

## INTRODUCTION TO SECRECY IN LITIGATION

NANCY S. MARDER\*

## INTRODUCTION

The symposium title, *Secrecy in Litigation*, masks several of the complexities that make this topic so challenging. Howard Erichson, who originally chose this title for a panel at the Annual Meeting of the Association of American Law Schools,<sup>1</sup> acknowledges in his essay<sup>2</sup> in this symposium issue that “secrecy” is a loaded term.<sup>3</sup> It has negative connotations. It suggests an effort to hide what is taking place and to keep the entire matter out of view. It also suggests an intention to keep the matter from ever being revealed. Other terms share some of the same meanings, such as “confidentiality”<sup>4</sup> or “privacy,” but do not have the same negative connotations. In fact, these other terms suggest the more positive aspects of keeping a matter from others’ view: the need to protect the issue because it is personal, embarrassing, or simply inappropriate for public disclosure. In spite of the use of the term “secrecy” in the title, which suggests that a value judgment has already been made and that secrecy is to be condemned and disclosure is to be condoned, this symposium offers a range of views on when privacy or disclosure is appropriate and when it is not during litigation and alternative dispute resolution (“ADR”).

The other term in the symposium title, “litigation,” masks additional complexities. Litigation encompasses a range of activities, such as the filing of a complaint in the clerk’s office, the exchange of information between parties during discovery, the arguing of motions in the courtroom,

\* Professor of Law, Chicago-Kent College of Law. I want to thank Lucy Moss for her excellent library assistance.

1. I want to thank Howard Erichson for organizing the panel *Secrecy in Litigation* for the Civil Procedure Section of the Association of American Law Schools (AALS) in January 2005 during his tenure as Chair. After attending the panel and while serving as the 2006 Chair, I invited the participants and several other scholars in the field to present their ideas in a symposium issue of the *Chicago-Kent Law Review*. They agreed, and as a result, the debate can include a greater number of participants and reach a broader audience than the original *Secrecy in Litigation* panel permitted.

2. See Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357 (2006).

3. *Id.* at 358 n.8.

4. *But see id.* (describing “confidentiality” as a loaded term as well).

the announcement of a verdict after trial, the publication of a judicial opinion, or the settlement that is agreed to by the parties prior to an appeal. Litigation can include that which takes place in the courtroom, such as bench or jury trials, as well as that which takes place in the judge's robing room or chambers, such as settlement conferences or motions decided without oral argument, and even that which takes place before a mediator or arbitrator to whom the trial judge has assigned the case for some other form of dispute resolution.<sup>5</sup> The term "litigation" extends to so many activities that it is important to be clear on just which activity is to be kept "secret" and for how long.

Although this symposium uses "secrecy" and "litigation" in its title, one goal is to explore the variants of secrecy, including confidentiality and privacy, and to be clear about which activities during litigation and/or alternative dispute resolution are to be kept "secret" and for how long. It is not that all secrecy is bad and that all public disclosure is good. There are trade-offs and competing interests. Proposed reforms must be viewed from different vantage points, such as those of the parties, the judge, and the public. Reforms, once put into effect, need to be examined to see if they have, in fact, achieved some of their stated goals. Moreover, reforms even if successful at the outset, need to be reevaluated over time to see if they are appropriate once circumstances, including technology, have changed.

### I. RECOGNIZING THE COMPLEXITIES

This symposium challenges the dichotomy that public disclosure throughout the litigation process is always good and that secrecy is always bad. The issue is not black or white, as several of the symposium contributors make clear.<sup>6</sup> One problem is that of unintended consequences. Sometimes opening up the process in order to ensure that the public is aware of information might actually lead to less information being made public. Altering the process can alter the exchange itself. As a result, even though the process has become more "open," the amount of information that is revealed has diminished.

One vivid illustration of this "more is less" problem, which involved hearings but not litigation, was the Senate Judiciary Committee hearings for Judge Samuel A. Alito Jr., after he had been nominated by the President for the U.S. Supreme Court. Several writers who covered the hearings noted how little Judge Alito spoke and how much time the Senators con-

5. See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (2000).

6. See *infra* Part II.A.

sumed with their speeches. Headlines such as *But Enough About You, Judge; Let's Hear What I Have to Say*,<sup>7</sup> *The Blog House; Alito Hearings: So Many Words, Yet So Little Said*,<sup>8</sup> and *The Wrong Questions from the Wrong Questioners: With All the Posturing, Platitudes and Pandering, We Learned Nothing About Alito*<sup>9</sup> made the point clear. One of the reasons to televise the hearings is so that the public can learn about the nominee's views. After all, an appointment to the Supreme Court is an appointment for life to the highest court in the land. The televised proceedings are supposed to allow viewers to watch the process so that they can become familiar with the judge's views, as well as be assured that the committee is doing its job.

Yet, what if viewers and Senators alike actually learned less about Judge Alito as a result of making the proceedings public than if the proceedings had been conducted behind closed doors by the Senate Judiciary Committee? Judge Alito, aware that the hearings were being televised, might have become overly circumspect in what he chose to reveal about his own views. At the same time, the televised hearings gave the Senators a bully pulpit from which to speak at great length so that they could impress their constituents as mid-term elections drew near. Judge Alito revealed less and the Senators pontificated more and the result was frustration for those members of the public who actually wanted to learn about Judge Alito's views.

Admittedly, Judge Alito might have avoided expressing his views even if the committee had questioned him behind closed doors, but at least then the committee members could have probed without worrying about the appearance of badgering the nominee and without striving to impress their constituents.<sup>10</sup> Behind closed doors, the committee members might

7. Elisabeth Bumiller, *But Enough About You, Judge; Let's Hear What I Have to Say*, N.Y. TIMES, Jan. 11, 2006, at A1 (providing a chart showing that "[a]ll but two senators used more words than Judge Samuel A. Alito Jr. during their allotted 30 minutes of questions yesterday [January 10, 2006]").

8. Tim O'Brien, *The Blog House; Alito Hearings: So Many Words, Yet So Little Said*, STAR TRIB. (Minneapolis, MN), Jan. 14, 2006, at 15A ("The Senate confirmation hearings for Supreme Court nominee Samuel Alito were illuminating only if you wondered what Sen. Joseph Biden thought of Princeton (he hates it) or what Sen. Arlen Specter calls e-mail ('computer letter'). . . . Alito will be confirmed because he was successful in saying nothing. Not that he could have said much, with the senators using up all the oxygen in the hearing room.").

9. Alan Dershowitz, Op-Ed, *The Wrong Questions from the Wrong Questioners*, CHI. TRIB., Jan. 20, 2006, at 21 ("[T]oo many senators view the hearings as a campaign opportunity instead of as a confirmation hearing. Almost the entire first day was taken up with committee members' 'opening statements,' which would be more accurately described as stump speeches.").

10. See, e.g., Adam Nagourney, *From the Left, Calls to Press Alito Harder*, N.Y. TIMES, Jan. 12, 2006, at A27 ("[Opponents of Judge Alito's nomination] said Republicans had been effective in trying to put Democrats on the defensive for being harsh, particularly after television shots showed Judge Alito's wife, Martha-Ann, crying and leaving the hearing room.").

have learned more about Judge Alito than they did as a result of the public nature of the proceedings.<sup>11</sup> Although there were other vehicles by which the Senators could learn about Judge Alito's views, such as the written questions that he had to answer prior to the hearings, the committee members lost an important opportunity provided by the hearings. The televised hearings, which were intended to make the nominee's views available to the public, instead altered the behavior of all of the participants—Senators and nominee alike—so that members of the committee, other Senators, and the public had less substantive information about the judge through an open process than they would have had through a closed process.

A related example is the use of cameras in the courtroom. Although there has been a push to have cameras in the courtroom in state courts<sup>12</sup> and on a very limited basis in federal courts,<sup>13</sup> there is disagreement about whether the presence of the camera, no matter how unobtrusive, affects the behavior of the participants. One federal judge observed: “[Cameras] affect peoples' performance and manner of behaving—and it's not always for the good.”<sup>14</sup> Another federal judge who participated in a pilot study that permitted cameras in some federal courtrooms on a limited basis found that “the camera is likely to do more than report the proceeding—it is likely to

11. See Adam Nagourney et al., *Glum Democrats Can't See Halting Bush on Courts*, N.Y. TIMES, Jan. 15, 2006, at 1 (“[Democratic m]embers of the [Senate Judiciary C]ommittee, while defending their performance, said they had been hampered because many of the issues they needed to deal with—like theories of executive power—were arcane and did not lend themselves to building a public case against Judge Alito.”).

12. See, e.g., *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 65 (2005) (statement of Seth Berlin, Partner, Levine, Sullivan, Koch & Schulz, LLP) (“All 50 states allow at least some camera coverage of judicial proceedings, including 37 states in which criminal proceedings may be televised in at least some circumstances. Only the District of Columbia bans camera coverage of all judicial proceedings.”) (footnote omitted); Editorial, *For Courtroom Cameras*, CHI. TRIB., Nov. 27, 2005, at C10 (“All 50 states now allow cameras in at least some courts, and 39 permit TV coverage of criminal trials.”); *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 124–25 (statement of Henry Schleiff, Chairman & CEO, Court TV Network) (“Now, as we move into the 21st century, in the United States today, all 50 states now allow cameras in some courts, generally at the appellate level—43 states permit cameras in their civil trial courts—and, of those, 39 states permit cameras in their criminal trial courts: as you can see, there is, clearly, a growing consensus that having cameras in courtrooms serves the public interest.”).

13. See, e.g., Dan Horn, *U.S. Judges Camera-Shy in Courtroom*, CINCINNATI ENQUIRER (Ohio), Jan. 29, 2006, at 1B (“Current rules bar cameras from all federal trial courts and give appeals courts the option to broadcast proceedings. So far, only two federal appeals courts, one in New York and one in California allow cameras.”); see also *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (statement of Jan E. Dubois, Federal District Court Judge for the Eastern District of Pennsylvania) (describing the experience she and other judges had as part of a pilot program, running from July 1, 1991 until December 31, 1994, which permitted cameras in certain federal courtrooms in select cases).

14. Horn, *supra* note 13, at 1B (quoting Federal District Court Chief Judge Sandra Beckwith of the Southern District of Ohio).

influence the substance of the proceeding.”<sup>15</sup> She was concerned by the percentage of judges who participated in the pilot study and who found that witnesses and jurors were affected by the presence of the cameras. In particular, these judges reported that cameras led to witnesses who were nervous, distracted, and less willing to appear in court.<sup>16</sup> The possibility of a camera in the courtroom led at least one defendant to suggest that he would settle rather than proceed to a televised trial.<sup>17</sup> In contrast, one proponent of cameras in the courtroom pointed to several state-court experiments in which “no effect” had been found on behavior in the courtroom when cameras were permitted.<sup>18</sup>

The state criminal trial of O.J. Simpson for the murder of Nicole Brown Simpson and Ronald Goldman<sup>19</sup> provides one of the more striking examples of how participants, including judge and lawyers, altered their behavior in response to having a camera in the courtroom. Even if the participants were not aware of the camera at every moment of the trial, they were sufficiently aware that the lawyers’ arguments became more theatrical, the judge’s rulings more tolerant, and the discourse in the press more trivial as a result of the omnipresence of the camera. Indeed, “the OJ Simpson factor” has contributed to many judges’ concerns that cameras will turn legal proceedings into “a media circus.”<sup>20</sup> Although there are advantages to having cameras in the courtroom, such as educating the public about the legal system<sup>21</sup> and making judges and lawyers accountable for their behav-

15. *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 86–87 (statement of Jan E. Dubois).

16. *See id.* at 83 (expressing concern that 64% of the participating judges found that cameras made witnesses more nervous; 41% of the judges found that cameras led to witnesses who were distracted; 46% of judges thought the cameras made witnesses less willing to appear; and 56% of the judges found that the cameras violated witnesses’ privacy).

17. *Id.* at 84.

18. *See Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 66–67 (statement of Seth Berlin) (citing a four-year experiment with cameras in the courtroom in which the Iowa Supreme Court had found that “jurors thought camera coverage had little effect on trial participants, and no effect on the performance of judges or witnesses,” and citing a three-year experiment in which the Alaska Judicial Council had concluded that “[t]elevision cameras in the courtroom have had virtually no effect on courtroom behavior on participants”).

19. *See People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County 1995).

20. Horn, *supra* note 13, at 1B.

21. *See, e.g., Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 73 (statement of Barbara Cochran, President, Radio-Television News Directors Association & Foundation) (“Most [studies] conclude that a silent, unobtrusive in-court camera provides the public with more and better information about, and insight into, the functioning of the courts.”); *id.* at 121 (statement of Henry Schleiff) (“Secondly, [allowing cameras in the courtroom] increases our citizen’s knowledge about how the third branch of the government functions: because television is the principal vehicle through which most people get their news, it only follows, that this same vehicle be employed as a tool to inform the electorate about this branch.”).

ior,<sup>22</sup> there are also disadvantages, such as the way that judges and lawyers tailor their behavior and arguments to appeal to a television audience<sup>23</sup> and the negative impact on witnesses, jurors, and parties.<sup>24</sup> Thus, the very opening up of the process—in this case, the opening up of the courtroom to a television audience rather than just to members of the public—can affect the information that is exchanged and the manner in which it is presented. Ironically, as the process becomes more public, the information can become more limited. Although judges might decide that the trade-off is worth making, and therefore, support the move to allow cameras in the courtroom,<sup>25</sup> that does not mean that there is no cost to this practice.

Another problem is that as one process becomes more public, potential participants might choose another process to avoid public scrutiny.<sup>26</sup> As a result, the issues that would have been raised in the more public forum still remain outside the public purview. For example, litigation is perceived as more public, so parties seeking greater privacy might make use of alternative dispute resolution. As Professors Judith Resnik<sup>27</sup> and Laurie Doré<sup>28</sup>

22. See, e.g., *id.* at 77 (statement of Barbara Cochran) (“[Legislation allowing cameras in federal courtrooms] has the potential to illuminate our federal courtrooms, demystify an often intimidating legal system, and subject the federal judicial process to an appropriate level of public scrutiny.”); *id.* at 121 (statement of Henry Schleiff) (“The importance to our citizens of allowing cameras in the courtroom is, really, two-fold: it enhances public scrutiny of the judicial system which, in turn, helps assure fairness of court proceedings, thereby promoting public confidence in the government itself . . .”).

23. See *supra* note 19 and accompanying text (describing the O.J. Simpson case).

24. See *supra* notes 13–17 and accompanying text (describing the pilot study of cameras in a few federal courts).

25. Several Justices have expressed opposition to allowing cameras in the U.S. Supreme Court. They are concerned about how it would change lawyers’ behavior as well as their own. See, e.g., Tony Mauro, *Roll the Cameras (or Soutersaurus Rex)*, LEGAL TIMES, Apr. 8, 1996, at 9 (“I think the case [against cameras] is so strong that I can tell you that the day you see a camera coming into our courtroom, it’s going to roll over my dead body.”) (quoting Justice David Souter); *id.* (“And by insisting that we perform our functions in a way that we’ve historically performed it, without the intrusive commentary that follows the camera and without the potential for changing the behavior of the judges and the attorneys that appear before us, I think there is a very strong case for continuing to exclude the cameras from our courtroom.”) (quoting Justice Anthony Kennedy); *id.* (“Ruth Bader Ginsburg and Stephen Breyer seem lukewarm at best [about allowing cameras in the Supreme Court].”). More recently, Justice Kennedy explained to the House Appropriations subcommittee that handles the judicial branch’s annual appropriation that the Justices viewed “the absence of cameras as a positive” because “[w]e teach that our branch has a different dynamic . . . We teach that we are judged by what we write.” Linda Greenhouse, 2 *Justices Indicate Supreme Court Is Unlikely to Televise Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16.

26. See *supra* note 17 and accompanying text (describing the defendant who would rather settle than continue to litigate if it meant having a televised trial).

27. See Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 568 (2006) (“[O]ne ought not to assume the endurance of the ability to equate courts with public access. . . . One ought not to equate administrative agencies and private providers inevitably with secrecy. Rather, choices abound about how to structure all these processes, as one can build in or discourage public dimensions.”).

28. See Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 468 (2006) (“These efforts

remind us, not all alternative dispute resolution is private and not all litigation is public, and it is necessary to avoid that simple dichotomy, and instead, to scrutinize each step of each process. Yet, one party often gets to choose the forum in which to resolve the dispute, and a commonplace practice is for businesses to include an arbitration clause in contracts<sup>29</sup> so that any dispute must be resolved in the seemingly more private setting of arbitration.<sup>30</sup> Businesses select this setting, not just to keep the matter from the public purview, but also to limit the length and expense of the process<sup>31</sup> and to avoid a jury trial.<sup>32</sup> Their decision, however, effectively keeps future

suggest that the current dichotomy between litigation and ADR confidentiality may not be completely justified.”); *id.* at 513 (“This ‘real intertwining and intermingling of dispute resolution techniques’ undermines the distinction between litigation and ADR and the contradictory attitudes toward confidentiality.”) (footnote omitted).

29. *See, e.g.*, Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through *Predispute Arbitration Clauses: The Average Consumer’s Experience*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55, 61 (“Across the industries studied, fifty-seven of the 161 sampled businesses (35.4%) included arbitration clauses in their consumer contracts. . . . The prevalence of arbitration clauses is highest (69.2%) in the financial category (credit cards, banking investment, and accounting/tax consulting), and lowest (0) in the food and entertainment category (grocery stores, restaurants, theme parks, and cultural/sports events).”) (footnote omitted).

30. *See, e.g.*, Doré, *supra* note 28, at 481–82 (“The ability to resolve a dispute in private with minimal public exposure motivates parties to select ADR over litigation and has undoubtedly fueled its growing popularity.”) (footnote omitted); *id.* at 484 (“Generally, however, the arbitration process and its outcomes remain private.”).

31. *See* Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHL-KENT L. REV. 571, 576 (2006) (“Employers have little to lose and much to gain by insisting on the arbitration of discrimination claims. Not only is the defense quicker and less expensive, the result is effectively shielded from public view, despite the Supreme Court’s assertion otherwise.”). *But see* Kenneth R. Harney, *Fannie Gives Swift Kick to Mandatory Arbitration*, CHI. TRIB., Oct. 10, 2004, § 16, at 1 (“While the arbitration process may be faster and less costly in some cases, consumer groups complain that too often arbitration proves to be just as expensive and protracted as the judicial route, but eliminates a consumer’s rights to argue before a jury and obtain reasonable compensation.”); Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15, 16 (“But if legislators and judges invest in ADR or require its use on the understanding that scarce resources will be freed up for other public purposes, then it is important for policy planning to determine whether such savings will materialize, and under what circumstances.”); Jane Spencer, *Waiving Your Right to a Jury Trial*, WALL ST. J., Aug. 17, 2004, at D1 (“But companies are finding that arbitration isn’t a magic bullet. For one thing, it can be just as expensive as litigation.”); Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at A30 (“The two myths about arbitration are that it’s quicker, and that’s not necessarily true, and that it’s cheaper—that’s definitely not true. If you go to trial, you get the judge for free.”) (quoting Harold Justman, a real estate lawyer with Fimmel, Justman & Rible in San Mateo, California).

32. *See* Kotkin, *supra* note 31, at 577. Another way for companies to avoid a jury trial is to include a “jury waiver” in the contract, which means that any dispute will go before a judge rather than a jury. *See* Spencer, *supra* note 31, at D1. Academics, lawyers, and judges have begun to focus on the vanishing trial, *see, e.g.*, Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004), and in particular, the vanishing jury trial. *See, e.g.*, The American Jury Trial—Do We Allow Its Death or Lead Its Rebirth?, Conference in Las Vegas, Nev. (Mar. 31–Apr. 2, 2005) (conference program on file with author). One of the factors contributing to the jury trial’s disappearance may be the appearance of jury waivers in a range of routine contracts, including “residential leases, checking-account agreements, auto loans and mortgage contracts.” Spencer, *supra*. Another factor may be the prevalence of mandatory arbitration clauses in everyday contracts from car leases to credit cards.

litigants from knowing the full extent of the problem, as Professor Minna Kotkin recounts in employment discrimination cases.<sup>33</sup> Yet, as both Professors Doré<sup>34</sup> and Kotkin<sup>35</sup> note, the U.S. Supreme Court has held that almost all disputes, including those involving statutory or public rights, are subject to binding arbitration,<sup>36</sup> and therefore can be decided in the more private setting of arbitration.

## II. WEIGHING COMPETING INTERESTS AND REEXAMINING CHANGING NEEDS

One of the difficulties in addressing the question how public or how private litigation and alternative dispute resolution should be is that there are competing interests. At the very least, there are the interests of the parties, who often want or are at least willing to keep matters private, the interests of future litigants, who would benefit from knowing about past cases, and the interests of the public, who would benefit from knowledge of the issue, particularly when the issue involves public health or safety. Another difficulty is that the balance among the competing interests is likely to change as conditions change.

### A. *Competing Interests*

As several of the contributors to this symposium make clear in their essays, litigants' privacy interests must be balanced against the public's and future litigants' interests in knowledge of the issue. Although several writers strike different balances, they all recognize that there are competing interests at stake.

Professor Marcus strikes the balance in favor of protecting the litigants who want to keep private the information that they have exchanged during discovery and that they have not filed with the court.<sup>37</sup> In doing so, he looks to past practice in this country and current practices abroad. He also focuses on the need to make public only those documents that are filed with the court because only those documents can be the basis for the court's decision in a case. Moreover, he finds nothing in the *Federal Rules of Civil Procedure* that requires the information exchanged during discov-

33. See Kotkin, *supra* note 31, at 572–73, 586; see also Doré, *supra* note 28, at 486–87.

34. See Doré, *supra* note 28, at 486.

35. See Kotkin, *supra* note 31, at 574–75.

36. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

37. See Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006).

ery to be filed with the court or to be made public. If the parties are able to protect sensitive information exchanged during discovery, then that will reduce their resistance to discovery.<sup>38</sup> It may even be, though Professor Marcus does not suggest this, that the protection of information exchanged during discovery might make it more likely that the legal claim will go forward, which will result in more information—at least about the legal claim—being made available to the public. Although Professor Marcus recognizes that public access to court filings serves the important interest of court transparency, he does not believe it comes into play with unfiled documents exchanged in the course of discovery, and therefore, the privacy of these documents ought to be protected.

Professor Erichson would allow parties to obtain protective orders for discovery confidentiality as long as they had made “a relatively light showing of good cause.”<sup>39</sup> Professor Erichson’s test—which is somewhere between “greater than zero”<sup>40</sup> but less than a showing of “‘serious injury’”<sup>41</sup>—tries to strike a balance between recognizing the autonomy of the parties to control discovery and to use this information toward resolution of the dispute with the public’s interest to monitor the adjudicatory process. Professor Erichson, like Professor Marcus, holds the view that “discovery is not adjudication, and the presumption of public access that applies to the adjudicatory process should not apply equally to discovery.”<sup>42</sup> Erichson, like Marcus, focuses on unfiled discovery as distinguished from filed discovery.<sup>43</sup> And Erichson, like Marcus, looks to other countries’ far more restrictive discovery practices to highlight just how broad, unusual, and party-controlled our discovery practices are.

In contrast, Andrew Goldstein weighs in on the side of greater openness during discovery, including unfiled discovery, in order to promote “judicial accountability, democratic engagement, and public confidence in the judicial system.”<sup>44</sup> At the same time, he would not give the public an automatic right to view all material exchanged during discovery; rather, he favors rules that allow courts to weigh “the importance of public access against litigants’ interests in privacy and the system’s interest in effi-

38. *See id.* at 355 (“The prospect of all discovery material being presumptively subject to the right of access would likely lead to an increased resistance to discovery requests.”) (quoting *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 n.10 (11th Cir. 2001)).

39. *See* Erichson, *supra* note 2, at 359.

40. *Id.* at 367.

41. *Id.* at 360 (citation omitted).

42. *Id.* at 361.

43. *See id.*

44. Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI. KENT L. REV. 375, 378 (2006); *see id.* at 381–82.

ciency.”<sup>45</sup> He would also distinguish between the documents that judges create (“judicial information”), in which there is a strong public interest, and the information that parties exchange (“litigant-centered information”), in which there is both a public interest in disclosure and a private interest in confidentiality.

In focusing on settlement agreements in employment discrimination cases, Professor Kotkin strikes the balance in favor of public disclosure of settlements, particularly in this context.<sup>46</sup> She worries that unless such information is made public, future litigants and the public will not know the extent of the discrimination. This lack of public information feeds current perceptions that plaintiffs’ claims in employment discrimination cases are frivolous, and it derails future claims by leaving lawyers with little information with which to counsel potential plaintiffs.<sup>47</sup> She notes the change in practice in employment discrimination cases, away from the more formal courtroom proceedings that would have resulted in a judge’s opinion to resolve discovery disputes, and instead to the more informal, cooperative discovery exchange in which the parties are supposed to come to agreement, and if they cannot, then a magistrate judge tries to negotiate such agreement.<sup>48</sup> According to Professor Kotkin, this trend has left potential plaintiffs in employment discrimination cases with few written opinions to guide them. She also observes that the range of documents that would have constituted the record has been compressed.<sup>49</sup> When this loss in what is made public during discovery is coupled with the loss of trials, the result is that the public knows little about these cases. Kotkin argues that in light of these developments, the “settlement information is the only data available by which to evaluate the extent of discrimination in the workplace.”<sup>50</sup> In her weighing of the competing interests, the interests of future plaintiffs and of the public in knowing about the extent of discrimination in the workplace take priority over the interests of the parties in reaching a private settlement.

Professor Doré canvasses the various stages of litigation and alternative dispute resolution, and finds that while most of what occurs during litigation is public and most of what occurs during ADR is private, these generalizations do not hold true across the board. For example, unfiled

45. *Id.* at 379.

46. *See* Kotkin, *supra* note 31, at 572 (“[T]he harm created by secrecy in employment discrimination litigation is cumulative and less immediately tangible.”).

47. *See id.* 572–73.

48. *See id.* at 578–79.

49. *See id.* at 579–81.

50. *Id.* at 585.

discovery documents, as Professors Marcus and Erichson noted as well, are not generally accessible to the public,<sup>51</sup> though much of litigation, from the docket sheet to the trial and judicial opinion, is presumptively open to the public.<sup>52</sup> Similarly, while the world of ADR is generally private, there are points at which it is not, such as when a prevailing party to an arbitration petitions a court to confirm the award and enter judgment, or when a dissatisfied party requests that a court vacate or modify an arbitral award under the limited grounds for judicial review.<sup>53</sup> The arbitration documents, once filed with the court, become judicial records with a concomitant right of the public to have access to them.<sup>54</sup> Professor Doré, while recognizing the need for parties to maintain confidentiality in some forms of ADR, particularly in mediation, nonetheless would strike a balance that allows for greater openness in ADR. She believes that this will be more widely recognized when the connections between litigation and ADR are acknowledged. For example, judges can encourage or order ADR even in a case that the plaintiff chose to bring in court.<sup>55</sup> If the links between litigation and ADR are appreciated, rather than having each viewed as a separate sphere governed by separate assumptions, then the reasons for public scrutiny that govern litigation in the courtroom should, in Professor Doré's view, have a place in the more private realm of ADR.

Professor Resnik also takes a holistic view of dispute resolution. She looks at all the sites where adjudication takes place, whether it is in a courtroom or judge's chambers or before an administrative agency or an arbitrator. At the same time, she singles out courts—and in particular federal courts—as playing a key role in the development of norms, such as accountability and equality.<sup>56</sup> This role of the federal courts is consistent with what she describes as the “Due Process Model of Civil Procedure,”<sup>57</sup> which developed with the *Federal Rules of Civil Procedure* in 1938. Consistent

51. See Doré, *supra* note 28, at 473–74.

52. See *id.* at 471–72, 476–77. But see Julia Preston, *Judge Issues Secret Ruling in Case of 2 at Mosque*, N.Y. TIMES, Mar. 11, 2006, at A10 (“A federal judge issued a highly unusual classified ruling yesterday, denying a motion for dismissal of a case against two leaders of an Albany mosque who are accused of laundering money in a federal terrorism sting operation. Because the ruling was classified, the defense lawyers were barred from reading why the judge decided that way.”); Michael J. Sniffen & John Solomon, *Secret Court Cases Increase Under Bush Administration*, CHI. TRIB., Mar. 5, 2006, § 1, at 7 (“Despite the 6th Amendment’s guarantee of public trials, nearly all records are being kept secret for more than 5,000 defendants who completed their journey through the federal courts in the past three years.”).

53. See Doré, *supra* note 28, at 507.

54. See *id.*

55. See *id.* at 513.

56. See Resnik, *supra* note 27, at 536–37.

57. *Id.* at 566.

with this model, federal courts in particular provide access to the public and serve as “a kind of fabulous ‘document depository’” as well as a producer and synthesizer of knowledge.<sup>58</sup> According to her account, the burgeoning of the federal docket, and the limited number of federal judges, has led to a delegation of adjudicative proceedings to an array of other decisionmakers, such as federal agencies. Much of their decision-making, however, even in trial-like proceedings, is unavailable to the public because it takes place in rooms not open to the public and results in decisions not disseminated to the public.<sup>59</sup> In addition to this delegation, there is the “outsourcing” of disputes to private venues, such as arbitration, where privacy predominates and data are hard to obtain.<sup>60</sup> Finally, there is the transformation of the role of the judge. In the past, the judge had primarily resolved disputes; now the judge also settles disputes,<sup>61</sup> and in the process she can require certain cases to go to arbitration, which is not typically open to the public.<sup>62</sup> These developments lead Professor Resnik to recommend that courts develop rules and doctrine that are “information produc[ing]”<sup>63</sup> and that state legislatures, and perhaps even Congress, act as well.<sup>64</sup> She wants to strike the balance for openness, and explains: “A justification for reducing litigant freedom is that the bargaining pressures come in part from legal efforts to promote conciliation over adjudication. . . . [L]egislative engagement is needed to regulate the power of parties and judges either to enable information generation through courts or to inhibit that potential.”<sup>65</sup>

### B. *Changing Needs*

Even though several of the contributors to this symposium strike different balances, they also recognize that the balances they strike now might need readjustment over time. One circumstance in which there might be a need for change is when technology alters how things are done. For example, court documents have long been filed by going down to the courthouse and filing a paper copy with the clerk’s office, in addition to serving a copy on the other side and delivering a courtesy copy to the judge’s chambers. Once the document was filed, it became a public document, which meant it

58. *Id.* at 539.

59. *See id.* at 542–43, 545–50.

60. *See id.* at 549.

61. For a prescient account of this transformation, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

62. *See* Resnik, *supra* note 27, at 552–55.

63. *Id.* at 560.

64. *See id.* at 564–65.

65. *Id.* at 565.

could be viewed by members of the public. However, a person who wanted to see the document had to go down to the courthouse and make her request. She could then read the document, and even photocopy it, but ultimately, she had to return the original document to the clerk's office; the original filed document was not allowed to leave the physical space of the clerk's office. The trip to the courthouse meant that only the most interested or determined individuals actually saw the document. Thus, a document could be public, in the sense that it was available to members of the public, but the document was not very public as a matter of practice because most members of the public did not make the effort to view such documents unless they had a particular need to do so. The U.S. Supreme Court has described such documents as "practically obscure" even though they are publicly available because of the effort required to view them: "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."<sup>66</sup>

Today, a number of courts have made electronic filing available, if not mandatory.<sup>67</sup> A party filing a document electronically sends it to the clerk's office via the Internet; the document is stored in cyberspace rather than in the clerk's office; and it is made available to members of the public if they visit the court's Web site. Although the document is still public in the same sense that it was always public, in fact it is far more accessible to the public because a member of the public who wants to view the document no longer has to travel to the courthouse. Anyone with an Internet connection can view the document, unless it is protected by a password or not made available on the Web site. Some courts have also limited access by requiring payment of a modest fee.<sup>68</sup> Otherwise, a viewer can examine the document at his or her leisure; it is no longer under the control of the clerk or the courthouse. The information that court documents might contain, such as Social Security numbers, birth dates, bank accounts, and other sensitive information, is now available "to any user with a Web browser and a modi-

66. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 764 (1989).

67. See, e.g., Jason Krause, *The Force of E-Filing*, A.B.A. J., Feb. 2006, at 54, 56 ("[E]-filing is mandatory in most bankruptcy courts, most federal courts and countless other jurisdictions . . . . The federal e-filing system is now in use in 82 district courts, 91 bankruptcy courts, the Court of International Trade and the Court of Federal Claims.").

68. See Kate Marquess, *Open Court?*, A.B.A. J., Apr. 2001, at 54, 57 ("Not all electronic systems allow complete public access. Some have built-in limits. For example, federal courts have authorized charging a fee for access to their Case Management/Electronic Case Files system . . .").

cum of curiosity,”<sup>69</sup> including identity thieves,<sup>70</sup> unless courts take steps to redact such information when making documents available on the Web.<sup>71</sup> Moreover, the viewer, without ever leaving his chair or computer, can click from one court Web site to other Web sites containing other pieces of information about a person, and can create a profile that, as a practical matter, would have been difficult to generate in the past.<sup>72</sup>

Not only is the reach of the electronic document far greater than the traditional paper copy, but any time a document that is supposed to remain sealed is mistakenly made public, the error is far harder, if not impossible, to correct. Once the document has been posted on the Web, it can instantly be viewed by millions of people. Thus, with new technology, the reach of “public” has expanded, and the consequences of any mistaken disclosure are far greater than when “public” meant an individual who went down to the courthouse, made her request to the clerk, and then returned the document to the clerk’s office when she had finished looking at it.

In light of this expanded sense of “public,” it is necessary for courts to create new procedural checks so that the chance of error is as small as humanly possible.<sup>73</sup> Just as the airline industry has developed multiple and duplicative checks to reduce pilot error, so too courts need to create such

69. *Id.*

70. For an example of the havoc that identity thieves can wreak, see Tom Zeller Jr., *Waking Up to Recurring ID Nightmares*, N.Y. TIMES, Jan. 9, 2006, at C3 (describing the plight of Raymond Lorenzo who has spent fifteen years trying to undo the damage caused by identity theft and who still has not succeeded “despite his many attempts to correct the record”).

71. See, e.g., Natalie Gomez-Velez, *Internet Access to Court Records—Balancing Public Access and Privacy*, 51 LOY. L. REV. 365, 437-38 (2005) (“Court systems should be encouraged to use the Internet to provide greater public access and transparency. . . . At the same time, courts should develop policies and practices that eliminate from public view (and perhaps from court records generally) high risk data elements that are not germane to the public purposes of access, while retaining discretion to safeguard sensitive information within public case records and proceedings.”); Sol Bermann, *Privacy and Access to Public Records in the Digital Age*, (Moritz College of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 62, 2006), available at <http://ssrn.com/abstract=899621> (recommending that public records are made available online but that sensitive personal information is redacted).

72. The *Chicago Tribune’s* Internet investigation of CIA employees, including many working undercover, recently revealed their “identities, workplaces, post office box addresses and telephone numbers . . . [based] entirely on public records, not private data.” John Crewdson, *Data Mining Easy As Using Credit Card*, CHI. TRIB., Mar. 12, 2006, § 1, at 19. The investigators noted that “[u]ntil recently, such public records represented a minimal threat to privacy, in large part because they were widely scattered in hundreds of libraries, city halls and courthouses around the country.” *Id.*

73. But see T.R. Reid, *Court Staff Errs Again in Bryant Case*, WASH. POST, July 29, 2004, at A2 (“The increasingly complicated legal wrangling surrounding the impending Kobe Bryant rape trial took another strange turn as court officials once again mistakenly released a sealed court document to the public. . . . [T]he court staff posted on the Internet a document that included [the alleged victim’s] name and some intimate details about her. It marked the third time that clerks at the small rural courthouse in Eagle, Colo., had mistakenly released sealed information to the public, in violation of court rules designed to protect the woman’s privacy.”).

checks to limit courthouse error because once the error is made, the harm is done, and it cannot be undone.

For example, most criminal court judges in Los Angeles require that the names and addresses of jurors who serve in criminal trials are sealed.<sup>74</sup> The purpose is to protect citizens who serve as jurors so that they feel that they are safe even when they sit on criminal cases involving drugs or gangs. The view is that jury service is demanding enough without jurors having to worry about retaliation from disgruntled parties or their associates. If names or addresses of jurors were mistakenly made available to the public via the Web, the mistake would be difficult to undo compared to a time when the hard copy of the voir dire transcript would have been made available to one individual at a time who would typically have to sign her name before being given the transcript. Jurors who had the expectation of privacy would find that expectation dashed, and this in turn might deter future jurors from serving. As it is, California has considerable difficulty in convincing citizens to respond to their jury summonses.<sup>75</sup> Thus, there is a need for additional safeguards in the clerk's office so that the chance of error is as small as possible.

This advance in technology, which has the benefit of allowing a far greater number of people to have access to legal documents, brings with it the concomitant responsibility of courts to make sure that documents that are not intended to be made public are not mistakenly revealed because the reach of the mistake is so much greater than it would have been in the age of paper documents. For example, Professor Marcus is even more concerned about the exchange of information during discovery with "[t]he advent of E-Discovery,"<sup>76</sup> where the exchange is made electronically rather than just with paper and is stored electronically. Whereas two parties ex-

74. See, e.g., Jerry Markon, *Judges Pushing for More Privacy of Jurors' Names*, WALL ST. J., June 27, 2001, at B1 (describing Los Angeles's "confidential juries" in which the jurors' "names and identifying information are withheld even after a verdict, but the names are shown to the lawyers during jury selection").

75. In California, failure to appear for jury duty is an act of contempt punishable by a fine of up to \$1000 and five days in jail. See Greg Moran, *When Jury Duty Calls: Counties Wrestle with High Evasion Rates*, CAL. LAW., May 2001, at 22. In Stanislaus County, for example, a "failure to appear" postcard follows an ignored jury summons, and if that does not elicit a response within ten days, then a uniformed marshal with an order to show cause can appear at the door. *Id.* In Los Angeles County, some prospective jurors who have ignored their jury summonses have been fined as much as \$1000.

76. Marcus, *supra* note 37, at 342; see *id.* at 339 ("The digital revolution magnifies the importance of these concerns about discovery . . ."). Professor Marcus explains that the information produced during discovery has also changed as a result of the Internet. With the exchange of e-mail, people's comments are likely to be more casual and made without the expectation that such comments will be public. Similarly, people's computers reveal information about them that they might be unaware of, such as sites that they have visited on the Web and drafts of documents that they subsequently revised, and all this information is discoverable because it is easier to store such information than it is to delete it. *Id.* at 343-44.

changing information by paper can keep that exchange private, it can be much harder to do so when the exchange is made by e-mail, which can easily, whether inadvertently or intentionally, be sent to myriad outsiders with just a click of the “send key.”

Some documents that might once have been made public when our notion of public was more limited might need to be reexamined given the way in which the concept of “public” has expanded. For example, divorce and custody disputes that take place in courtrooms are typically open to the public; the agreements reached, unless sealed, are also open to the public. If the documents from those proceedings are now available on the Web, then what was once understood as a private family matter, even though it made use of the public forum of the courtroom to resolve, is now open to millions of people. On the one hand, when divorce proceedings make public the extent of the perks that a former CEO of a public company received, as happened in the divorce proceedings of Jack Welch, one can argue that there is a benefit to the public in having access to this information.<sup>77</sup> On the other hand, if one’s child custody arrangements are now available on the Web, is this really to the benefit of the child? Were these private arrangements really meant to be the subject of public scrutiny? Moreover, does it simply mean that the rich will take their divorce and custody disputes to the more private setting of a mediator, while those with fewer financial resources will be left in state court with no chance of shielding their children from the public eye?<sup>78</sup> Finally, is this information about children involved in custody disputes now available to all members of the public, including those who would use it to prey on children who are vulnerable or at risk?

As the above example suggests, the balance between disclosure and privacy that was struck at one point might need to be altered at a later point when changes in technology have led to the information being shared beyond what anyone had ever envisioned. Or, it might be that in this age of

77. See, e.g., David T. Cook, *Enough Penance for Corporations?*, CHRISTIAN SCI. MONITOR, Dec. 31, 2002, at 1 (“2002 was a year of corporate scandals with details so bizarre they seemed like satire. . . . [O]n display: a corporate cost-cutting legend (former General Electric Chairman Jack Wel[c]h) whose angry wife revealed his retirement package included a \$9 million annual pension, round-the-clock access to a Boeing 737, and company-paid memberships to multiple golf clubs.”); Susan Reimer, *Interesting, If Not Pretty, When Rich Folks Divorce*, BALTIMORE SUN, Nov. 12, 2002, at 1E (“Take, for example, the contretemps between former General Electric boss Jack Wel[c]h and his soon-to-be ex-wife, Jane Beasley Welch. . . . [T]he affidavits [Jack Welch] had to file also revealed his perks-for-life deal with GE: An apartment in Trump Tower, plus all costs associated with it: furniture, food, wine, flowers, cook, wait staff, housekeeper, laundry, dry-cleaning, subscriptions, postage and an open tab at the restaurant on the ground floor.”).

78. See, e.g., Marcus, *supra* note 37, at 338 (“Given the disclosure consequence of pursuing divorce through the public courts, in California some wealthy petitioners simply make use of private judges for their divorces in order to maintain confidentiality.”).

reality television, with the further blurring of the private and the public, we have come to expect that information that was once regarded as private is now properly within the public domain no matter how large that domain has become.

Advances in technology, such as electronic filing of court documents, also could serve as the impetus for courts to rethink steps that they once took to cut down on the number of documents that were being filed because they lacked the space to store all those pieces of paper. Andrew Goldstein and Professor Kotkin note that Rule 5(d)<sup>79</sup> was amended in 2000 to stop the filing of discovery documents because clerks and courthouses were being overwhelmed by paper.<sup>80</sup> Professor Kotkin argues that with the advent of electronic filing, courts no longer have to worry about storage space, and thus, the rule should be amended. Her view is that if documents such as deposition transcripts and interrogatory answers are filed with the court as they had been before storage space became a concern, then they will be subject to public disclosure as they had been in the past and will no longer be presumed to be confidential.<sup>81</sup>

### III. DECIDING WHO DECIDES

In light of the competing interests and the changing needs, one response is to have decisions about privacy or disclosure made on a case-by-case basis so that each decision can be narrowly tailored to the particulars of the case. This suggests that judges should make these decisions because they have the particulars of the case before them. They might make these decisions on an individual basis or they might respond as a body and institute rule changes. Another alternative is to have legislatures make these decisions through the passage of statutes so that judges do not have to decide on an ad hoc basis and do not feel under pressure to do what parties want to the detriment of the interests of the public.

#### A. *Judicial Responses*

The advantage to having judges make decisions about whether discovery exchanges, settlement agreements, or some other document should be sealed is that judges have the particulars of the case before them. Arguably, they are in the best position to decide because they oversee the litigation.

79. FED. R. CIV. P. 5(d) (“[D]iscovery requests and responses must not be filed until they are used in the proceeding or the court orders filing . . .”).

80. See Goldstein, *supra* note 44, at 411; Kotkin, *supra* note 31, at 582.

81. See Kotkin, *supra* note 31, at 582–83.

Appellate judges could develop a test to give guidance to lower court judges as to when it is appropriate for lower court judges to seal a document at the parties' behest. Professor Erichson suggests one such test for unfiled documents exchanged during discovery.<sup>82</sup> Dr. Reagan's empirical study of which documents tend to be sealed suggests that judges have already developed some practices; they tend to seal settlement agreements, but not very often,<sup>83</sup> and they do not typically seal complaints<sup>84</sup> or docket sheets.<sup>85</sup> When they do seal settlement agreements, it tends to be the amount of the settlement that is kept under seal.<sup>86</sup> Yet, Dr. Reagan expressed concern that "there often is an insufficient public record of what is sealed and why."<sup>87</sup> Certainly, the easier cases are the ones that raise an issue of public health or safety; in such cases, judges will be reticent about sealing the settlement agreement.<sup>88</sup>

The disadvantage to leaving such decisions to judges, particularly as they contend with overcrowded dockets and busy calendars, is that judges are under pressure to move cases off their docket. For federal judges, this pressure comes from the *Federal Rules*<sup>89</sup> and from Congress.<sup>90</sup> If the parties want to settle, which means the case will be removed from the judge's docket, then there is pressure on the judge to agree to seal the settlement if

82. See Erichson, *supra* note 2, at 367–68.

83. See Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 452 (2006) ("[W]e determined that of the 288,846 civil cases terminated in 2001 or 2002 in the fifty-two study districts, 1,270 had sealed settlement agreements, which is 0.44%—less than one-half of one percent.").

84. See *id.* at 458 ("In 97% of the cases in which we found sealed settlement agreements the complaint was not sealed.").

85. See *id.* at 452 ("[T]ypically the only part of the court record kept secret by a sealed settlement agreement is the amount of settlement.").

86. See *id.* at 460 ("In general, however, the only thing kept secret by the sealing of a settlement agreement is the amount of settlement.") (citation omitted); *id.* at 462 ("What our research shows is that . . . the seals typically keep secret only the amounts of settlement.").

87. *Id.* at 461.

88. See, e.g., Joseph F. Anderson, Jr., *Foreword: Secrecy in Litigation: The Healthy Debate Continues*, 81 CHI.-KENT L. REV. 301, 302 n.3 (2006) (citing two recent cases in which the judges did not permit the record to be sealed because the cases "arguably involved conduct that transcended the immediate conflict and impacted the public interest"); Marcus, *supra* note 37, at 331; Reagan, *supra* note 83, at 439 (using a hypothetical in which a corporation sells a product that injures consumers and the parties reach a settlement agreement and want that agreement to be sealed).

89. See FED. R. CIV. P. 16 (encouraging judges to meet with the parties and to facilitate settlement).

90. See 28 U.S.C. §§ 471, 476 (2000) (encouraging judges to move cases along and putting judges under pressure to do so by having their names put on a list if they do not decide motions and bench trials within a certain amount of time); 28 U.S.C. §§ 651–658 (2000) (allowing judges to encourage, if not require, that certain cases proceed to ADR).

that is what it will take for the case to be removed from the docket.<sup>91</sup> While the parties press their privacy interests to have the settlement agreement sealed, there might be no one to voice the public's interest to make the agreement available to the public.<sup>92</sup> A judge, accustomed to relying on the adversarial system for opposing viewpoints, has to provide her own arguments on behalf of the public, though as Andrew Goldstein argues, judges have little incentive to do this.<sup>93</sup>

This pressure on the individual judge can be somewhat alleviated if the judiciary provides a rule that governs how judges are to respond when faced with parties' requests to seal certain documents. As Chief Judge Anderson suggests in his *Foreword*<sup>94</sup> and explained more fully in an earlier article,<sup>95</sup> a judicial rule may avert a more draconian or inflexible legislative response.<sup>96</sup> Accordingly, some courts, particularly federal courts,<sup>97</sup> have stepped in with rules that govern the sealing of settlement agreements or other documents. For example, in the federal district of South Carolina, where Chief Judge Anderson serves, the judiciary implemented a rule that provides as follows: "No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule."<sup>98</sup> Although the rule seems absolute, it applies only when parties seek judicial approval for their settlement, and another rule provides "an escape valve"<sup>99</sup> anytime litigants can show "good cause."<sup>100</sup> The rule, when combined with the good cause escape valve, may still not deter individual judges from sealing settlement agreements any more than if there had been no rule in place,<sup>101</sup> though it will at least give the judge reason to pause, if not to say no to the request.

91. See, e.g., 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) ("Judges face incredible pressure to go along with court-ordered secrecy in the heat of battle.").

92. The press or intervenors should be able to voice the public's perspective, but as Andrew Goldstein explains, they do not always have the knowledge or opportunity to do so. See Goldstein, *supra* note 44, at 431, 434, 436.

93. See *id.* at 379.

94. See Anderson, *supra* note 88, at 302.

95. See Anderson, *supra* note 91.

96. See Anderson, *supra* note 88, at 302 ("Perhaps even more importantly, the judiciary must take steps to keep its own house in order, lest the political branches foist upon the judicial system draconian rules for open court records that even public access proponents admit go too far.").

97. See Reagan, *supra* note 83, at 444 ("In the state courts, sealing is generally a statutory matter. In federal courts, it is generally a matter of local rule."). Dr. Reagan found that "[o]f the ninety-four federal district courts, forty-seven districts (50%) had local rules concerning the sealing of court records in civil cases." *Id.*

98. D.S.C. LOCAL R. 5.03(E).

99. Anderson, *supra* note 91, at 722.

100. See D.S.C. LOCAL R. 1.02 ("For good cause shown in a particular case, the Court may suspend or modify any Local Civil Rule.").

101. See Goldstein, *supra* note 44, at 393-94.

Rule 76a, put into effect by the Texas Supreme Court<sup>102</sup> under pressure from the Texas legislature,<sup>103</sup> provides standards for judges to follow in deciding whether to seal a document. It also requires a party seeking the sealing of a court record to file a written motion with the trial court that is available on the court's public docket<sup>104</sup> as well as to post the notice of motion with both the trial court and the Texas Supreme Court.<sup>105</sup> The public notice allows those who want to intervene for the purpose of challenging the request to seal to do so. Andrew Goldstein reports that these rules have not led to more cumbersome procedures or multiple intervenors, as originally feared, and instead, the rules have deterred parties from routinely requesting that judicial information be sealed, as indicated by the dwindling number of requests.<sup>106</sup>

However, these Texas rules have been less successful when applied, in Goldstein's phrase, to "litigant-centered information," which includes information exchanged by parties during discovery (whether filed with the court or unfiled) as well as to settlement agreements. Rule 76a applies to unfiled discovery of special interest to the public, but the broad language of the rule led the appellate court to require the trial court to decide whether "good cause" existed to enter the protective order, which left parties in the position of being able to "contract around Rule 76a's application to unfiled discovery."<sup>107</sup> Parties were simply able to stipulate that none of the documents constituted "court records" under Rule 76a, which made it difficult for the trial court to address the issue and for outsiders to intervene.<sup>108</sup> The Texas Supreme Court has since made it even harder for third-parties to gain access to the unfiled discovery.<sup>109</sup>

### B. Legislative Responses

Some state legislatures<sup>110</sup> have passed statutes that limit when settlement agreements or other documents filed in court can be sealed by court order. Andrew Goldstein notes that Florida, Louisiana, Texas, Virginia, and

102. See TEX. R. CIV. P. 76(a)(1) (2004).

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

104. See TEX. R. CIV. P. 76(a)(3).

105. See *id.*

106. See Goldstein, *supra* note 44, at 399–400.

107. *Id.* at 421.

108. See *id.* at 421–22.

109. See *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 521–22, 524–26 (Tex. 1998); Goldstein, *supra* note 44, at 422–23.

110. Dr. Reagan found that "[i]n the state courts, sealing is generally a statutory matter." Reagan, *supra* note 83, at 444. He also found that twenty-nine states had statutes or rules governing the sealing of court records in civil cases. *Id.*

Washington have passed anti-secrecy provisions, while New Jersey has passed a law requiring that certain information in medical malpractice cases be made available.<sup>111</sup> For example, Florida passed a “Sunshine in Litigation Act” in 1990 that provides that “no court shall enter an order or judgment” that conceals a “public hazard.”<sup>112</sup> One advantage to legislative action is that it is more likely to produce uniformity in judicial practice compared to when judges simply exercise their discretion. Another advantage is that it relieves individual judges of having to decide whether a document should be sealed. In most instances, such legislation bans such court orders. In addition, legislators are able to weigh the interests of parties to settle matters with the interests of the public to have access to information on matters of public concern, and legislators are not limited to the presentation provided by the parties, as a judge is, but can hear from myriad members of the public and special interest groups who want to weigh in on the subject. Thus, the legislature is able to have more input from more segments of society before drafting a statute than the judge who has usually only two parties before her, sometimes supplemented by the views of intervenors or amici.<sup>113</sup>

Although on one level such statutes bring simplicity to an area otherwise plagued by uncertainty, on another, more practical level, such statutes have not proven to be a panacea thus far. As Andrew Goldstein’s research reveals, the statutes do not always work as intended.<sup>114</sup> With the Florida statute, parties have figured out ways around it. One problem is that there is ambiguity in the language of the statute. For example, what constitutes a “public hazard”? As Professor Kotkin laments, employment discrimination is usually not seen as a “public hazard.”<sup>115</sup> Another problem is that it is unclear at what stage the law applies. Does it apply during discovery or only after a public hazard has been found after trial? Goldstein found that Florida’s statute was rarely applied, and similar laws in Washington and Louisiana met a similar fate.<sup>116</sup> New Jersey’s more narrowly written law, which requires information about any medical malpractice award whether reached through judgment or settlement to be posted on the Web as part of

111. See Goldstein, *supra* note 44, at 380 n.27.

112. FLA. STAT. § 69.081(3) (2004).

113. *But see* Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 882–83, 886 (N.J. 2004) (rejecting the request of Consumers for Auto Reliability and Safety to intervene in a products liability action and to have the protective order vacated or modified because “[t]he universal understanding in the legal community is that unfiled documents in discovery are not subject to public access”).

114. See Goldstein, *supra* note 44, at 430–34.

115. Kotkin, *supra* note 31, at 586.

116. Goldstein, *supra* note 44, at 425–26, 431–33.

every practitioner's profile,<sup>117</sup> might be, as Andrew Goldstein suggests, more difficult for parties to maneuver around, but at the same time, it does not allow for any balancing of competing interests.<sup>118</sup>

Although the legislation enacted thus far has not always worked as intended, this does not mean that such legislation should be abandoned. Professor Resnik, for example, recommends a multifaceted approach, in which judges are guided by rules that are "information-product[ing]"<sup>119</sup> and legislatures exercise oversight over "the power of parties and judges either to enable information generation through courts or to inhibit that potential."<sup>120</sup>

#### IV. CONTINUING THE DEBATE

##### A. *Clarifying the Terms*

Although this symposium issue does not provide any easy answers, the writers do advance the debate. They do this in several ways. First, they bring some clarity to the debate. It is important to understand that the debate embraces different documents at different junctures in litigation and alternative dispute resolution. For example, Professor Marcus focuses on the documents that are exchanged by the parties and not filed with the court during the discovery process.<sup>121</sup> His view is that these documents should be kept private and that there should be no presumption of public access to them.<sup>122</sup> Professor Erichson shares this view but would require the parties seeking to keep these documents confidential through a protective order to make a relatively light showing of good cause.<sup>123</sup> On the other hand, Chief Judge Anderson focuses on settlement agreements that the parties want the judge to seal.<sup>124</sup> He wants judges to resist sealing such agreements and to avoid giving the court's imprimatur to such private arrangements. Chief Judge Anderson would help judges to resist by implementation of rule changes that deter such sealing particularly in cases where there is a strong public interest in access to the information.<sup>125</sup> Professor Kotkin, who fo-

117. See N.J. STAT. ANN. § 45:9-22.22(a), 23(a)(10) (West 2004).

118. Goldstein, *supra* note 44, at 434.

119. Resnik, *supra* note 27, at 560.

120. *Id.* at 565.

121. See *supra* text accompanying notes 37–38.

122. See *supra* text accompanying notes 37–38.

123. See *supra* text accompanying notes 39–43.

124. See *supra* text accompanying notes 94–101.

125. See Anderson, *supra* note 88, at 302 ("Although I have generally been a proponent of open court records in cases such as those described above, I recognize that compelling countervailing arguments can be made.").

cuses on the loss to the public and to future plaintiffs when parties settle privately in employment discrimination cases, would have such settlement information be made public at least in the aggregate.<sup>126</sup>

Second, several of the contributors have undertaken empirical work to establish how commonplace it is for documents to be sealed and how effective judicial rules and legislative statutes have been to limit such sealing. Dr. Reagan, in his empirical study of sealed settlement agreements, looked at how often the sealing of settlement agreements occurs. He found that settlement agreements are not sealed very often, and even when they are sealed, other documents in the case remain available to the public.<sup>127</sup> Thus, his research suggests the need to look beyond the settlement agreement, even if it is sealed, to see what the public can learn about a case from other documents on file with the court and open to the public. Yet, the accessibility of these other documents did not assuage his concerns entirely. He concluded: “My impression after reviewing many hundreds of case files for this project is that, although the sealing of settlement agreements in federal courts is considerably less frequent than many people fear, there often is an insufficient public record of what is sealed and why.”<sup>128</sup>

Andrew Goldstein, in his review of some state efforts, including those of Texas, Florida, Louisiana, Washington, and South Carolina, found that even when legislatures passed sunshine laws or judiciaries implemented rule changes to limit sealed settlement agreements, lawyers and parties often found ways to negotiate around these laws or rules so that they did not accomplish their stated purposes.<sup>129</sup>

Third, a number of contributors challenge commonly-held views about the public’s access or lack of access to litigation and alternative dispute resolution. Their efforts should convince readers to reexamine their assumptions because not all litigation is open and not all alternative dispute resolution is private, and not all openness is good and not all privacy is bad. Professor Doré shows that while most of adjudication is open to the public and most of ADR is kept confidential, these generalizations are not true at all stages of these processes.<sup>130</sup> She also suggests that some of the justifications for public scrutiny during adjudication are equally applicable to

126. See Kotkin, *supra* note 31, at 589–90.

127. See *supra* text accompanying notes 83–87.

128. Reagan, *supra* note 83, at 461.

129. See *supra* notes 111–14, 116–18 and accompanying text.

130. See, e.g., Doré, *supra* note 28, at 501–10 (describing ways in which courts can review arbitration confidentiality).

ADR.<sup>131</sup> Professor Resnik explains that to see the issue as “adjudication versus ADR” is to miss the critical point that “privatization is occurring on both sides of that equation” and that “affirmative action” needs to be taken in all of these processes.<sup>132</sup>

### B. *Starting Small*

In light of the loopholes in legislation and the escape clauses in the judicial rules, one approach is to start small with pilot projects. One example is the Chicago judges’ project that Professor Kotkin recommends<sup>133</sup> and that Professor Resnik notes.<sup>134</sup> This project was first described in an article by Judge Morton Denlow, a magistrate judge of the U.S. District Court for the Northern District of Illinois, and Jennifer E. Shack, Director of Research for the Center for Analysis of Alternative Dispute Resolution Systems in Chicago.<sup>135</sup> They recount how magistrate judges in Chicago created a settlement database to which they can refer when presiding over settlement conferences and which allows the judges to give guidance to parties by showing what similar cases have settled for in the past.

Judge Denlow and Ms. Shack offer some nuts-and-bolts advice for creating such a database with the hope that judges in other districts will adopt this practice. They describe a five-step process for building a settlement database.<sup>136</sup> The process begins with judges deciding which categories of cases to track, such as employment discrimination, civil rights, and personal injury, and then deciding what other case information needs to be collected. The judges then design a settlement report that a judge can complete in under five minutes after a settlement has been reached. Finally, it takes about one hour each month for a staff or other person to enter the settlement reports into the database and generate a monthly settlement report. This report can aid judges in several ways: it helps them to prepare for a settlement conference; it allows them to indicate to the parties what past comparable cases have settled for, while preserving party anonymity; and it reassures parties that they are settling for a reasonable amount, particularly

131. *See id.* at 482 (“The opaque environment of ADR, . . . however, raises concerns similar to those posed by court secrecy and thus jeopardizes legitimate public interests in disclosure.”) (footnote omitted).

132. Resnik, *supra* note 27, at 569.

133. *See* Kotkin, *supra* note 31, at 587–88.

134. *See* Resnik, *supra* note 27, at 553 n.127.

135. Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, *JUDGES’ J.*, Winter 2004, at 19.

136. *See id.* at 20–21 (describing five-step process).

when one or both parties do not have experience with such cases.<sup>137</sup> Potentially, the database will allow judges to discern patterns, such as the best point in the litigation process at which to begin settlement talks.

The authors suggest that the data might be made available to the public,<sup>138</sup> and their suggestion is a good one. Although this pilot project does not address the question whether settlement agreements should be made public or kept private, this project does provide a good vehicle for making public information that is otherwise unavailable to the public, and for doing so without compromising the privacy of the parties. This project addresses some of the concerns that Professor Kotkin raises, such as the absence of this information in the public domain, which, in turn, limits lawyers' abilities to bring such cases in the future and limits the public's knowledge of how prevalent these cases are.<sup>139</sup> This pilot project takes as its starting-point the assumption that settlement agreements are here to stay, and tries to figure out how to provide judges, lawyers, and parties with information that they need to settle cases in an informed way. The next step is to make this data available to the public so that it can assess how well the settlement process is or is not working.<sup>140</sup>

#### CONCLUSION

The essays that follow explore different strands of the public/private debate in litigation and ADR. Contributors focus on different stages of litigation and/or alternative dispute resolution and the benefits and harms of disclosure or privacy at particular junctures in these processes. They come out on different sides of the issue, depending upon from whose perspective they view it, at what point in time, and how they balance the competing interests. Several contributors also urge that the system of resolving disputes, whether by judge, arbitrator, or some other neutral third-party, be

137. *See id.* at 21–22.

138. *See id.* at 22 (“Given the importance of the data, courts might develop mechanisms to make this information available to the public to facilitate evaluations.”).

139. *See supra* note 50 and accompanying text.

140. In the tax context, the Internal Revenue Service has, pursuant to a court order, provided audit data to a statistician, Professor Susan B. Long, for the past thirty years. She has made this data available to the public on her Web site and has analyzed it and issued reports. One article described her efforts as follows: “Much of what the public knows about the efficiency, effectiveness and evenhandedness of the revenue service and other big federal agencies is based on the figures that Professor Long collects and posts.” David Cay Johnston, *I.R.S. Is Sued on Failure to Release Tax Data*, N.Y. TIMES, Jan. 10, 2006, at A19. Recently, however, the I.R.S. refused to provide the data to Professor Long in spite of the federal court order. *Id.* (“In May 2004, the service told [Professor Long] that it would not provide the information and ordered its statisticians to stop answering her questions.”). She has had to return to court to ask it to enforce its order. *See* Editorial, *What Is the I.R.S. Trying to Hide?*, N.Y. TIMES, Jan. 17, 2006, at A18.

viewed in its entirety so that we realize that changes in one setting might affect changes in another. My hope is that these essays will assist the reader by providing an array of thoughtful views and will advance “the healthy debate”<sup>141</sup> by clarifying terms, challenging assumptions, and evaluating reforms.

141. Anderson, *supra* note 88, at 301.