to recognize that those disclosures are forced under the power of the court. Absent litigation, there would be no right of public access to an individual's or a company's internal records, information and files. Nowhere in the history of the development of our substantive or procedural law is there any indication that our rules on liberal discovery were intended to serve a broader public purpose of forcing disclosure of otherwise private, privileged, or confidential information. Indeed, Justice Berger wrote in his concurring opinion in *Gannatt Co., Inc. v. DePasquale*:³

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pre-trial deposition or pre-trial interrogatories were other than wholly private to the litigants.

It is clear, moreover, from experience, that our liberal rules of discovery have themselves lead to a significant potential for abuse. That abuse is not limited to matters of delay and expense. Discovery has every potential for seriously invading the privacy interests of both the litigants as well as third parties brought into the litigation simply because they possess relevant informa-



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tion. But those privacy interests have been weighed secondary to the interests of obtaining justice in litigation. Nevertheless, those broad rules mandating discovery of otherwise private information have always carried the procedural and substantive safeguard of protective and sealing orders. Although the courts could and would force disclosure of otherwise private information, that disclosure would be subject to the power of the court to limit the use and further dissemination of such information. There is the opportunity, now that those safeguards are stringently limited by proposed Rule 76a, for litigants (and under the proposed rule, others) to obtain, incidentally or by design, information that not only is irrelevant or marginally relevant to the issues being litigated, but information which could be irreparably damaging if publicly disclosed.

As a general rule, a defendant in litigation faced with allegations involving a misappropriation of an intangible property interest is entitled to be informed of the property interest at issue. Relief, in fact, has been denied where a plaintiff has failed or refused to identify the asserted trade secrets or other information allegedly misappropriated.⁴ Also, in defending against such allegations, such defendants are frequently placed in the position of having to disclose their own valuable trade secret or confidential information.⁵

Such requirements coupled with liberal discovery rules frequently have led experienced litigators to agree to a form of protective order which secured both information produced during discovery and information which was required to be disclosed in pleadings and other court records. Such orders typically precluded farther dissemination and improper use. Agreeing to such a protective order permitted discovery to continue with minimal court involvement and generally advanced the litigation to the advantage of both parties. Discovery disputes, however, periodically required the filing of motions and briefs that disclosed all or a portion of the information covered by such protective orders. Protective orders have frequently covered that possibility by requiring that such information be filed with the court under seal. Further, when the litigation required that trade secret or confidential information be disclosed in court records, orders sealing that limited information from public view were necessary. If such a sealing order were not entered, the valuable property rights in that information would be irreparably lost.⁶ Forcing parties in such litigation to go through the procedures mandated by currently proposed Rule 76a will stall and add delay to such litigation, with no appreciable benefit to the parties or the public at large. Indeed, the proposed rule will likely spawn mini-trials well in advance of trial on whether any protectable information is at issue. Perhaps most importantly, the proposed rule will add substantially to the already high litigation costs for intellectual property disputes. Not only will the procedures mandated by Rule 76a create that additional expense, but parties now will have additional incentives to resist discovery leading inevitably to protracted discovery battles.

The proposed rule creates those problems by failing to recognize that the vested property interest of an intangible property right, by definition, carries a "compelling need" not to be disclosed to the public because that disclosure would cause an immediate loss (or at least an impairment of) that property right. The very reason that such property rights are recognized is because information is *not* public. Even matters of public policy do not create a carte blanche for disclosure of such information. For example, in *Ruckelshaus v. Monsanto Company*,⁷ the Supreme Court reviewed a federal law covering the registration of pesticides. That law required that Monsanto disclose information regarding the pesticide to the Environmental Protection Agency ("EPA") in order to obtain a registration to market the pesticide. That law, based on a public policy rationale, permitted the EPA to disclose that information to Monsanto's competitors and the public. The district court held the statute constituted a taking of Monsanto's "property" without just compensation in violation of the due process requirements of the Fifth

Amendment of the U.S. Constitution.⁸ The Supreme Court agreed that Monsanto's property interest was protected by the Fifth Amendment:

This general perception of trade secrets as property is consonant with a notion of "property" that extends beyond land and tangible goods and includes the products of an individual's "labor and invention."

* * *

That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of the Courts. [Emphasis added.]⁹

* * *

A major treatise in the field of trade secret law states: "In view of *Monsanto, supra*, the federal government under the Fifth Amendment and the states under the Fourteenth Amendment should be precluded from enacting laws or regulations that take trade secrets for public use without just compensation, or destroy or transfer them for private use at all."¹⁰ Moreover, those property interests at stake extend well beyond technical-type data or information traditionally viewed as a "trade secret." Confidential business information is likewise property as recognized by the Supreme Court in *Carpenter v. United States*,¹¹ finding that information gathered for the *Wall Street Journal* constituted "money or property" for purposes of the federal mail and wire fraud statutes¹² prior to publication. The court wrote: "Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy."¹³ Additionally, the courts

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have recognized a right of privacy, secured by the Fourth Amendment to the U.S. Constitution, in confidential business information produced during discovery, but not used at trial.¹⁴ Indeed, the D.C. Circuit has noted that the drafters of the Federal Rules of Civil Procedure specifically provided that the presumption of openness was outweighed by a litigant's privacy interests in sensitive commercial information.

Rule 76a and the accompanying amendment to Rule 166b, furthermore represent a dramatic and radical departure from a long list of both federal and state laws which recognize that the vested property interests in trade secret and sensitive commercial information, by definition, carry a "compelling need" that such information not be disclosed. For example, the Federal Freedom of Information Act,¹⁵ specifically exempts trade secrets and confidential commercial and financial information from disclosure. The Privacy Act of 1974¹⁶ prohibits, subject to exemptions, disclosure of personal information without consent. The Internal Revenue Code¹⁷ prohibits disclosure of information regarding business affairs given for purposes of tax collection. The Texas Open Records Act¹⁸ exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Indeed, the Act provides that it is a misdemeanor to distribute such confidential information. In short, there is a fundamental difference in the rights at issue which distinguish trade secrets and other sensitive commercial information from other types of information subject to public access.

As presently drafted, Rule 76a requires that the proponent of a sealing order establish, by a preponderance of the evidence, the four criteria listed in paragraphs (a)-(d). The debate leading up to this proposal, including the express lack of specific provi-

sions dealing with trade secret and sensitive commercial information, leaves little doubt that those criteria are expected to be strictly construed. Those criteria would not create, in practice, an implicit exemption for trade secrets and sensitive business information despite the fact that the property interests at stake would inherently satisfy at least the criteria of (a)-(c). Additionally, proponents of a sealing order (and even a protective order covering discovery, under the amendments to Rule 166(b) are placed in the impossible position of proving a negative — namely, that the information sought to be protected does *not* relate to public health or safety, or the administration of public office, or the operation of government. It would be the rare instance in which information regarding a company's products would not, at least to some degree, "relate" to those broad categories. The situation would be different if the rule were one dealing with a request for a government-granted privilege, such as a license to sell pesticides as in *Monsanto*. But this rule deals with litigation and forced disclosure — not voluntary disclosure to secure a privilege.

In the same vein, the proposed rule forces the disclosure of settlement agreements if they are broadly related to public health or safety, or to information concerning the administration of public office or the operation of government. Intellectual property litigation frequently involves businesses which choose to settle their dispute on a commercial basis. Settlement agreements are many times similar to a commercial contract the parties would have negotiated outside of litigation. Non-public entities have an expected right of privacy in those commercial agreements when they contain provisions imposing obligations of confidentiality. Under the proposed rule, however, those expectations of privacy would be utterly extinguished if the subject matter broadly concerned public health or safety.

The protected property interests of trade secrets, confidential and proprietary information, know-how, and show-how are frequently and widely used by competing companies in our modern competitive economy to create and offer improved goods and services. Those intangible property rights are many times the sole competitive edge a company uses to compete effectively. Of equal importance is the fact that such intangible property interests are widely bought, sold, and traded under domestic and international licenses, and create a commercial economy quite apart from the tangible products those rights relate to. But, such intangible property interests are somewhat more fragile and more difficult to protect than tangible property interests. Available technology today permits far more extensive duplication and dissemination of information than was possible even a few short years ago. Nevertheless, the law imposes an obligation on proprietors of such intangible property interests to take adequate measures to protect against such dissemination. For if they do not, the property interest is lost.

Adequate laws, both substantive and procedural, for protecting those property interests are essential to modern day businesses. Further, it is essential that such businesses have continued access to and use of our courts to protect and preserve those property interests. Until the advent of proposed Rule 76a, Texas offered both substantive and procedural safeguards for protecting and preserving valuable property interests. If passed in the form proposed, without specific safeguards for trade secret and sensitive commercial information, however, Rule 76a holds the potential for radically changing both our law and our image. The need to correct abuses does not carry with it any right to run roughshod over vested property interests. Nor does it carry the need to create procedural rules that will destroy valuable substantive rights.

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1. Courts in both England and the U.S., in the late 1800s and early 1900s, struggled with finding an acceptable, universal definition for a "trade secret." The problem has been that other types of intellectual property rights, such as patents, trademarks, and copyrights, were defined

and governed by statutes. But, there was, unfortunately, no cogent definition of a "trade secret" until publication of the Restatement (First) of Torts in 1939. Comment (b) of §757 of the Restatement sets out a definition for a "trade secret." Texas, as well as a number of other states, have adopted that definition of a "trade secret" in numerous cases. That, indeed, was the definition adopted by the Texas Supreme Court in *Hyde Corporation v. Huffines*, 158 Tex. 566, 314 S.W. 2d 763 (Tex. 1958), cert. denied, 358 U.S. 898 (1958), and in the companion case, *K&G Oil Tools and Service Co. v. G&G Fishing Tool Service*, 314 S.W. 2d 782 (Tex. 1958), cert. denied 358 U.S. 898 (1958). But the Restatement (First) of Torts was written quite early in the development of trade secret law, and was written in a radically different age of technology. Technology today centers largely on "information" and the ability to gather, assimilate, store, and process that information. As a result, in addition to the traditional concept of "trade secrets," companies today typically count as assets somewhat more generic categories of information now commonly known as "know-how" and "show-how." The phrase "intangible property rights" is generally used as an all-inclusive phrase to refer to truly valuable, commercial information and materials in which a property interest has been recognized.

2. The concept of protecting such information, indeed, dates from Roman times. Schiller, *Trade Secrets and the Roman Law: The Actio Cerui Corrupti*, 30 Colum. L. Rev. 837 (1930).
3. 443 U.S. 368, 396, 99 S. Ct. 2898, 2914 (1979). See also, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199 (1984).
4. See e.g. *Litton Systems, Inc. v. Sunstrand Corp.*, 750 F. 2d 952, 224 U.S.P.Q. 252 (Fed. Cir. 1984).
5. See *Aerosonic Corporation v. Trodyne Corporation*, 402 F.2d 223, 228 (5th Cir. 1968).
6. *M.R.S. Datascope Inc. v. Exchange Date Corporation, Inc.*, 745 S.W. 2d 542 (Tex. App. - Hou. [1st. Dis.] 1988, no writ) (a customer list filed with the court not under a sealing order made that list public).
7. 467 U.S. 986 (1984).
8. The district court wrote: Therefore, the Court finds that Monsanto possessed a cognizable property right in the data submitted to EPA * * *. The property rights Monsanto possesses in its intellectual property (data) are the right to exclude others from the enjoyment of such data, in particular, the right to prevent the unauthorized use and the right to prohibit disclosure of its data. 564 F. Supp. 552, 565-566 (1983).
9. 467 U.S. at 1004. Indeed, Justice Blackmun wrote: With respect to a trade secret, the right to exclude others is essential to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data. 467 U.S. at 1011.
10. Jager, *Trade Secrets Law* §4.01[3] (1989).
11. 108 S. Ct. 316 (1987).
12. 18 U.S.C. §1431, 1443.
13. 108 S. Ct. at 320. See also, *Zotos International, Inc. v. Young*, 830 F.2d 350 (D.C. Cir. 1987) (holding that the Food and Drug Administration acted arbitrarily and capriciously in denying trade secret status to an ingredient in a cosmetic simply because it could be identified by reverse engineering); *National Surety Corp. v. Applied Systems*, 418 So.2d 847 (Ala. 1982) (computer programs constitute property permitting a cause of action for conversion to accrue against former employees who "misappropriate" the programs).
14. *Travoulares v. The Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984). The D.C. Circuit noted that, "[i]f the purpose of the common law right of access is to check judicial abuses, then that right should only extend to materials upon which a judicial decision is based," quoting from *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980).
15. 5 U.S.C. §552(b)(4).
16. 5 U.S.C. §552a(b).
17. 26 U.S.C. §6101.
18. Tex. Rev. Civ. Stat. Ann. art. 6252 - 17a (supp. 1990).

Gale Peterson practices intellectual property law litigation with Cox & Smith in San Antonio. He holds a LLM in trade regulation law, with highest honors, from George Washington University and a degree in electrical engineering from the University of Nebraska. He is chairman of the Intellectual Property Law Section of the State Bar of Texas, and is also an active member of the Virginia and District of Columbia bars.

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Each legal article submitted to the *Texas Bar Journal* must conform to the following guidelines:

Length: no more than 3,000 words, excluding footnotes. Generally, approximately 12 typewritten, double-spaced pages will equal 3,000 words.

Footnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" and *Texas Law Review* "Green Book" form.

Form: must be typewritten, double-spaced on 8^{1/2}" x 11" paper; five (5) copies of each article must be provided. Only completed articles will be considered (no abstracts; article outlines or ideas will be considered).

Content: wide-ranging topics are accepted, as long as they pertain to the Texas legal profession and are of interest to a large number of Texas practitioners. *Not acceptable* are articles dealing with pending litigation, or current political or religious issues or personalities. Articles which advocate legislation or a legislative position are published only when approved by the State Bar's Legislative Committee and/or Board of Directors.

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Biographical information/photo: each author of an accepted article must supply the *Texas Bar Journal* a recent black and white photograph of himself/herself and a brief (50 words or less) biographical sketch, both of which appear in conjunction with the article.

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Due to the large number of legal articles submitted to the *Texas Bar Journal*, the Editorial Committee generally takes 30 to 90 days to offer its judgment on each article. After an article has been approved, it is usually published in the *Bar Journal* within one year.

All communications regarding legal articles should be directed to Sandra Williams, Administrative Assistant, *Texas Bar Journal*, P.O. Box 12487, Capitol Station, Austin, Texas 78711, 512/463-1522.

Proposed Rule 76a: An Elaborate, Time-Consuming, Cumbersome Procedure

By David E. Chamberlain

I oppose the current draft of proposed Rule 76a together with the companion amendment to Rule 166b(5). While discouraging settlement, the proposals encourage the addition of intervening parties, the filing of motions, the mandatory setting of hearings and the filing of appeals.

These rules would produce radical changes in pretrial and trial practice for lawyers attempting to protect confidential and proprietary information of clients involved in most types of litigation, including personal injury suits, commercial litigation, family law, and trade secrets litigation. In its present form, the draft rule would make virtually impossible the protection of valuable or highly sensitive confidential information even when there is no, or very little, public interest in disclosure, and would increase dramatically the amount of litigation time, delay and expense associated with efforts to protect confidential information. Proposed Rule 76a would also seriously impede the settlement of many lawsuits, thereby undermining the strong public policy in Texas law in favor of settlements.

The version of Rule 76a proposed by the Texas Supreme Court Advisory Committee would create an elaborate, time-consuming and cumbersome procedure applicable to the sealing of "court records." Essentially, the procedure requires a motion and fourteen days' public notice before any "court records" may be protected from disclosure. The term "court records" includes discovery documents relating in any way to "public health or safety" and settlement agreements (whether or not filed of record) that "restrict public access" to "public health or safety" matters. One or more public hearings must be held in which anyone can intervene and from which any intervenor can appeal. At the hearing an extremely strict, and as a practical matter nearly impossible, standard of "compelling need" must be met in order to protect confidential information from disclosure. Several problems are evident in this procedure:

"Compelling Need." Rule 76a creates an extraordinarily stringent and difficult standard of "compelling need" that must be shown in order to protect from public disclosure any "court records" including most discovery and settlement agreements in most personal injury cases.¹ Civil cases in which the standard can be met will be extremely rare.

The rule will prevent protection of sensitive confidential information in many cases in which courts have traditionally and sensibly recognized that such non-disclosure is entirely appropriate to protect important privacy or property interests, such as divorce suits, cases involving sexual abuse of children, and cases involving valuable trade secrets and other proprietary information.

The mandatory "compelling need" showing includes the following requirements: a "specific interest" that "clearly overrides" the "presumption that all court records are open to the general public"; that such interest will suffer "immediate and irreparable harm"; that no less restrictive alternative will adequately protect the specific interest; that sealing will effectively protect the specific interest without being overbroad; and that sealing records will not restrict public access concerning matters related to "public health or safety" or the operation of government.

Apparently that strict standard of "compelling need" resulted from the view that any restriction of access to court records involves First Amendment rights and requires a standard of strict

scrutiny. In fact, that view is simply incorrect.

No decision from the United States Supreme Court, the Texas Supreme Court or the Fifth Circuit Court of Appeals has ever held that there is a First Amendment right of access to civil court records, much less to unfiled discovery materials or settlement agreements. Indeed, several federal appellate courts have held that there is no such constitutional right of access.¹

A more appropriate standard should provide for an even-handed balancing of competing interests, recognizing the unique role that trial courts play in controlling their own records, as well as the common law presumption of access to records. The United States Supreme Court recognized this balance in *Nixon v. Warner Communications, Inc.*² The court stated:

"It is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify private spite or promote public scandal through the publication of the painful and sometimes disgusting details of a divorce case. . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, . . . or as sources of business information that might harm a litigant's competitive standing.

The few cases that have recognized such a [common-law right of access] do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."³

Discovery. The practical effect of Rule 76a and the proposed corresponding amendment to Rule 166b(5) would be to subject many pretrial discovery materials to the cumbersome and time-consuming procedures of 76a. Specifically, the amendment to Rule 166b(5) provides that no protective order or agreement relating to "protecting [sic] disclosure of information concerning matters of public health or safety or information concerning the administration of public office or the operation of government" shall be valid unless the party seeking protection files the discovery and complies with Rule 76a.

The application of Rule 76a to discovery materials is a dramatic reversal of law and public policy throughout the United States. Historically, courts have treated the results of discovery differently from the public parts of a civil trial. The United States Supreme Court expressly recognized this distinction in *Seattle Times Company v. Rhinehart*,⁴ in holding that a trial court had properly issued an order protecting from disclosure the results of certain discovery and that the "strict scrutiny" standard of the First Amendment did not apply:

"Moreover, pretrial depositions and interrogatories are not public components of civil trial.

19. Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. See Fed. Rule Civ. Proc. 5(d). Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. See *ibid.*; Wash. Super. Ct. Civil Rule 26(c). Federal

district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. See, e.g., C.D. Cal. Rule 8.3; S.D.N.Y. Civ. Rule 19. Thus, to the extent the courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

Such proceedings were not open to the public at common law, . . . and, in general, they are conducted in private as a matter of modern practice . . . Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information. Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny."⁵

The rule's inclusion of all "matters of public health or safety" is vague and ambiguous, but appears sufficiently overbroad to embrace almost all products liability, premises liability and other personal injury suits, not to mention business litigation involving physicians or medical care providers. By the same token, a personal injury plaintiff will find it difficult to conceal the results of a court ordered physical or psychiatric examination.

It is distressing that the Advisory Committee has proposed such a stringent and unwieldy rule that literally binds the wrists of our trial judges. It assumes, without any basis whatsoever, that our courts and litigants have abused current rules. I submit that the procedure authorized by current Rule 166b(5)(c), allowing sealing and other protective orders upon a showing of "good cause" more properly vests in the trial court the discretion to deal with the many and varied discovery disputes that can arise involving the disclosure of confidential information.

Applying Rule 76a to discovery guarantees an increase in pretrial motions and hearings, further burdening our already over-worked trial judges and congested trial court dockets.

Settlements. Proposed Rule 76a would apply to "settlement agreements, whether or not filed of record, which restrict public access to matters concerning public health or safety or to information concerning the administration office or the operation of government." One should question whose interests are being served by this proposed change.

Applying the public notice/public hearing procedure even to unfiled settlement agreements represents a radical departure from existing law and would undermine the strong traditional public policy in Texas favoring settlements.⁶ Settlement considerations are even more important today with the overwhelming dockets of some of our courts. Furthermore, in certain instances parties simply cannot afford to settle even frivolous lawsuits by means of public settlement, for to do so would open the floodgates to an endless series of additional frivolous claims. Simply stated, if plaintiff and defendant cannot settle a case on their own terms, they may choose to forego settlement altogether. The proposed rule would effectively abolish the right to enter into such confidential settlements of products liability and personal injury cases, as well as cases involving physicians or hospitals.

Appeal. The provisions of proposed Rule 76a dealing with continuing jurisdiction and appeal allow any person to intervene at any time to attempt to seal or unseal court records and allow any such intervenor (but not a party) to take an immediate appeal from any order sealing court records. Moreover, the rule in no way limits intervention or hearings to a single resolution of the merits. This raises the possibility of multiple interventions at different times by different parties with multiple interlocutory appeals. In cases involving substantial document production, the potential for ever-increasing delay and expense is obvious.

Conclusion. The important considerations in favor of open

access to court records need be balanced to some extent against the fundamental interests of our citizens in the rights of privacy⁷ and property. A reasonable rule concerning the disclosure of confidential information is needed. Unfortunately, proposed Rule 76a is one-sided, makes impossible the protection of legitimate confidential information, and would result in expensive and unnecessary pretrial delay, motions, hearings, and interlocutory appeals.

I urge each member of the Bar to review the proposed rule carefully and to analyze the practical difficulties that the rule would create for pretrial discovery, trial and settlement, in addition to the very real threat to litigants' privacy and property rights.

1. See, e.g., *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *In Re Reporters Committee*, 773 F.2d 1325 (D.C. Cir. 1985); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981).
2. 435 U.S. 589, 598, (1978)
3. 435 U.S. at 598-99.
4. 467 U.S. 20 104 S.Ct. 2199 (1984). See also, *C.R. Anderson v. Cryovac, Inc.*, 805 F.2d 1,13 (1st Cir. 1986) ("[D]iscovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process."); *In Re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987) ("appellant's common law right of access does not extend to information collected through discovery which is not a matter of public record"); *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404,409 (1st Cir. 1987).
5. 467 U.S. at 33, 104 S. Ct. at 2207-08.
6. See, e.g., *Fernandez v. Tellez*, 663 S.W.2d 91 (Tex. App. — El Paso 1983, no writ) (even the strong policy of DTPA statute to protect consumers does not override the stronger policy of the law favoring settlements); *Bass v. Phoenix Seadrill/78 Ltd.*, 749 F.2d 1154 (5th Cir. 1985).
7. Both the United States Supreme Court and the Texas Supreme Court have recognized the right of privacy. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

David E. Chamberlain is engaged in a civil litigation practice with Lea & Chamberlain in Austin. He graduated, with honors from St. Mary's University School of Law. He is currently a vice president of the Texas Association of Defense Counsel. He was formerly a briefing attorney for the Texas Supreme Court and president of the Austin Young Lawyers Association.

Public Hearing Scheduled May 18-19

A public hearing regarding the proposed Texas Rules of Disciplinary Procedure will be held May 18-19 at the Texas Law Center in Austin. Any individual interested in commenting on this proposal is invited to attend. For more information about the proposed rules and the public hearing, please turn to page 384.

Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, And Texas Rules of Civil Evidence

IN THE SUPREME COURT OF TEXAS

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE, TEXAS RULES OF APPELLATE PROCEDURE, AND TEXAS RULES OF CIVIL EVIDENCE

ORDERED:

1. That Texas Rules of Civil Procedure 3a, 4, 5, 10, 13, 18a, 18b, 21, 21a, 26, 45, 47, 57, 60, 63, 67, 87, 106, 107, 113, 120a, 166, 166a, 166b, 167, 167a, 168, 169, 183, 200, 201, 206, 208, 215, 216, 223, 237a, 245, 248, 269, 294, 296, 297, 298, 299, 301, 305, 306c, 308a, 534, 536, 571, 687, 749a, 749c, 751, 769, 771, 781, and 792 are amended as set forth below.
2. That Texas Rules of Civil Procedure 72, 73, 184, 184a, and 260 are repealed.
3. That Texas Rules of Civil Procedure 18c, 21b, 76a, 299a, and 536a are added as set forth below.
4. That Texas Rules of Appellate Procedure 1, 3, 4, 5, 9, 12, 15a, 17, 20, 40, 41, 43, 46, 47, 49, 51, 52, 53, 54, 56, 57, 59, 72, 74, 79, 90, 91, 100, 130, 131, 132, 133, 134, 135, 136, 140, 160, 170, 172, 181, 182, 190, 202, and 210, and certain captions and an appendix, are amended as set forth below.
5. That Texas Rule of Appellate Procedure 21 is added as set forth below.
6. That Texas Rule of Civil Evidence 703, and the comment to Rule 604, are amended as set forth below.
7. That these changes in the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence shall take effect September 1, 1990.
8. That the comments appended to these changes are incomplete, that they are included only for the convenience of the bench and bar, and that they are not a part of the rules.
9. That the Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.
10. That the Clerk shall file an original of this Order in the minutes of the Court to be preserved as a permanent record of the Court.

SIGNED AND ENTERED in duplicate originals this 24th day of April, 1990.

/s/

Thomas R. Phillips, Chief Justice

/s/

Franklin S. Spears, Justice

/s/

C. L. Ray, Justice

/s/

Raul A. Gonzalez, Justice

/s/

Oscar H. Mauzy, Justice

/s/

Eugene A. Cook, Justice

/s/

Jack Hightower, Justice

/s/

Nathan L. Hecht, Justice

/s/

Lloyd Doggett, Justice

CONCURRING AND DISSENTING STATEMENT BY JUSTICE GONZALEZ AND JUSTICE HECHT

We concur in the changes to the Texas Rules of Civil Procedure adopted by this Order except the addition of Rule 76a and the concomitant amendment to Rule 166b.5.c. We agree that that it is appropriate to articulate standards for sealing court records which recognize and protect the public's legitimate interest in open court proceedings. Our concern is that the adopted rules are excessive.

Strong arguments have been made that pleadings, motions and other papers voluntarily filed by a party to avail itself of the judicial process should not be sealed absent specific, compelling reasons. The arguments are much weaker for denying protection from public disclosure of information which a person is ordinarily entitled to hold private and would not divulge except for the requirements of the discovery process. It is one thing to require that pleas to a court ordinarily be public; it is quite another to force a person to give an opponent in a lawsuit private information and then require disclosure to the world. On balance, we believe that the adopted rules do not afford litigants adequate protection of their legitimate right to privacy.

The procedural burdens created by the adopted rules are thrust principally upon already overburdened trial courts and courts of appeals. The trial courts must now conduct full, evidentiary hearings before ordering court records sealed. After records are ordered sealed, any party who did not have actual notice of earlier proceedings may request reconsideration of the order. Because it is impossible to give actual notice to the world, an order sealing records can never be effectively final. Trial courts must either hold as many hearings as there are requests by people without actual notice of prior hearings, or surrender and unseal the records. All parties, for and against sealing, are entitled to appeal. The demand of the adopted rules on the

judiciary's limited resources is impossible to assess.

Finally, Rule 76a and the change in Rule 166b.5.c are probably more controversial than any rules ever adopted by this Court. Although issues relating to sealing court records have been addressed across the country, adoption of rules like these two is unprecedented. Despite strongly conflicting views of the members of our Rules Advisory Committee, the Court has not invited the same public comment on these two rules as it has on the others. People outside the rules drafting process, lawyers and non-lawyers alike, have only recently become aware that these two rules were being considered. Even without inviting comment, the Court has received a relatively large number of

sharply divergent views of these rules. The stridency of the controversy; the dearth of precedent; and lack of opportunity for full public comment all counsel a more measured response by the Court than the rules it adopts. We have refused this year to change the rules pertaining to the preparation of jury charges because of conflicting comments on the proposed amendments. The reasons for deferring sweeping changes in the charge rules for further debate apply equally to Rule 76a and Rule 166b.5.c.

We agree with the Court generally that court records should be open to the public. We do not agree with the manner in which the Court has chosen to effectuate this policy.

In order to indicate the changes in the rules below, words to be deleted appear with a line through them and words to be added appear in bold face type.

TEXAS RULES OF CIVIL PROCEDURE

Rule 3a. Rules by Other Courts-Local Rules

Each court of appeals, administrative judicial region, district court, county court, county court at law, and probate court, may make and amend the local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located; and

(2) no time period provided by these rules may be altered by local rules;

(23) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas; and

(34) any proposed local rule or amendment shall not become effective until at least thirty (30) days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made; and

(45) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;

(6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

COMMENT TO 1990 CHANGE: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices to determine issues of substantive merit.

Rule 4. Computation of Time

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or

by telephonic document transfer; and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

COMMENT TO 1990 CHANGE: Amended to omit counting Saturdays, Sundays and legal holidays in all periods of less than five days with certain exceptions.

Rule 5. Enlargement of Time

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act; but the court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules; provided, however, if a motion for new trial

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time; provided, however, that a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

COMMENT TO 1990 CHANGE: To make the last date for mailing under Rule 5 coincide with the last date for filing.

Rule 10. Withdrawal of Counsel-Attorney

Withdrawal of an attorney may be effected (a) upon motion showing good cause and under such conditions imposed by the Court; or (b) upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, and State Bar of Texas identification number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only. If the attorney in charge withdraws and other counsel remain or become substituted, another counsel must be designated of record, with notice to all other parties in accordance with Rule 21a, as attorney in charge.

An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state:

for

SECRECY IN THE PUBLIC DOMAIN

A Report

on

Discovery, Protective Orders and Sealed Records

by

David McHam

Prepared for

The Texas Policy Research Forum

P.O. Box 1427, Austin, Texas 78767

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THE AUTHOR

David McHam has taught journalism since 1961, first at Baylor and since 1974 at SMU. He is the author of the pamphlet, "Law and the Press" in Texas, which has been in circulation since 1972. He has been a member of a grievance committee of the Dallas County Bar and of the board of directors of the Freedom of Information Foundation of Texas. He is a member of the board of the Texas Policy Research Forum.

THE ORGANIZATION

The Texas Policy Research Forum was founded in 1989 to deal with issues of public concern in Texas. This is the second report from the organization.

Dr. Ray Marshall is chairman of the board and the other board members are Harry Hubbard, Bill Whitehurst, Gustavo Garcia, Bernard Rapoport and David McHam.

The executive director is Willie Chapman.

THE REPORT

Anyone wishing to reprint all or any portion of this report may do so.

Credit to the Texas Policy Research Forum and/or David McHam would be appreciated, but is not required.

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FOREWORD

This is a journalistic view of what has become one of the most critical issues facing Texas today. If that statement seems overwrought, that shows my journalistic bias. I haven't been to law school and I am not a lawyer. For that and other reasons, this report should not be taken as a definitive legal treatise. Please view it as the offering of someone without formal legal training who is nonetheless interested in and concerned about the legal process.

Having studied issues such as this for most of my career, I have come to believe that our society must be as open as possible. I'm not alone in thinking that, and it isn't an unusual or novel view. I think that any deterrent to openness is a stumbling block to democracy. But I also think that we have the power to change what we think is wrong. It is in that context that the report is submitted.

The writing and point of view of this report are mine. A great many people helped me with the research, and I am most grateful to each of you.

David McHam,
Professor of Journalism
Southern Methodist University
Dallas, Texas

INTRODUCTION

This report is presented with the conviction that keeping court records open is essential to the continuing process by which the public participates in all aspects of government.

To that end, let me submit these observations:

- * The courts of the State of Texas are established and administered from public funds with the consent of the people. For that reason, the citizenry should not be asked to relinquish their access to what is and must remain a public concern.
- * Parties that come to the public courtroom for the purpose of settling disputes should not be allowed to take advantage of the benefits of such a procedure and then turn it into a private matter by asking that records be sealed.
- * The public has a right to know.
- * Matters before the courts are of concern to the public and access is essential if citizens are to know what transpires.
- * Secrecy must be discouraged in a democratic society.
- * A basic tenet of democracy is openness. The opposite of openness is rule by totalitarian authority. Totalitarian authority cannot succeed without the cooperation and acquiescence of the courts.
- * Protective orders have become the newest defense in civil cases.
- * Until now, we have allowed a few people to distort the purpose and intent of an open government by successfully arguing that maintaining private interests of various kinds overrides the rights of the public. No where else in society could such an argument succeed.

Defendants often require plaintiffs to agree to protective orders as a condition for giving up information during discovery. Or, defendants have had plaintiffs agree to closing the record before agreeing to settlements. And,

it could work the other way: The plaintiff may seek a greater award with the stipulation that the plaintiff and the plaintiff's lawyers won't reveal the substance of the suit.

We the people of Texas shouldn't accept that. Taken to any greater extreme, such activities could seriously undermine the civil court system in Texas.

Now, in Texas for the first time, our Supreme Court has an opportunity to establish guidelines that could end the unquestioning use of protective orders. At the same time, the guidelines would create a process by which the arguments for and against protective orders may be heard. This is a fair and equitable solution to the problem.

A rule has been suggested to the Supreme Court of Texas that does that. It provides for a hearing in open court and allows anyone to speak to the issue. Notice of the hearing must be posted. Attempts to seal court records must meet a test for compelling need.

The Supreme Court will vote on the rule soon.

The new rule is more restrictive than the existing rule. Sides have been drawn. Many defense lawyers who represent corporations are not in favor of the new rule. They contend that being able to use protective orders helps instead of hinders the process.

Journalists, many lawyers and many members of the public favor the new rule. Journalists know from the study of history and from their experience that a democratic society functions best when all matters of public concern are open to inspection, evaluation and review. That's the very nature of democracy. It may not be tidy and it may not suit everyone. But democracy often is messy and confrontational.

It is, by the way, a nonpartisan and nonpolitical view. Journalists have grown accustomed to fighting for what they think is right. In modern times, learning to report and write are only part of what a aspiring journalists must do to prepare themselves. They also must learn a great deal

about the law and about the longstanding role journalists have played in shaping laws related to openness.

This is particularly true in Texas, where journalists have been instrumental in such historic legislation as the open meetings and open records acts.

Presstime, the publication of the American Newspaper Publishers Association, in March 1989 said:

"Media Law Reporter, which started in 1977 to publish media-related court decisions, recorded only seven access cases that first year and about 30 in 1981. But the number zoomed to nearly 200 a year by 1985 and has stayed at about that level ever since, estimates Managing Editor Cynthia J. Bolbach."

All kinds of access cases, not just those related to protective orders, are involved in this estimate. The article also said:

"These developments and others point to the fact that in the realm of media law, attention has been slowly shifting away from libel litigation to problems of access to government information.

"Access litigation, rather than libel cases, will command the resources -- money and otherwise -- of journalists and media companies well into the 1990s,' according to Media Litigation '88, a new report issued by the Society of Professional Journalists.

"Its conclusion was based on a survey of 35 media attorneys that indicated a decrease in libel actions and a "sudden rise" in complaints about closing of courtrooms and public meetings, routine sealing of court files, and other problems in obtaining public documents."

Newspapers in Texas have examined the question of sealing court records, and some of them have attacked the present practice in editorials. At least one newspaper -- The Dallas Morning News -- has even become involved in litigation to force civil records open.

Even before the new rule dealing with this issue had been approved in its final form by the Supreme Court Advisory Committee, The Dallas Morning News commented editorially:

"It (the proposed new rule) would prohibit court records from being sealed from public view unless the parties in the legal matters showed a 'compelling need,' such as in cases involving victims of sexual attacks and child abuse. Hearings on motions to seal the documents would have to be public.

"Important records about dangerous products now are being routinely sealed as part of bargaining agreements between the litigants in court cases. That self-serving practice needs to stop, posthaste. The study group's recommendation would make it much easier for the public to get its hands on information that could save lives.

"The only way the court system can have the confidence of the people is by conducting its business in full view of them."¹

The Fort Worth Star-Telegram supported more openness in civil court records in an editorial on December 2, 1989.

DISCOVERY

What's involved here is what the legal profession refers to as discovery. Discovery is the nuts and bolts of a civil case. Discovery is the way facts are uncovered and the issues in the case narrowed and maybe eventually agreed upon. The rules for discovery are in the Texas Rules of Civil Procedure, enacted by the Supreme Court of Texas.

Discovery is the exchange of information about the issues in a lawsuit. It occurs in stages as the case is prepared for trial. Materials that may be requested and/or exchanged include documents, depositions, interrogatories and affidavits.

In Texas, fairly great latitude is given to both parties as to what may be requested and given as part of discovery. However, in recent times the process itself has been affected by a new tactic by which lawyers are obtaining protective orders before agreeing to give up information.

Asking that records be closed is not new. Lawyers say they first noticed an increase in the number of cases being sealed about 1970. Studies show that most of the records under seal have been since 1980.

1 - From a Dallas Morning News editorial of February 13, 1990.

The question of protective orders may arise from the first in a civil proceeding. The defendant may argue the need for protective orders before agreeing to participate in the discovery process. If agreement is reached -- which the facts show is almost always the way the dispute ends -- the lawsuit is said to be settled.

In some cases the agreement to close the records may be part of the settlement. That is, the defendant will make the closing of the records a condition of settling. Obviously this information could be embarrassing or damaging to the defendant. But should the information be sealed for that reason?

A skeptic may look askance at the defendant's attempts to seal the record as a condition of settling. Plaintiffs who succeed in their contentions should not then be forced to become a party to a form of legal blackmail. Also, lawyers may be bound to secrecy and not be able to share the fruits of their labor by having a protective order entered.

Rule 166b of the Texas Rules of Civil Procedure defines forms of discovery:

"Permissible forms of discover are (a) oral or written depositions of any party or non-party, (b) written interrogatories to a party, (c) requests of a party for admission of facts and the genuineness or identity of documents or things, (d) requests and motions for production, examination, and copying of documents or other tangible materials, (e) requests and motions for entry upon and examination of real property and (f) motions for a mental or physical examination of a party or person under the legal control of a party."

The rule further states in 166b(2)(a):

"Parties may obtain discovery regarding any matter which is relevant (emphasis added) to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party."

PROPOSED RULE 76a, SEALING COURT RECORDS, A HISTORY

A standing advisory committee of the Texas Supreme Court is responsible for gathering information and making recommendations on procedures. The Advisory Committee has been assisting the Supreme Court since 1939. In 1980 the Supreme Court issued an order under which the current Advisory Committee functions. The statutory authority for the committee is Government Code Section 22.004.

The current Advisory Committee has 37 members. The chairman is Luther H. Soules III of San Antonio.

From time to time the legislature has acknowledged the need for examination of certain areas related to civil procedure and has brought this to the attention of the Supreme Court.

A growing and alarming trend toward closing court records has been an issue in Texas in recent years. Many individuals and organizations have made legislators aware of the situation. Among the organizations are Public Citizen, Consumers Union and Texas Media. One of the most active groups is the Freedom of Information Foundation of Texas, on whose board are lawyers and representatives of the news media. The foundation has conducted workshops throughout the state on topics of concern, including the secrecy of court records.

Until now, Rule 166b(5) of the Texas Rules of Civil Procedure has been in effect. This is that rule:

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted.

As a result of the urging of various constituencies, the legislature in the 1989 session passed the following:

Sealing of Court Records. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.²

The Supreme Court turned to its Advisory Committee. Chairman Soules appointed a subcommittee to draft a proposed rule to be presented to the full committee and in turn to the Supreme Court. The co-chairs of the subcommittee were Charles F. Herring, Jr. and Charles E. "Lefty" Morris of Austin. Other members of the committee were Soules, Solomon Casseb of San Antonio, Ken Fuller of Dallas and Justice David Peeples of San Antonio. Twenty-two others were participants.

The subcommittee conducted public hearings on November 18 and December 15, 1989, and the Supreme Court held a rare public hearing on November 30, 1989. From those hearings, the subcommittee gathered an extensive record, including position statements and proposed rules.

Eventually the co-chairs came up with a consolidation of the various suggestions and submitted a draft rule to the full committee.

Meanwhile, the Supreme Court Advisory Committee was also looking into the issue of cameras and recording devices in the courtroom. At a meeting on February 9, 1990, the Advisory Committee passed and recommended to the Supreme Court a significant change in the current rule

2 - Section 22.010, Texas Government Code.

related to cameras and recording devices in the courtroom. It proposed the following:

Rule 21, Texas Rules of Appellate Procedure:

A judge may permit broadcasting, televising, recording or photographing of proceedings in the courtroom in the following circumstances:

(a) in accordance with orders of the Supreme Court or the Court of Criminal Appeals, or

(b) when broadcasting, televising, recording or photographing will not unduly distract participants or impair the dignity of the proceedings and (i) the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised or photographed, or (ii) in the case of oral arguments in appellate courts, if approved by order of the court, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

This rule would change the existing Canon 3, Section 9 of the Code of Judicial Conduct, which prohibits the use of photography or recording devices in the courtroom.

Texas is one of only six states that does not allow television cameras or radio recordings in the courtroom.

On February 16, 1990, the Advisory Committee approved this proposed rule on sealing court records and sent it to the Supreme Court for final action:

Rule 76a, Texas Rules of Civil Procedure: Sealing Court Records

A. Definitions

1. Compelling Need: "Compelling Need" means the existence of a specific interest which, in the administration of justice, is substantial enough to clearly override the presumption that all Court Records are open to the general public. Specifically, a moving party must establish by preponderance of the evidence all of the following:

(a) a specific interest of the person or entity sought to be protected by the sealing of the Court Records clearly outweighs

the interest in open Court Records and will suffer immediate and irreparable harm if the Court Records are not sealed;

(b) no less restrictive alternative will adequately protect the specific interest of the person or entity sought to be protected;

(c) sealing will effectively protect the specific interest of the person or entity sought to be protected without being overbroad; and

(d) sealing will not restrict public access to information concerning matters related to public health or safety, or to the administration of public office or the operation of government.

2. Court Records: For purposes of this rule, the term "Court Records" shall include all documents and records of any nature filed in connection with any matter before any civil court in the State of Texas. This rule shall not apply to materials simply exchanged between the parties or to discovery made by a party pursuant to a discovery request and not filed with a court, or to documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents. The term "court records" also includes settlement agreements, whether or not filed of record, which restrict public access to matters concerning public health and safety, or to information concerning the administration of public office; otherwise, the term court record does not include settlement agreements whether or not filed of record.

B. All orders of any nature and all opinions made in the adjudication of cases are specifically made public information and shall never be sealed. Unless provided to the contrary by statute, before a judge may seal any other Court Records, the following prerequisites must be satisfied:

1. Hearing: A hearing shall be held in open court, open to the public, at which any person desiring to support or oppose the sealing of Court Records, whether or not a party to the suit, may intervene for the limited purpose of participating in the hearing. The court may conduct an IN CAMERA inspection of records where necessary to prevent disclosure of records sought to be protected. At the hearing, the court must consider all evidence presented, which may include competent affidavits, provided, however, that the court may require any affiants be available for cross examination.

2. Notice: The party seeking sealing shall file a written motion in support of the sealing request, which motion shall be open to public inspection. The moving party shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating that a hearing will be held in open court on a motion to seal Court Records in the specific case, stating that any person has an

opportunity to intervene and be heard concerning the sealing of Court Records, and stating the specific time and place of the hearing, the style of the case, and the case number. The notice shall also describe the type of case and the specific Court Records which are sought to be sealed. The written motion in support of the sealing request shall be filed and the public notice shall be posted at least fourteen days prior to the hearing. Immediately after posting such notice, the moving party shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas, stating that notice under this rule has been provided. The Clerk of the Supreme Court of Texas shall post the notice in a public place. The notice shall not be sealed, but shall remain open to public inspection.

3. Temporary Sealing Order: A temporary sealing order may be entered upon motion and notice to the other parties in the case pursuant to Rules 21 and 21a, but without holding a hearing or requiring public notice as provided for in paragraphs (B)(1) and (B)(2) above, upon a showing of compelling need from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing can be held as otherwise provided herein. Every temporary sealing order granted without posted notice or public hearing shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, shall contain the findings required by paragraph (B) (4) and state why the order was granted without notice, and shall expire by its terms, not to exceed fourteen days after signing, as the court fixes, unless within the time so fixed by the order, for good cause shown, is extended for a like period or unless the parties consent that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. If a temporary sealing order is granted without public notice and hearing, a motion for sealing order shall be filed, notice provided and a hearing set as elsewhere provided in these rules. On two days' notice to the party who obtained the temporary sealing order or on such shorter notice to that party as the court may prescribe, any person, whether or not a party to the lawsuit, may appear or intervene and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. When the motion for sealing or the motion to dissolve or modify a temporary sealing order comes on for hearing, the party who obtained the temporary sealing order shall proceed with the motion and, if he does not do so, the court shall dissolve the temporary sealing order. At any hearing on a sealing order held after the grant of a temporary sealing order, the burden of proof shall be upon the party requesting sealing to prove said party's right to the sealing order as fully and completely as if no temporary sealing order had been sought or entered.

4. Sealing Order: If, after considering all the evidence concerning sealing Court Records, the judge concludes that a Compelling Need as defined herein has been shown, the judge shall within three days sign a written order dividing the Court Records into two files: one kept open to public inspection and the other containing only those limited portions of the court records for which a Compelling Need for sealing exists. Such order, if granted, shall be specific, stating the case number, the style of the case, the specific findings demonstrating that a Compelling Need has been shown, made at or after the hearing, the conclusions of law, the specific portions of the Court Records which are to be sealed, and the time period for which the sealed portions of the Court Records are to be sealed. Under no circumstances may the written motion to seal or the sealing order be sealed; both must remain in the open, public portion of the file.

C. Continuing Jurisdiction: Any person may intervene as a matter of right at any time before or after judgment in connection with any request to seal or to unseal Court Records. A court that renders a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order.

D. Appeal. Any sealing order, any sealing provision contained in any judgment, and any order granting or overruling a motion to seal, or to alter, vacate, or enforce a sealing order shall be deemed severed and a final appealable judgment, which may be appealed by any party or intervener who has requested, supported or opposed any sealing order. Upon any such appeal, the trial court's failure to make the specific findings required in paragraph (B)(4) shall never be harmless error and shall be reversible error. The trial court's failure to comply with the notice and hearing requirements in paragraphs (B)(1) - (B)(3) shall render any sealing order void and of no force and effect.

E. No Court Records shall be withdrawn from the public file except as expressly permitted by specific statute or rule.

The Supreme Court Advisory Committee also proposed a change in the current Texas discovery rule, Rule 166b(5). It also relates to protective orders and settlement agreements. It reads:

"No protective order or agreement relating to protecting disclosure of information concerning matters of public health or safety, or information concerning the administration of public office or the operation of government shall be valid unless the party seeking protection files the discovery or results of discovery with the clerk of the court and complies with Rule 76a."

PROS AND CONS

Opponents of the proposed rule used a series of arguments in presentations and letters to the subcommittee of the Advisory Committee. Here is a summary of some of those arguments:

1) Citizens have a right to privacy. Opponents argue that a federal case and a state case provide that right. The cases are *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

Griswold is a privacy case in which the United States Supreme Court overturned a Connecticut statute that made it a crime for any person to use any drug or article to prevent conception.

Billings is also a privacy case. Judge James Denton wrote the opinion for the Supreme Court of Texas. The opinion held that the installation of a wiretap device on a subscriber's telephone by an employee of the telephone company was an unwarranted invasion of the right of privacy.

2) Such a rule would impede settlements. Opponents say that settlements are an important aspect of the civil justice system. With the increase in litigation, settlement is necessary, they argue, to avoid an even greater backlog of cases.

3) An organization holding a trade secret, the opponents of the bill contend, would be less likely to bring suit to protect the rights to that secret if it knows that the very secrets it is attempting to protect could become an open record.

4) Open-ended access to information in court records would be an invitation for plaintiff's attorneys to market and exchange information, the opponents contend. They say protective orders prevent the sharing of information between litigants in similar cases.

5) Information that becomes part of the record in a civil case would not have become public record without the litigation, opponents say, and defendants are especially placed in an unfair situation by having to reveal

information to defend itself. Opponents say his problem is especially bad in cases in which defendants are defending themselves in suits without merit.

Note that little opposition has come from lawyers who practice family law. One reason is that the new procedures are not drastically different from ones already followed in family law courts. Also, the news media have not made family law a target of complaints about sealed records. Family law is not what is at issue here.

IN REBUTTAL

A great many motives arise for seeking protective orders.

The real issue in this debate is shared discovery. Plaintiff's lawyers want it and defense lawyers don't. Opponents often don't say directly that they are against sharing discovered information. Therefore, the objections fall in other areas, such as privacy and trade secrets.

Using the trade secret argument may itself be a defense. In truth, no court is going to require a business to disclose a true trade secret. But, often lawyers will argue that a product or process involves a trade secret when closer scrutiny reveals otherwise.

Defense lawyers may argue trade secrets when their real objective seems to be creating as big a barrier to litigation as possible, including the one most difficult for plaintiffs and their lawyers in cases such as this -- expense.

The president of the Association of Trial Lawyers of America, Russ Herman, estimated that the cost of doing the original work necessary to prepare a complex product liability case is about \$100,000.

In "Confidentiality Orders," a definitive book on this subject, the authors make this observation about trade secrets:

"Disclosure may operate in a number of different ways. For example, the marketing and sale of a product containing trade secrets constitutes a public disclosure which defeats a claim of confidentiality when the nature of the trade secret is ascertainable by an inspection of the product. Even though a

marketed product would have to be torn apart or tested and examined by a skilled expert to discover the trade secret, the sale of the product nonetheless constitutes a public disclosure."³

In a 1988 interview with The Washington Post, Hare said that civil courts have traditionally been a way for the public to scrutinize institutions and corporations. "There's no other way that the public is going to get that information," he said. "It just does not come out through the regulatory agency route."⁴

How far are we willing to allow the adversary system to go? One way to look at this question is to ask whether a trial on its merits ought not to examine all the available information that is pertinent. Otherwise, the combination of expense, stubbornness, chance and differences in trial procedures could result in two cases on essentially the same question turning out significantly different.

Defense lawyers are fearful that discovery materials shared among lawyers will end up the basis of articles in the news media. With many cases, such as those in which public safety and policy are involved, wouldn't the broadest possible disclosure be best?

Protective orders may prohibit the plaintiff or the plaintiff's lawyers from ever disclosing information gathered for the case. Sharing discovery information would enable parties to different suits on the same topics to compare the forthrightness and consistency of responses. Sharing discovery would ease court congestion, would reduce the cost of litigation and would aid the court in narrowing issues in similar cases.

The question of shared discovery has been discussed by a great many people in seminars, journal articles and the like. In a paper delivered before state bar seminars in Houston and Austin in November 1989, attorney Broadus A. Spivey of Austin declared:

"The courts have recognized that there is a concerted effort on the part of some defendants to deprive plaintiffs of the

3 - "Confidentiality Orders," Francis H. Hare, Jr., James L. Gilbert, William H. ReMine, John Wiley & Sons, Inc., 1988, page 121.

4 - The Washington Post, October 23, 1988.

opportunity to confer freely and exchange information in certain industry-wide cases."

Spivey quoted United States District Judge Noah Cox:

"The day is long past where lawsuits resemble trial by battle. Access to justice therefore cannot depend on weight of resources any more than upon strength of fists. It is the duty of the courts to insure that wealth and power alone do not determine the lawsuits, and that those elements do not hamper an expedient, inexpensive determination of the merits of each case."

Spivey said,

"In *United States v. Procter & Gamble Co. ...*, the Court held that modern discovery rules were designed to make a trial less of a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Almost all civil cases end up being settled. How many cases end up being settled in Texas? Estimates vary, but the rule of thumb seems to be about 90 percent or more. Public Citizen, the watchdog group founded by Ralph Nader, says that settlements occurred in 442 of the 457 product liability cases filed in Texas in 1988. Only 15, or 3 percent, of such cases went to trial.

At the Texas Supreme Court hearing on this issue on November 30, testimony showed that state district judges have sealed hundreds of documents and court rules from the public. Making records secret has become common practice, the court was told.

Dallas lawyer Charles Babcock, who has represented the Dallas Times Herald and is a member of the board of the Freedom of Information Foundation of Texas, said:

"It is imperative that the court act quickly because the problem is widespread and growing, and there is no easy way for the public to challenge" a judge's order sealing a case. . . . Wholesale sealing that is going on in this state is a threat to our democratic form of government."

Howard Swindle, an editor at The Dallas Morning News, cited examples from the newspaper's 1987 series on the subject and said:

"These examples could send a message that in Texas -- should you be wealthy enough or prominent enough -- you can conduct your potentially embarrassing lawsuits in the privacy of a judge's chambers instead of a public courtroom."

An Austin lawyer, David Donaldson, who represents the Austin American-Statesman, said the practice of sealing lawsuits "raises the issue in the public perception that sealing is available to those who have an 'in' with judges."⁵

The proposed rule eliminates the routine closing of court records and establishes a procedure that ensures that all parties may be heard.

Under the proposed rule, lawyers with legitimate reasons for asking that records be closed will have an opportunity to argue their positions in court. At the same time, any citizen will have an opportunity to argue otherwise.

RESEARCH ON THE SUBJECT

A surprising amount of information has been gathered on the issue in newspapers, trade publications and journal articles.

The most famous study was done in 1988 by The Washington Post. Four articles entitled "Public Courts, Private Justice" ran October 23 through 26, 1988. Follow-up stories ran on February 6, February 22, March 22 and March 26, 1989. The reporters were Elsa Walsh and Benjamin Weiser. In its awards issue in March 1990, the Washington Journalism Review cited the series as the Post's continuing excellence in investigative journalism and said the series "came close to winning a Pulitzer."

The reporters identified 200 suits under seal in courts in the Washington, D.C., area and determined that many of them dealt with questions of public policy or safety.

The first article, on October 23, 1988, said that General Motors Corp. had used court secrecy to keep information about auto safety from becoming public. The article said:

5 - Details of the hearing taken from the Austin American Statesman, December 1, 1989.

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

The article then quoted documents the newspaper had obtained even though they were under protective order. The article said:

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

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

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

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

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

One of the GM cases was tried in Texas and it later figured in an appeal to the Supreme Court of Texas over the question of protective orders. The Texas decision was a victory for the anti-secrecy forces.

Newsday, a Long Island/New York City newspaper, ran an occasional series in 1988 under the heading "Deadly Secrets." Stories of particular interest ran on April 24 and June 5, 1988.

The most extensive study in Texas was done by Steve McGonigle of The Dallas Morning News in 1987. McGonigle won a civil gavel award from the American Bar Association for his work.

The articles ran November 22 and 23, 1987. McGonigle was able to find 282 sealed cases in Dallas County going back to 1920. Of these, 139 were sealed in their entirety. To show how sealing records has become more and more popular in recent times, McGonigle found that 202 of the 282 had been sealed since 1980. Thirty-five were sealed in 1986.

The November 23 article said,

"The News' inquiry revealed a system in which savvy, influential parties to lawsuits persuade judges to seal court records without public knowledge, creating a near-private forum for resolving often sensitive and embarrassing legal disputes."

The November 22 article said:

"Some of the sealed lawsuits contain allegations of sexual misconduct by doctors with their patients, professional incompetence by lawyers and doctors, defaulted loans by savings and loan executives, environmental contamination by corporations and fatally defective products by manufacturers."

"The secret treatment of the lawsuits, according to plaintiff lawyers, most frequently stems from attempts to avoid personal embarrassment or professional disrepute, to discourage additional lawsuits, or to coerce large settlements from defendants in return for confidentiality."

The district clerk of Dallas County, Bill Long, who is the custodian of the sealed records, said, "From my understanding, a lot of those records were sealed for other than judicial reasons, probably political considerations, maybe favoritism with certain law firms."

During McGonigle's investigation, John Marshall, who was then the county's chief administrative judge, ordered 80 of the cases opened after McGonigle discovered that they were being held in secret despite no legal orders sealing them.

The story said:

"Marshall believes that Thomas Jefferson, Alexander Hamilton, John Jay and other framers of public rights would

share his view that barring court records from the public is an evil that democracy cannot abide.

"You can't seal things up and keep them away from the people to whom you are responsible and be valid," said the 44-year-old Republican jurist. "There is something inherently invalid in that."

Publications for lawyers have had a great deal to say about protective orders over the last three years. One of the first to deal with the issue was *Trial*, published by the Association of American Trial Lawyers of America. In its August 1986 issue, *Trial* ran an article by Larry E. Coben. Coben, from Philadelphia, is a founding member of the Attorneys Information Exchange Group for Automotive Crashworthiness (Fuel System Integrity, Passive Restraint Systems and Jeep/RV Rollover). This is the way the article began:

"For years, defendants in major product cases have insisted on protective orders before agreeing to disclose data that plaintiffs requested in discovery. The methods used to elicit a protective order have varied, and, depending on the subtleties of the agreement, its effect on litigants is often unclear for several years.

"The purpose of a protective order is to protect the defendant/manufacture from having its materials made known to other injured parties. Rather than protecting a manufacturer against its competitors, protective orders have served as a major obstacle in disseminating information relevant to the legitimate claims of litigants. These gag orders have compelled each plaintiff who is injured by the same product to 'reinvent the wheel.'"

Innumerable law and journalism review articles have been written on this subject.

An article in *Journalism Quarterly*, Summer 1988, identified specific areas where closing court records since 1984 had hampered the public's right to know. They were:

- * information concerning the extent of tobacco companies' knowledge of the cancer danger of their products, *Cipollone v. Liggett Group*, 785 F.2d 1108 (3rd Cir. 1986);
- * proposals for a chemical waste clean-up, *U.S. v. Hooker*, 599 F.Supp. 655 (W.D.N.Y. 1984);

- * donor lists and financial information on a religious cult, *Seattle Times v. Rhinehart*, 467 U.S. 20, 81 L.Ed.2d 17, 104 S.Ct. 2199 (1984);
- * a drug company's knowledge of the dangers of one of its products, *Koller v. Richardson-Merrill*, 737 F.2d 1038 (D.C. Cir. 1984);
- * employee records of a company sued for racial discrimination, *Harris v. Amoco*, 768 F.2d 669 (5th Cir. 1985);
- * a new formula for reimbursement of hospitals by a state, *Oklahoma Hospital Assn. v. Oklahoma Publishing Corp.*, 748 F.2d 1421 (10th Cir. 1984);
- * a bank's plan to badger class action plaintiffs in a bank fraud case against it, *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) and,
- * information on the destruction of a Korean airliner by a Russian defense installation, *In re Korean Air Lines Disaster*, 597 F.Supp. 621 (D.C.D.C. 1984).⁶

A commission of the American Bar Association studied the problem and issued an extensive report in February 1987. Here are some of the comments in that report:

"Defense counsel in product liability cases often request that plaintiffs' attorneys enter into secrecy agreements in order to obtain documents, interrogatory answers, or even depositions. Because the courts are reluctant to referee discovery fights about every claim of privilege, and because the plaintiff's attorney in a particular case may be indifferent as to whether documents disclosed by defendants are available to the public, plaintiffs generally go along in order to move the case ahead. Judges generally assent to such agreements, in large part to move cases along and avoid controversy.

"Secrecy agreements raise a number of issues in connection with ongoing litigation. The first is that in a typical products liability situation, there will be individuals suing all over the country, and the secrecy agreements preclude them from sharing information with each other, even where the other plaintiffs and their lawyers agree to be bound by the terms of the secrecy agreement. Some contend that the purposes of this practice are to run up the costs of litigation for plaintiffs and to prevent plaintiffs from sharing strategy as well as documents with one another. Others respond that the practice reflects genuine privacy concerns.

6 - "Courts Restrict Release of Discovery Information" by Deckle McLean, *Journalism Quarterly*, Summer 1988.

"The second related issue is that the prohibitions also preclude the giving of information to regulatory and law enforcement agencies that may need the data to decide whether a particular product should be taken off the market, warning labels required, or other action taken to protect the public. ...

"A third related issue arises when a promise is extracted from the plaintiff's attorney not to represent other victims in similar cases. Such an agreement is currently improper under the provisions of the Code of Professional Responsibility, which prevent restrictions on a lawyer's practice, but it is still done in some instances.

"A fourth aspect of the secrecy problem relates to post-settlement or post-verdict conditions that require the destruction or return of documents obtained from the defendant, including in some cases the notes and files of the plaintiff's attorney. ..."

The most extensive book on the subject, "Confidential Orders," by Francis H. Hare, Jr., James L. Gilbert and William H. ReMine has pages of bibliography including texts, articles and cases. It was published in 1988 by John Wiley & Sons, Inc.

LAWS AND LEGAL CHALLENGES

Bills limiting secrecy in federal courts have been introduced in Congress, but so far, none of them is very far along the legislative process.

The most concentrated challenges have come from lawyers, acting individually and in groups. A good example is the Trial Lawyers for Public Justice in Washington, D.C. The organization describes itself as "a public interest law firm that exposes and corrects outrageous corporate and government misconduct through damage and trial litigation."

The Dallas Morning News filed a suit on May 14, 1988, seeking to end the practice of sealing records. A settlement was reached in which the county agreed to make future closings of documents conform to the law.

The only case to go to the United States Supreme Court was *Seattle Times v. Rhinehart*, 104 S.Ct. 2199 (1984). The Times was a defendant in a suit alleging defamation and invasion of privacy. The suit was brought by a religious group. During discovery, the Times sought the names of the members of the group and the names of donors. The religious group obtained

an order closing that information under the provisions of a state rule of civil procedure.

The Times appealed, saying it had a First Amendment right to the material. The Supreme Court of Washington ruled against the newspaper. The United States Supreme Court affirmed that decision in an opinion written by Justice Lewis Powell.

Powell's opinion said that First Amendment rights do not extend to discovery. It also said that prevention of dissemination of discovery information was not a prior restraint issue. But it said that the trial court's limit of the discovery material would not restrict dissemination of the information if it is obtained from other sources.

This decision dealt only with the issue of protective orders during the discovery process.

Here's a description of the case taken from an article in *Journalism Quarterly*:

"Seattle Times Company v. Rhinehart arose from a libel suit in which Mr. Rhinehart, the spiritual leader of the religious group, Aquarian Foundation, sued the newspaper company for publishing several allegedly defamatory stories about him and the Aquarian Foundation. During the course of discovery, Rhinehart refused to disclose certain information regarding the identity of the Aquarian Foundation's donors and members. The trial court issued an order compelling Rhinehart to identify all donors for the past five years, to identify the amounts donated, and to reveal information which would substantiate any claims of diminished membership. At the same time, the trial court issued a protective order prohibiting the newspaper from publishing, disseminating or using the information in any way other than to prepare its defense in the case. . . .

"The Court held that there is no First Amendment violation when 1) a protective order is entered on a showing of good cause; 2) the order is limited to the context of pretrial civil discovery; and 3) the order does not restrict the dissemination of information gained from other sources."⁷

7 - "Recent Developments in Law of Access" by Ann L. Plamondon, *Journalism Quarterly*, Spring 1986.

So what happened in the Seattle Times case? In 1988 a Washington state court awarded the Times \$42,000 and dismissed the defamation suit brought by Rhinehart as being frivolous. In 1989 another court ordered Rhinehart to pay the Times \$64,000 in attorney's fees. (Presstime, March 1989).

THE KEY TEXAS CASE

In Texas, one case, *Garcia v. Peebles*, 734 SW 2d 343 (1987), set the precedent. This is the way the case was discussed in the November 1987 issue of *Inside Litigation*, a publication of Prentice-Hall:

"Attorneys for General Motors Corp. got an unwelcome surprise this summer when the Texas Supreme Court handed down its opinion in the case of *Garcia v. Peebles*.

"What plaintiffs' counsel wanted in this car crash case was to share discovery materials with other plaintiffs' counsel in similar cases. But the appeal focused simply on a burden-of-proof question: Could the trial judge put the burden on the plaintiffs to identify documents they wanted to protect from disclosure? In other words, should disclosure be the rule and protection the exception, or vice versa?

"But the court 'jumped over that whole little battleground,'" says one of GM's lawyers, Thomas Crofts Jr. of Groce, Locke and Hebdon in San Antonio. In the context of sharing discovery materials, the Texas court said, disclosure is the rule -- no exception, period.

"At the end of September, the trial judge, H. David Peebles of San Antonio, responded to the supreme court's decision by modifying the protective order. The original had decreed that materials obtained in discovery be used solely in connection with the case at hand (plaintiffs, however, could file a request to exempt specific documents from the protective order). The modified order provided that plaintiffs "may share the information, ideas and documents with other Plaintiffs attorneys and expert witnesses involving pending fuel system integrity litigation against General Motors involving passenger cars or pickup trucks." . . .

"In his modified order in the *Garcia* case, Judge Peebles put in a requirement that outside attorneys and experts receiving discovery material "certify they will not release it to competitors of General Motors or others who might exploit it for economic gain."

The decision said that protective orders should be carefully tailored to protect a defendant's proprietary interests from disclosure to competitors. But, it said that plaintiffs are entitled to share discovered documents with other litigants.

From the ruling:

"The United States Supreme Court noted in *United States v. Procter & Gamble Co.* . . . that modern discovery rules were designed to 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' . . . This court recognized that goal of discovery and pointed out that 'the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.' . . .

"Unfortunately, this goal of the discovery process is often frustrated by the adversarial approach to discovery. The 'rules of the game' encourage parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts. . . . The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise. Courts across the nation have commented on the lack of candor during the discovery in complicated litigation. . . .

"Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses. . . .

"In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefitting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense. . . . A number of courts have recognized that allowing shared discovery is far more efficient than the repetitive system now employed."

Virginia is the only state to enact a statute on the question of protective orders. It is as follows:

A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court after notice and an opportunity to be heard to any party or person protected by the protective order and provided the attorney who received the material or information agrees, in writing, to be bound by the terms of the protective order."

In 1989, North Carolina enacted a statute prohibiting confidential settlements made by or on behalf of public agencies, public officials or public employees. Florida has an appellate rule of procedure, Rule 9.100, providing for expedited appellate review of orders excluding the press or public.

CONCLUSION

Practicing journalists, including those of divergent political persuasions, would tend to agree with John Stuart Mill on the issue. In "On Liberty," which first appeared in 1859, Mill addressed the question of how individuals may deal with information. He said:

"When we consider either the history of opinion or the ordinary conduct of human life, to what is it to be ascribed that the one and the other are no worse than they are? Not certainly to the inherent force of the human understanding, for on any matter not self-evident there are ninety-nine persons totally incapable of judging of it for one who is capable; and the capacity of the hundredth person is only comparative, for the majority of the eminent men of every past generation held many opinions now known to be erroneous, and did or approved numerous things which no one will now justify. . . . The whole strength and value, then, of human judgment depending on the one property, that it can be set right when it is wrong, reliance can be placed on it only when the means of setting it right are kept constantly at hand. . . . No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner."

A benchmark case for journalists and nonjournalists alike was one that went to trial in 1735 involving John Peter Zenger. This was essentially a political case. Those who wrote for Zenger's New-York Weekly Journal had criticized the new colonial governor, William Cosby, in print. When the dispute worsened, Cosby caused charges of seditious libel to be brought

against Zenger. Zenger was arrested and held in jail for more than eight months awaiting trial.

Zenger's lawyer was Andrew Hamilton of Philadelphia, and he faced a formidable task. Under English law, then used in the colonies, the very act of publishing was tantamount to conviction if the court decided the words in question were libelous. A barrier almost impossible to climb over was the dictum, "The greater the truth, the greater the libel."

Hamilton questioned the arbitrary nature of the proceedings and asked why Americans were being forced to follow rules in court simply because they were being used in England:

"What strange doctrine is it to press everything for law here which is so in England?"

Hamilton told the jury:

"The Question before the Court and you, Gentlemen of the Jury, is not of small nor private Concern, it is not the Cause of a poor Printer, nor of New York alone, which you are now trying: No! It may in its Consequence affect every Freeman that lives under a British Government on the Main of America. It is the best Cause. It is the Cause of Liberty . . ."

The jury agreed with Hamilton and set Zenger free.

The Zenger case was a turning point in American life. It could be said to have been the moment at which Americans took control of their courts. From then on, the British avoided testing the will of Americans in the courts. That tradition of being in control of the procedures in and before courts of justice -- which began in 1735 -- we still hold dear in America today.

Should the Supreme Court of Texas approve the proposed rule before it, Texas would be a model state in prohibiting secrecy in the public domain.

APPENDIX

THE SUPREME COURT ADVISORY COMMITTEE

Purpose: To advise the Supreme Court on proposed changes in the Texas Rules of Civil Procedure.

Statutory Authority: Government Code §22.004

Chairman: Luther H. Soules III, 175 E. Houston, 10th Floor
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Term 1/1/85 to 1/1/91

Gilbert T. Adams, Jr.	<i>Beaumont</i>	John M. O'Quinn	<i>Houston</i>
Pat Beard	<i>Waco</i>	Judge Jack Pope	<i>Austin</i>
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Elaine A.G. Carlson	<i>Austin</i>	Harry M. Reasoner	<i>Houston</i>
Solomon Casseb, Jr.	<i>San Antonio</i>	Luther H. Soules III	<i>San Antonio</i>
John E. Collins	<i>Dallas</i>	Broadus A. Spivey	<i>Austin</i>
Vester T. Hughes, Jr.	<i>Dallas</i>	Judge Linda B. Thomas	<i>Dallas</i>
Charles Morris	<i>Austin</i>	Harry L. Tindall	<i>Houston</i>

Term 1/1/88 to 1/1/94

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Prof. J. Hadley Edgar	<i>Lubbock</i>	Judge Raul Rivera	<i>San Antonio</i>
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Judge Sam Houston Clinton — *Court of Criminal Appeals*

Chief Justice Austin McCloud — *Court of Appeals, Eastland*

Judge David Peeples — *Chair., Administration of Justice Committee, State Bar of Texas*

R. Doak Bishop — *Chair., Administration of the Rules of Evidence Committee, State Bar of Texas*

Justice Nathan Hecht — *Supreme Court of Texas, Rules Member*

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WRITER'S DIRECT DIAL NUMBER:

March 1, 1990

90 MAR 5
A 9: 48

Justice Nathan Hecht
Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

Enclosed is the final report from the Supreme Court Advisory Committee with recommendations for rules changes coming from its 1989 and 1990 sessions.

To me one recommendation in particular which needs special mention is the recommended change to Rule 166b(5) which provides as follows:

"No protective order or agreement relating to protecting disclosure of information concerning matters of public health or safety, or information concerning the administration of public office or the operation of government shall be valid unless the party seeking protection files the discovery or results of discovery with the clerk of the court and complies with Rule 76a."

The reason that I believe that this recommendation needs special mention is because the process through which it proceeded was not the usual process, and it is an extremely important and far reaching matter.

1. That provision was never submitted to the discovery subcommittee for study or recommendation.
2. That concept was considered before the Special Subcommittee on Sealing of Court Records and was, by that subcommittee, not recommended. Neither the Subcommittee's reported rule nor the "Locke-Purnell" proposal

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for Rule 76a encompassed discovery not filed with a court.

3. That concept was never a subject of any advance written proposal in any agenda prepared for any Committee meeting.
4. The inclusion of discovery in the rule on sealing court records was expressly tabled by a majority of all members present at the meeting on Friday 9, 1990, on motion of Justice Peeples. That meeting was attended by 25 of 36 members of the Supreme Court Advisory Committee.
5. Notwithstanding the February 9 vote to table, a majority of the 20 members who attended the smaller meeting on Friday, February 16 voted to reopen the question. The matter then passed by narrow majority vote of 10 to 7 with less than half the full membership attending and voting. None of the four member judges of the committee was able to attend the February 16 meeting.
6. The proposal was not published for comment from the bench and bar.

The chair, upon Justice Peeples' motion to table, had on February 9 assigned the matter of sealing discovery in pending cases to a Special Subcommittee to be co-chaired by Justice Peeples and Steve McConnico (Chair of the Standing Subcommittee over Discovery Rules) during the 1990-1991 biennium pursuant to recommended rules changes to be effective in 1992, and all members who volunteered to serve on the committee were appointed to that Special Subcommittee.

If the proposal is adopted in conjunction with proposed new Rule 76a the following consequences, I believe, inevitably follow:

1. In any case in which there is enough interest for the press to intervene to block the sealing of discovery an argument will be made that the case "concerns" some aspect of "public health and safety." How then is a trial judge to predict when to follow Rule 76a and when not to follow 76a. In my judgment, to be safe, the trial judges will need to follow Rule 76a in every case because, if that is not done, in any high interest case, someone (and that includes non-parties) can even subsequently posture an argument that "public health and safety" was "concerned" and bring it by way of criticism of the court itself as well as the parties.

2. Accordingly, the proposed change to Rule 166b(5) will permit, if not require, Rule 76a hearings on perhaps every motion for protective order seeking confidentiality of discovery materials. The parties will not be able to agree on confidentiality because the parties, like the court, cannot predict the meaning or scope of the words "concerning" and "public health and safety."
3. Any person or entity, whether or not a party and whether or not affiliated with the press, can "intervene" to un-seal or un-do a confidentiality order and generate a new hearing. Thereafter, that same or any other person or entity can come in again and intervene to un-do or un-seal a confidentiality order, and so on.
4. Every time a hearing is held the ruling is subject to an independent appeal, together with all attendant costs, distractions from progress in the trial, and delays.

In any particular case, there could be an infinite number of discovery hearings provoked even by outsiders to the litigation who intervene for the specific purpose of discovery hearings and, following such hearings, an infinite series of pending appeals, all prior to the time if ever the case reaches trial.

Is every law office in Texas made the subject of scrutiny and access by members of the press and anyone else who wants to look at discovery if discovery in a case is not made the subject of a Rule 76a protective order? If to seal discovery a public hearing must be held, does not the public have an interest in that discovery? If the public has an interest in the discovery and it is located in a law office and is not the subject of a protective order, then is it subject to inspection by anyone at any reasonable time? How long after a case is over must this "public" discovery be retained by a lawyer? Is the lawyer, acting as an officer of the court, in his role as custodial attorney for the discovery, placed in that role for eternity, and whether or not the case ever goes to trial? Do the lawyers provide eternal financing, or is there to be some public support for retention of this "public" discovery? Is more concern for a degree of confidentiality also more supportive of Texas established policy of open discovery as between parties? These are questions which, together with others, were raised in the committee debate, but were all left unresolved.

I believe this to be the only occurrence in the history of the Committee where such a broad sweeping and burdensome change has been recommended by the Committee with so little study and consideration.

Justice Nathan Hecht
March 1, 1990
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Your chair believes that this matter should be reposed where it was left at the end of the February 9 meeting, i.e. in the hands of the Special Subcommittee to be carefully studied and reported on during the next biennium pursuant to 1992 rules revision.

As you know, I serve altogether at the will of the Court and seek only to achieve the purposes expressed in Rule 1. The Rules are the Courts'. Not mine nor the Committee's. I hope we have succeeded for the most part in offering improvement.

Very truly yours,



Luther H. Soules III

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xc: All Supreme Court Advisory Committee Members