SEALING AND REVEALING: RETHINKING THE RULES GOVERNING PUBLIC ACCESS TO INFORMATION GENERATED THROUGH LITIGATION

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INTRODUCTION

What happens in Vegas stays in Vegas. But should the same slogan apply to people who use the court system to gain information of public importance and then agree among themselves to keep it secret? That was the question faced by the New Jersey Supreme Court recently in *Estate of Frankl v. Goodyear Tire & Rubber Co.*,[1] a case stemming from the deaths of three Air Force officers whose van rolled over after the tread of one of its Goodyear tires separated.[2] When the families of two of the deceased, Captain Robert Frankl and Lieutenant Colonel Karen Budian, sued Goodyear in New Jersey state court,[3] both sides, as is common in products liability actions,[4] stipulated early in the case to an "umbrella" protective order, pursuant to which the parties could designate materials exchanged in discovery as "confidential" and thereby prevent them from being released to the public.[5] The trial judge agreed to enforce the order.[6]

Three months into the discovery process, the families of Frankl and Budian asked the court for permission to release publicly several of the documents Goodyear had marked as confidential because, they alleged, the documents revealed that the company had an "ongoing safety issue" with the tire model at issue in the case and that at least eight other accidents had

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1. 853 A.2d 880 (N.J. 2004).

2. *Id.* at 882; Robert Schwaneberg, *The Dilemma of the Secret Settlements*, SUNDAY STAR-LEDGER (Newark, N.J.), Oct. 19, 2003, at 1.

3. *Frankl*, 853 A.2d at 882.

4. *See* Charles J. Reed, *Confidentiality and the Courts: Secrecy's Threat to Public Safety*, 76 JUDICATURE 308, 308 (1993) ("As a preemptive measure at the beginning of the discovery process, defense attorneys insist that the plaintiff's attorney agree to a protective order preventing communication with anyone regarding any information provided by the manufacturer.").

5. *Frankl*, 853 A.2d at 882. The parties reserved the right to challenge any assertion of confidentiality. *Id.*

6. *See id.*

been caused by similar tread separations.[7] Consumers for Auto Reliability and Safety ("CARS"), a consumer advocacy group, moved to intervene in the case to have the protective order vacated or modified.[8] CARS argued that the public had a strong interest in seeing the documents because the Goodyear tires at issue were in use on millions of vehicles throughout the world.[9]

Shortly before the court was to rule on whether to release the documents, the parties reached a settlement agreement pursuant to which the plaintiffs were paid $4.7 million in exchange for dropping the lawsuit and agreeing to return and keep secret all documents that had been exchanged in discovery.[10] CARS, however, continued to press for access, asserting that Goodyear never demonstrated the "good cause" necessary for the court to enter its initial protective order.[11] The New Jersey Supreme Court in 2004 unanimously rejected CARS's petition, reasoning that "[t]he universal understanding in the legal community is that unfiled documents in discovery are not subject to public access."[12]

Although "universal understanding" smacks of an overstatement, the *Frankl* court was correct that the majority of courts, both state and federal, do not recognize a public right of access to materials that parties exchange in discovery but do not file with the court.[13] Perhaps surprisingly, this position has become even more pervasive in recent years[14] despite heightened

7. *See* Brief of Consumers for Auto Reliability and Safety in Support of Motion to Intervene, Vacate or Modify Protective Order, and Seek Public Access to Documents at 5, Estate of Frankl v. Goodyear Tire & Rubber Co., No. MER-L-003052-99 (N.J. Super. Ct. Law Div. 2000) [hereinafter Brief of Consumers for Auto Reliability]. Newspaper articles reported an even more widespread problem, implicating the tire "in at least 44 crashes, 19 deaths, 160 injuries and 15,000 product liability claims." *See* Collins Conner, *Goodyear Kept Tire Problems Quiet*, ST. PETERSBURG TIMES, Oct. 21, 2001, at 1A.

8. Brief of Consumers for Auto Reliability and Safety, *supra* note 7, at 2.

9. *Id.*

10. *See* Schwaneberg, *supra* note 2.

11. *See* Michael Booth, *Court Draws Line on Public Access to Discovery Data*, N.J. LAW J., Aug. 2, 2004, at 1.

12. Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 886, 887 (N.J. 2004).

13. *See, e.g.*, SEC v. TheStreet.com, 273 F.3d 222, 233 (2d Cir. 2001) (stating that discovery materials "do not carry a presumption of public access" (quoting United States v. Glens Falls Newpapers, Inc., 160 F.3d 853, 857 (2d Cir. 1998)); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 165 (3d Cir. 1993) (no public access to materials attached to discovery motions); Anderson v. Cryovac, Inc., 805 F.2d 1, 11–12 (1st Cir. 1986) ("We think it is clear and hold that there is no right of public access to documents considered in discovery motions"). *But see* Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002) ("Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order is necessary."). *See also infra* Part II.B.

14. One indication of the growing acceptance of the discovery-is-private view comes from the Sedona Conference, a non-partisan law and policy think tank, which recently convened a "working group" on the issue of court secrecy made up of several leading scholars and practitioners with expertise in the topic. *See* SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING

public awareness of, and outrage over, secrecy in litigation. News reports describing how the Catholic archdioceses had secretly settled dozens of lawsuits in cases involving priests who allegedly molested children[15] and how Firestone and Ford were able to hide the Ford Explorer's rollover problems by settling scores of lawsuits with strict confidentiality clauses[16] have prompted more than a dozen states,[17] the U.S. Congress,[18] and several federal courts[19] to consider new legislation or rules aimed at restricting litigation secrecy. But thus far, the only new rules to be enacted since the Firestone scandal first emerged in late 2000 address materials filed in court (e.g., complaints, substantive motions, docket sheets, trial transcripts, and judicial opinions) and do not deal with the broad discretion of courts to

PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES iii (2005), *available at* http://www.thesedonaconference.org/content/miscFiles/wg2may05draft2 [hereinafter SEDONA GUIDELINES] (revised April 2005 public comment draft). The working group's steering committee includes Hon. Ronald J. Hedges, U.S. Magistrate Judge and Kenneth J. Withers, Federal Judicial Center. *Id.* at 52–53. Its participants include Peter C. Harvey, Attorney General for New Jersey; Virginia B. Evans, Assistant U.S. Attorney, District of Maryland; Laurie Kratky Doré, Drake University Law School; Scott Nelson, Public Citizen; James E. Rooks, Jr., Center for Constitutional Litigation; and several prominent plaintiffs' and defense attorneys. *Id.* The Guidelines endorsed the position that "[t]here is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court." *Id.* at 15. Some participants published "alternative viewpoints" that differed from several of the report's final conclusions, *see* SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES, ALTERNATIVE VIEWPOINTS, *available at* http://www.thesedonaconference.org/content/miscFiles/WG2AltViews.pdf (last visited Mar. 2, 2006), but the lack of a public right to participate in discovery received no such published dissent, s*ee* SEDONA GUIDELINES, *supra*, at iv–vi.

15. *See, e.g.*, Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye*, BOSTON GLOBE, Jan. 31, 2002, at A1. In the case of a single priest, Father John Geoghan, more than 130 people over twenty years brought accusations of sexual abuse; the church confidentially settled at least fifty of these claims. *See* Michael Rezendes, *Church Allowed Abuse By Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, at A1.

16. *See* Matthew L. Wald & Keith Bradsher, *Judge Tells Firestone to Release Technical Data on Tires*, N.Y. TIMES, Sept. 28, 2000, at C2 ("Officials at the Department of Transportation say the sealing of documents in settled lawsuits is one reason they did not spot the pattern of scores of rollover deaths in Ford Explorers equipped with Firestone tires that failed."). The recall of over fourteen million potentially dangerous tires followed eight years of Ford and Firestone settling more than 100 lawsuits with confidentiality agreements. The tires were linked to more than 270 deaths in the United States. *See* Keith Bradsher, *S.U.V. Tire Defects Were Known in '96 but Not Reported*, N.Y. TIMES, June 24, 2001, at A1; Thomas W. Gerdel, *On the Road Again: Tire Company Recovering After Disastrous Recall in 2000*, PLAIN DEALER (Cleveland, Ohio), Apr. 4, 2004, at G1; Richard A. Oppel Jr., *Bridgestone Agrees to Pay $7.5 Million in Explorer Crash*, N.Y. TIMES, Aug. 25, 2001, at C1.

17. The states are Arizona, Arkansas, California, Florida, Georgia, Illinois, Massachusetts, Nevada, New Jersey, North Carolina, Rhode Island, Tennessee, and Texas. *See* Elizabeth E. Spainhour, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards*, 82 N.C. L. REV. 2155, 2157, 2161 (2004); Martha Neil, *Confidential Settlements Scrutinized*, A.B.A. J., July 2002, at 20; Rebecca A. Womeldorf & William S. D. Cravens, *More Sunshine Laws Proposed*, NAT'L L. J., Nov. 12, 2001, at B14.

18. *See* Sunshine in Litigation Act of 2003, S. 817, 108th Congress (2003).

19. *See, e.g.*, D.S.C. LOCAL CIV. R. 5.03; D.N.J. LOCAL CIV. R. 5.3; S.D. Fla. LOCAL R. 5.4.

enter protective orders during discovery or the ability of parties to reach private agreements to keep discovery confidential.[20]

This Article asks whether courts, scholars, and policymakers should reconsider the tenet that discovery is not subject to public access and, more broadly, whether the currently predominant rules governing access to *all* forms of information generated through litigation adequately protect the interests of the public. At stake are several important—and sometimes competing—public interests. On the one hand, public access to court records can make the judicial system more accountable, encourage better performance of judicial duties, educate the public about the workings of the civil justice system, and promote public confidence in the system by letting citizens know they can see the information relied upon by judges to adjudicate cases.[21] The public also can have an interest in seeing the information uncovered by the process of litigation so that the activities of those who discriminate or commit torts or break the law or back out of contracts are brought to light.[22] On the other hand, broad public access to documents generated through litigation can jeopardize the privacy of individuals and businesses and thereby make courts less desirable forums for the resolution of disputes.[23] Rules governing access must balance these interests while also ensuring that the justice system remains an efficient—and relatively inexpensive—forum for dispute resolution.

I argue that the current rules give too much weight to the interests of privacy and expediency at the expense of promoting judicial accountability, democratic engagement, and public confidence in the judicial system. The resolution of the *Frankl* case, for example, illustrates how a blanket holding that discovery is private prevents courts from even considering the public interest in determining whether certain materials generated through litiga-

20. *See* D.S.C. LOCAL. CIV. R. 5.03 (restricting ability of courts to seal filed settlement agreements, while allowing bilateral secrecy covenants between litigants); D.N.J. LOCAL CIV. R. 5.3(b), (c) (requiring notice and hearing before sealing documents filed in court, but also sanctioning the ability of parties to "enter into written agreements to keep materials produced in discovery confidential and to return or destroy such materials as agreed by parties and as allowed by law"); Model Order Regarding Confidentiality, Judge Mark R. Kravitz (D. Conn. 2005) (requiring a showing of "extraordinary circumstances" for a court document to be sealed from public view; the rule does not apply to unfiled discovery).

21. *See, e.g.*, Gambale v. Deutsche Bank AG, 377 F.3d 133, 140 (2d Cir. 2004) ("[T]he bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." (quoting United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995))); *see also infra* Part I.A.

22. *See infra* Part II.A.

23. *See* SEDONA GUIDELINES, *supra* note 14, at 1 (noting that civil litigation can entail "disclosure of intimate personal or financial information" and that "[t]rade secrets or confidential marketing, research, or commercial information may be at stake").

tion can be made public. At issue in *Frankl* were thirty-one documents that allegedly contained information about the safety of the Goodyear tires—information that was at the center of the merits of the litigation and, if the allegations in the complaint were accurate, could potentially have saved dozens of lives if made public.[24] The documents, while not filed with the court, were generated through a process of judicial coercion—that is, Goodyear would not have turned them over absent the law requiring discovery—and their confidentiality was protected by a judicial order. But the lack of any public right of access to unfiled discovery made the court powerless to balance the competing public interests. As a result, the parties, rather than the court, had control over what the public was able to learn about the case. The parties were able to use secrecy as a bargaining chip during settlement negotiations, resulting in the plaintiffs being paid what was presumably a premium for agreeing to remain silent about the potentially explosive information they had learned in discovery. The ability to engage in this kind of secret dealmaking is, at least in part, what enabled the Catholic archdioceses and Ford/Firestone to keep their wrongdoing quiet for so many years despite being sued again and again in courtrooms throughout the country.[25]

This is not to say that the public should have an automatic right to view all or most of the material exchanged in discovery. Rather, rules must be crafted to give courts the ability—and incentive—to sufficiently weigh the importance of public access against litigants' interests in privacy and the system's interest in efficiency. The problem with many of the currently predominant rules governing access to court documents, and especially those that say the public has no right to access unfiled discovery, is that judges are powerless, or provided with little motivation, to consider the interests of the public. The result is that there is no balancing and private parties, rather than publicly-financed courts, control what information the public sees.

This Article is divided into two sections. The first looks at the rules governing what I refer to as "judicial" information: information generated through litigation that is directly tied to judicial decision-making, including pleadings, motions, judicial opinions, court orders, and settlement agreements that are approved of or enforced by the court. The second examines the rules governing what I refer to as "litigant-centered" information. These materials, which are generated as a result of court processes but do not form the basis for judicial decision-making, consist of discovery that has

24. *See* Booth, *supra* note 11.

25. *See* Robinson, *supra* note 15; Wald & Bradsher, *supra* note 16.

been exchanged between the parties but that has yet to be used in court, as well as privately reached, privately enforced settlement agreements. The crucial difference between the two categories is that the primary public interest implicated in the accessibility of judicial information is in enabling the public to monitor the exercise of judicial power, whereas the public interest in litigant-centered information is typically in the raw material itself, and not as it relates to the workings of the court.[26]

Each of this Article's two sections begins by analyzing the competing public interests at stake. Why is it important to provide the public with access to information generated through litigation? What kinds of privacy are put at risk by granting such access? The sections go on to examine the rules most courts currently apply when determining whether judicial or litigant-centered information should be made available to the public and explore whether these rules adequately weigh the competing public interests.

Each section then looks at possible alternative regimes. In the last fifteen years, a handful of states and courts have experimented with different forms of "sunshine" rules that attempt to prohibit certain kinds of litigation secrecy.[27] Some of the rules, such as the District of South Carolina's recently enacted ban on filing sealed settlements with the court,[28] apply ex-

26. I use the terms "judicial" and "litigant-centered" information as opposed to "filed" and "unfiled" because the essential questions are how the materials are used and what public interests they implicate, not whether a court permitted or required their filing. *Compare* SEC v. TheStreet.com, 273 F.3d 222, 231 (2d Cir. 2001) ("[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of access." (quoting United States v. Amodeo, 44 F.3d 141, 145)), *with* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 783 n.11 (3d Cir. 1994) ("[W]hether the relevant document is in the court file is the critical inquiry."). As detailed in Part II, *infra*, Rule 5(d) of the Federal Rules of Civil Procedure was revised in 2000 to prohibit the filing of discovery materials until they are "used in the proceeding." FED. R. CIV. P. 5(d). *See also* FED. R. CIV. P. 5, Committee Notes on Rules—2000 Amendment. The stated intent of the revision was to ease the burden on clerks' offices, not to alter access rights to discovery materials. *See infra* Part II. Thus, inquiring into whether materials are located in a court's file, while relevant to matters of custody and document preservation, sheds no light on whether the materials should be publicly accessible as a policy matter.

27. In the late 1980s and early 1990s, concerns about too much secrecy in litigation, spurred on by news reports of hundreds of lawsuits being sealed from public view, *see, e.g.*, Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues: Key GM Fuel Tank Memos Kept Hidden in Auto Crash Suits*, WASH. POST, Oct. 23, 1988, at A1, prompted more than twenty-five states to consider legislation prohibiting various forms of court secrecy. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 n.7 (1991) (listing the proposed bills). While the vast majority of these initiatives failed, anti-secrecy provisions were enacted in Florida, Louisiana, Texas, Virginia, and Washington. *See id.*; *infra* Parts I.D and II.C. More recently, New Jersey passed a law in 2003 requiring certain information about medical malpractice settlements to be made public, *see infra* Part II.C.4, and the federal district courts in South Carolina and New Jersey enacted local rules restricting judges' abilities to order certain documents to be kept under seal, *see infra* Part I.D.

28. D.S.C. LOCAL CIV. R. 5.03.

clusively to judicial information; others, such as Texas's Rule 76a,[29] attempt to address both judicial and litigant-centered secrecy. The Article analyzes what proponents say were the motivations behind these sunshine experiments and looks in detail at how these rules have worked in practice. I conclude that while the sunshine rules have not achieved all of their intended objectives, they provide a roadmap for a system of civil litigation in which concerns about privacy and efficiency are considered but are not permitted to subsume the public's interest in being able to access court-generated information.

I. THE RULES GOVERNING JUDICIAL INFORMATION

A. The Public Interest in Judicial Information

Courts are public institutions that exercise enormous power over people's lives. This power is coupled with a measure of accountability, however, by granting the public access to "judicial" information, the documents that judges rely upon to make decisions and create as part of their exercise of judicial duties.[30] The public's interest in monitoring the actions of the courts was recognized in the earliest days of the American republic, when the "common right" to obtain and inspect a copy of a court record was viewed as sacrosanct.[31]

Broad public access to judicial information advances several important societal goals: it promotes public confidence in the judicial system,[32] enhances the quality of justice by enabling the public to monitor judicial behavior,[33] educates the public about the workings of the courts,[34] and

29. TEX. R. CIV. P. 76a.

30. *See* SEDONA GUIDELINES, *supra* note 14, at 1 ("Public access to judicial proceedings facilitates public monitoring of our publicly-created, staffed, and subsidized judicial system. Fair and open judicial proceedings and decisions encourage public confidence in and respect for the courts—a trust essential to continued support of the judiciary. A public eye on the litigation process can enhance fair and accurate fact-finding and decision-making. . . . A public trial also educates citizens about the justice system itself as well as its workings in a particular case.").

31. *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 471 (rev. ed., Philadelphia, Rees Welsh & Co. 1899) (noting that any limitation on the right to inspect court records would be "repugnant to the genius of American institutions"); *see also* Nixon v. Warner Comm'cs, Inc., 435 U.S. 589, 612–13 (1978) (Marshall, J., dissenting) (stating that the right to inspect and copy public records predates the Constitution); Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504, 506 (D. Colo. 1902) ("[T]he matter of inspecting and taking copies of public records is as old in the law as the records are old.").

32. Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988).

33. *See* Anne Elizabeth Cohen, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1827 (1984) ("The availability of documents means that graft and ignorance will be more difficult to conceal.").

34. *See* SEDONA GUIDELINES, *supra* note 14, at 1.

informs citizens of "opportunities for participation in the system that would otherwise pass unknown to many members of the public."[35] As Justice Holmes explained:

> 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.[36]

The public's interest in monitoring what courts do ostensibly peaks during civil and criminal trials, where judges make myriad decisions, large and small, that impact the cases before them.[37] The interest is no less compelling, however, with regard to pre- and post-trial materials that judges rely upon to make decisions, especially considering that the vast majority of civil litigation concludes prior to trial.[38] In a case that ends in a grant of summary judgment, for example, a citizen cannot monitor whether the judge based his decision on proper considerations without having access to the materials the judge relied upon.[39] Similarly, if a court approves of or agrees to enforce a settlement contract, the public has a strong interest in knowing the terms of the settlement in order to evaluate the court's invocation of its power over the settlement.[40]

While the public's ability to monitor the exercise of judicial power is the central interest at stake with regard to the accessibility of judicial information, it is not the public's only interest. The public also has an interest in seeing the content of materials generated through litigation when that

35. Mokhiber v. Davis, 537 A.2d 1100, 1110 (D.C. Cir. 1988).

36. Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

37. *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068–69 (3d Cir. 1984) (stating that the public's ability to access civil trials is "inherent in the nature of our democratic form of government").

38. In 2001 and 2002 combined, more than 500,000 federal civil cases terminated, yet there were fewer than 13,000 trials. *See* LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2002 ANNUAL REPORT OF THE DIRECTOR 123 tbl.C (2002) (showing 248,174 civil cases terminated in 2001 and 259,537 civil cases terminated in 2002), *available at* http://www.uscourts.gov/library/dirrpt02/2002.pdf; *id.* at 162, tbl.C-7 (showing 6,015 civil trials completed during twelve-month period ending September 30, 2002); LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS: 2001 ANNUAL REPORT OF THE DIRECTOR 163, tbl.C-7 (2001) (showing 6,513 civil trials completed during the twelve-month period ending Sept. 30, 2001), *available at* http://www.uscourts.gov/library/dirrpt01/2001.pdf.

39. *See* Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) ("[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.").

40. *See, e.g.*, Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992) ("It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case.").

content implicates the merits of the cases brought.[41] In a recent lawsuit alleging gender discrimination at Deutsche Bank AG, for example, a court ordered the release of four pages of an internal study of diversity at the bank that revealed that, in contrast to its competitors, the company had "no women in top management positions."[42] The public's interest in the study stemmed in part from the judge's reliance on the study in denying the company's motion for summary judgment. But the public also had an interest in seeing documentary evidence of potential gender discrimination at one of the world's foremost investment banks.[43] Had the court not *sua sponte* ordered the study's release, the public would never have seen it because the parties settled on the eve of trial and agreed to keep the study, along with other documents central to the merits of the case, confidential.[44]

Broad public access to judicial information serves another important purpose: the formation and shaping of societal norms. Professor Judith Resnik argues persuasively that transparent court processes establish standards for non-judicial forms of adjudication as well as for courts in other countries, and have led to widespread societal condemnation of sexual harassment and domestic violence.[45]

Running counter to these concerns, however, is the public's interest in protecting the privacy of individuals and the proprietary information of businesses. The process of civil litigation can require litigants to reveal to courts information that the public has an interest in keeping confidential, such as materials related to national security, the names of rape victims, or valuable trade secrets. The public would be harmed by a system of litigation that required, for example, the Coca-Cola Company to publicly reveal its recipe for Coca-Cola Zero just because a judge viewed the recipe in evaluating a competitor's lawsuit for trade secret misappropriation. Such a system would no doubt invite frivolous lawsuits from competitors and perhaps stifle companies from investing in innovation.

In cases that implicate legitimate privacy interests (i.e., not simply a company's or person's desire to avoid public scrutiny of wrongdoing), courts, when determining whether to grant public access to judicial infor-

41. For a more detailed discussion of the public's interest in the content of what transpires in litigation, see *infra* Part II.A.

42. *See* Gambale v. Deutsche Bank AG, No. 02 Civ. 4791, 2003 WL 21511851, at *2, *5 (S.D.N.Y. July 2, 2003), *aff'd in part*, 377 F.3d 133 (2d Cir. 2004).

43. *See Gambale*, 377 F.3d at 136 (noting that the district court judge "wondered aloud why the public should not know about discrimination at a major banking institution").

44. *See Gambale*, 2003 WL 21511851, at *1.

45. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521 (2006); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 405–26 (1987).

mation, need to balance requests for confidentiality against the public's interests in monitoring judicial action and viewing evidence of potential wrongdoing. The question central to this Article is whether the currently predominant rules and procedures governing access to judicial information give courts the ability and incentive to undertake this kind of balancing.

B. The Rules Governing Access Rights to Judicial Information

Both state and federal courts recognize a First Amendment or common law right of public access to most forms of judicial information.[46] The Supreme Court, in *Richmond Newspapers, Inc. v. Virginia*,[47] recognized a "right to attend criminal trials" as being "implicit in the guarantees of the First Amendment," but has not addressed whether the First Amendment applies to access to civil trials.[48] Lower courts, however, have found that the rationale of *Richmond Newspapers*—that open trials assure "freedom of communication on matters relating to the functioning of government"[49]—extends to the forms of judicial information that most concern "the free discussion of governmental affairs."[50] Accordingly, courts of appeals have recognized First Amendment rights to attend civil trials and access civil trial transcripts,[51] to view documents accompanying motions for summary judgment,[52] and to access civil docket sheets,[53] but have held that the First Amendment does not apply to the public's ability to access discovery materials used at trial.[54]

Because First Amendment access rights are limited to matters invoking "freedom of communication,"[55] in most situations courts turn to the common law when determining whether to grant public access to judicial information. The common law right of access applies to all "judicial deci-

46. *See, e.g.*, Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 16 (Ill. 2000) (recognizing a "common law right of access to [civil] court records" as "essential to the proper functioning of a democracy"); *Gambale*, 377 F.3d at 140 ("The public has a common law presumptive right of access to judicial documents, and likely a constitutional one as well." (citation omitted)).

47. 448 U.S. 555 (1980)

48. *See id.* at 580, 580 n.17 ("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.").

49. *Id.* at 575.

50. Publicker Indus., Inc. v. Cohen, 735 F.2d 1059, 1070 (3d Cir. 1984).

51. *See id.* at 1069–70.

52. *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988).

53. *See* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93–94 (2d Cir. 2004).

54. *See In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1338–39 (D.C. Cir. 1985).

55. *See id.* at 1331–32.

sions and the documents which comprise the bases of those decisions."[56] Courts largely agree that the right extends not only to trial documents such as exhibits, but also to materials related to most pretrial court rulings,[57] as well as to settlement agreements filed with the court.[58] Courts also have repeatedly held that neither the First Amendment nor the common law right of public access to judicial information is absolute; rather, both rights create a presumption that parties wishing to seal must overcome.[59]

Courts differ widely, however, in terms of the rules and procedures employed to ensure this presumption of access is protected. In the majority of states and districts, the rules governing sealing of judicial information come from judicial doctrine as opposed to rules of procedure.[60] While the doctrine and rules vary, the standards and procedures they mandate can be grouped roughly into three tiers: 1) rules that require a compelling interest

56. Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994).

57. *See, e.g.*, Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164 (3d Cir. 1993) (common law right of access applies to materials accompanying all "pretrial motions of a non-discovery nature"); Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991) (common law right of access applies to summary judgment motion and attached documents).

58. *See, e.g.*, Herrnreiter v. Chi. Hous. Auth., 281 F.3d 634, 637 (7th Cir. 2002) ("Now that the [settlement] agreement itself has become a subject of litigation, it must be opened to the public just like other information . . . that becomes the subject of litigation."); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) ("The presumption in favor of the public's common law right of access to court records . . . applies to settlement agreements that are filed and submitted to the district court. . . ."); EEOC v. Erection Co., 900 F.2d 168, 169–70 (9th Cir. 1990) (applying presumption of right of access to consent decree filed with settlement agreement); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 344–45 (3d Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.").

Courts disagree, however, about whether the common law right applies to discovery materials that are filed with the court in connection with discovery motions. The Third Circuit, in ruling that a right of access does not apply to such materials, reasoned that holding otherwise "would make raw discovery, ordinarily inaccessible to the public, accessible merely because it had to be included in motions precipitated by inadequate discovery responses or overly aggressive discovery demands." *Leucadia*, 998 F.2d at 164. *See also* Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) ("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."). The D.C. Circuit, on the other hand, has held that the common law right applies to materials attached to discovery motions because of the centrality of the role discovery plays in civil litigation. *See* Mokhiber v. Davis, 537 A.2d 1100, 1112 (D.C. 1988). The court explained:

> The manner in which [discovery] proceeds may prove decisive to the outcome of particular disputes, and the availability of mandatory discovery has greatly affected the way in which our courts do justice. Moreover, discovery procedures have become a continuing focus of controversy and reform within the judiciary and the legal community. This debate has arisen precisely because discovery is so important in trial practice.

Id.

59. *See, e.g.*, *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001) (stating that the strong presumption of public access to judicial information "may be rebutted").

60. As of 2003, eleven federal districts (out of ninety-four) and twenty-two states had drafted procedural rules that limit a judge's discretion to seal court documents. *See* TIM REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT—MAY 2003 PROGRESS REPORT 2, 5 (2003) [herinafter FJC 2003 REPORT], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SealSet2.pdf/$file/SealSet2.pdf.

and narrow tailoring in order to seal; 2) rules that require weighing the public interest in access against countervailing interests in privacy; and 3) rules that require a showing of "good cause" in order to seal.

The first tier mainly involves cases implicating First Amendment access rights.[61] In such cases, courts generally require parties requesting secrecy to show that the denial of access "serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."[62] The Fourth Circuit takes the extra step of adding to this required showing a series of procedural protections. In *Rushford v. New Yorker Magazine*, a libel case in which the entire record accompanying a summary judgment motion was placed under seal, the Fourth Circuit held that because the First Amendment protected access to the materials at issue, the trial court had to provide the public with "adequate notice" of the request to seal and an opportunity to challenge the request before the court made its decision.[63] Moreover, if the court decided to seal, it had to state its reasons on the record, supported by specific findings, as well as its reasons for rejecting alternatives to sealing.[64] The rationale for the procedure came from Justice Powell, who wrote in *Gannett Co. v. DePasquale*,[65] a case involving the closing of criminal proceedings, that "[i]t is not enough . . . that trial courts apply a certain standard to requests for closure. If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion."[66] The Fourth Circuit's procedural protections are less than they appear, however, in that the notice provision applies only to those members of the public already in the courtroom.[67]

61. Two jurisdictions—the state of Texas and the Northern District of California—apply a form of the compelling interest/least-restrictive means standard to more than just First Amendment materials. *See* TEX. R. CIV. P. 76(a) (discussed in Part I.D, *infra*); N.D. CAL. CIV. L.R. 79-5(b) (2003) (commentary) (stating that all requests to seal must be "narrowly tailored to seal only the particular information that is genuinely privileged or protectable as a trade secret or otherwise has a compelling need for confidentiality").

62. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); *see also* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

63. *Rushford*, 846 F.2d at 253–54.

64. *Id.* at 254.

65. 443 U.S. 368 (1979).

66. *Id.* at 400-01 (Powell, J., concurring).

67. *See In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984) ("[W]e believe individual notice is unwarranted. Notifying the persons present in the courtroom of the request to seal or docketing it reasonably in advance of deciding the issue is appropriate."). Some courts within the Fourth Circuit have been reversed for failing to grant even this limited form of notice. *See, e.g.*, Rosenfeld v. Montgomery County Pub. Sch., 25 F.App'x 123, 132–33 (4th Cir. 2001) (reversing district court that had not provided "public notice or an opportunity for interested parties to object").

The second and third tiers involve common law right-of-access cases. Courts that employ the second tier of protection require that to win a sealing order, the public's interest in access must be outweighed or "heavily outweighed" by countervailing interests in privacy.[68] Pursuant to this standard, the public's interest in viewing the materials must be considered, but the denial of access, unlike in First Amendment cases, does not need to be narrowly tailored to the countervailing interest asserted. One federal district and several states have adopted procedural rules requiring this balancing test to be applied to all motions to seal court records.[69]

The third level of protection requires only a showing of "good cause" to win a sealing order. The good cause standard, which gives trial judges broad discretion to determine the propriety of a sealing request,[70] has been adopted into procedural rules by nine federal districts[71] and five states.[72] Judges, however, have varied widely in their interpretations of what constitutes sufficient good cause in order to seal court records, with some explicitly requiring a weighing of public interests[73] and others finding a showing of good cause even though only the interests of private parties were advanced.[74] The Sixth Circuit has held that the good cause requirement of Rule 26(c) of the Federal Rules of Civil Procedure governs all requests to seal,[75] even though by its terms the rule applies only to the issuance of

68. *E.g.*, *Rushford*, 846 F.2d at 253 (stating that the common law presumption of access "can be rebutted if countervailing interests heavily outweigh the public interests in access"); *In re* Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001); Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1212 (9th Cir. 2002) (the "'strong presumption in favor of access' to judicial documents . . . 'can be overcome' only by showing 'sufficiently important countervailing interests'") (quoting San Jose Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1102 (9th Cir. 1999)).

69. *See* W.D. WASH. LOCAL CIV. R. 5(g)(1) (requiring that in order to seal court records, the "strong presumption of public access" must be outweighed by "the interests of the public and the parties in protecting files . . . from public review"); FJC 2003 REPORT, *supra* note 60, at 5 (describing procedural rules in California, Idaho, Indiana, and North Carolina that require privacy interests to outweigh public interests in order for court records to be sealed; and rules in Georgia and Utah that require privacy interests to "clearly" outweigh public interests).

70. *See, e.g.*, Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc., 924 P.2d 273, 277 (N.M. Ct. App. 1996) (good cause finding can only be reversed on abuse of discretion).

71. The districts are Northern California, Northern Illinois, Western Michigan, Northern and Southern Mississippi, Eastern Missouri, Northern Oklahoma, Eastern Tennessee and Utah. *See* FJC 2003 REPORT, *supra* note 60, at 2 n.2.

72. The states are Delaware, Michigan, New York, Tennessee, and Vermont. *See id.* at 5.

73. *E.g.*, Doe v. New York Univ., 786 N.Y.S.2d 892, 900 (Sup. Ct. 2004) (good cause to seal court records requires compelling circumstances and a weighing of public interests).

74. *E.g.*, Bd. of Comm'rs of Doña Ana County v. Las Cruces Sun-News, 76 P.3d 36, 40 (N.M. Ct. App. 2003) (good cause requires a showing of a "clearly defined and serious injury to the party seeking closure" (quoting Krahling v. Executive Life Ins. Co., 959 P.2d 562, 567 (N.M. Ct. App. 1998))).

75. Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996) ("Rule 26(c) allows the sealing of court papers only for 'good cause shown.'").

protective orders during discovery.[76] While Rule 26(c) does not define good cause,[77] it suggests that the need to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense" is sufficient without any required balancing of countervailing public access interests.[78] The Sixth Circuit has stressed, however, that good cause does not permit the parties to "adjudicate their own case based on their own self-interest."[79]

C. Do the Currently Predominant Rules Adequately Balance Interests in Access?

The public's interests in accessing judicial information are often independent of the desires or rights of the parties in any given case. In many, or perhaps most, cases, both parties may prefer secrecy, but that alone cannot trump the societal utility of providing public access. Recognizing this, courts that adhere to the first two tiers of rules require an explicit weighing of the public's interest against any countervailing interest in secrecy. The third tier's "good cause" requirement, by contrast, gives judges broad discretion to seal information without mandating such a balancing test, potentially enabling a party's interest in secrecy to prevail without a sufficient consideration of the public's interest in access. Even more problematic is that in all three tiers, other than the Fourth Circuit's limited notice provision in First Amendment cases, courts generally do not give members of the public or other interested parties a sufficient opportunity to intervene to challenge requests to seal.

The result is that in most cases involving secrecy requests, the only representative of the public's interest is the trial judge, whose own interests may conflict with the public's. Trial judges—at least according to several commentators, including ones who sit behind the bench—"are under great pressure to clear their calendars" and "tend, therefore, to approve secrecy agreements that encourage settlement."[80] In addition to being motivated by expediency, political pressures and the desire to cultivate relationships with other lawyers may play a role in state court, where many judges are elected,

76. *See* FED. R. CIV. P. 26(c).

77. *See id.*

78. *See id.*

79. *Procter & Gamble*, 78 F.3d at 227.

80. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 517 (1994). *See also* Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 729 (2004) ("[J]udges face incredible pressure to go along with court-ordered secrecy in the heat of battle.").

resulting in judges granting secrecy orders regardless of the public interest in disclosure.[81]

The extent to which judges sign off on secrecy without fully considering the public interest is difficult to gauge because secrecy requests may not be docketed, and even when they are, "the public record almost never include[s] specific findings justifying sealing."[82] Some evidence suggests, however, that the existing rules governing judicial information do not adequately protect public interests in access. In Connecticut, for example, investigations by the *Hartford Courant* and the *Connecticut Law Tribune* in late 2002 revealed that Connecticut courts had sealed the files of about 7,000 cases and had designated another forty or more cases as so "supersecret" that court clerks were instructed to deny their existence.[83] The reporters had assumed that many of the sealed cases would be family court cases, which can implicate unique privacy interests, but the investigation revealed that a large number of non-family civil cases had also been sealed, including ones whose captions indicated potential public interest implications, such as *Connecticut Department of Health v. Silver Hill Hospital* and *Connecticut Attorney General v. Kimber Manufacturing*.[84] Significantly, this court-ordered secrecy—much of which was unaccompanied by public explanations for judicial sealing decisions[85]—occurred despite rules in the Connecticut Practice Book stating that proceedings and pleadings can only be sealed when a party's interest in privacy outweighs the presumed right of the public to open trials, and that judges have to issue public decisions about why sealing some or all of a proceeding is warranted.[86]

Connecticut may be an extreme example, but the most extensive study available of court-ordered secrecy, completed in 2004 by the Federal Judicial Center ("FJC"), the research arm of the federal judiciary, suggests that sealing without explanation occurs in significant numbers of cases in federal courts as well.[87] The FJC examined 288,846 cases that had been dis-

81. *See* Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, DALLAS MORNING NEWS, Nov. 22, 1987, at 1A. The article quotes Bill Long, who as district clerk of Dallas County was the custodian of the sealed records: "From my understanding, a lot of those records were sealed for other than judicial reasons, probably political considerations, maybe favoritism with certain law firms." *Id.*

82. ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 7 (2004) [hereinafter FJC 2004 REPORT].

83. *See* CONN. BAR ASS'N, REPORT OF THE TASK FORCE ON CONFIDENTIALITY AND THE COURTS 12–13 (2004) [hereinafter CBA REPORT]; *see also* Hartford Courant Co., 380 F.3d 83, 86–87 (detailing how Connecticut courts had been routinely sealing scores of entire case files and docket sheets without providing any justification).

84. *See* CBA REPORT, *supra* note 83, at 13.

85. *See id.* at 12–13.

86. *See id.* at 12.

87. *See* FJC 2004 REPORT, *supra* note 82.

posed of by federal courts in 2001 and 2002, and found that 1,270, or 0.44%, of the cases studied were resolved with settlement agreements sealed by the court.[88] The report concluded that such sealing was not a significant problem because it was "rare" and because "[i]n 97% of the cases [with sealed settlements], the *complaint* is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings."[89]

But the FJC's numbers can be read in a different way. The report categorized 503 of the cases with judicially-sealed settlements, or forty percent, as ones "that might be of special public interest," including 258 products liability cases.[90] These are significant numbers by themselves, but they are even more significant considering that the FJC defined "special public interest" narrowly, limiting the category to cases involving environmental harm, products liability, sexual abuse, and those with a public party as defendant.[91] Left out of the forty percent were 88 Fair Labor Standards Act cases, 223 "Other Employment/Labor" cases, and 124 "Other Civil Rights" cases.[92] The public arguably has a "special" interest in knowing how all of these cases were resolved because the cases involve accusations that private actors had violated federal statutes intended to protect workers and minorities. Without access, the public is unable to evaluate or monitor judges' decisions to approve these settlements and agree to enforce their terms.

It is possible, therefore, that collectively more than 900 of the 1,270 cases with sealed settlements involved strong countervailing public interests in access, and because the judges in almost all of these cases did not justify their decisions to seal,[93] we have no way of knowing whether the public's interests were given proper consideration. As Judge Joseph Anderson, who led the District of South Carolina's effort to ban sealed settle-

88. *See id.* at 3.

89. *Id.* at 8. The Judicial Conference's Advisory Committee on Civil Rules relied on these findings in rejecting a 2004 proposal that would have limited judicial discretion to seal court records. *See* Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the U.S., to Honorable Herbert Kohl, U.S. Senate, Nov. 17, 2004 [hereinafter Nov. 17 Mecham Letter] (on file with author) ("Based on the relatively small number of cases involving a sealed settlement agreement, the availability of other sources, including the complaint, to inform the public of potential hazards in cases involving a sealed settlement agreement, and the questionable authority and ability of the [Advisory Committee on Civil Rules] to regulate confidentiality provisions enforced by state substantive law, the Committee concluded that no amendment to the Federal Rules of Civil Procedure is appropriate.").

90. FJC 2004 REPORT, *supra* note 82, at 8 tbl.2.

91. *Id.*

92. *Id.* at 5.

93. *See id.* at 7 ("[T]he public record almost never include[s] specific findings justifying sealing.").

ments, notes, "even if confidential settlements are occurring in only a small number of cases, the regrettable fact is that those cases are often the very cases not deserving of court-ordered secrecy."[94]

Furthermore, the assertion that the public can learn what it needs to know from the unsealed complaints misconstrues how information about litigation is disseminated. Neither ordinary citizens nor journalists are capable of poring through the hundreds of thousands of complaints filed every year, and because complaints are only allegations, they often become newsworthy only upon word of a settlement. A court's sealing of the settlement, therefore, can effectively "secretize"[95] the entire case, regardless of whether the complaint is accessible. Moreover, the public's interest in viewing a settlement approved of or enforced by a court is not only in learning about "alleged wrongdoers and wrongdoings" but also in being able to monitor the court's exercise of its power over the settlement.

The limited evidence available, therefore, while far from conclusive, suggests that the currently predominant rules have allowed a significant amount of judicial information to be sealed without sufficient weighing of the public's interests in access.

D. Alternative Regimes

1. The Prohibition Response: "Banning" Sealed Settlements

In November 2002, the federal district judges in South Carolina voted 8–2 to enact what is now Local Rule 5.03(E), which reads, "No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule."[96] The impetus for this blanket rule was the sentiment that the doctrinal standards governing the sealing of filed settlement agreements were not affording adequate protection to the public's interest in openness.[97] Fourth Circuit case law requires that in order to overcome the public's common law right of access to filed settlement agreements, countervailing interests must "heavily outweigh" the public's interest in access.[98] According to Judge Anderson, however, this requirement was "sometimes more honored in the breach than in the observance" due to the "incredible amount of pressure brought to bear on a judge when a favorable settlement

94. Anderson, *supra* note 80, at 738.

95. The term is Richard Zitrin's. *See* Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1566 (2004).

96. D.S.C. LOCAL CIV. R. 5.03(E); Anderson, *supra* note 80, at 725.

97. *See* Anderson, *supra* note 80, at 718–19.

98. *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

is reached contingent on a secrecy agreement."[99] If a judge rejects the deal, the plaintiff may lose the settlement and the case may go to trial—a risk many judges are unwilling to take in the name of promoting openness in the court system.[100] The purpose of the local rule, therefore, was to take "court-ordered secrecy off the table as a bargaining chip."[101]

One of the most common criticisms of the rule when it was enacted was that it would deter parties from settling and thus flood the courts with more trials than they could handle.[102] Without acknowledging whether docket pressure is an appropriate defense of the status quo, Judge Anderson responded that litigants seeking secrecy would be unlikely to give up a settlement in exchange for "the most public of all institutions—a trial before a jury in an open courtroom."[103]

Importantly, the South Carolina rule expressly does not impact the ability of parties to settle privately;[104] rather, it applies only on those rare occasions in which parties ask the court for judicial approval of their settlements (i.e., the types of settlements that were the subject of the 2004 FJC Report).[105] The narrow scope of the rule thus makes it unlikely to have any impact at all on the court's caseload. In fact, in the twelve months following the enactment of the rule, judges in the district tried two fewer cases than they did in the twelve months prior to its enactment.[106]

A more nuanced criticism comes from Judge Lee Rosenthal, chair of the Judicial Conference's Advisory Committee on Civil Rules. Judge Rosenthal is concerned that banning sealed settlements from being filed with the court may encourage litigants who would otherwise be inclined to seek court approval instead to settle privately, thereby depriving the public of any representative in the process at all.[107] One problem with this argument is that a large proportion of sealed settlement agreements filed with courts are in cases in which court approval of any settlement is required,

99. Anderson, *supra* note 80, at 718, 721 n.31.

100. *Id.* at 721 n.31.

101. *Id.* at 730.

102. *See id.* at 726.

103. *Id.*

104. *See* D.S.C. LOCAL CIV. R. 5.03 ("Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court."). In some cases, such as those involving minors and class actions, judicial approval of any settlement agreement is required.

105. *See* Nov. 17 Mecham Letter, *supra* note 89 ("[M]ost settlement agreements are neither filed with a court nor require court approval. Instead, most settlement agreements are private contractual obligations.").

106. Anderson, *supra* note 80, at 726.

107. Interview with Judge Lee Rosenthal, New Haven, Connecticut, Dec. 10, 2004. *Cf.* D.N.J. LOCAL CIV. R. 5.3(d) (prohibiting parties from submitting proposed settlements to the court unless required to do so by law).

such as those involving minors, class actions, and alleged violations of the Fair Labor Standards Act.[108] Litigants in these cases have nowhere else to go, and the fact that court involvement is required by statute suggests that the public has a strong interest in their outcomes or in monitoring the process of judicial decision-making. Secondly, for those cases in which litigants have the option of settling privately, there is a value in having the court insist on openness as the price for judicial enforcement of the agreement. A privately reached settlement can be enforced only through state contract law, whereas a court-approved settlement is backed by a much bigger club: the court's power of contempt. The aim of the South Carolina rule is to protect the public's interest in monitoring how courts wield this power.

A third criticism of the rule is that its categorical language ("*No* settlement agreement filed with the Court shall be sealed."[109]) does not provide courts with sufficient flexibility to weigh countervailing interests such as the protection of trade secrets or the names of minors.[110] Judge Anderson has emphasized, however, that in situations in which "a legitimate need for court-ordered secrecy can be demonstrated," an "escape valve" exists, in that the local rules also state that upon "good cause shown," a court may suspend or modify any local rule.[111] Read together, the South Carolina rules "establish a preference for openness at settlement, while still preserving the ability of the presiding judge to seal a settlement when, for example, proprietary information or trade secrets need to be protected, or a particularly vulnerable party needs to be shielded from the glare of an otherwise newsworthy settlement."[112] The problem with this escape valve is that the exception has the potential to swallow the rule. Is the filing of a sealed settlement truly "off the table" if a party can make a showing of good cause to have the rule suspended?

Overall, then, while it is too early to determine the kind of impact South Carolina's local rule will have, it appears to take at least a small step toward combating the problem of judges being pressured into signing off on secrecy without properly weighing the public's interests in access. The rule gives judges a tool with which to say "No" to requests for secrecy. That said, the rule's escape valve puts secrecy back on the table any time

108. *See* FJC 2004 REPORT, *supra* note 82, at 3.

109. D.S.C. LOCAL CIV. R. 5.03(E) (emphasis added).

110. *See* Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 823 (2004) (arguing that by rendering the ordinarily qualified presumption of access irrebuttable, the South Carolina rule "goes too far; the rationale for public access to judicial records 'supports a strong presumption rather than an absolute rule'") (quoting Jessup v. Luther, 227 F.3d 926, 928 (7th Cir. 2002)).

111. Anderson, *supra* note 80, at 722–23. *See also* D.S.C. LOCAL CIV. R. 1.02.

112. Anderson, *supra* note 80, at 723 (emphasis omitted).

litigants claim they can make a showing of good cause. Furthermore, because the rule applies only to sealed settlements and not to other forms of court-enforced secrecy, and because it expressly endorses the ability of parties to reach private secret settlements, it may end up having little effect on the amount of court-generated information the public is able to see.

2. The Procedural Response: Giving Public Representatives a Chance to Intervene

Whereas South Carolina's Local Rule 5.03(E) attempts to ensure public access to certain forms of judicial information by taking the option of secrecy off the bargaining table, the state of Texas and the federal districts of Maryland and New Jersey have chosen a different method: giving public representatives a meaningful ability to challenge any request to seal.[113] All three jurisdictions require that: 1) requests to seal are posted on the courts' public dockets;[114] 2) interested or third parties have an opportunity to intervene or object to any motion to seal;[115] and 3) courts, before granting any request to seal, make specific findings that alternatives to sealing do not provide sufficient protection.[116] Because Texas's Rule 76a is the most comprehensive and has been in effect for the longest period of time, I explore its history, function, and effectiveness in some depth.

The initial impetus behind Rule 76a was a series of articles published in 1987 by the *Dallas Morning News* detailing the increasingly "routine" sealing of court files by judges in Dallas County.[117] Many of the sealed files came from cases that appeared to have significant interest to the pub-

113. *See* D.N.J. LOCAL CIV. R. 5.3(c); D. MD. CIV. R. 105.11; TEX. R. CIV. P. 76a(3).

114. *See* D.N.J. LOCAL CIV. R. 5.3(c)(2) (requiring secrecy requests to be made available to the public); D. MD. CIV. R. 105.11 (requiring same to be docketed and made available to the public); TEX. R. CIV. P. 76a(3) (requiring notice to be posted with the Texas Supreme Court).

115. *See* D.N.J. LOCAL CIV. R. 5.3(c)(4) (allowing "[a]ny intersted person" to intervene); D. MD. CIV. R. 105.11 (permitting "interested parties" to file objections); TEX. R. CIV. P. 76a(3) (allowing "any person" to intervene). Texas and Maryland both require courts to wait fourteen days after notice is posted before issuing a sealing order. TEX. R. CIV. P. 76a(4); D. MD. CIV. R. 105.11. New Jersey, which requires electronic filing of motions to seal, requires courts to provide at least one day between posting and sealing. D.N.J. LOCAL CIV. R. 5.3(c)(1)–(4).

116. *See* D.N.J. LOCAL CIV. R. 5.3(c)(2), (5) (any court order on a motion to seal "shall include findings" on whether a "clearly defined and serious injury . . . would result if the relief sought is not granted, and . . . why a less restrictive alternative to the relief sought is not available"); D. MD. CIV. R. 105.11 (motions to seal must be supported by "specific factual representations to justify the sealing" and provide "an explanation why alternatives to sealing would not provide sufficient protection"); TEX. R. CIV. P. 76a(1)(b), (6) (any sealing order must provide "specific reasons for finding and concluding" that the necessary showing for sealing has been made, including whether "no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted").

117. *See* McGonigle, *supra* note 81. The investigation found 282 sealed cases in Dallas County since 1920, 202 of which had been sealed since 1980 and 35 in 1986 alone. Judges "routinely sealed the cases at the mutual requests of the parties without extensively questioning the need to seal them." *Id.*

lic, including lead poisoning, lethally defective products, doctors sexually assaulting their patients, and "sensitive" issues involving politically connected parties.[118] The *Dallas Morning News* stories were followed by reports of sealed cases in other parts of the state, including one case involving a San Antonio priest charged with sexual abuse,[119] and another involving a psychiatrist in Austin accused of drugging and raping one of his patients.[120]

In the wake of these reports, the Texas legislature passed a law requiring the Texas Supreme Court to adopt rules "establishing guidelines for the courts of this state to use in determining whether in the interests of justice the records in a civil case, including settlements, should be sealed."[121] The Texas Supreme Court responded by holding a series of public hearings in which lengthy and heated disputes broke out over whether any new rule should address unfiled discovery.[122] Part II of this Article describes this controversy and how Rule 76a attempts to address some forms of litigant-centered information. Rule 76a's application to judicial information, on the other hand, quickly achieved broad support from all quarters of the legal community.[123]

The rule, which was enacted in 1990 and has not been amended since, begins with a categorical declaration: "No court order or opinion issued in the adjudication of a case may be sealed."[124] This blanket ban is an endorsement of the principle that when a court formally invokes its powers, it may not do so behind closed doors. The rule then provides:

> Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:
>
> (a) a specific, serious and substantial interest which clearly outweighs:
>
> (1) this presumption of openness;
>
> (2) any probable adverse effect that sealing will have upon the general public health or safety;

118. *See id.*; *see also* Steve McGonigle, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, DALLAS MORNING NEWS, Nov. 23, 1987, at 1A.

119. *See* Transcript, Tex. Supreme Court Advisory Comm. Hearing, Jul. 15, 1989, at 26 (comments of Harry L. Tindall) (on file with author).

120. Transcript, Tex. Supreme Court Hearing, Nov. 30, 1989, at 180 (comments of Charles Babcock) (on file with author).

121. TEX. GOV'T CODE ANN. § 22.010 (Vernon 2004).

122. *See* Memorandum from Chuck Herring, Co-Chair, Supreme Court Advisory Committee's Ad Hoc Subcommittee on Court Sealing, to Texas Supreme Court, Mar. 5, 1990 [hereinafter Herring Memo] (on file with author).

123. *See id.*

124. TEX. R. CIV. P. 76a(1). *See* Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991).

> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.[125]

These requirements approximate the first tier test which courts have used in First Amendment sealing cases, but Texas applies them to all court records, with exceptions only for documents filed *in camera* for the purpose of a discoverability ruling, documents whose access is otherwise restricted by law, and records in family law cases.[126] Lloyd Doggett, the Texas Supreme Court justice credited as the driving force behind the rule, explained that the purpose of requiring a "specific, serious and substantial interest" in order to seal was to avoid generalized claims "such as promoting settlement, avoiding injury to reputation, [or] expediting discovery."[127] The court also wanted to ensure that judges had no choice but to apply the rule's two-part test, so the court rejected a proposal by members of the state's intellectual property bar to include a list of presumptively protectable interests such as privacy and trade secrets.[128] Doggett explained that if trial judges were given such a list, they likely "would not apply the balancing test but would merely authorize secrecy for any documents that fell within the enumerated categories."[129]

The court also recognized that laying out standards for sealing was not enough, and that "openness guarantees would be meaningless without proper procedural safeguards and a mechanism for the public to enforce its right of access."[130] Rule 76a therefore requires a party wishing to seal a court record to file a written motion with the trial court that is accessible on the court's public docket,[131] and to post detailed notice of the motion with both the trial court and the Texas Supreme Court.[132] The dual posting was

125. TEX. R. CIV. P. 76a.

126. TEX. R. CIV. P. 76a(2)(a). During deliberations over the rule, the chair of the Family Law Section of the State Bar of Texas asserted that because family law disputes often involve "sensitive personal information," records in these cases should be excluded from the rule's application. *See* Letter from Scott T. Cook, Chairman, Family Law Section of State Bar of Tex., to Hon. Nathan L. Hecht, Tex. Supreme Court (Mar. 22, 1990). This Article does not explore the unique issues that arise in connection with court secrecy and family law matters. For an excellent discussion of these issues, see Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999).

127. *See* Doggett & Mucchetti, *supra* note 124, at 668–69.

128. *See* Letter from Gale R. Peterson, Cox & Smith, Inc., to Hon. Raul A. Gonzales, Associate Justice, Tex. Supreme Court (Mar. 4, 1990) (on file with author).

129. Doggett & Mucchetti, *supra* note 124, at 668 n.117.

130. *Id.* at 678.

131. TEX. R. CIV. P. 76a(3) ("Court records may be sealed only upon a party's written motion, which shall be open to public inspection.").

132. *Id.* The rule states:

> The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the

necessary to ensure that "the capitol press and public interest groups based in Austin will be made aware of the proposed sealing" and to create a database concerning the extent of secrecy requests statewide.[133] No earlier than fourteen days after the notice is posted, the court must hold an open hearing on the sealing request where "any person" is given the right to intervene for the purpose of challenging the request to seal.[134] If the court grants the request, its order must be open to the public and explain the "specific reasons for finding and concluding" that the proper showing had been made.[135] Sealing orders (as well as decisions not to seal) are considered severed from the underlying case and are immediately appealable by any party present at the hearing.[136] The goals of the procedure were to ensure not only that no court could sign off on a sealing order out of expediency or simply because the parties agreed to it, but also to force courts to "do it right the first time," as opposed to requiring interested parties to try to open documents that had already been sealed.[137]

Even with these up-front procedures, however, the Texas Supreme Court was concerned that after a sealing request was granted, circum-

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

Id.

133. Doggett & Mucchetti, *supra* note 124, at 679.

134. TEX. R. CIV. P. 76a(3) ("[A]ny person may intervene and be heard concerning the sealing of court records."); TEX. R. CIV. P. 76a(4) ("A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records *in camera* when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.").

135. TEX. R. CIV. P. 76a(6) ("A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1, has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.").

136. TEX. R. CIV. P. 76(a)(8) ("Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.").

137. *See* Transcript, Tex. Supreme Court Hearing, Nov. 30, 1989, at 216–17 (comments of Thomas S. Leatherbury) (on file with author) ("[W]here the notice is posted, where there is an opportunity to appear and be heard at the very outset, then ultimately you will have a lot less litigation if you do it right the first time.").

stances could change that would no longer warrant sealing.[138] Lawyers for various news organizations had testified about several cases in which the press was unable to challenge sealing orders because the trial court's plenary jurisdiction had expired.[139] Rule 76a therefore gives courts continuing jurisdiction over sealing orders and allows intervenors to try to unseal court records "at any time before or after judgment," so long as they did not have "actual notice" of any prior request to seal.[140]

Based on the limited empirical evidence available, Rule 76a appears in practice to have worked as intended (at least as it applies to judicial information). In the fifteen years since the rule's enactment, trial judges have relied on it to prevent parties from stipulating to the sealing of court records, and the written judgment and immediate appeal provisions have enabled appellate courts to strike down sealing orders in which the trial court did not sufficiently weigh the public interest. The rule has been used to unseal a complaint in a high-profile case involving a prominent law firm's attempt to break its lease;[141] to refuse the attempt of the Burlington Northern Railroad Company to have sealed the entire record of a case it had lost;[142] to reject Compaq Computer's request to seal all documents filed in connection with plaintiffs' motion for class action certification in a case involving allegedly faulty computer equipment;[143] to overturn a trial court's order sealing an audit report in a securities fraud case;[144] and to overturn a trial court's decision to seal the record of an entire trial at the request of the parties.[145]

In addition, journalists used Rule 76a to gain access to settlement information in two cases involving the sexual abuse of minors.[146] In both

138. *See* Doggett & Mucchetti, *supra* note 124, at 681 (expressing desire to ensure that sealing orders "will not exist indefinitely without the possibility of future intervention, when secrecy is no longer justified").

139. *See* Herring Memo, *supra* note 122.

140. TEX. R. CIV. P. 76a(7) ("Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1, shall always be on the party seeking to seal records.").

141. Boardman v. Elm Block Dev. Ltd. P'ship, 872 S.W.2d 297, 297-98, 300 (Tex. App. 1994).

142. Burlington N. R.R. Co. v. Sw. Elec. Power Co., 905 S.W.2d 683, 684 (Tex. App. 1995).

143. Compaq Computer Corp. v. Lapray, 75 S.W.3d 669, 670–72 (Tex. App. 2002).

144. True & Sewell, P.C. v. Arkoma Basin Res., Inc., No. 05-99-00692-CV, 1999 WL 970924, at *1 (Tex. App. Oct. 26, 1999).

145. Stroud Oil Props., Inc. v. Henderson, No. 2-03-003-CV, 2003 WL 21404820, at *1, *3 (Tex. App. June 19, 2003).

146. Fox v. Anonymous, 869 S.W.2d 499, 501–02 (Tex. App. 1993); Fox v. Doe, 869 S.W.2d 507, 509 (Tex. App. 1993).

cases, trial courts had approved the parties' requests to file their settlement agreements under seal.[147] (Texas law requires courts to approve settlements involving minors.[148]) Journalists intervened pursuant to Rule 76a, and on appeal, the appellate court struck down the section of the sealing order in one case relating to information about the alleged assailants and the terms of the settlement agreements, and upheld provisions that excluded similar information from the sealing order in the other case.[149] Notably, however, the courts upheld the sealing of the victims' names and any identifying materials, finding that such information was the kind of "specific, serious, and substantial" interest Rule 76a was designed to protect.[150]

The rule therefore appears to have had its desired effect of requiring judges to apply the balancing test and consider the public interest even when both parties agree to secrecy. Furthermore, while some opponents of the rule's enactment objected to its cumbersome procedures,[151] in practice the rule appears not to have been administratively difficult to implement.[152] An early study of the rule showed that of the first 202 cases with Rule 76a hearings, only 11 resulted in written appellate opinions, and 5 of these dealt with specific gaps in the understanding of the rule that have subsequently been resolved.[153] Moreover, the rule's continuing-jurisdiction provision also has proven to be unproblematic. Although critics had argued that the rule's broad grant of "never-ending" jurisdiction would mean "you could have 18 different appeals by 18 different intervenors if each come in at different times,"[154] as of this writing, there are no reported cases showing more than one requested intervention pursuant to Rule 76a.[155] This track record may stem from courts strictly enforcing the requirement that if a

147. *Anonymous*, 869 S.W.2d at 503; *Doe*, 869 S.W.2d at 510.

148. *See* Byrd v. Woodruff, 891 S.W.2d 689, 705 (Tex. App. 1994).

149. *Anonymous*, 869 S.W.2d at 501, 507; *Doe*, 869 S.W.2d at 509, 510, 512–13.

150. *Anonymous*, 869 S.W.2d at 507; *Doe*, 869 S.W.2d at 512.

151. *See, e.g.*, Letter from Larry S. Milner, President & Chief Executive Officer, Tex. Chamber of Commerce, to Hon. Nathan L. Hecht, Tex. Supreme Court (Mar. 30, 1990) (on file with author); Letter from Ronald R. Kranzow, Senior Vice President & Legal Counsel, Frito-Lay, Inc., to Hon. Nathan L. Hecht, Tex. Supreme Court (Mar. 2, 1990) (on file with author); Letter from Jack D. Maroney, Brown Maroney & Oaks Hartline, to Hon. Nathan L. Hecht, Tex. Supreme Court (Feb. 28, 1990) (on file with author).

152. *See* Transcript, Tex. Supreme Court Advisory Comm. Hearing, Mar. 4, 2004, at 11277, 11279 (on file with author) (discussing the lack of administrative problems in enacting and enforcing the rule).

153. *See* Robert C. Nissen, Note, *Open Court Records in Products Liability Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931, 953 (1994).

154. Transcript, Tex. Supreme Court Advisory Comm. Hearing, Feb. 16, 1990, at 111 (comments of Russell McMains) (on file with author).

155. Based on search of Westlaw and LexisNexis.

third party has "actual notice" of a Rule 76a hearing, it cannot subsequently intervene.[156]

Most importantly, the rule also appears to have deterred parties from routinely requesting to seal judicial information. Texas courts dispose of more than 850,000 civil cases a year,[157] and yet from the rule's inception in 1990 through the end of 2005, there were a total of only 1,527 Rule 76a filings—an average of about 100 per year.[158] Requests to seal court records pursuant to the rule thus occur in less than one out of every 8,000 cases. At a recent hearing of the Texas Supreme Court Advisory Committee, one member said, "[O]ur consensus here is that, although there are very few filings, [Rule 76a] seems to be functioning well; and the newspapers are not angry and the TV stations are not angry."[159]

E. Conclusions

In many courts and states, the currently predominant rules governing the sealing of judicial information attempt to protect the public's First Amendment and common law rights of access by requiring courts to consider the public's interest in access before granting any request to seal. In the Eleventh Circuit, for example, it has been the law since 1992 that trial courts are not permitted to seal settlement agreements unless the request to seal is "necessitated by a compelling governmental interest, and is narrowly tailored to that interest," and judges' sealing orders must be articulated in findings.[160] Yet the FJC study found that from 2001 to 2002, the Southern District of Florida, located in the Eleventh Circuit, sealed 111 settlement agreements that were filed with the court, many of which involved claims of sexual harassment, labor violations, and products liability, without providing any publicly available findings whatsoever.[161] Secrecy, by its nature, is hard to measure, but the limited evidence available suggests that the

156. *See* Pub. Citizen v. Ins. Servs. Office, Inc., 824 S.W.2d 811, 813 (Tex. App. 1992) ("We believe that Rule 76a(7) prevents an interested non-party such as Public Citizen from waiting on the sidelines until a court issues an order, and then, if dissatisfied with the outcome, intervening and forcing the parties and court to relitigate the issue.").

157. Angela L. Garcia, Judicial Info. Manager, Office of Court Admin., Tex. Supreme Court, Total Number of Civil Cases Disposed of in Texas 2003–2005 (on file with author).

158. Lisa Hobbs, Gen. Counsel, Tex. Supreme Court, Rule 76a Filings Since Sept. 1, 1990 (on file with author).

159. Transcript, Supreme Court Advisory Comm. Hearing, Mar. 4, 2004, at 11279 (on file with author).

160. Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992) (quoting Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983)).

161. *See* FJC 2004 REPORT, *supra* note 82, C24–C35.

existing legal standards, while rigorous on paper, fail to adequately protect the public's interest in access to judicial information.

One way to respond to this problem is through the South Carolina model, which attempts to "take secrecy off the table" by banning it altogether. But Judge Anderson's acknowledgment of his court's "escape valve" shows that a categorical prohibition goes too far. In some instances, such as when valid trade secrets are at risk, the public's interest in protecting confidentiality may outweigh its interest in openness. Judges in South Carolina, therefore, despite Local Rule 5.03(E), will still have to face the "incredible pressure" of litigants pressing for secrecy.

A second response to the problem of judges failing to properly weigh the competing public interests at stake is to create "a mechanism for the public to enforce its right of access."[162] Texas and the federal districts of New Jersey and Maryland have tried to ensure that judges are not always the only ones in the room responsible for giving voice to public interests. The rules of these jurisdictions—which require parties to post notice of requests to seal, give public representatives a meaningful opportunity to intervene, and force judges to justify sealing orders in writing—make it much more likely that courts will fully weigh the public's interest in access before issuing a sealing order.

Given the apparent success that Texas has had with Rule 76a's application to judicial information, other states and courts should explore instituting similar rules. The costs of the procedure are minimal (notice can be done through courts' websites), and the payoff is substantial: ensuring 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."[163]

II. THE RULES GOVERNING LITIGANT-CENTERED INFORMATION

A. The Public Interest in Litigant-Centered Information

As important as it is for courts to institute rules protecting the right of access to judicial information, the vast majority of secrecy in civil litigation, including that which occurred in *Frankl* and in many of the Catholic Church and Ford/Firestone cases, involves litigant-centered information.[164]

162. Doggett & Mucchetti, *supra* note 124, at 678.

163. Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

164. *See* Richard A. Zitrin, *The Laudable South Carolina Rules Must Be Broadened*, 55 S.C. L. REV. 883, 886–87 (2004).

This category of information, defined as materials generated through court processes but that are not the subject of judicial decision-making, comes in two forms: discovery, whether or not filed, that has been exchanged between the parties but has not been attached to a court motion, and settlement agreements that are neither approved of nor enforced by a court. The chief public interest in granting public access to judicial information—allowing public scrutiny of judicial decision-making—is not a factor with litigant-centered information because judges play little, if any, role in overseeing its production.[165]

But those who advocate the position that unfiled discovery and privately reached settlements do not implicate public concerns ignore the public's interests in viewing evidence of wrongdoing or misconduct, preventing parties from buying and selling the concealment of wrongdoing, and ensuring that courts place the enforcement resources of the state behind secrecy only when there is sufficient justification.

Americans turn to their court systems not only to resolve disputes, but also as a means of producing information useful to society. Unlike many European countries, which largely depend on administrative agencies to enforce the law, the United States relies to a great extent on its system of civil litigation to expose wrongdoing.[166] States and the federal government tend to respond to regulatory needs not by creating new bureaucracies—which can be co-opted by the targets of their enforcement—but rather by passing laws that impose new forms of civil liability, leaving enforcement in private hands.[167] As Professor Paul Carrington puts it, "[D]iscovery is the American alternative to the administrative state."[168]

Of course, discovery is an unwieldy tool, producing large amounts of information that the public actually may have an interest in *not* seeing. In an environmental hazards case, for instance, discovery may require the turning over of third party medical records, which the litigants may need to estimate damages. The interests of privacy weigh heavily in favor of keep-

165. *See* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 472 (1991) (In discovery, "the role of the court, where the court takes a role at all, is as a manager of the litigation and not as a producer of information."); Doré, *supra* note 110, at 817 ("Public access to unfiled discovery . . . does not assist the public in monitoring or understanding a court's primary adjudicative function.").

166. *See* Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts*, 9 KAN. J.L. & PUB. POL'Y 456, 457 (2000) (arguing that since at least the 1960s, federal courts have "replaced administrative agencies as the preferred means of enforcing much of our national law," especially as compared to the United States's European counterparts).

167. *See id.*

168. *Id.* at 459. *See also* Stephen N. Subrin, *A New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981) (arguing that the creation of uniform federal rules with liberal pleading requirements and discovery provisions reflected New Deal values by facilitating public litigation).

ing such records confidential. On the other hand, discovery also can generate information of vital public importance about, for example, the hazardous nature of a product or a company's longstanding practice of discrimination.[169] Information revealed through discovery is often of far greater interest to the public than is publicly accessible judicial information such as complaints because some discovery materials, e.g., internal company memos detailing the number of injury reports generated by a given product, have the potential to verify allegations of wrongdoing.[170]

If such information tended to come out at trial, little reason would exist to give the public access to it as discovery. But the proportion of cases in the United States that go to trial has dropped precipitously in the past several decades, at both the state and federal level.[171] The decline in the number of tort trials has been especially steep: in 1962, one in six tort cases went to trial; by 2002, only one in forty-six was tried.[172] As a greater percentage of litigation takes place outside of the courtroom, courts are increasingly unable to fulfill their role as revealers of societally useful information.[173]

Some commentators argue that we should not expect courts to act as ombudsmen, especially in areas like consumer safety where regulators have

169. *See* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 973 (2001) ("[P]rivate litigation is good at exposing bad acts. As contrasted with the Continental and English civil systems, which place premiums on secrecy and confidentiality, U.S. courts provide for liberal discovery rules, open courtrooms, and presumptions in favor of unsealing documents that may involve the public interest. The U.S. court system is able to make bad acts visible and subject to public discussion in ways that administrative FOIA requests sometimes cannot.").

170. The American presumption that the pleadings of a case are public as soon as they are filed with the court—regardless of whether a judge has read them, let alone factored them into a decision—supports the notion that one function of the system of civil litigation in the U.S. is to reveal accusations of wrongdoing. In Great Britain, by contrast, the pleadings in a case are presumptively private, accessible only through the permission of the court. *See* Ian Grainger, *Public Access to Court Files*, 24 CIV. JUST. Q. 304, 304 (2005).

171. *See* Brian J. Ostrom et al., *Examing Trial Trends in State Courts: 1976-2002*, 1 J. EMPERICAL LEGAL STUD. 755, 776 app.B (2004) (finding that the number of state court civil trials in the twenty-two states studied dropped from 36.1 percent in 1976 to 15.8 percent in 2002); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 tbl.1 (2004) (reporting that 1.8 percent of federal civil cases went to trial in 2002, one-sixth of the 1962 rate).

172. *See* Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, DISP. RESOL. MAG. 3 (Summer 2004).

173. *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 787 ("[C]ourts' practices and processes are increasingly private, prompting the question of whether to insist, as some state legislatures are now doing, on public access to information about outcomes in certain kinds of disputes.").

investigatory and enforcement powers not available to courts.[174] Evidence suggests, however, that the opposite is true and that court secrecy in fact contributes to the impotency of government regulators. In an article defending South Carolina's ban on sealed settlements, Judge Anderson describes the ineffectiveness of the Consumer Product Safety Act, which requires manufacturers to report to the Consumer Product Safety Commission ("CPSC") whenever a product is the subject of three verdicts or settlements arising out of claims of death or serious bodily injury.[175] Between 1991, when the reporting requirement began, and 2002, only 551 reports were filed with the CPSC, even though during this same period, more than 150,000 product liability lawsuits were filed in federal court—and this represents a small fraction of the number of state cases.[176] Judge Anderson suggests that one explanation for this "massive under-reporting" may be that "litigants hide behind gag orders issued by the court at settlement."[177]

Such hiding is made possible by courts that fail to recognize a potential public interest in discovery. The tenet that discovery is private gives bad actors the option on the eve of trial, or just before the filing of a substantive motion that would attach damaging information, to avoid any disclosure of their wrongdoing. They can do this by buying secrecy from their opponents in the form of a larger settlement offer.[178]

In other contexts, contracts that involve paying someone to remain silent about another person's wrongful conduct are generally unenforceable and potentially criminal.[179] The Model Penal Code and most state laws list as a crime "accept[ing] or agree[ing] to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense."[180] These laws reflect society's disapproval of agreements to conceal wrongdoing. In addition, legal ethics codes prevent lawyers from agreeing as part of a settlement contract not to represent fu-

174. *See, e.g.*, Marcus, *supra* note 165, at 481 ("[T]he argument that courts should identify and publicize information obtained through discovery relating to public health overstates the role of courts in product liability litigation because courts do not have the kinds of powers regulators wield.").

175. Anderson, *supra* note 80, at 733–34.

176. *See id.*

177. *Id.* at 733.

178. *See* Weinstein, *supra* note 80, at 511 ("It is not unusual for a defendant to 'sweeten' the settlement offer to plaintiffs on condition of secrecy. The defendant may threaten the plaintiff with a lengthy and expensive trial to coerce confidentiality. . . . Since the ethical rules require that attorneys obtain a swift and optimal recovery for their clients, the plaintiff's attorney seems to have little choice but to accept a favorable settlement offer on secrecy terms.").

179. *See* Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 793 (2002).

180. MODEL PENAL CODE § 242.5 (2001).

ture clients in related litigation.[181] Underlying these rules is the notion that lawyer services are "public goods" that cannot be sacrificed to the interests of the parties.[182] The principles behind these state and lawyer rules should apply with equal force to information generated through the court-mandated process of discovery. Once a court has ordered documents which reveal societally useful information to be produced, the public has an interest in ensuring that parties cannot then bargain among themselves to keep that information secret.

The public also has an interest in ensuring that secrecy does not distort the judicial system. Although a blanket rule making *all* discovery public could enable potential plaintiffs to extort large pay-outs by threatening to file lawsuits, the current system fosters "perverse incentives to file suit" by allowing plaintiffs to sell what they learn in discovery.[183] This "undercuts the efficiency of tort law, employment law, and every other kind of law that allows private causes of action" by "overcompensat[ing] victims and sometimes compensat[ing] those who have not been victimized at all."[184]

Giving parties the ability to treat discovery like a private commodity, therefore, has several deleterious effects on the court system: it protects those who engage in misconduct, rewards those who use the courts as a form of extortion, and leaves potential future victims vulnerable.[185] These outcomes are enabled by the routine granting of protective orders. As a result, courts are placing their stamps of approval—accompanied by the coercive power of contempt—on the concealment, giving the appearance of judicial complicity in the wrongdoing and thus damaging public confidence in the courts.

The public, therefore, has three concrete interests in being able to access at least some forms of litigant-centered information: to view evidence of misconduct, to prevent parties from purchasing the concealment of wrongdoing, and to ensure that courts do not use judicial power to sanction this concealment.

It is important to note, however, that these interests do not necessarily extend to the content of settlement agreements themselves. Typically, a private settlement contract will contain a dollar figure—which may be un-

181. *See* MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2003) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

182. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2624 (1995).

183. *See* Koniak, *supra* note 179, at 803.

184. *Id.*

185. *See* Weinstein, *supra* note 80, at 516–17.

related to the merits of the action—and the terms of the settlement's enforcement; it is unlikely to contain the kind of information related to the merits of a dispute that makes discovery material of interest to the public. In the *Frankl* case, for example, the fact that the parties settled for $4.7 million does not necessarily indicate whether the tires at issue were dangerous. The public's interest was not, therefore, in viewing the settlement contract, but rather in: 1) seeing the discovery documents that allegedly revealed whether there was an "ongoing safety issue" with the tire; 2) preventing the parties from agreeing to cover up the tire's alleged dangers; and 3) not having such concealment enforced by a judicial protective order.

The public's interest in access to litigant-centered information must also be balanced by countervailing interests in protecting privacy and ensuring that courts remain efficient and inexpensive forums in which to resolve disputes. Because pretrial discovery is so sweeping in its scope, requiring the production of all materials relevant to the claims brought regardless of whether they would be admissible in court, the privacy concerns in regard to public access are especially acute. Discovery can reveal "intensely personal and confidential information, such as medical records, marital information, religious documents, financial records, and even trade secrets or intellectual property."[186] A broad public right of access to discovery could put this information at risk of widespread exposure and create incentives for plaintiffs to file baseless lawsuits solely as a means to threaten release of materials not meant to be public.

The sweeping scope of discovery also raises administrative problems. One reason litigants readily accede to broad discovery requests may be that they easily can get protective orders ensuring the information produced will not be made public; without guarantees of secrecy, litigants may fight every step of the way.[187] Removing judicial protection of discovery therefore could result in an increase in the "number of litigated discovery disputes," which would "ultimately restrict the actual flow of discovery information."[188]

186. Miller, *supra* note 27, at 466.

187. *See id.* at 428 (stating that curtailing judicial discretion to enter protective orders "would wreak havoc on the efficient functioning of the litigation process"); *see also* Rex K. Linder, *President's Page: Assault on Protective Orders*, 66 DEF. COUNS. J. 165, 165 (1999) ("If confidentiality cannot be protected, parties will be inclined to fight production of documents that may be sensitive or confidential rather than risk their indiscriminate disclosure.").

188. ADVISORY COMM. ON CIVIL RULES, MINUTES, Oct. 20–21, 1994, *available at* http://www.uscourts.gov/rules/Minutes/cv10-20.htm. *See also* Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Herb Kohl, U.S. Senator (Oct. 3, 2002) (on file with author) (arguing that restrictions on judicial discretion to enter protective orders could "unnecessarily complicate discovery practices, increase cost, and prove counterproductive").

These concerns can be overstated, however. Evidence suggests that litigants in complex cases already fight tooth-and-nail over discovery and already spend the resources to inspect every document that gets turned over.[189] In addition, one study showed that protective orders are requested in only five to ten percent of the cases filed in federal court in the districts examined, and of these cases, only ten to twenty percent involved personal injury.[190] Forcing judges to make more particularized findings before issuing protective orders, therefore, may affect only a small percentage of the federal docket and have little effect on current litigation practice.

On the other hand, a rule that requires the public filing of *all* discovery would surely precipitate a much larger number of requests for protective orders and could deter some potential litigants from filing suit.[191] The answer to such concerns, however, is not to insist that all discovery materials remain private, but rather to craft a regime that balances the desire for an efficient system of litigation and the protection of legitimate privacy interests with the public's interests in accessing litigant-centered information.

B. The Rules Governing Access to Litigant-Centered Information

1. History

Prior to the advent of the 1938 Federal Rules of Civil Procedure, what we know of now as discovery didn't exist. Rather, the early shape of cases was determined by the pleadings, which, at common law, consisted of the oral exchange in court between the plaintiff and defendant, with the goal of ascertaining the nature of the complaint and the points in controversy.[192] The pleadings generally took place in open court, but only the final plead-

189. *See* Landon Thomas Jr., *Jury Tallies Morgan's Total at $1.45 Billion*, N.Y. TIMES, May 19, 2005, at C1 (describing Morgan Stanley's attempts to obstruct the discovery process in a business litigation).

190. *See* ELIZABETH C. WIGGINS ET AL., PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3, 13 tbl.13 (1996).

191. The risk of driving some litigants out of the court system is real. After Florida and Texas passed their rules, proponents of alternative dispute resolution began peddling to businesses their privately-run forums, where even the existence of claims "generally escapes the knowledge of the news media and the general public." *See* William H. Schroder Jr., *Private ADR May Offer Increased Confidentiality: Business Concerned with the 'Sunshine in Litigation' Movement May Find ADR to Be Attractive*, NAT'L L.J., July 25, 1994, at C14 (encouraging businesses to turn to ADR because of the "rising risk of the destruction of the confidentiality of valuable business information in the U.S. judicial system"); *see also* Kathleen L. Blaner, *The Emperor Has No Clothes: How Courts Deny Protection for Confidential Information*, 70 DEF. COUNS. J. 12, 21 (2003) (suggesting that anti-secrecy rules will force businesses and litigants to turn to private forms of dispute resolution).

192. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 399–400 (5th ed. 1956).

ings were placed in the public record.[193] Depositions, taken infrequently, were intended to preserve evidence (as opposed to gather information), and were typically sealed.[194] Early cases indicate, however, that sealing of depositions was intended only to ensure accuracy and that they were to be filed with the court and made available to the public in advance of trial when possible.[195]

Drawing lessons from this early history is difficult, given the dramatic changes in litigaton brought about by the enactment of the Rules of Civil Procedure. But what is clear is that under the common law, the scope of judicial information to which the public had access—by attending trial—was greater than exists in today's world of nearly trial-free litigation.[196] At the same time, the Rules of Civil Procedure had the effect of vastly enlarging the amount of litigant-centered information by requiring parties to turn over at the outset of a case materials that had traditionally been considered private.[197]

In his influential article opposing efforts to place restrictions on courts' abilities to enter protective orders, Professor Arthur Miller argues that the public's right of access to court proceedings "has never been extended beyond the confines of the courtroom and court documents" and that the discovery process was intended to "avoid surprise at trial," not to "enlarge the public's access to information."[198] Others have expressed similar sentiments.[199] Even if the Rules of Civil Procedure were not meant increase the public pool of court-generated information, however, it does

193. *See id.*

194. *See* Katie Eccles, Note, *The* Agent Orange *Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 STAN. L. REV. 1577, 1593–94 (1990).

195. *See* Louis Werner Stave Co. v. Marden, Orth & Hastings Co., 280 F. 601, 604 (2d Cir. 1922) ("[Since] the parties to the litigation would know, or, in any event, would have the right to know, the contents of the deposition, there was not the slightest reason why the deposition should not be placed upon the files of the court and become accessible to the litigants, and for that matter to the public."); *see also Mokhiber*, 537 A.2d at 1112 ("English law and federal law in America have long afforded litigants some ability to obtain depositions of witnesses and documents.").

196. *See* Luban, *supra* note 182, at 2647 ("The rules . . . transferred power from judges to lawyers, who litigate . . . largely outside the scrutiny of the trial judge and almost entirely outside the scrutiny of appellate courts.").

197. *See* Rhinehart v. Seattle Times Co., 654 P.2d 673, 679 (Wash. 1982) ("[B]y requiring a party to submit to the searching inquiries of discovery, the courts have required him to give information about himself which he would otherwise have no obligation to disclose. A realm of privacy which courts had previously left undisturbed was now opened.").

198. Miller, *supra* note 27, at 429, 447.

199. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) ("[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."); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6–7 (1983).

not necessarily follow that discovery was intended to take place wholly in private. Walling off discovery from the public could actually *shrink* the public's access to information by moving much of what used to happen inside public courts into private law offices, a result not likely intended by the drafters of the rules.

In addition, early articles about the motivations for the rules and the uses of discovery provide no indication one way or the other as to whether the fruits of discovery were intended to be presumptively public or private.[200] Case law also does not provide a conclusive answer, although several early cases suggest that discovery was presumed to be public absent a protective order.[201] Moreover, Professor Miller's own treatise states that while depositions were historically taken in private, "[t]raditionally, a

200. *See* Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933); Edson R Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737 (1939); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942); William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951). Professor Speck's study of the first fifteen years of discovery practice provides one of the few early discussions of public access to discovery, but it is inconclusive as to whether discovery was presumptively private or public. The study concludes:

> Apparently, discovery is not used to pry into private affairs. Occasionally it is said that a suit is a mere pretense to take advantage of discovery, and that parallel suits are brought in state and federal courts to take advantage of more liberal federal discovery. No such instances were found, and the attorneys mentioned "prying" more as a theoretical possibility than as an actuality. Persons from whom discovery is sought fear that it will bring out illegal activities, trade secrets, or simply embarrassing facts. Unfortunately when a person becomes involved in litigation much material that he would ordinarily like to keep private becomes of judicial concern, and the person subject to discovery is likely to value his desire for privacy higher than he values the judicial interest in full disclosure. Judges endeavor to limit discovery to the needs of the lawsuit and have declined to permit use of federal discovery for ulterior purposes. But the probability that litigation will bring out relevant material that a party would prefer to keep hidden certainly influences decisions to sue or settle.

Id. at 1151 (citations omitted).

201. *See, e.g.*, Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405, 407, 410–11 (N.D.N.Y. 1973) (allowing non-parties to have access to discovery materials in patent infringement case); 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 and become part of the public record unless some compelling reason exists for denying public access to such proceedings."); 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."). *See generally* Donald J. Rendall, Jr., *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766, 770 (1980) ("Absent any judicial order to the contrary, discovery, like other pretrial proceedings, is 'ordinarily to be conducted in public.'") (quoting Olympic Refining Co. v. Carter, 332 F.2d 260, 264 (9th Cir. 1964)). One reason for the lack of evidence in the early history and case law for whether discovery was meant to be public or private may be that prior to the advent of electronic case files, the right to "inspect and copy" court files required physical presence at the courthouse—insulating litigants and third parties from harm resulting from the dissemination of information. The Supreme Court has referred to this difficulty in gathering paper files as "practical obscurity." *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989) (Blackmun, J., concurring).

deposition transcript has been a public document freely open to inspection after it is filed with the clerk."[202]

Furthermore, a close look at the history of the changes to Rule 26(c) of the Federal Rules of Civil Procedure, which governs the issuance of protective orders, and to Rule 5(d), which addresses whether discovery should be filed with the court, reveals that neither the Advisory Committee on Civil Rules, nor the Judicial Conference, nor the courts of appeals, has been able to come to a consensus about whether discovery is, or should be, presumptively public or private.

The interpretation of the rules is crucial because courts traditionally have not recognized First Amendment or common law rights of public access to unfiled discovery. (Judge John Minor Wisdom explained, "If 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."[203]) But beginning in 1978 with the Seventh Circuit's decision in *American Telephone & Telegraph Co. v. Grady*,[204] several courts have found in the Federal Rules of Civil Procedure a *statutory* right of access to discovery proceedings.[205] The basis for these rulings was that because Rule 26(c) requires a court to find good cause before entering a protective order, "the obverse" must also be true: "if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection."[206]

202. 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2042 (2d ed. 1994). The treatise notes, however, that "the reality has for some time been that no such public record is made in many instances." *Id.*

203. Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980) (citation omitted). Courts have held that First Amendment rights are implicated when courts prevent a *party* from disseminating information that it has learned in discovery, *see, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984) ("The Court today recognizes that pretrial protective orders . . . are subject to scrutiny under the First Amendment.") (Brennan, J., concurring), but that is a separate question from whether the public has a right, independent of the parties, to access discovery materials.

204. 594 F.2d 594 (7th Cir. 1978).

205. *See, e.g.*, *id.* at 596; Tavoulareas v. Wash. Post Co., 724 F.2d 1010, 1015–16 (D.C. Cir. 1984) ("[T]he Federal Rules of Civil Procedure and the advisory committee notes indicate that discovery proceedings are presumptively open unless otherwise ordered by the court."); Pub. Citizen v. Liggett Group, Inc., 858 F.2d 775, 780, 788-90 (1st Cir. 1988) (holding that public has presumptive right under Federal Rule of Civil Procedure 5(d) and 26(c) to inspect discovery materials filed with the district court and that "[t]he effect of . . . nonfiling was to deny the public the right it would otherwise have had to inspect freely the discovery materials in this case"); Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999) ("Most cases endorse a presumption of public access to discovery materials."); San Jose Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1103 (9th Cir. 1999) ("It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public.").

206. *In re* Agent Orange Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir. 1987). *See also* Linda Greenhouse, *Judicial Conference Rejects More Secrecy in Civil Court*, N.Y. TIMES, Mar. 15, 1995, at B9 (quoting Judge Gilbert S. Merritt, then chair of the Executive Committee of the Judicial Conference, explaining that despite the Conference's sanction of the issuance of stipulated protective orders, secrecy

Courts also relied on Rule 5(d), which until 2000 required parties to file discovery materials unless the court ordered otherwise.[207] The 1980 Advisory Committee notes accompanying Rule 5(d) state that the Committee had considered banning the filing of discovery absent a court order to file (a policy many courts had adopted as local rules), but rejected the proposal because discovery 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."[208] The Second Circuit, in *In re Agent Orange Litigation*, concluded that these notes meant that "the general public be afforded access to discovery materials whenever possible."[209]

In 2000, however, the Advisory Committee adopted the proposal it had rejected in 1980 and changed Rule 5(d) to read, "[D]iscovery requests and responses must not be filed until they are used in the proceeding or the court orders filing."[210] According to the Advisory Committee notes and minutes of the Committee's meetings as well as those of the Judicial Conference, the purpose of the amendment was to alleviate the burden on court clerks, not to change any presumption of public access.[211] Moreover, when the Committee first proposed making the change, Judge Walter Mansfield, then chair of the Committee, suggested that discovery be public whenever public interests were implicated.[212] He noted that "a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has an interest, such as a Watergate or similar scandal."[213]

arrangements "should not just be left to the option of the parties" and that "[f]ederal courts shouldn't do anything without just cause").

207. *See* FED. R. CIV. P. 5(d); FED. R. CIV. P. 5, Committee Notes on Rules—2000 Amendment.

208. *See* FED. R. CIV. P. 5, Notes of Advisory Committee on Rules—1980 Amendment.

209. 821 F.2d at 146.

210. FED. R. CIV. P. 5(d); FED. R. CIV. P. 5, Committee Notes on Rules—2000 Amendment.

211. *See* FED. R. CIV. P. 5, Committee Notes on Rules—2000 Amendment (citing the increase in "costs and burdens" as parties make "increased use of audio- and videotaped depositions"); JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES 24, June 18–19, 1998, *available at* http://www.uscourts.gov/rules/Minutes/june1998.pdf (citing "serious space problems" in clerks' offices); JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES 17, June 14–15, 1999, *available at* http://www.uscourts.gov/rules/Minutes/june1999.pdf (stating that the goal of the rule is to "alleviate the storage burdens and costs imposed on clerks' offices" and "bring the national rule on filing into conformity with most of the present local rules and practices on the subject").

212. Walter R. Mansfield, Letter to the Editor, *To Lift Paper Mountains Off the U.S. Court System*, N.Y. TIMES, Aug. 2, 1980, at 20.

213. *Id.* Judge Mansfield also explained that "should the public importance of the material not appear until after filing has been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection." *Id.*

Read fairly, then, history does not suggest that the public should have no right of access to discovery. Rather, it shows how courts and rulemakers have struggled with the question of access since the advent of modern discovery and have been unwilling to foreclose the possibility that, at least on certain occasions, litigant-centered information should be presumptively accessible to the public.

2. The Current Rules

Litigant-centered information is sealed from the public in two ways: 1) through private agreements that require parties to return or destroy materials that are exchanged in discovery and/or to remain silent about what they saw; and 2) through protective orders issued during discovery. The current law on private secrecy agreements is clear: with the exceptions of the "sunshine" rules detailed below and those cases in which court approval of a settlement is required, federal and state courts place no restrictions on the ability of parties to file notices of dismissal and settle their cases secretly.[214]

The law on protective orders and public access to unfiled discovery is more ambiguous. As noted above, before the 2000 amendment to Rule 5(d), some courts found a statutory right of access to unfiled discovery. Yet since the amendment, many courts have ruled that a statutory right of access no longer exists.[215] The Second Circuit, for example, held in 2001 that *Agent Orange* was no longer controlling and that the public did not have a presumptive right of access to discovery materials.[216]

Whether or not discovery is presumptively private has a critical impact on what it means for a court to issue a protective order. If the public has a presumptive right to access discovery materials, a Rule 26(c) protective order would restrain not just the parties, who are represented before the court, but also the public, which is not a party to the suit and typically has

214. *See* SEDONA GUIDELINES, *supra* note 14, at 36.

215. *See, e.g.*, Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 886–87 (N.J. 2004). *See also* SEDONA GUIDELINES, *supra* note 14, at 15 (stating that there is "no presumed right of public access" to discovery materials). In the early 1980s, the district of Oregon had a local rule that provided the public with access to discovery that was not on file with the court. *See* Marcus, *supra* note 199, at 14 n.61 (noting that District of Oregon Rule 120-4(b) then stated, "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"). The district has since eliminated this rule. *See* D. OR., R. PRACTICE, http://www.ord.uscourts.gov/Rules/LRTableofContents.htm (last visited Feb. 28, 2006).

216. SEC v. TheStreet.com, 273 F.3d 222, 233 n.11 (2d Cir. 2001) ("[T]o the extent that *Agent Orange* relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, we observe that the recent amendment to this rule provides no presumption of filing all discovery materials, let alone public access to them.").

no representative at the time of the request for the order. As a result, the media or any other public representative would have a strong argument to be able to intervene in all requests for protective orders. Moreover, the "good cause" standard would necessarily have to include weighing the public interest in access against the requesting party's interest in privacy. Courts would therefore only rarely, if ever, be able to sign off on stipulated umbrella protective orders that give the parties the ability to bargain away the public's right of access.[217]

One recent example demonstrating the implications of recognizing a public right of access to discovery came in a high-profile case involving former priest John Geoghan, who had been accused of sexually molesting more than 130 children over thirty years and had paid millions of dollars to secretly settle with his victims.[218] In *Leary v. Geoghan*,[219] more than eighty of those victims sued the Boston Archdiocese for civil damages.[220] During discovery, depositions were taken of Cardinal Bernard Law, who had supervised Geoghan for many years, and several other church officials.[221] The trial judge, citing *Agent Orange* for the "presumption that discovery materials should be publicly available whenever possible,"[222] permitted the *Boston Globe* to intervene in the case and then ordered the public release of the discovery materials.[223] Pivotal to the judge's reasoning was the fact that while the Massachusetts equivalent to Rule 5(d) requires that discovery not be filed absent a court order, it also allows any "concerned citizen" to petition for access, thus affirming the public's presumptive right of access to discovery.[224]

Absent such a right of access, the *Boston Globe* would have had no grounds on which to intervene. If discovery is presumptively private, Rule 26(c) protective orders restrain only the actions of the parties before the court and not the public. For example, in *Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*,[225] journalists attempted to have two protective

217. *See, e.g.*, San Jose Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1101 (9th Cir. 1999) ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away.").

218. *See* INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH, ix, 53 (2002).

219. Nos. Civ. A. 99-0371, 99-1109, 2001 WL 1902393 (Mass. Super. Ct. Nov. 26, 2001).

220. *Id.* at *1.

221. *See* Boston Globe, Abuse in the Catholic Church, http://www.boston.com/globe/spotlight/abuse/geoghan/law_deposition.htm (last visited Jan. 22, 2006).

222. *See Leary*, 2001 WL 1902393, at *7 (quoting Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc., 138 F.R.D. 33, 36 (S.D.N.Y 1991).

223. *Id.* at *8.

224. *Id.* at *3–*4.

225. 748 F.2d 1421 (10th Cir. 1984).

orders vacated in a case involving the way hospitals were being reimbursed for Medicaid expenses.[226] The Tenth Circuit held that the journalists had no standing to intervene because the parties had stipulated to the protective orders and the public had no right, independent of the parties, to access discovery materials.[227] Thus, in courts that view discovery as being presumptively private, the good cause requirement of Rule 26(c) should be invoked only when one party wants to disseminate what it learned in discovery.[228] As a result, such courts, in theory, should weigh only the private interests of the parties in determining whether good cause exists because no public interest in access applies.[229]

Ironically, however, even as courts increasingly have held that the public has no right of access to discovery, they have also tried to make the good cause requirement more rigorous—without acknowledging the inconsistency between the two positions. The Third Circuit, for example, does not recognize a public right of access to discovery materials,[230] but nevertheless requires that courts, before issuing protective orders, consider "the importance of disclosure to the public."[231] Likewise, in *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, the Seventh Circuit stated that "until admitted into the record, material uncovered during pretrial discovery is ordinarily not within the scope of press access," but then held that the district court erred in not allowing the media to intervene in the case to challenge the propriety of a protective order.[232] These cases suggest that courts, while willing to deny the public a right of access to discovery materials in the abstract, may not yet be ready to accept the case-by-case implications of that view.

The current doctrine governing litigant-centered information, therefore, is conflicting. Many courts recognize no public right of access to dis-

226. *Id.* at 1422–23.

227. *Id.* at 1425–26. *See also* Exum v. U.S. Olympic Comm., 209 F.R.D. 201, 205 (D. Colo. 2002) (noting that "if [a] protective order is not entered, the press may obtain access to materials produced to plaintiff in discovery *only* if the plaintiff exercises his right to disseminate those materials") (emphasis added).

228. *See* Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 78 (2000) (arguing that under the terms of Rule 26(c), when parties stipulate to protective orders, the good cause requirement does not apply and courts should accept such orders should as prima facie valid).

229. *See* SEDONA GUIDELINES, *supra* note 14, at 17 (stating that the good cause standard is met "as long as the parties can articulate a legitimate need for privacy or confidentiality").

230. *See* Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164 (3d Cir. 1993).

231. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994) (quoting Miller, *supra* note 27, at 433–35). The court also lamented that "[d]isturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the *countervailing public interests* which are sacrificed by the orders." *Id.* at 785 (emphasis added).

232. 24 F.3d 893, 897–98 (7th Cir. 1994).

covery and also hold that Rule 26(c), or its state equivalent, requires only the consideration of the private interests of the litigants before issuing a protective order.[233] Others, such as the Third and Seventh Circuits, require courts to balance several factors, including whether the public has an interest in viewing the material, but stop short of granting the public a general right of access to discovery. The Ninth Circuit, on the other hand, has continued even after the change to Rule 5(d), in 2000, to recognize the public's right to view discovery.[234] For a court in the Ninth Circuit to issue a protective order, the party seeking protection must show that "specific prejudice or harm will result if no protective order is granted," and that the interests in privacy outweigh the public's interest in access.[235]

Regardless of the standards imposed, among both state and federal courts, the general rule is that once a protective order is issued, it will be reversed only upon abuse of discretion, giving trial judges wide latitude in determining whether to grant protection.[236]

C. Do the Currently Predominant Rules Adequately Balance Interests in Access?

The increasingly prevalent view that unfiled discovery is strictly private no doubt advances the public's interests in the protection of privacy and the administrative efficiency of the court system. But, as explained above, it does not sufficiently permit or encourage courts to consider the countervailing public interests in access. Nowhere is this more apparent than in the routine issuance of stipulated umbrella protective orders.[237]

On the one hand, umbrella orders "expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication."[238] On the other hand, such orders are often the product of an uneven

233. *See, e.g.*, *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 357–59 (11th Cir. 1987) (Clark, J., dissenting) (criticizing majority for treating case as purely private and not weighing public interest in openness against private interest in secrecy); Rhinehart v. Seattle Times Co., 654 P.2d 673, 679 (Wash. 1982) (embarrassment of a party is a sufficient condition for good cause). For a comprehensive discussion of federal courts' varying approaches to "good cause," see Laurie Kratke Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 339–44 (1999).

234. Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1210–11 (9th Cir. 2002).

235. *Id.*

236. *See, e.g.*, Ballard v. Herzke, 924 S.W.2d 652, 659 (Tenn. 1996) ("The burden of establishing abuse of discretion is on the party seeking to overturn the trial court's ruling on appeal."); McCarthy v. Barnett Bank of Polk County, 876 F.2d 89, 91 (11th Cir. 1989).

237. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 (E.D. Pa. 1981) ("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.").

238. MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004).

bargain and, as occurred in *Frankl*, give the parties the ability to control the litigation without considering the interests of the public. Defendants have several reasons for seeking umbrella orders: to prevent other potential plaintiffs from learning about the action; to force other plaintiffs to go through the discovery process on their own; to prevent the plaintiff's lawyer from discussing or comparing documents received to those received by others in similar cases, making it impossible to know whether defendants' responses to multiple plaintiffs have been inconsistent; and to prevent the public from learning about possible evidence of wrongdoing.[239] In return, all that plaintiffs typically get is what they were entitled to under the discovery rules in the first place, but without the threat of protracted litigation.[240] Courts, which might otherwise be inclined to reject such a coercive deal, sign off on umbrella orders because "the time that it would take a judicial officer to rule on the protectability of thousands of documents could cripple the court."[241]

The routine granting of umbrella protective orders, therefore, benefits defendants and judges at the expense of the public, which is shut out of the discovery process regardless of the evidence that emerges and in many instances will be unable to learn anything more about the case because the parties will settle before trial. A recent article advising defendants on how to best respond to Fair Labor Standards Act complaints illustrates the perversity of the process.[242] The authors recommend that companies demand "broad confidentiality" at the pretrial stage because "experienced plaintiffs' counsel know that confidentiality and closure is the product they are selling."[243] The article cautions, however, that if the EEOC or the National Labor Relations Board gets involved in the case, the agencies "may not countenance language that amounts, in their view, to gag orders."[244] This, then, is what the issuance of umbrella orders allows: the buying and selling of gag orders as a means to avoid public and governmental scrutiny.

239. *See* Ross T. Turner, Note, *Rule 26(c)(7) Protective Orders: Just What Are You Hiding Under There, Anyway?*, 87 KY. L.J. 1299, 1304–05 (1999).

240. *See* Kurt Putnam, Note, *Your Trade Secret Is Safe with Us: How the Revision to Federal Rules of Civil Procedure Makes Discovery Presumptively Confidential*, 24 HASTINGS COMM. & ENT. L.J. 427, 432 (2002) (arguing that protective order stipulations are often the product of a "devil's bargain," with a well-funded defendant threatening to challenge a smaller plaintiff's attempt to get discovery "every step of the way").

241. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 n.18 (3d Cir. 1986).

242. *See* Christina Feege & James Boudreau, *The Stealth Class Action: Demand Letters Often Serve as Opening Salvo for Discrimination or Wage and Hour Claims*, N.Y. L.J., Dec. 20, 2004, at 8.

243. *Id.*

244. *Id.*

Taken together, the currently predominant rules governing public access to litigant-centered information—which recognize no right of access to discovery, allow parties to enter freely into secret settlement agreements, and give judges broad discretion to issue protective orders—satisfy privacy interests but fail to balance the public's interests in viewing documents that expose wrongdoing, in preventing the commoditization of court-generated information, and in requiring judges to balance public interests before ordering secrecy.

D. Alternative Regimes

Several states have experimented with ways to protect the public's interests in access to litigant-centered information without sacrificing privacy rights or making the legal system too unwieldy or inefficient. Their experiences suggest that the currently predominant regime is not the only or best means of governing public access to civil litigation. But they also reveal the fundamental difficulty of attempting to grant access to the types of litigant-centered information that implicate public interests while simultaneously protecting the privacy rights attached to materials that do not.

1. Treating Litigant-Centered Information Like Judicial Information

During the deliberations leading to the creation of Rule 76a, the Texas plaintiffs' bar, along with the state attorney general and lawyers for several media and public interest organizations, insisted that any new rule would be "a sham on the public" if it did not apply to at least some forms of unfiled discovery because so many cases were settled before information was ever filed with the court.[245] The defense bar and nearly the entire business community furiously opposed any application to unfiled discovery, asserting that doing so would threaten legitimate privacy interests such as trade secrets,[246] create a "tremendous increase in the number and length of pre-

245. *See, e.g.*, Transcript, Tex. Supreme Court Hearing, Nov. 30, 1989, at 238, 243–49 (testimony of Tommy Jacks on behalf of the Texas Trial Lawyers Association) (on file with author) (noting the prevalence of sealing in products liability cases, and that such cases often settle before key information is filed with the court); Transcript, Tex. Supreme Court Advisory Comm. Proceeding, Feb. 9, 1990, at 256–57 (comments of John E. Collins) (on file with author) ("[I]f you don't include discovery documents in this definition, it is a sham on the public, the press and the media because, otherwise, all you have is a plaintiff's original petitions, the defendant's answers and special exceptions. You know, big deal. That is nothing."); Letter from Jim Mattox, Attorney Gen. of Tex., to Thomas R. Phillips, Chief Justice, Supreme Court of Tex., (Mar. 21, 1990) (on file with author) (arguing that "indiscriminate sealing" was undermining confidence in the judicial process and threatening the "the health and safety of our citizens").

246. *See* Letter from M. Scott Nickson, Vice President, Gen. Counsel, & Sec'y, Dresser Industries, Inc., to Nathan Hecht, Assoc. Justice, Tex. Supreme Court, Feb. 27, 1990 (on file with author).

trial hearings,"[247] and drive businesses out of the state.[248] Interest groups around the country entered the fray,[249] aware that the rule of one state could have enormous influence on the shape of litigation in other states.[250]

The Texas Supreme Court, which was bitterly divided on the issue,[251] attempted to strike a balance by applying Rule 76a's procedural protections only to those forms of unfiled discovery that are of special interest to the public. Accordingly, the rule defines "court records" to include "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."[252] This language is narrower than the court's advisory committee's proposal, which applied broadly to *all* matters "concerning" public health and safety regardless of whether there was a probable adverse effect on either.[253] Even so, Rule 76a on its face appeared to subject a considerable amount of unfiled discovery to the rule's procedural requirements and to reach the types of cases that first inspired the legislature to issue its mandate to the court: those involving products liability, sexual assault, and environmental hazards. Justice Doggett wrote that the provision was "intended to address those instances where the public need is greatest" and that the rule's detractors ignore "the larger role that courts, no less than the other branches of government, play in contributing to an informed populace."[254]

247. *See* Herring Memo, *supra* note 122, at 9.

248. *See id.* at 35.

249. *See, e.g.*, Transcript, Tex. Supreme Court Hearing, Nov. 30, 1989, at 268, 295–96 (testimony of Tom Smith on behalf of Public Citizens, and Howard Nations on behalf of the American Trial Lawyers Ass'n) (on file with author); Letter from James E. Walsh III, Vice President Law, Am. Airlines, to Nathan Hecht, Assoc. Justice, Tex. Supreme Court, Apr. 2, 1990 (on file with author); Letter from James W. Wilson, Senior Vice President & Gen. Counsel, Brown & Root, Inc., to Nathan Hecht, Assoc. Justice, Tex. Supreme Court, Mar. 21, 1990 (on file with author); Letter from Rose M. Murphy, Assoc. Counsel, Int'l Paper, to Nathan Hecht, Assoc. Justice, Tex. Supreme Court, Mar. 8, 1990 (on file with author); Letter from John Hildreth, Dir., Consumers Union, to Nathan Hecht, Assoc. Justice, Tex. Supreme Court, Mar. 6, 1990 (on file with author).

250. *See* Richard A. Rosen, *Confidentiality Agreements Become Increasingly Elusive*, NAT'L L.J., July 20, 1998, at B7 ("Because it is virtually impossible to obtain protection for documents that are already on the public record in one jurisdiction, the state that has adapted the most severe restriction on entering confidentiality agreements will, as a practical matter, set the standard for courts all over the country, both state and federal.").

251. The rule passed on a 5–4 vote, and the fight over the its application to unfiled discovery was so contentious that Justices Raul Gonzales and Nathan Hecht issued an unprecedented public dissent, arguing that the final rule was "excessive" and that it did not "afford litigants adequate protection of their legitimate right to privacy." *See Concurring and Dissenting Statement By Justice Gonzales and Justice Hecht*, TEX. BAR J., June 1990, at 589.

252. TEX. R. CIV. P. 76a(2)(c).

253. *See* Transcript, Tex. Supreme Court Advisory Comm. Hearing, Feb. 16, 1990, at 175 (comments of Tom H. Davis) (on file with author).

254. Doggett & Mucchetti, *supra* note 124, at 654.

The proffered purpose of the rule, therefore, was to achieve the kind of balancing of public interests this Article advocates. And an early case suggested that the rule would work as intended. In March, 1992, General Motors settled a lawsuit in Fort Worth for an undisclosed sum of money with the family of Frank Zelenuk, who had died three years earlier when his GM pickup truck caught fire after a side-impact collision with another vehicle.[255] The focus of the underlying claim was that the placement of the fuel tanks outside the frame railings of the truck made the tanks more vulnerable to explosion in a collision.[256] Under the terms of the settlement agreement, Zelenuk's family returned to General Motors all documents that had been exchanged pursuant to a protective order during discovery.[257] Had the case occurred in any state other than Texas, it likely would have ended there.

Two months after the settlement, however, Public Citizen intervened pursuant to Rule 76a and asked the court to disclose the discovery documents to the public.[258] The trial court ruled that Public Citizen first had to show that the materials—approximately 80,000 documents, including crash test results, photographs, and memoranda about the fuel system in the trucks—constituted "court records" pursuant to the terms of Rule 76a.[259] General Motors argued that Rule 76a should not apply both because the protected documents consisted of "highly sensitive engineering and business information,"[260] and because "none of the information . . . concerned matters that had a probable adverse effect upon the public's health or safety."[261] Public Citizen, in response, introduced a deposition from a separate case in which a General Motors engineer said the company had withheld from him negative crash test documents that demonstrated the danger of the trucks, and that if he had seen these results earlier he would have testified against General Motors.[262] The court, based on this testimony, ruled in favor of Public Citizen, deemed the documents to be "court records," and scheduled a Rule 76a hearing to see if General Motors could justify keeping the documents under seal.[263]

255. *See* Steven C. Laird, *Rule 76a: The Public's Crowbar*, TEX. LAW., Dec. 21, 1992, at 12.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *See* Mary Hull, *76a Intervention Allowed in Settled Case: GM Claims Protective Order Shrouds Pickup Crash Data*, TEX. LAW., June 15, 1992, at 4.

261. *See* Laird, *supra* note 255.

262. *See* Hull, *supra* note 260.

263. *Id.*

On the morning of the hearing, General Motors decided to release the documents to the public.[264] They revealed that General Motors had known as far back as 1974 that its fuel tank design created a greater fire hazard than other fuel tank configurations, but had not changed the design until 1988.[265] (The full extent of General Motors' use of secrecy did not become apparent, however, until 2003, when a federal judge in Montana ordered the release of a document that showed the company had confidentially settled 297 fuel tank cases across the country for a total of more than $495 million.[266])

The outcome of *Zelenuk* led one of the lawyers who represented Public Citizen to call Rule 76a "The Public's Crowbar."[267] But the case would prove to be one of the very few instances, at least through the writing of this Article, in which Rule 76a has been used to pry open unfiled discovery materials that expose harms or wrongdoing.

The primary reason for the rule's limited use stems from its one-size-fits-all approach. If courts were to apply the rule as its language suggests—to all unfiled discovery "concerning matters that have a probable adverse effect upon the general public health or safety"—nearly every products liability case would fall within its ambit. Such a broad scope would result in applying the rule's cumbersome procedures, as well as its First Amendment-style scrutiny, to thousands of requests for protective orders, even when the information at issue may not implicate public interests warranting such protection. Texas appellate courts therefore quickly found a way to scale back the scope of the rule, forcing litigants to establish independently that discovery material should be considered a "court record" before being granted a hearing.

In *Ford Motor Co. v. Benson*,[268] a 1993 case involving alleged defects in the design of the Ford Bronco II, Ford moved for a protective order before agreeing to produce documents in discovery.[269] The trial judge *sua sponte* decided that she first needed to determine whether the documents in

264. *See* Laird, *supra* note 255.

265. *Id.*

266. *See* Myron Levin, *GM Paid $495 Million in Suits: The Automaker Settled 297 Cases Involving Fiery Pickup Crashes, a Court Document Shows*, L.A. TIMES, May 7, 2003, at A1. U.S. District Judge Donald Molloy ordered the release of the document after finding that good cause did not exist for it to have been filed under protective order. *See id.* Judge Molloy had previously ordered the document's release, Phillips v. GMC, 126 F.Supp.2d 1328, 1329 (D. Mont. 2001), but that decision was vacated by the Ninth Circuit on the ground that Judge Molloy had not conducted a proper good cause analysis, Phillips v. GMC, 307 F.3d 1206, 1209, 1211 (9th Cir. 2002).

267. *See* Laird, *supra* note 255.

268. 846 S.W.2d 487 (Tex. App. 1993).

269. *Id.* at 488.

question concerned matters that have a probable adverse effect upon the general public health or safety.[270] After holding a two-day hearing and reviewing *in camera* several thousand pages of documents and deposition transcripts, the judge found that certain of the materials met Rule 76a's definition of court records and therefore denied in part Ford's request to seal.[271] But the court of appeals reversed, holding that when a party moves for a protective order, the trial court's sole task is to determine whether "good cause" exists to enter the order.[272] According to the ruling, Rule 76a comes into play only *after* documents have been exchanged and one party alleges that they have a probable adverse effect on public safety.[273] The court also ruled that the burden of proof falls on the party alleging that the discovery materials constitute court records.[274]

The effect of *Benson* was to give parties an easy way to contract around Rule 76a's application to unfiled discovery. Shortly after the decision, two Texas intellectual property lawyers published an article advising defendants to negotiate protective orders stipulating that none of the documents produced constitute court records under Rule 76a, because "if neither party contends that the discovery materials are court records, then the trial court should not address this issue."[275] As a practical matter, therefore, *Benson* made the task of intervening to gain access to unfiled discovery exceptionally difficult. If the parties stipulate that the documents exchanged are not court records—which is likely, considering the cost of waging a protracted discovery battle—then outsiders would have no access to the documents they seek to unseal, making it nearly impossible to establish that the documents have a probable adverse effect on public safety.

In the years since *Benson*, Rule 76a has been used in only two reported cases to give the public access to unfiled discovery materials. The lynchpin in both cases was that the parties pushing for access declined to stipulate to protective orders. In *Upjohn Co. v. Freeman*,[276] the plaintiff, who alleged that the sleeping pill Halcion caused him to murder his friend, argued from the outset that the materials requested in discovery were "court records" under Rule 76a—a strategy that allowed Public Citizen and the

270. *See id.* at 491.

271. *See id.*; Janet Elliott, *Ford's 76a Loss Sets Stage for Appeal*, TEX. LAW., Mar. 23, 1992, at 4.

272. *See Benson*, 846 S.W.2d at 491.

273. *Id.*

274. *Id.*

275. *See* Jennifer S. Sickler & Michael F. Heim, *The Impact of Rule 76a: Trade Secrets Crash and Burn in Texas*, 1 TEX. INTELL. PROP. L.J. 95, 102 (1993). The Texas court of appeals, in an unpublished decision, ruled that such stipulated agreements did not violate Rule 76a. Tollack v. Allianz of Am. Corp., No. 05-91-01943-CV, 1993 WL 321458, at *6 (Tex. App. Aug. 16, 1993).

276. 906 S.W.2d 92 (Tex. App. 1995).

Dallas Morning News to intervene to challenge the defendant's requested sealing order.[277] The intervention proved to be critical because the plaintiff's interest in the case ended in August 1994, after a Texas appeals court reversed a jury award of $2.15 million,[278] whereas the numerous appeals surrounding the Rule 76a issues were not resolved until the following July, when the appellate court upheld the district court order releasing dozens of documents, including internal company memoranda, adverse reaction reports, and depositions with exhibits from other cases around the country.[279] Importantly, however, the court also upheld sealing the documents containing Upjohn's testing and analysis protocols because they constituted trade secrets,[280] showing that Rule 76a's balancing test, when applied properly, has the potential to protect both the public's interest in access and a party's interest in privacy.

In the second case, *Wood v. James R. Moriarity, P.C.*,[281] it was the defendant who refused to agree to a protective order. James Moriarity, an attorney, had been sued for libel for running advertisements alleging that a group of psychiatrists had received kickbacks, overcharged for their services, and physically and mentally abused patients.[282] During discovery, Moriarity requested that the plaintiff psychiatrists produce various personal and business records.[283] The plaintiffs moved for a protective order, but the trial court, finding that all of the documents in question constituted "court records," refused.[284] After a public Rule 76a hearing in which the *Dallas Observer* intervened, the trial court found that "the public interest and right to know the contents of Plaintiffs' discovery responses in this lawsuit outweigh Plaintiffs' interest in the privacy of such records."[285] The decision was upheld by the court of appeals in February 1997.[286]

The following year, however, the Texas Supreme Court released an opinion that essentially overturned the unfiled discovery provision of Rule 76a. In *General Tire, Inc. v. Kepple*,[287] which, like *Benson*, involved alleged tire defects on the Ford Bronco II, the Court made two key rulings on

277. *Id.* at 95.
278. Associated Press, *New Ruling Favors Maker of Halcion*, PHIL. INQUIRER, Aug. 30, 1994, at A14.
279. *Upjohn*, 906 S.W.2d at 98.
280. *Id.* at 94–95.
281. 940 S.W.2d 359 (Tex. App. 1997).
282. *Id.* at 360.
283. *Id.*
284. *Id.* at 362.
285. *Id.* at 364.
286. *Id.* at 365.
287. 970 S.W.2d 520 (Tex. 1998).

the application of Rule 76a to unfiled discovery. The first was that the rule's notice and hearing provisions are not to be applied to the threshold determination of whether unfiled discovery constitutes court records.[288] As a result, the only way for a third party to gain access to unfiled discovery is to hope that the trial judge is willing to inspect the documents *in camera* and make an independent ruling on the matter.[289] The second holding was that a trial court cannot broadly rely on an alleged product defect in determining that discovery materials "concerning" that alleged defect constitute court records.[290] Rather, trial courts must find a specific "nexus" between the alleged defect and the documents at issue.[291] Applying this standard, the Texas Supreme Court found that *none* of the documents that had been exchanged in discovery in the case—including tire design specifications and information relating to how frequently customers returned defective tires—had a sufficient nexus to the specific defect at issue to be considered court records.[292] It is difficult to imagine how a third party, unable to inspect discovery documents, could ever learn enough about them to be able to meet such a rigorous threshold.[293] After *General Tire*, no reported cases have applied Rule 76(a) to unfiled discovery.[294]

The Texas experience thus demonstrates how the desire of litigants and courts to retain the status quo can render meaningless a rule that is sweeping in its potential scope but imprecise as to how it should be applied. At a hearing of the Texas Supreme Court's advisory committee in 2004, Charles Babcock, a defense lawyer who represents media and insurance companies, described how even if unfiled discovery arguably falls within the definition of a court record under Rule 76a, "the parties will agree to a protective order, give it to the judge to sign, and then wait to see if a member of the press or a member of the public comes in and complains about it."[295] Tracy Christopher, a trial judge, responded that this was a positive development because if courts had to scrutinize all stipulated protective orders that might implicate Rule 76a, they would have to do so "in

288. *Id.* at 524.

289. *Id.* at 525.

290. *Id.* at 527.

291. *Id.*

292. *Id.*

293. Tom Smith, the director of the Texas office of Public Citizen, said the *General Tire* decision "eviscerates Rule 76a." *See* Janet Elliott & Nathan Koppel, *Key Supreme Court Rulings Tackle Seat Belts and Spoliation*, TEX. LAW., June 15, 1998, at 4.

294. Based on a search of LexisNexis and Westlaw.

295. Transcript, Supreme Court Advisory Comm. Hearing, Mar. 4, 2004, at 11266 (comments of Charles Babcock) (on file with author).

every products case."[296] This would impose "a huge burden on the trial [c]ourt to look through every single document that is produced to determine whether or not it impacts the health, safety and welfare."[297]

The Texas rule, therefore, has not created an administrative burden and has not, by most accounts, led to unwarranted invasions of litigant privacy. But other than in a handful of cases, the rule does not appear to have had its intended effect of requiring courts to consider the public's interest in accessing discovery materials in those instances in which that interest is particularly strong.

2. "Banning" Protective Orders in Public Hazard Cases

Whereas Texas has tried to protect the public's interest in access to litigant-centered information through procedural means and the establishment of a rigorous balancing test, Florida has attempted to reach the same end by prohibiting courts from entering protective orders in cases of public importance. Florida's Sunshine in Litigation Act, which was enacted in 1990, provides that "no court shall enter an order or judgment" that conceals a "public hazard."[298] The law is a categorical ban that neither allows for the kind of balancing test required by Texas's Rule 76a nor has an escape clause like the District of South Carolina's Local Rule 5.03. The Sunshine Act's only explicit exception—for trade secrets "which are not pertinent to public hazards"[299]—excludes nothing in practice since relation to a public hazard is what triggers the law's application in the first place. Thus, under the terms of the statute, even if the "information concerning a public hazard" is a valuable trade secret or implicates important privacy concerns, it cannot be concealed.

The law also defines "public hazard" in expansive terms: the phrase refers to "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."[300] By including people, products, and procedures in the list, the statute appears to address secrecy in the types of cases that most concern

296. *Id.* at 11271 (comments of Tracy E. Christopher) (on file with author).

297. *Id.*

298. FLA. STAT. § 69.081(3) (2005) ("Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.").

299. *Id.* § 69.081(5) ("Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.").

300. *Id.* § 69.081(2)

the public: sexual abuse, products liability, environmental contamination, and medical malpractice. The definition is limited in a crucial way, however: for an "instrumentality" to be a public hazard, it must have caused injury in the past *and* be likely to do so again in the future. This requirement creates considerable ambiguities and gives litigants a potential way of getting around the law. Is a priest who molested a child, for example, a "public hazard" if it cannot be proven that he is likely to offend again? What about a doctor who has made the same medical mistake several times? The statute also suffers from one of the key problems that weakened the effect of Texas Rule 76a: it is not clear at what point a court is to make the determination of whether something constitutes a public hazard. Should it be before the exchange of discovery? After trial? At the moment of settlement?

The statute has another provision that is narrower in scope than appears at first glance. On its face, the Sunshine Act grants standing to "[a]ny substantially affected person, including but not limited to representatives of news media," to contest any order or agreement that violates the statute.[301] But unlike Rule 76a, the law does not spell out a procedure for intervention, nor does it provide a mechanism for giving third parties notice of any sealing orders. It also does not provide trial courts with continuing jurisdiction over protective or sealing orders.

As a result of these ambiguities and omissions, in practice the Sunshine Act, like Rule 76a, has had far less impact than its supporters had imagined, largely failing in its purpose of preventing courts from entering protective orders that conceal public hazards.[302] Interviews with several Florida trial and media lawyers,[303] and an examination of the limited existing case law on the Act, reveal two predominant reasons the law is utilized so infrequently.

First, because the definition of "public hazard" requires the "instrumentality" at issue to have caused and be likely to cause injury, it is rarely clear or obvious whether a protective order conceals what is in fact a public

301. *Id.* § 69.081(6).

302. *E.g.*, Telephone Interview with Barry Richard, Attorney, Greenberg Traurig, P.A., (Feb. 16, 2005) (plaintiffs' Attorney who advocated for the passage of the Act); *see also infra* notes 306–30 and accompanying text.

303. *See* Telephone Interview with Barry Richard, *supra* note 302; Telephone Interview with Barbara Peterson, President, Fla. First Amendment Found. (Feb. 12, 2005); Telephone Interview with Pete Weitzel, Former Director, Fla. Freedom of Info. Movement (Feb. 18, 2005); Telephone Interview with Sandy Chance, Dir., Brechner Ctr. for Freedom of Info. at the Univ. of Fla. (Feb. 10, 2005); Telephone Interview with Bruce R. Kaster, Attorney, Bruce R. Kaster, P.A., (Feb. 23, 2005) (attorney for Ronnie Jones); Telephone Interview with Rebecca Womeldorf, Member, Sedona Conference (Feb. 18, 2005).

hazard. As a result, courts are reluctant to rule that something is a public hazard until after either trial on the merits or a separate Sunshine Act hearing, which can resemble a trial. Because protective orders are issued at the outset of litigation, before any such hearing, judges can continue to issue them without violating the law—even in products liability cases—under the theory that the determination of whether the product is a public hazard has not yet been made.

The law, therefore, has tended to come into play only in the rare cases in which it is clear that a public hazard exists. In *ACandS, Inc. v. Askew*,[304] the first reported case in which the Sunshine Act was raised, the appeals court affirmed the trial court's order granting access to deposition testimony because the case involved asbestos, and "the public is well aware of the dangerous nature of asbestos."[305] Likewise, during the course of discovery in the state's high-profile lawsuit against the American Tobacco Company and other cigarette manufacturers to recoup Medicaid costs,[306] the fact that the health hazards of cigarettes had been acknowledged by the manufacturers themselves enabled the special master in charge of overseeing discovery to declare *sua sponte* that the Sunshine Act prevented him from issuing the kind of umbrella protective order that the tobacco companies had won in nearly every other state.[307] Similarly, in September 2000, a Miami judge relied on the Act to dissolve a protective order in a case involving Firestone ATX tires two months after the company issued a nationwide recall of that model tire.[308]

But when the existence of a public hazard has yet to be established, the task of applying the Sunshine Act becomes exceedingly difficult. In *E.I. DuPont De Nemours & Co. v. Lambert*,[309] a case involving allegations that the pesticide Benlate had ruined the plaintiff's ornamental plant business, the Florida Secretary of Agriculture and a local newspaper intervened to lift an order granting the parties confidentiality during the discovery process.[310] The intervenors argued that Benlate, which allegedly caused wide-

304. 597 So. 2d 895 (Fla. Dist. Ct. App. 1992).

305. *Id.* at 899.

306. *See* State v. Am. Tobacco Co., No. CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996).

307. *See* Judy Plunkett Evans, *Tobacco Companies Lose Bid to Keep Documents Sealed*, PALM BEACH DAILY BUS. REV., Oct. 4, 1996, at B1.

308. *See* Drew Douglas, *Product Liability: Florida Judge Lifts Order Shielding Firestone Documents in Rollover Lawsuit*, 191 DAILY REP. EXEC., Oct. 2, 2000, at A-27 (citing Alvarez v. Bridgestone/Firestone, Inc., No. 98-21672 (Fla. Cir. Ct. Sept. 29, 2000) (bench ruling)).

309. 654 So. 2d 226 (Fla. Dist. Ct. App. 1995).

310. *Id.* at 227.

spread crop damage in Florida,[311] was a public hazard under the terms of the Sunshine Act.[312] DuPont responded that "[t]he statute does not create an open search through a manufacturer's files merely because a product is alleged . . . to be a public hazard."[313] The trial court scheduled a hearing on the issue, but before the hearing took place, a jury returned a $3.15 million verdict in the underlying lawsuit.[314] The judge subsequently cancelled the Sunshine Act hearing and, based on the evidence introduced at trial, ruled that Benlate was a public hazard and lifted the confidentiality order.[315] The decision was reversed on appeal, however, on the ground that procedural due process requires a court to hold a separate Sunshine Act hearing before releasing documents pursuant to the statute.[316] (On remand, the trial court scheduled a full evidentiary hearing, but before it took place, DuPont voluntarily released the documents.[317])

The appellate court's due process ruling in *DuPont* served to patch a significant procedural hole in the statute, but also made it much more costly and time-consuming for courts to apply the Sunshine Act. This became evident in *Novartis Pharmaceuticals Corp. v. Carnoto*,[318] a case that began in 1995 and has yet to be resolved. During discovery in *Novartis*, which involved allegations that the anti-lactation drug Parlodel caused the plaintiff to have a stroke,[319] Judge Robert Andrews decided to do something Florida judges rarely do: acting *sua sponte*, he refused to issue a blanket protective order until after determining whether the Sunshine Act applied.[320] Because the case involved hundreds of thousands of documents,

311. *See* Paul Power Jr., *Sunshine-in-Litigation Act Ineffective in Benlate Dispute*, TAMPA TRIB., Dec. 19, 1995, at 18.

312. *DuPont*, 654 So. 2d at 227–28.

313. Power, *supra* note 311 (alteration in original).

314. *Id.*

315. *DuPont*, 654 So. 2d at 227–28.

316. *Id.* at 228.

317. *See* Jermain Griffin, *Legislators to Negotiate Scope of Proposed 'Sunshine in Litigation' Law*, CHI. DAILY L. BULL., May 9, 2003, at 1.

318. Case No. 95-9076 09 (Fla. Dist. Ct. App.); Telephone Interview with Wilton L. Stickland, Attorney, Wilton L. Strickland, P.A. (Jan. 20, 2006) (Attorney for Plaintiffs Connie and Rene Carnoto).

319. *See Fla. Trial Court Can Hold 'Public Hazard' Hearing Before Drug Case Concludes*, MEALEY'S EMERG. DRUGS & DEVICES, Aug. 2, 2001, at 1 [hereinafter *Public Hazard*].

320. *See* Stephen Van Drake, *Drug Maker Attacks State's Public Hazard Law*, SO. FLA. BUS. J., Aug. 10–16, 2001, at 1A (noting that Judge Andrews demanded the Sunshine Act hearing on his own, as none of the litigants in the case asked for one). An alternative view about whether judges should question the propriety of issuing protective orders in products liability cases was expressed by Miami Judge Eleanor Schockett, who said in a 2000 interview that she regularly gives protective orders at the outset of litigation because "nothing has been proven yet" and because protective orders are an important check on overly aggressive plaintiffs' attorneys. *See* Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly?: Judicial Orders Protecting Companies Kept Tire Case Quiet*, USA TODAY, Oct. 16, 2000, at 1B.

however, Judge Andrews assigned a special master to review the documents and make a recommendation as to the applicability of the statute.[321]

Novartis appealed, arguing that it had never consented to the referral of the matter to a special master and that any ruling on the Sunshine Act issue would be akin to a judicial determination of the merits of the case.[322] Novartis contended that Sunshine Act hearings should only occur after trial, or else parties "could be saddled with the 'public hazard' label even if the jury subsequently finds [them] blameless."[323] The issue attracted the attention of national interest groups, with the U.S. Chamber of Commerce, the Products Liability Advisory Council, and The TRUE Coalition (Tort Reform United Effort), filing amicus briefs on behalf of Novartis, and the Academy of Florida Trial Lawyers filing on behalf of the plaintiffs.[324] The court of appeals found the challenges to the constitutionality of the Sunshine Act to be "premature at best," but ruled that Novartis had not consented to the referral to the special master, so Judge Andrews would have to address the issue on his own.[325]

The decision kept alive the prospect of the Sunshine Act being used by judges before trial to refuse to enter broad protective orders that might conceal public hazards. But it also highlighted the difficulty of such a process. After the appeals court decision, Judge Andrews told a newspaper that he had "better things to do than spend hours upon hours upon hours to review documents."[326] And Novartis continued to fight to keep its documents from being disclosed, petitioning the appeals court on five separate occasions to have Judge Andrews removed from the case.[327] Judges thus have little motivation to rely on the Sunshine Act to reject motions for protective orders. For example, in a recent case involving whether the drug Accutane caused a young man to fly a plane into a building, a magistrate—finding it "unnecessary" to resolve the plaintiffs' claims that the Sunshine Act pre-

321. *See* Van Drake, *supra* note 320.

322. *See Public Hazard*, *supra* note 319.

323. *See id.*

324. *See id.*

325. *See* Novertis Pharm. Corp. v. Carnoto, 798 So. 2d 22, 23 (Fla. Dist. Ct. App. 2001).

326. *See* Van Drake, *supra* note 320.

327. *See* Kelly Cramer, *Justices: Judge Deserves Reprimand*, MIAMI DAILY BUS. REV., May 14, 2004, at 1. In June 2003, the fifth attempt to remove Judge Andrews succeeded. A year earlier, the judge had been quoted in a 2002 article saying that Novartis was "trying to bury the plaintiffs in documents" and that the company had "only itself to blame" for the escalating costs of the litigation. After a rebuke by the appeals court, Judge Andrews agreed to remove himself from the case. *Id. See also* Novartis Pharm. Corp. v. Carnoto, 840 So. 2d 410, 411 (Fla. Dist. Ct. App. 2003) ("We are confident that if this experienced trial judge finds the motion legally sufficient, he will disqualify himself without further intervention of this court.").

cluded the issuance of a confidentiality order—approved an order making all material produced in the case presumed to be confidential.[328]

The second reason for the limited use of the law is that parties have little incentive to litigate Sunshine Act issues on their own and the law does not provide for the kind of notice that would regularly attract intervenors. In the recent case of *Jones v. Goodyear Tire & Rubber Co.*,[329] for example, the Sunshine Act came into play only because there was little cost to the plaintiff in raising the issue.[330] The facts of the case are as follows. In October 1994, Ronnie Jones, a thirty-five-year-old auto mechanic in Miami, was severely injured when a school bus's tire that he was trying to fix suddenly exploded.[331] Jones sued Goodyear, the maker of the tire, claiming that a design defect caused the explosion.[332] Before the trial, Goodyear convinced the court to grant a confidentiality order—over Jones's objection—that prohibited the parties or their lawyers from disclosing to the public any Goodyear documents obtained during discovery,[333] some of which allegedly show that Goodyear's own tests of the tire model that injured Jones revealed the tire's propensity to burst under pressure.[334] In 2001, when a jury awarded Jones $1.8 million in damages, the confidentiality order remained in place, and Jones intended to comply with its terms and return all documents to Goodyear.[335]

But the trial court then issued a directed verdict and ordered a new trial based on lack of evidence.[336] Jones appealed to have the verdict reinstated, and because he was already before the appeals court, he also moved to have the confidentiality order vacated based on the Sunshine Act.[337] The court of appeals in 2003 reinstated the verdict and held that "[s]ince the jury clearly found that Jones was injured by the tire in question, the tire is deemed a 'public hazard,'" and therefore no court could enter an order

328. *See Accutane Plaintiff Attorney Can Share with Co-Counsel; No Public Hazard Hearing*, MEALEY'S EMERG. DRUGS & DEVICES, Apr. 17, 2003, at 11.

329. 871 So. 2d 899 (Fla. Dist. Ct. App. 2003).

330. *See* Telephone Interview with Bruce R. Kaster, *supra* note 303.

331. *Goodyear*, 871 So. 2d at 900.

332. *Id.*

333. *Id.* at 905. Jones raised the Sunshine Act in protesting Goodyear's request for the blanket confidentiality order. *Id.* But once the judge issued the order, Jones could not raise the issue on appeal until after the trial because under Florida law, the issuance of protective orders cannot serve as the basis for interlocutory review. *See* FLA. R. APP. P. 9.130(a)(3); Kyker v. Lopez, 718 So. 2d 957, 958 (Fla. Dist. Ct. App. 1998).

334. Telephone Interview with Bruce R. Kaster, *supra* note 303.

335. *Id.*

336. *See* Jones v. Goodyear Tire & Rubber Co., 871 So. 2d 899, 901–02 (Fla. Dist. Ct. App. 2003).

337. *See id.* at 905; Telephone Interview with Bruce R. Kaster, *supra* note 303.

"which would conceal information regarding this tire."[338] The appeals court ruling, while protecting the public's interest in access to information, reveals the problem of the categorical nature of the Florida statute. Once the court found that the tire was a public hazard, no information "concerning" the tire could be sealed. This opened the door to the release of potential trade secret information that the public arguably had an interest in keeping confidential.

The outcome of *Goodyear* has breathed a little life into the Sunshine Act, with some plaintiffs' lawyers saying they will rely on it to challenge protective orders more frequently.[339] But in most cases, the cost and delay that can be generated by litigation over the Act mean that it takes especially motivated plaintiffs, such as those in the Accutane case, or a high-profile case that attracts intervenors, such as the one involving Benlate, or judges willing to take matters into their own hands, such as Judge Andrews, for the law to be applied.

3. Restricting Secret Settlements

The provisions of Texas Rule 76a and the Florida Sunshine Act discussed above attempt to protect the public's interest in litigant-centered information by limiting the discretion of judges to enter secrecy orders. The Texas rule and the Florida statute, as well as laws in Washington and Louisiana, also attempt to achieve the same objective by limiting the ability of parties to reach settlement agreements that conceal public hazards.

Texas Rule 76a defines "court records" to include not just some forms of unfiled discovery, but also unfiled settlement agreements "that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety."[340] In theory, this provision should apply to cases like *Frankl*, in which the parties agreed to a settlement that restricted disclosure of information concerning the safety of the Goodyear tire. But no reported cases in Texas exist showing that this provision of Rule 76a has ever been used. One possible explanation is that the rule has no enforcement mechanism. So long as the parties agree that the product at issue does not have a "probable adverse effect" upon public safety, no third party is likely to ever learn enough about an unfiled settlement to be able to prove its danger to the public. Even in *Frankl*, the parties could easily have agreed that the "probable adverse effect" of the tire had

338. *Goodyear*, 871 So. 2d at 906.

339. Telephone Interview with Barry Richard, *supra* note 302.

340. TEX. R. CIV. P. 76a(2)(b).

yet to be established, and CARS, without access to the underlying documents, would never be able to show otherwise.

Similar enforcement difficulties plague other states' attempts to restrict secret settlements. The legislative history of Florida's Sunshine Act suggests that the law's primary purpose was to stop parties from entering into settlements that concealed the dangers of hazardous products.[341] Accordingly, section (4) of the law renders void and unenforceable "[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard."[342] As with Texas Rule 76a, however, no reported cases exist in which a settlement was rendered invalid under the law[343]—and a past president of the Academy of Florida Trial Lawyers reports that the law has had no impact whatsoever on parties' willingness to secretly settle products liability cases.[344] One reason for this may be the way the Sunshine Act defines "public hazard." Parties who enter into secrecy agreements potentially covered by the law can argue that no court has yet established that the "instrumentality" at issue has ever caused or is likely to cause harm. Moreover, no incentive exists for a party to breach a secret settlement once entered because there would be no guarantee that a court would find that the law applied; such a breach would therefore place the settlement payment at risk.

The Washington and Louisiana laws also appear to have had little, if any, impact on parties' willingness to enter into secret settlement agreements. Both states attempt to strike more of a balance than do the Texas and Florida rules by stressing the public's interest not only in access but also in protecting valid privacy interests.

Washington's Public Right to Know Bill, enacted in 1994, applies only in products liability and hazardous waste cases.[345] It provides that courts can enter or enforce confidentiality agreements only if the agreement

341. *See* H.R. COMM. ON JUDICIARY, SB 278, FINAL ANALYSIS & ECONOMIC IMPACT STATEMENT 2 (Fla. 1990) (citing the "growing concern relating to the practice of settling cases, especially in the products liability area, where as a part of the settlement the parties will agree not to disclose information regarding hazardous products, or the court will enter a protective order precluding such disclosure").

342. FLA. STAT. § 69.081(4) (2005).

343. Search of Westlaw, LexisNexis, and www.flcourts.org.

344. Telephone Interview with Lance J. Block, Jr., Past President, Acad. of Fla. Trial Lawyers (Jan. 13, 2006).

345. WASH. REV. CODE.§ 4.24.611 (2005).

is "in the public interest."[346] The law's preamble defines the "public interest" in two ways. First, it highlights the importance of public access:

> The legislature finds that public health and safety is promoted when the public has knowledge that enables members of the public to make informed choices about risks to their health and safety. Therefore, the legislature declares as a matter of public policy that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards to the public.[347]

Second, it stresses the need to protect privacy:

> The legislature also recognizes that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.[348]

Accordingly, the law requires courts, before approving or enforcing a confidentiality agreement, to weigh the public safety risks of secrecy against the "right of the public to protect the confidentiality of information."[349] This kind of balancing test might have had real impact if courts were required to apply it when evaluating whether to issue protective orders. The law on its face also has a more comprehensive reach than the Florida law in that it is not limited to hazards that have actually caused injury.[350] Rather, the statute applies to confidentiality agreements that limit the disclosure of information "about an *alleged* hazard to the public," thereby applying to potentially all products liability cases.[351]

The law, however, does not apply to protective orders,[352] and instead covers only agreements between parties, including "private" agreements,[353] which courts rarely see. As a result, the law's reach is exceptionally narrow: it applies only when courts are required to approve a settlement agreement in a products liability or hazardous substance case, or when one party in such a case breaches a settlement and the other calls on the court to enforce it. The only reported case citing the law found that it did not apply

346. *Id.* § 4.24.611(4)(b).

347. *Id.* § 4.24.601.

348. *Id.*

349. *Id.* § 4.24.611(4)(b).

350. *Id.* § 4.24.611(1)(b).

351. *Id.* (emphasis added).

352. *Id.* § 4.24.611(4)(a) ("Nothing in this chapter shall limit the issuance of any protective or discovery orders during the course of litigation pursuant to court rules.").

353. *Id.* § 4.24.611(1)(b) ("'Confidentiality provision' means any terms in a court order or a private agreement settling, concluding, or terminating a product liability/hazardous substance claim, that limit the possession, disclosure, or dissemination of information about an alleged hazard to the public, whether those terms are integrated in the order or private agreement or written separately.").

to a confidential settlement in which the defendant agreed not to harass a psychologist.[354]

Like the Washington law, Louisiana's anti-secrecy statute, referred to at the time of its passage as the Sunshine in the Courthouse bill, tries to strike a balance between the public's interest in openness and its interest in keeping certain forms of information confidential. The statute's provision "banning" secret settlements states:

> Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information relating to a public hazard, or any information which may be useful to members of the public in protecting themselves from injury that might result from a public hazard is null and shall be void and unenforceable as contrary to public policy, *unless such information is a trade secret or other confidential research, development, or commercial information.*[355]

The statute also gives "any representative of the news media" standing to contest any violation of the law.[356]

The Sunshine in the Courthouse bill was passed amid much hype, with its sponsor, Representative Glenn Ansardi, declaring that it would "render null and unenforceable any portion of an agreement which would attempt to conceal a public hazard."[357] But once the law was enacted in 1995, it seemed to disappear: from that year until this writing, the law has not been mentioned in any of the state's major newspapers or legal newsletters[358] and has not once come up in any reported case law.[359] One likely explanation for this is the law's broad exception for "commercial information," a term the statute doesn't define,[360] but which gives litigants a ready argument for why the law should not apply. Moreover, the right to intervene means little if public representatives have no way of knowing when or whether parties agree to a secret settlement.

4. Targeted Bans of Private Secrecy

One of the reasons Texas, Florida, Washington, and Louisiana have appeared to be unable to curb parties' willingness or ability to enter into private secrecy agreements is that the states' rules are unclear regarding to whom or what they apply. The rules all attempt to restrict or prohibit settlements that conceal information concerning "public hazards," but parties

354. State v. Noah, 9 P.3d 858, 863, 871 (Wash. Ct. App. 2000).
355. LA. CODE CIV. PROC. ANN. art. 1426(D) (2005) (emphasis added).
356. *Id.* art. 1426(E).
357. *See* CIVIL LAW AND PROCEDURE COMM., MINUTES 9, Apr. 25, 1995 (Louisiana).
358. Search of LexisNexis database of Louisiana newspapers and legal resources.
359. Search of Westlaw and LexisNexis.
360. *See* LA. CODE CIV. PROC. ANN. art. 1426.

can always argue that no court has yet determined that the product at issue is a public hazard. As a result, lawyers and clients who agree to secrecy—and potentially earn a premium for their silence—have little incentive to breach their contracts and risk their settlement awards on the possibility that a court will find that the existence of a "public hazard" excuses the breach.

One possible solution to this contracting-around-the-law problem is for states to give up attempting to ban harmful secret settlements with a single broadly worded statute and instead enact specific laws that leave no doubt whatsoever that confidentiality clauses in certain well-defined sets of cases are prohibited and will not be enforced. For example, the one provision of Florida's Sunshine Act that has this kind of clarity—and that lawyers say is working as intended[361]—is the law's 1991 amendment banning confidentiality clauses in settlements in *all* cases against the state or against any municipality.[362] Several states have similar provisions prohibiting state agencies from secretly settling their cases.[363]

Another anti-secrecy provision with clearly defined parameters is New Jersey's 2003 law requiring information about any medical malpractice award, whether reached through judgment or private settlement, to become part of each practitioner's profile that is posted on the internet.[364] The law's unambiguous application should make it difficult for parties to contract around.[365] This means, however, that no balancing of interests takes place: the malpractice information will be posted regardless of the existence of any countervailing interests. Such targeted bans of secrecy therefore may have greater potential than rules with broader scopes—and correspondingly larger loopholes—to reveal societally useful information, but must be narrowly confined so as not to jeopardize legitimate privacy interests.

361. Telephone Interview with Bruce R. Kaster, *supra* note 303; Telephone Interview with Barbara Peterson, *supra* note 303; Telephone Interview with Sandy Chance, *supra* note 303; Telephone Interview with Pete Weitzel, *supra* note 303.

362. FLA. STAT. § 69.081 (8)(a) (2005).

363. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 760, 777–78, 78 n.61 (noting examples of states that ban secret settlements with state agencies and recommending that all states and cities ban secret settlements in civil actions against the police).

364. *See* N.J. STAT. ANN. § 45:9-22.22(a), 23(a)(10) (West 2004); New Jersey Office of the Attorney General, New Jersey Health Care Profile, http://12.150.185.184/dca/ (last visited Jan. 22, 2006).

365. The law has not been in effect long enough to be able to measure compliance because its enforcement was put on hold until last year, when a federal court ruled that the statute was constitutional. *See* Med. Soc'y of N.J. v. Mottola, 320 F. Supp. 2d 254, 272 (D.N.J. 2004).

III. CONCLUSION

Public access to information generated through litigation enables citizens to monitor and participate in the judicial system and have confidence that courts serve public, as well as private, interests. Public access also enables courts to reveal information useful to a society that relies to a great extent on private parties to enforce its laws. The current regime of rules governing access to court-generated information, however, has not only led court processes to occur increasingly in private, but also has enabled wrongdoers to manipulate the system and hide their bad acts, and allowed judges to put the state's enforcement power behind morally questionable contracts of silence.

While several states and courts have tried to reverse the trend toward privacy in litigation, no set of rules yet exists that has achieved the proper balance among the public's interests in accessing information about judicial decision-making and litigant wrongdoing, protecting privacy rights, and ensuring the attractiveness of the courts as a venue for dispute resolution. Several key lessons, however, can be drawn from this Article's review of the rules governing public access to court-generated information.

First, the currently predominant rules do not adequately protect the public's interest in either judicial or litigant-centered information. Both sets of rules leave too much potential for the parties in a case to agree among themselves to secrecy and then have a judge sign off on their request. The FJC study of sealed settlements, the willingness of Connecticut courts to seal files without providing justification, and the experiences of Texas and Florida with sunshine rules that look strong on paper but that have often been ignored all demonstrate that simply having rigorous standards is not enough to protect the public's interests in access to court proceedings. If given broad discretion and no mandatory procedure to follow, judges face too much pressure from litigants and from their dockets to be expected to say "No" to requests for secrecy.

Second, at least when it comes to judicial information, the most effective means of ensuring that the public's interests are given sufficient weight appears to be to give third parties a meaningful opportunity to intervene before courts order records to be sealed and also to require judges who issue sealing orders to make particularized findings of fact that the privacy interests outweigh public interests in access. As Justice Powell explained, "If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be

heard on the question of their exclusion."[366] In today's world of wired courts and litigants, the minor costs involved in establishing a procedure whereby all requests to seal records are posted on a court's website a day or more in advance of a sealing hearing are far outweighed by the need to ensure the protection of the public's access rights.

Third, it is not enough to fix the rules governing judicial information and leave alone the ability of parties to exchange—and then burn—discovery in secret. Yet, whereas Texas Rule 76a provides a laudable model for the rules governing judicial information, no such model exists for litigant-centered information. The state sunshine experiments, while acting to some extent as "information-forcers,"[367] (revealing information about General Motors, Halcion, Firestone, the American Tobacco Company, and more) have largely failed to prevent parties and courts from secretizing the kinds of litigant-centered information that implicate public interests.

The state experiences do, however, point in the direction of what a model regime would look like. It would begin with the presumption that the public has at least a qualified right of access to some forms of litigant-centered information. The sheer scope of material that is exchanged in discovery, combined with the public interest in not giving courts incentives to pull back on liberal discovery, caution against providing a sweeping right of access equal to the right of access to judicial information. But a qualified right of access could avoid these pitfalls while allowing third party intervenors to represent the public in those cases in which public access interests are strongest. A model regime would provide a mechanism that efficiently sorts out the information exchanged in discovery that implicates no public concerns from the information that the public has an interest in seeing—e.g., information that implicates the merits of the case or reveals evidence of harms or wrongdoing.

One possible starting point is the Massachusetts rule in the *Geoghan* case that permits "concerned citizens" to intervene to gain access to discovery. That rule alone, however, would have little effect without alerting representatives of the public that a protective or sealing order exists. Perhaps parties should be required to publicly post their discovery requests in order to provide notice to potential intervenors of the categories of documents to which they may seek to gain access. An alternative would be to require that once parties enter court and use judicial power to gain discovery, they cannot leave court without a special master reviewing the docu-

366. Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring).

367. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 653–54 (2005).

ments exchanged as well as any settlement agreement to see if public interest material is being hidden. Lawyers' groups also can create their own norms in this regard and adopt the ethics rule proposed by Richard Zitrin that would prohibit lawyers from participating in agreements that conceal public dangers.[368] Ideally, states would experiment with different regimes to see which rules most effectively balance the public interests at stake. What is clear, however, is that the status quo, in which more and more of the judicial system operates behind closed doors, should not be seen as the best or only plausible alternative.

368. *See* Zitrin, *supra* note 164, at 904–05.