



# DANGEROUS S E C R E T S

C O N F R O N T I N G  
C O N F I D E N T I A L I T Y  
I N O U R P U B L I C C O U R T S

2020 FORUM FOR STATE APPELLATE COURT JUDGES



FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.





# DANGEROUS SECRETS

CONFRONTING  
CONFIDENTIALITY  
IN OUR PUBLIC COURTS

2020 FORUM FOR STATE APPELLATE COURT JUDGES



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“In order to foster public confidence in judicial decisions,  
open proceedings and open records should be the default.

How can one have confidence in the decision  
unless one can view the bases for that decision?”

—*A judge attending the 2020 Forum*

“This calls for a serious balancing of interests,  
with heavy weight given to the public interest.”

—*A judge attending the 2020 Forum*

“The question is not ‘Are you fair?’, but ‘Are you just?’  
Judges have a responsibility to their office  
as well as to the public.”

—*A judge attending the 2020 Forum*



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# FOREWORD

The Pound Civil Justice Institute’s twenty-eighth Forum for State Appellate Court Judges was held on July 11, 2020. As with all of our past forums, it was both enjoyable and thought-provoking. In the Forum setting, judges, practicing attorneys, and legal scholars considered crucial issues related to confidentiality in our public courts.

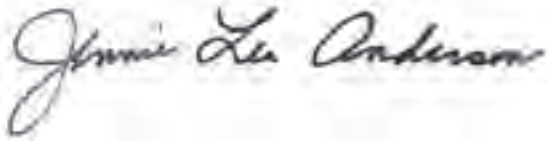
The Pound Institute recognizes that state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is inevitably fruitful. Forum participants always bring different points of view with them, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute’s Fellows. That diversity of viewpoints emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court-funding crisis to the decline of jury trial, to separation of powers, rulemaking, forced arbitration, judicial transparency, state constitutionalism, and aggregate litigation. We are proud of our Forums, and are gratified by the growth in interest and attendance we have experienced since their inception, as well as by the very positive comments we have received from judges and faculty members who have participated. A full listing of our prior Forums is provided in an appendix to this report, and their reports and research papers—along with most of our other publications—are available for free download on our website, [www.poundinstitute.org](http://www.poundinstitute.org).

The Pound Institute is indebted to many people for the success of the 2020 Forum:

- Professors Dustin Benham and Sergio Campos, who wrote and presented the papers that started our discussions;
- Honorable John R. Fisher, of the District of Columbia Court of Appeals, who welcomed the attending judges to the Forum;
- Our lunch keynote speaker, Reuters correspondent Dan Levine, for a fascinating account of the recent Reuters investigation into secrecy in the courts;
- Our panelists—Professors Seth Endo and Minna Kotkin, the Honorable Erin A. Nowell and the Honorable John Cannon Few, Emily Coughlin, Ellen Reisman, Jennifer Bennett, and Chris Placitella;
- The moderators of our small-group discussions—Janet Abaray, David Arbogast, Linda Atkinson, Leslie Brueckner, Kathryn Clarke, Brenda Fulmer, Eric Gibbs, Raymond Jones, Mark Kitrick, Florence Murray, Christopher Nace, Gail Pearson, Ben Siminou, Gerson Smoger, and Peggy Wedgworth; and
- The Pound Civil Justice Institute’s dedicated and talented staff: Executive Director Mary Collishaw, who overcame the unprecedented challenges of the COVID-19 pandemic to organize and execute a successful remote conference; and Forum Reporter Jim Rooks.

Most of all, we appreciate the participation of the distinguished judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your consideration of matters relating to confidentiality in litigation.

A handwritten signature in black ink that reads "Jennie Lee Anderson". The signature is written in a cursive, flowing style.

Jennie Lee Anderson  
President, Pound Civil Justice Institute, 2019-2020

# INTRODUCTION

On July 11, 2020, 70 judges, representing 25 states and the District of Columbia, as well as academics and attorneys, took part in the Pound Civil Justice Institute’s twenty-eighth annual Forum for State Appellate Court Judges. For the first time ever, because of the nationwide pandemic, the Forum was conducted remotely, with attending judges, academics, and attorneys viewing the presentations via a dedicated online platform, and with judges participating in discussion groups online.

The judges examined the topic “Dangerous Secrets: Confronting Confidentiality in Our Public Courts.” Their deliberations were based on original papers written for the Forum by Professor Dustin Benham of Texas Tech University School of Law (“Foundational and Contemporary Court Secrecy Issues”), and Professor Sergio Campos of the University of Miami School of Law (“Confidentiality in the Courts: Privacy Protection or Prior Restraint?”). The papers were distributed to participants in advance of the meeting, and the authors made less-formal presentations of their papers to the judges during the video plenary sessions.

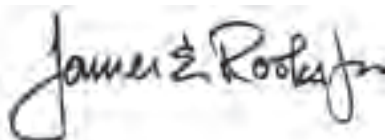
The paper presentations were followed by discussion by panels of distinguished commentators: Professor Seth Endo of the University of Florida Levin College of Law; the Honorable Erin A. Nowell of the Fifth District Court of Appeals in Dallas, Texas; attorneys Emily Coughlin and Jennifer Bennett; Professor Minna Kotkin of Brooklyn Law School; the Honorable John Cannon Few of the Supreme Court of South Carolina; and attorneys Ellen Reisman, and Chris Placitella.

The judges also heard a lunchtime keynote address by Reuters Correspondent Dan Levine of San Francisco, speaking on the topic “A Full Accounting: How Transparency in the Courthouse Can Help the Country America Heal.”

After each plenary session, the judges participated in small group discussions, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators joined the groups to share in the discussion and respond to questions. The common ground achieved during the discussion groups, as well as any new concepts, appear in the “Points of Convergence” section of this report.

At the concluding general session, all of the Forum faculty had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Benham and Campos, on accounts of discussion group moderators, and on the transcripts of the Forum’s general sessions.



James E. Rooks, Jr.  
Forum Reporter



# WELCOME REMARKS

## The Honorable John R. Fisher

### District of Columbia Court of Appeals

Good morning and welcome to this forum presented by the Pound Civil Justice Institute. This is the 2020 Forum for State Appellate Court Judges. I am told that it is the first virtual forum that the institute has presented. I am fearful to say this, but it may not be the last.

Why am I here to welcome you? That was a lot easier to explain a few months ago when the plan was that we would all gather in the District of Columbia in a hotel conference room and I would welcome you on behalf of the District of Columbia Court of Appeals. As with so many things over the last few months, plans have had to change. But I nevertheless am pleased to be here to welcome you on behalf of our court, the highest court of the District of Columbia. Unless you think I have delusions of grandeur, I said highest court of the District of Columbia. We are not the highest court in the District of Columbia, as you well know.

Our court is different in many ways. Some people say we are strange. We are created by act of Congress. Our judges are appointed by the President of the United States. But we function as a state appellate court, as you folks do.

In that vein, I am pleased to invite you to today's topic, which should be very interesting: confidentiality in our public courts. We talk a lot these days about the values that courts serve. We talk a lot about transparency. We talk about access to justice. In these days of virtual court proceedings, we also need to keep in mind that the public has a right to attend most court proceedings.

I happen to live and work in a town where it seems that nothing remains secret very long. It also seems that things do not remain confidential very long. But it is important that we remember that, along with transparency and the public's right of access in the proper context, confidentiality can be an important value for the courts to serve.

Again, welcome. Enjoy the forum. And by all means, please stay well.

**It is important that we remember that, along with transparency and the public's right of access in the proper context, confidentiality can be an important value for the courts to serve.**



## Foundational and Contemporary Court Confidentiality

Dustin B. Benham, Texas Tech University School of Law

### EXECUTIVE SUMMARY

*In his Introduction, Professor Benham asserts that “an integrated confidentiality system now pervades American dispute resolution.” The system has been created over decades by legislatures, court rule makers, and courts themselves. Although confidentiality advocates have argued that the availability of confidentiality outweighs potential harm to the public, Benham points to the increasing body of evidence that information critical to public health and safety has been kept secret, often with direct involvement of the courts. The current trends toward the use of aggregate litigation suggest that, left unchecked, court secrecy will spread even more widely throughout the litigation system.*

*In Part II, Professor Benham describes the current confidentiality regime, including the incentives for parties to participate in it. Courts tend to cooperate with party-offered solutions that will not overly tax court resources and will move cases along. Avoiding or expediting discovery disputes is a high priority for all actors in the process, leading to willing acceptance of confidentiality in exchange for information that can make the case. Some confidentiality is achieved through private agreements, some with the involvement of the court, and some results from other long-accepted, ingrained practices developed over years. Benham describes confidentiality measures leading to more and more secrecy, with secret settlements being the inevitable end-point. Such settlements sometimes conceal important information about the litigation and parties.*

*In Part III, Professor Benham considers the existing limitations on court confidentiality, both de jure and de facto. They include First Amendment guarantees, limitations imposed by state contract law, state limitations on confidentiality related to sexual harassment claims (“#metoo sunshine”), various anti-secrecy statutes (like Florida’s Sunshine in Litigation Act), state and local court rules adopted to keep court proceedings transparent, and even a federal tax law provision which makes sexual harassment settlements with annexed non-disclosure agreements non-deductible.*

*Professor Benham also proposes some alternatives. The first would require that courts (in their own interest) involve themselves more in reviewing proposed secrecy arrangements. But beyond that, following a close reading of *Seattle Times v. Rhinehart*, he advocates “Constitutionalizing” the “good cause” requirement for protective orders (which, he notes, “silence people”). Finally, Benham argues that more filed materials that are relevant to a court’s exercise of judicial power should be afforded the presumption of public access.*

*In conclusion, Professor Benham argues that sunshine laws or other reforms must address the “actual player incentives in litigation.” They must recognize that secrecy undermines the legitimacy of the courts. And they must treat protective orders and sealing orders for what they are: speech restraints. Public safety and perceptions of court legitimacy justify the inevitable increased burdens on the courts. This is a vital concern for both appellate courts and trial courts—especially those overseeing aggregate litigation, whose orders can affect thousands of cases at once.*



## INTRODUCTION

An integrated confidentiality system now pervades American dispute resolution. This system was created over the course of decades by legislatures, rule makers, and courts. Proponents of confidentiality have long justified the system by claiming that the benefits of withholding litigation information outweigh any potential public harm. Recent evidence, uncovered by an extensive media investigation, undermines this premise.<sup>1</sup> In some of the most

**In some of the most important public-harms cases of the past two decades, critical health and safety information was kept secret in court files.**

important public-harms cases of the past two decades, critical health and safety information was kept secret in court files. People died in the meantime. It has also become apparent that consolidating cases in multi-district litigation has the potential to accelerate and homogenize confidentiality nationally.<sup>2</sup> The recent evidence of these trends is concerning and would prompt any conscientious observer to reconsider the status quo.

This Article will first consider the structure and impact of court confidentiality. Much of the current system is driven by inertia, tradition, and player incentives (in addition to formal rules). Next, the paper examines some of the existing limitations on court confidentiality and proposes a few alternatives.

### Current Structure and Impacts of Court Confidentiality

The current system arose from player incentives. These incentives keep many disputes out of court altogether, settled pursuant to private (but court enforceable) confidentiality agreements or submitted to private arbitration. For disputes that do make it into a court, a web of procedural rules, traditions, repeat-player relationships, and litigant preferences provide ready confidentiality. Largely absent from the creation or operation of these systems is the public.

#### A. Confidentiality Incentives

A vast amount of litigation information is kept from public view, temporarily or permanently. This veil of secrecy justifiably obscures benign, private information—social security numbers, medical records.<sup>3</sup> But it also conceals information critically important to public safety—the identity and location of pedophile priests, the poisoning of a water supply, dangerous automobiles.<sup>4</sup> While specific reasons for keeping information confidential vary from case to case, player incentives have driven confidentiality into the DNA of modern American litigation.<sup>5</sup>

Much litigation, and pre-litigation, is asymmetrical, and the incentive relationship is driven, at least in part, by this asymmetry. In the personal injury, employment, civil rights, and other contexts, defendants typically have superior resources and superior access to information. Plaintiffs may have little to no resources, and many may rely to a great extent on the resources of an attorney retained on a contingent fee. Another asymmetry: defendants often face repeating claims over the same or related conduct.<sup>6</sup> Distributing thousands of products, supervising thousands of employees, or employing policies that affect thousands of people can create a significant volume of litigation.<sup>7</sup> Plaintiffs, on the other hand, are typically in a one-off situation, litigating a single case over a single injury (though their attorneys may have multiple similar cases).<sup>8</sup>



In this reality, several incentives drive parties to keep information confidential. First, corporate defendants want to avoid the reputation harm, and related commercial injury, caused by the release of confidential information.<sup>9</sup> This is true even if the defendant has a potential defense to a claim (for instance, its product is not actually dangerous) because of the risk that the media or public might misconstrue the information. Second, defendants are incentivized to stifle similar claims, even if those claims are meritorious.<sup>10</sup> Assuming a repeating case context, potential claimants could feed off information from the first case or other similar cases.<sup>11</sup> More cases to defend means more money in defense costs and judgment liability. Additionally, more cases—particularly meritorious cases—will likely cause more reputation injury. Third, the defendant company will have a strong incentive to protect its intellectual property.<sup>12</sup> To the extent the design of a product or information about a process is valuable (often a fiercely debated question in products-liability litigation involving older, “stale,” products), its public disclosure could eviscerate its value.<sup>13</sup>

**Several incentives drive parties to keep information confidential.**

Plaintiffs also have potentially strong incentives to keep litigation information—even defendants’ information—secret. Because defendants are often significantly incentivized to keep litigation information from the public, the plaintiff who obtains such information holds something of value to sell back to the defendant at settlement.<sup>14</sup> Indeed, parties to a settlement often exchange money for, e.g., a promise of silence from the plaintiff.<sup>15</sup> But the value in this type of bargain can only be realized if the information at issue is not generally known. For if the information were widely known, a defendant would never pay to keep it secret. Thus, plaintiffs have an incentive to develop the maximum amount of damaging information, keep it secret in the interim, and then sell that secrecy back to defendants for money.<sup>16</sup>

Moreover, confidentiality in the case may also suit the plaintiff’s reputational interests. Imagine, for instance, that the plaintiff’s toxicology screens at the time of the injury showed that the plaintiff had cocaine in her system. A plaintiff would almost certainly want to keep this information from public view. Additionally, the plaintiff will need to obtain discovery to litigate her claim. Agreeing to broad confidentiality may make this easier. According to some, opposing confidentiality sets up grueling discovery fights with defendants who might otherwise offer to produce information in exchange for a “standard” protective order.<sup>17</sup>

**The typical players, in the typical case, simply are not incentivized to litigate in public.**

In most litigation, this leaves one final player to account for—the court. And courts, like litigants, have incentives to keep information confidential.<sup>18</sup> At the outset, there is the idea—true or not—that defendants will more vigorously contest discovery in the absence of confidentiality. Many courts loathe discovery fights, and prefer the lubricating effect of a blanket protective order.<sup>19</sup> Moreover, courts are incentivized to resolve cases on their dockets, and confidentiality has been recognized as an aid to settlement.<sup>20</sup> Additionally, many

judges work admirably as stewards of the public interest but nonetheless see their primary role as resolving individual cases on the merits.<sup>21</sup> Many are reticent to facilitate media investigations or be a public repository for scandalous information.<sup>22</sup>

Thus, the typical players, in the typical case, simply are not incentivized to litigate in public.

Absent from the typical case are the players *with* incentives to make litigation information public.<sup>23</sup> This includes the media, citizen action groups, and even government.<sup>24</sup> These groups represent the public's interest in knowing about danger and public malfeasance. Such groups can intervene and seek the release of litigation information.<sup>25</sup> But the standards for succeeding in such an endeavor can be daunting.<sup>26</sup> The cost of litigation is high, beyond the reach, in many cases, of media and public-interest organizations. Beyond the cost, perhaps the biggest hurdle to third-party intervention is that third parties simply do not know what they do not know about confidential litigation.<sup>27</sup>

It is true that the basic factual allegations (in most cases) will be publicly available in the complaint,<sup>28</sup> but the media is aware that those allegations require little corroboration in advance of filing.<sup>29</sup> Without access to proof, sorting the wheat from the chaff in the court system is quite difficult.<sup>30</sup> Thus, while the media and the public have incentives to seek access to information important to public safety and governance, the practical hurdles to doing so remain quite high. As a result, third-party intervention remains relatively infrequent.

## **B. Off Ramps: Avoiding Public Access Rights Through Private Agreement**

Pre-incident non-disclosure agreements (“NDAs”) and arbitration agreements keep much important information out of court and out of public view. Arbitration agreements, and some NDAs, are part of adhesion contracts that precede any incident that might give rise to dispute. Sometimes, court rules even suggest or require the practice.<sup>31</sup>

Pre-incident NDAs effectively muzzle potential claimants—often employees with a harassment claim—and arbitration agreements remand entire disputes to a private forum. These disputes are routinely settled, also on a promise of secrecy, or litigated to a conclusion in private arbitration.<sup>32</sup> Often, no public docket or document exists to alert the public that a dispute ever happened. Similarly, post-incident NDAs are often coupled with settlement agreements to keep potential litigation information secret in exchange for money.<sup>33</sup>

The impact of this trend has been exceedingly visible in a parade of recent sexual misconduct cases.<sup>34</sup> In many of these cases, powerful potential defendants reportedly used NDAs and settlement agreements leveraged upon less-powerful claimants to keep information about alleged misconduct secret.<sup>35</sup> In several cases, the alleged misconduct continued for decades, often under the shield of contractual secrecy promises.

The impact of pre-litigation confidentiality agreements may never be fully known. Many of these arrangements take place in lawyers' offices, leaving no trace in court files and courtrooms. And potential defendants are quite adept at structuring the agreements to keep the disputes permanently out of public view.<sup>36</sup> Some NDAs include provisions for payments over years. Presumably, a breach of the contract's secrecy provision would stop the payments, giving the victim a strong incentive to remain silent. Other agreements include a requirement that the claimant execute an affidavit denying that the potential defendant committed the alleged misconduct.<sup>37</sup> Upon breach of the secrecy provision, the affidavit could be paraded through the press, or court, to discredit the alleged victim's allegations. Some agreements have reportedly included provisions for electronic device and email password turnover, apparently to ensure that all evidence of misconduct ends up in the possession of the potential defendant's lawyers, presumably to be secured or destroyed.<sup>38</sup>

All the while, the public has no seat at the table in structuring these private agreements—indeed the public, in many cases, does not know the table exists.<sup>39</sup> In the current status quo, repeat offenders are allowed to repeat so long as they have the wealth and sophistication to craft an adequate contract.<sup>40</sup> Several states have passed new

laws to restrict these practices, as discussed in more detail in Section III.A.3, below, but some question their efficacy.<sup>41</sup>

Sexual misconduct cases, sadly, are the tip of the iceberg of widespread confidentiality agreements affecting public health and safety.<sup>42</sup> Potential defendants often have no reason to alert anyone to potential risks, and claimants are fearful of the implications following a breach, often having faced long odds to get a fair settlement in the first place.<sup>43</sup>

**The public has no seat at the table in structuring these private agreements—indeed the public, in many cases, does not know the table exists.**

### C. The Ball Rolls Down the Hill: Tradition, Inertia, and Confidentiality

Once a case is filed, tradition and inertia also drive litigation confidentiality. Like a ball rolling down a hill, confidentiality is injected into cases early, usually in the form of a stipulated protective order, and often gathers enough speed to overcome legal hurdles meant to stop pervasive secrecy later.<sup>44</sup>

#### 1. Easy Access to Protective Orders

Early in litigation, procedural rules, widespread local practices, and player expectations work together like a well-oiled machine to keep unfiled discovery confidential.<sup>45</sup> In jurisdictions across the country, courts have standing (or “suggested”) protective orders.<sup>46</sup> The orders often include provisions that allow the parties themselves to designate discovery material as “confidential.”<sup>47</sup> In some cases, using these “umbrella” provisions, parties designate entire document productions, entire deposition transcripts, or engage in other blanket designation practices. Umbrella confidentiality designations preclude disclosure absent a party challenge.<sup>48</sup> But for reasons already discussed, parties are often unmotivated to engage in these contests on behalf of the interests of an absent public. Indeed, many protective orders even forbid disclosure to government authorities, including regulators tasked with overseeing the specific product or risk at issue in the case.<sup>49</sup>

Even when courts do not enter a standing protective order, parties routinely stipulate to confidentiality to keep discovery moving.<sup>50</sup> Like the standing orders, many agreements involve umbrella provisions that conceal anything designated by a party.<sup>51</sup> The parties often agree to protective orders supported by thin or non-existent proof of good cause. Courts enter them because the parties have agreed. Courts have enough disputes to resolve without routinely questioning agreed matters.

**Courts have enough disputes to resolve without routinely questioning agreed matters.**

The General Motors (GM) ignition litigation is a stark example of the impact of protective orders. General Motors manufactured cars with ignitions that sometimes inadvertently slipped into a mode that limited maneuverability and disabled the airbags simultaneously.<sup>52</sup> Over 100 people died as a result, and many more were injured.<sup>53</sup> Sadly, GM knew of the defect for years, did not timely recall the vehicles, and did not adequately disclose the issue to regulators.<sup>54</sup> All the while, litigation involving the ignition issue rolled on in courts around the country.

Eventually, after litigation uncovered damning documents showing GM knew of the problem and did not take relatively inexpensive measures to remedy it, the company conducted an investigation and recalled hundreds of thousands of vehicles.<sup>55</sup> Still, broad protective orders concealed information—from the public and regulators—relevant to the ignition problem. In 2014, a lawyer representing the parents of a dead 29-year-old ignition-related-

crash victim revealed some of the information to regulators, despite being bound by a protective order.<sup>56</sup> Shortly after, GM expanded the recall by millions of vehicles, and multiple investigations ensued. GM ultimately entered into a deferred prosecution agreement and paid \$900 million to resolve criminal charges.<sup>57</sup>

But the ignition scandal was not the first case involving widespread harm and risk hidden by protective orders. In the Ford/Firestone affair, a combination of defective tires and unstable SUVs created a dangerous rollover risk that killed or injured hundreds of victims.<sup>58</sup> The first cases settled in the early 1990s while protective orders kept pertinent information out of the hands of the public and regulators. Then, almost a decade later, the media published information leaked from litigation.<sup>59</sup> A recall and investigations ensued, but in the meantime, people died in rollovers.

Protective orders are not limited to the defective vehicle context. In a particularly painful example of litigation-confidentiality harms, priests sexually abused children while litigation involving the abuse of other children was hidden by court order.<sup>60</sup> In 2013, after initial resistance, the church agreed to release documents that had been subject to a protective order.<sup>61</sup> The information, involving the Archdiocese of Milwaukee, documented decades of sexual abuse of children and the actions of an archbishop to move church money to avoid paying sexual assault victims' claims.<sup>62</sup>

Protective orders are typically applicable to unfiled discovery. As the examples above show, this information—filed or not—can concern issues of grave importance and have significant public safety implications. But it is often exchanged between the parties, by their attorneys through physical (or now more commonly electronic) exchange. Much discovery never makes its way into court files, and as a result the process gives courts a step of remove from the unseemly business of warehousing secret information that could save lives.<sup>63</sup> The information is in lawyers' offices and on lawyers' servers. But as cases march forward, some discovery information does make its way into court files via motion practice.<sup>64</sup>

## 2. Ubiquitous Protective Orders Lead to Pervasive Sealing

Protective orders often make sealed filings the default. The orders, supported by good cause alone, cannot keep discovery confidential once filed. So they sometimes require filing all protected information under seal or forbid filing protected material without first seeking a sealing order for the material.<sup>65</sup> At this point, courts could technically reject the sealing request. But the request will likely be unopposed and routinely granted.<sup>66</sup>

**Protective orders often make sealed filings the default.**

In this way, protective orders create a ball-down-the-hill effect at the next, arguably more pernicious, stage in litigation confidentiality. Information in public court files has historically been just that—public.<sup>67</sup> But inertia from the first order—granted on the relatively undemanding “good-cause” standard—is easy to see. The court granted the order in the first place, deeming material confidential. And based on that confidential status, the confidential materials *must* be filed under seal or not be filed at all. The materials for which a party seeks sealing have already been marked as “confidential” under the court-ordered scheme. In many instances, no party has challenged the designation. Moreover, court filings, particularly those directly on the merits of the case, may contain damning information.<sup>68</sup> The stakes of allowing public disclosure of this material can be quite high. And the court’s protective order has already kept it from public view, making the court complicit to some degree in the interim secrecy and public harms that may have resulted. It is easy to see why a court that signed a protective order would not want to eviscerate protection for the very materials the order had kept confidential.<sup>69</sup>



Meanwhile, the parties have been habituated to the confidentiality regime—in both the particular case and in the system at large. In exchange for easier discovery, one or both of the parties has often agreed to a protective order. Information was turned over and designated “confidential.” For a variety of reasons, the party receiving the information often has little incentive to challenge the confidentiality designations. When it comes time to file protected documents, parties comply with an order requiring they be filed under seal, filed with a request for sealing, or directing they not be filed at all.<sup>70</sup> At this stage in the litigation—often with pressing merits fights heating up—the attorneys may simply view protected materials as legitimately confidential or simply overlook the harder road of contesting presumptive sealing.

Moreover, common protective-order practices infect sealing practice. Sealing court records is usually a decision reserved to the court. But some courts have entered sealing orders that apparently delegate court-record sealing power to litigants, mirroring umbrella protective-order practices.<sup>71</sup>

A recent example involved the Jeffrey Epstein matter. Epstein, along with several associates, was accused of sexual impropriety with multiple alleged victims.<sup>72</sup> His associates strongly denied wrongdoing, and one of the accusers sued one of the alleged wrongdoers for defamation. Discovery ensued. “Due to the volume of sealing requests filed during discovery . . . the District Court entered a Sealing Order that effectively ceded control of the sealing process to the parties themselves.”<sup>73</sup> Indeed, the “Sealing Order disposed of the requirement that the parties file individual letter briefs to request sealing and prospectively granted all of the parties future sealing requests.”<sup>74</sup>

Following the sealing order, the parties filed many motions under seal, including a motion for summary judgment, responses, and related exhibits. The district court denied summary judgment in a 76-page opinion. The *opinion* itself was heavily redacted to keep secret the information the parties had decided to seal. The Second Circuit ultimately, and rightly, rejected the district court’s approach for reasons discussed in Section III.D, below.<sup>75</sup>

Excessive sealing has also infected national multi-district litigation, comprising thousands of cases. For example, in the national opiate litigation, over 1,300 public entities sued drug manufacturers and distributors for billions in costs related to the opioid crisis.<sup>76</sup> According to the plaintiffs, consumers were prescribed opioids at dangerous levels, leading to serious injury and death. The over-prescription problem flowed from, for example, misleading marketing about dosage timing.<sup>77</sup> Indeed, documents tending to establish the drug was mis-marketed were produced in factually related West Virginia litigation as early as 2004, filed in court, but sealed from public view.<sup>78</sup> In the intervening years, thousands have died from prescription opioids.<sup>79</sup>

**Excessive sealing has also infected national multi-district litigation, comprising thousands of cases.**

In the MDL litigation, the court allowed defendants to file pleadings and motions pertaining to the drug’s dangers under seal.<sup>80</sup> Ultimately, the court of appeals reversed the district court’s refusal to lift the seal for media intervenors and remanded for further consideration. But in the meantime, more deaths undoubtedly occurred while documents exposing the source and nature of the public health danger remained hidden.<sup>81</sup>

This episode highlights a growing problem. MDLs consolidate litigation comprising thousands of individual cases. And sealing orders restrict access to court records in many, if not all, of them. This trend is particularly

troubling when considering the growth of MDL litigation to resolve national drug and products cases. By one estimate, more than 50% of the entire federal civil docket is now resolved through MDL litigation.<sup>82</sup> Thus, one judge often has the power to secret away a court file that touches major national issues impacting public health and safety.

One longstanding argument against court-transparency reform is that, empirically, there is no problem to reform.<sup>83</sup> A recent Reuters investigation seems to provide substantial evidence to the contrary. In a seminal explication of the there-is-no-problem position, Professor Arthur Miller queried, “[i]s it true that protective orders and court seals keep information regarding public health and safety hidden?”<sup>84</sup> Answering his own question, Professor Miller wrote, “[t]hus far, assertions to that effect have been supported primarily by anecdotal evidence; research or statistical data is completely nonexistent.”<sup>85</sup> As Professor Miller apparently acknowledged in an interview last year, the Reuters analysis “helps fill that void.”<sup>86</sup>

The Reuters bombshell investigation examined the implications of MDL sealing rulings.<sup>87</sup> It found that “judges sealed evidence relevant to public health and safety in about half of the 115 biggest defective-product” MDLs.<sup>88</sup> Indeed, in 31 of the 115 cases, judges sealed entire arguments that addressed the merits of cases. In 85 percent of the MDL cases where judges sealed health and safety information, judges provided *no* explanation for the sealing.<sup>89</sup>

Astonishingly, in 31 of the cases Reuters analyzed, *entire* motions were filed under seal.<sup>90</sup> This included sealed complaints, summary judgment motions, *Daubert* motions, class certification motions, and motions in limine.<sup>91</sup>

**Assuming no one is interested or successful in challenging the sealing order, significant evidence of public danger may not come to light.**

In many instances, those types of filings may be the only place where the nature and strength of evidence supporting allegations of danger are aired. Take, for instance, summary judgment motions. If a sealed summary judgment is granted, the claims resolved are not tried. Assuming no one is interested or successful in challenging the sealing order, significant evidence of public danger may not come to light.

Imagine the inverse—the motion for summary judgment is denied and the case is headed to trial. At trial, for both practical and legal reasons, it becomes much more difficult to keep evidence from public view.

This reality increases pressure on defendants inclined toward secrecy to settle cases after losing dispositive motions.<sup>92</sup> And it gives the plaintiff increased leverage to demand money in exchange for a confidential settlement because the risk of public disclosure increases at the trial stage.<sup>93</sup> Of course, there are other reasons to pay to avoid trial (e.g. attorney’s fees and the risk of judgment exposure, including the possibility of a punitive damage award). But the possibility of adverse trial publicity for information kept confidential through dispositive motion practice puts pressure on defendants to settle . . . confidentially.

### 3. Secret Settlements

One of the most potent post-filing tools to keep litigation information confidential is the settlement agreement. Parties can agree to a wide variety of terms, including provisions to keep all information learned in the case confidential in perpetuity, return or destroy case information, or seek agreed sealing for additional portions of the record. Some agreements may have enforcement teeth in the form of payouts over time or liquidated damages provisions.

The settlement agreement itself may have important information with public danger implications. Theoretically, it is possible for a party to admit fault directly in a settlement agreement, though it would be rare. More commonly, both sides deny fault in the terms of the agreement and recite standard language that they are settling to avoid the uncertainty and inconvenience of litigation. But even in the absence of a direct admission of fault, settlement agreements may contain strong circumstantial evidence of fault.<sup>94</sup> This circumstantial evidence could include the amount paid to settle, terms that require changes in products or practices, contractually mandated apologies, or even mandatory therapy requirements for alleged sexual predators.<sup>95</sup> This evidence circumstantially, though not necessarily, speaks to the strength of the claimant's case and might serve as corroboration for the allegations of public harm and danger.

But public access to settlement agreements is limited, and many are kept secret by practical or judicial considerations. In some cases, the actual settlement agreement is not filed with the court. In most circumstances, courts dismiss cases upon the agreed request of the parties.<sup>96</sup> The agreement is not filed and only put before the court in the event of a breach as part of a contract action. When settlement agreements are filed, at least one analysis suggests that they are not often sealed (though the amount of settlement is sometimes sealed).<sup>97</sup> But a federal judge, familiar with local rulemaking in the court-confidentiality context, suggests that docket analysis may not reveal the full extent of the practice.<sup>98</sup>

**Public access to settlement agreements is limited, and many are kept secret by practical or judicial considerations.**

## Limitations on Court Confidentiality

Publicly funded courts routinely bless agreements or issue orders that keep lifesaving information from the public. What then are the limits on the parties to contract for secrecy? What are the limits on court power to order it?

This Section examines and proposes reforms to the limitations on litigation confidentiality in three different contexts: private confidentiality agreements, protective orders governing unfiled discovery, and sealing orders governing access to information in court files.

### A. Limitations on Private Confidentiality Agreements

Confidentiality by agreement pervades dispute resolution.<sup>99</sup> It is interwoven into the fabric of litigation. Though putatively “private,” these agreements rely, in some measure, on the existence of public court-enforcement power for their efficacy. This Subpart will consider current limitations on that power and propose reforms to enhance “sunshine” laws.

Potential limitations on private confidentiality agreements flow from a few sources, including the First Amendment, state contract law, statute, court rule, and even federal tax law. “Potential limitations” is the appropriate phrase because private confidentiality agreements are broadly enforced, even in cases where they conceal information critical to public health and safety. This is true even though a few states have attempted to limit private confidentiality for issues of public importance through “sunshine” statutes.

## 1. The First Amendment

If a party breaches a secrecy agreement by revealing confidential information, the party seeking enforcement may seek damages for breach or an injunction.<sup>100</sup> Both remedies invoke court power, through either a damages award in an enforceable judgment or an order that a party breaches at the peril of contempt. Either of these scenarios, most particularly an injunction against speech, would seem to implicate the First Amendment.<sup>101</sup>

Despite the appearance of state action against speech, however, courts may treat confidentiality agreements as content neutral, or treat the agreement as a waiver of First Amendment rights, or some combination of both.<sup>102</sup> At least one scholar, however, has posited that enforcing certain confidentiality agreements may be subject to strict scrutiny as content-based speech regulation.<sup>103</sup> This approach would obviously invalidate many secrecy agreements, but has not found widespread traction in courts.

## 2. Contract Law

Even if the state has the constitutional power to enforce confidentiality agreements, should it? Courts have long refused to enforce contracts that violate public policy. The Restatement of Contracts (First) forbade contracts

**Even if the state has the constitutional power to enforce confidentiality agreements, should it? Courts have long refused to enforce contracts that violate public policy.**

that concealed crimes.<sup>104</sup> The Restatement (Second) omits that particular provision but refers to the Model Penal Code provision that forbids compounding, a misdemeanor which criminalizes, e.g., accepting money to conceal crimes.<sup>105</sup> Most civil frauds and environmental violations also involve crimes, and agreements exchanging money to conceal them would, facially at least, be criminal compounding.<sup>106</sup> The Model Penal Code, however (mirroring the litigation status quo), provides an affirmative defense exempting agreements that compensate victims for harm flowing from the criminal conduct.<sup>107</sup> The breadth of this defense is less than certain, and if an agreement

provided for compensation beyond the reasonable value of the harm (i.e., it compensated not just for the injury but also paid hush money), it might trigger criminal liability.<sup>108</sup>

## 3. #MeToo Sunshine

In the wake of several high-profile sex assault scandals, and in response to the #MeToo movement, several states have moved to limit confidentiality agreements and orders.<sup>109</sup> As described in more detail above, wealthy alleged perpetrators used NDAs to silence victims and, capitalizing on the secrecy, allegedly victimized more women.<sup>110</sup> The statutes place various limitations on NDAs in the sexual harassment context, with one state (New Jersey) rendering the agreements unenforceable.<sup>111</sup> Some of the laws restrict only confidentiality agreements in the context of filed lawsuits, leaving the agreements available pre-suit.<sup>112</sup> Other states make the agreements available at the request of the victim.<sup>113</sup> While these statutes are a step forward, the patchwork approach is sub-optimal. One proponent of the legislation, acknowledging criticism that the laws did not go far enough, observed that “we got only half a loaf.”<sup>114</sup>

## 4. Traditional Sunshine Legislation

For years, transparency proponents have advocated for “sunshine” statutes.<sup>115</sup> And several states have attempted statutory solutions to court secrecy problems.<sup>116</sup> For example, Florida’s Sunshine in Litigation Act, arguably the broadest such law, forbids private agreements and court orders that conceal public hazards.<sup>117</sup> For decades,



a federal Sunshine in Litigation Act has been introduced but never passed.<sup>118</sup> Despite the admirable efforts of sunshine advocates, the laws in their current form have largely failed to stem the court secrecy problem.<sup>119</sup>

The primary reason the laws have failed is that they are not self-executing, and parties are often not incentivized to invoke them. Likewise, courts are not obligated, under most current sunshine statutes, to raise sunshine limitations *sua sponte*.<sup>120</sup> Even if the issue is raised, courts are reticent to declare that the subject matter of pending litigation is a “public hazard” early in the litigation process.<sup>121</sup> Doing so has implications for the merits of the case, and many courts understandably want to reserve questions about whether a product, for instance, is dangerous for the merits stage. Many cases settle before courts get that opportunity, and the settlement often leaves no one at the table with an incentive to advocate for sunshine. Moreover, the definition of “public hazard” is amorphous and excludes entire classes of cases that deserve sunshine (like economic frauds).<sup>122</sup>

Further, some sunshine statutes (inevitably the product of legislative “sausage making”) exempt “confidential” commercial information from their reach.<sup>123</sup> This category of information may encompass the dangerous design of a product or a company process that leads to widespread harm.<sup>124</sup> And some of the statutes only apply to final settlement agreements, leaving parties free to agree to secrecy in the interim and couple it with a promise to return-or-destroy any discovery before final settlement ever occurs.<sup>125</sup>

Sunshine statutes and rules are a step in the right direction. But the laws need to be broadened to be effective. I propose some solutions in Section III.B, below.

**Sunshine statutes and rules are a step in the right direction. But the laws need to be broadened to be effective.**

## 5. Federal Tax Law

One promising new avenue to limit harmful confidentiality arose in the Tax Cuts and Jobs Act, passed in 2017. In a little-noticed provision, the law limited tax deductions for sexual harassment settlements made subject to nondisclosure agreements.<sup>126</sup> Specifically, the law disallowed deductions for “any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney’s fees related to such a settlement or payment.”<sup>127</sup> One commentator has noted several issues with the law as written, including the fact that victims may not be allowed to deduct the attorney’s fees they paid to obtain the award.<sup>128</sup> But sunshine via tax policy, as opposed to traditional sunshine efforts, is more likely to beget compliance because of the substantial penalties companies and persons face for non-compliance.<sup>129</sup>

## B. A Proposal for Brighter “Sunshine”

Private agreements to keep information obtained through litigation confidential should be illegal.<sup>130</sup> This does not mean that litigation information should never be kept confidential—indeed, a wide swath *should* be confidential. My proposal is simply that the parties cannot agree to such confidentiality without involving the court. The court should be out of the business of rubberstamping explicit or tacit confidentiality agreements.

Courts and litigation have historically played a significant role in exposing injustice, corruption, and public hazards.<sup>131</sup> It is true that discovery often takes place in private and without direct court involvement.<sup>132</sup> Indeed, it often takes place in lawyers’ offices and on private servers, not in the courthouse. But little to no discovery would ever take place without court power standing behind litigants to enforce rules that make the process mandatory. Thus, it is with the force of law, and the imprimatur of courts, that discovery takes place.

And likewise, the taint of scandal that flows from discovery secrecy gone wrong, especially when it results in serious public harms, stains those very institutions.<sup>133</sup> Moreover, the public funds the court power behind both the discovery and the adjudicative process. The public deserves to know, as a general proposition, how that power is being used, whom it shields, and whether corruption or favor has entered the process.<sup>134</sup>

**The public funds the court power behind both the discovery and the adjudicative process. The public deserves to know, as a general proposition, how that power is being used, whom it shields, and whether corruption or favor has entered the process.**

The court simultaneously has the most to lose, should be accountable to the public, and is in the best position to consider the public interest. The non-court actors in the process come to resolve a private dispute and, ordinarily, act in their own self-interest without much regard for countervailing considerations.<sup>135</sup>

What does it mean, though, to forbid an “agreement” to keep discovery information confidential? Parties in litigation might agree in several different ways. First,

parties might enter into an explicit oral or written agreement to keep information confidential. Second, parties might stipulate to confidentiality in court papers. Third, parties could simply agree not to oppose a motion for a protective order or some other confidentiality device. Fourth, parties could putatively oppose a motion for confidentiality but secretly, or even with a “wink wink,” agree not to vigorously contest the motion. The proposal I suggest would be primarily focused on eliminating the first and second forms of agreement and require all confidentiality issues to come before the court for decision. The law cannot force parties to vigorously oppose and litigate matters that they have no incentive to litigate. But by requiring the court’s involvement—whether or not the parties actively oppose confidentiality—the instances in which sunshine is appropriately applied to litigation materials will increase.

The subject-matter scope of this proposal is quite broad in one way—*all* litigation information. But the context is, in many senses, narrow. The restriction on private confidentiality agreements would not reach agreements outside the litigation context. There may be reasons to make entire categories of confidentiality agreements illegal as contrary to public policy, whether they involve litigation information or not, but that is beyond the scope of my proposal.<sup>136</sup>

The restriction I describe would simply require courts to decide whether the fruits of discovery should be kept confidential. To do so, courts would employ the protective-order powers granted them by Rule 26(c).<sup>137</sup> Good cause exists, and courts would have ample power to protect, e.g., legitimate trade secrets, some proprietary and competitive information, many medical records, and personal identifying information.<sup>138</sup> On the other hand, there is often little good reason to protect the identities of pedophiles, the existence of environmental contamination, and other public hazards.<sup>139</sup>

In a world of busy court dockets and judges who detest discovery fights, what incentive would courts have to assiduously examine requests for confidentiality? Won’t the parties (at least tacitly) agree not to contest each other’s requests, leaving the system in much the same place it is now? The answer is to craft a framework that requires, and documents, judicial involvement irrespective of the wishes of the parties.

In this regard, the latest iteration of the yet-to-be-passed federal Sunshine in Litigation Act has positive features.<sup>140</sup> The act requires judges to make independent fact findings supporting confidentiality.<sup>141</sup> Beyond the

independent-findings requirement, judges should be required to *detail* their reasoning for granting or denying confidentiality requests. Moreover, judges should, where appropriate, be required to go beyond the pleadings in the case to assess the putatively confidential materials at issue. Confidentiality orders should be written to maximize the exposition of fact finding and reasoning while minimizing any redactions in the order itself.<sup>142</sup>

**Judges should be required to detail their reasoning for granting or denying confidentiality requests.**

One big practical question surrounding a no-private-confidentiality-agreement system: how do courts go about fact finding to support umbrella protective orders that delegate confidentiality designations to the parties? These orders are ubiquitous.<sup>143</sup> One can see why courts would find them desirable—in an era of e-discovery, cases can involve the exchange of millions of documents. Courts simply do not have the resources to turn each page of these productions by hand to resolve confidentiality issues.

But, for reasons discussed below, these orders (absent a stipulation) violate Rule 26(c) and the First Amendment. Judges should not despair, however, because technology and other procedures may alleviate page-by-page burdens on courts without delegating, wholesale, confidentiality determinations to the parties. The problems with umbrella orders in a no-private-confidentiality-agreement environment, and potential solutions, are discussed in Section III.C.iii.2, below.

Another potential problem with outlawing private confidentiality agreements for information obtained through litigation: what does it mean to *obtain* information through litigation?<sup>144</sup> It means, at a minimum, information exchanged in response to a formal discovery request, including at deposition. Formal discovery in a pending case, even if conducted outside the four walls of the courthouse, takes place by virtue of federal or state law subject to the enforcement power of the court. Information exchanged through this mechanism should be squarely within a prohibition against private confidentiality agreements.

If the private-confidentiality-agreement prohibition were limited to formal discovery, however, parties would be incentivized to exchange information informally, by oral or written agreement. To counter this, information “obtained” in litigation should be broadly defined, and should also include the informal exchange, between parties to civil litigation, of information that is relevant to the claims or defenses in the case.<sup>145</sup>

Another problem that might arise in a no-private-confidentiality litigation system could be hidden or shadow agreements. In addition to keeping litigation information confidential, parties could agree to keep the existence of the confidentiality agreement confidential. Even if the law voided such agreements, the parties often have major incentives (as discussed above) to pursue broad secrecy, even when it comes at the expense of the public. Incentives to invoke sunshine laws to void confidentiality agreements are quite weak in many instances. Thus, though technically illegal, hidden confidentiality agreements could still be a potent source of secrecy.

To counter this potential issue, an effective sunshine law should provide for civil sanctions against anyone who enters into an illegal agreement.<sup>146</sup> The civil sanctions regime could be made quite effective by requiring certifications during litigation. For instance, Rule 41 allows for the parties to stipulate to a dismissal, and parties invoke it to end cases when they settle.<sup>147</sup> The rule could be amended to require parties seeking such a dismissal to certify in writing that they have made no illegal confidentiality agreements covering information obtained in litigation.<sup>148</sup> Even outside the dismissal context, Rule 16 could be amended to require parties to certify at pretrial that they have not entered into any confidentiality agreements covering litigation information.<sup>149</sup>

False certifications would violate multiple procedural rules and be subject to the sanctions power of the court. The sanctions imposed for violations would contemplate the circumstances but should target culpable actors and be at a level sufficient to discourage illegal confidentiality. Moreover, an attorney who made a false certification would be subject to professional discipline. Model Rule of Professional Conduct 3.3, among others, forbids lawyers from “mak[ing] a false statement of fact” to a court.<sup>150</sup>

**If the parties are incentivized to secrecy, and if the public has no right of access to unfiled discovery, won’t information remain secret even if no order requires it be kept secret?**

All of this raises bigger fundamental questions: If the parties are incentivized to secrecy, and if the public has no right of access to unfiled discovery, won’t information remain secret even if no order requires it be kept secret? And doesn’t this reality cut against the point of sunshine in the first place—protecting the public? My response to this concern is two-fold. First, it is not that the parties have *no* incentives to make

litigation information public. In fact, many people desire to prevent the harm that has befallen them from hurting someone else. But where confidentiality agreements are available, the parties often are incentivized to trade money for secrecy. When that bargain becomes illegal, the desire to protect the public through disclosure may yet win out. Second, protecting the public is not the *only* point of sunshine legislation. Another purpose is extracting the court from the illicit market in harmful confidential information.

Beyond disincentivizing judges, parties, and attorneys from engaging in, or ratifying, illegal confidentiality arrangements, an effective sunshine law would also properly incentivize third parties who act on behalf of the public interest.<sup>151</sup> Media intervenors and public interest groups are often in the best position to expose wrongdoing to the broader public.<sup>152</sup> But, as discussed above, resource constraints and incentives often deter them from intervening.<sup>153</sup>

At the outset, a proper sunshine law needs to account for the problem of “unknown unknowns.” Information asymmetry is a strong practical limitation working against third-party intervention—the organizations that would intervene simply do not know the nature of the materials kept secret and thus are not properly incentivized to uncover it. Some state sunshine laws already require public posting of sealing orders.<sup>154</sup> But in the intervening decades, technology has made a central repository of information about protective orders and sealing orders feasible. New sunshine laws should create such a repository for the respective court system in which they apply. The repository would aggregate basic case and order information and make it publicly accessible at no charge. Additionally, by court and jurisdiction, the courts should publish comprehensive statistics regarding protective and sealing orders.

More information would be a first step, but intervenors still face other resource constraints. Accordingly, a proper sunshine law should provide for intervenor attorney fees and costs in successful interventions, at least where parties resist the intervention to maintain confidentiality.<sup>155</sup> This would disincentivize meritless party opposition to transparency. On the other side of the balance, the threat of an attorney’s fee award against an intervenor would be a substantial deterrent to intervention, so the law should limit or eliminate awards against good faith intervenors. Meritless interventions would still be disincentivized by laws and rules prohibiting frivolous filings. But intervenors would not be chilled by the risk of an adverse attorney’s fee award in close cases.



Banning private confidentiality for litigation materials would make the system more transparent and extricate courts from illicit confidentiality bargains. Effective sunshine laws should take an approach that recognizes the power of party incentives to agree to secrecy, the taint that flows to courts from these agreements, and the public harm that flows from them.<sup>156</sup>

**Banning private confidentiality for litigation materials would make the system more transparent and extricate courts from illicit confidentiality bargains.**

## C. A “New” Limitation on Court-Issued Protective Orders

The primary limitation on confidentiality orders for unfiled discovery is Rule 26(c), and coupled with stipulations and courts seeking streamlined discovery, it has not been much of a limitation. At least part of the trend toward broad secrecy surrounding unfiled discovery is rooted in courts’ discretion in fashioning protective orders. Indeed, the Supreme Court has characterized this rule-based discretion as “broad.”<sup>157</sup>

Protective orders, however, are court orders that silence people. Indeed, they bear a striking resemblance to classic prior restraints, subject to strict scrutiny. Nevertheless, some courts have read the First Amendment out of the protective-order framework entirely.<sup>158</sup>

I contend, as I have elsewhere, that a First-Amendment-less approach ignores critical language in *Seattle Times v. Rhinehart*, the Court’s seminal protective-order case.<sup>159</sup> Rather than holding that the First Amendment did not apply to Rule 26(c) protective orders, the court held—at a minimum—that “where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c) . . . it does not offend the First Amendment.”<sup>160</sup> I have gone further, in previous work, and contended that the best reading of *Seattle Times*, in light of the Court’s subsequent statements regarding the case, invites lower courts to apply intermediate scrutiny to individual protective orders.<sup>161</sup>

For the sake of discussion, let us table the question of whether intermediate scrutiny applies and instead focus on a narrower reading of *Seattle Times*: a protective order unsupported by good cause violates the First Amendment. What are the likely implications of this reading? Before we turn to this question, it would be good to briefly examine the history of the First Amendment and protective orders.

### 1. The History of the First Amendment and Protective Orders

As pretrial litigation and discovery continued to evolve after the adoption of the civil rules, the Second Circuit held that the First Amendment did not apply to pretrial protective orders.<sup>162</sup> This version of the world prevailed for a decade or so. Then, in a decision that sent ripples round the litigation world, the D.C. Circuit applied the First Amendment to invalidate a protective order.<sup>163</sup> In *In re Halkin*, the court examined an order in a case where the government was alleged to have wrongfully monitored anti-war activists who opposed the Vietnam war.<sup>164</sup> The court applied strict scrutiny and struck it down. A few years later, the First Circuit examined a protective order in a case involving allegations of politically motivated assassinations carried out by the police.<sup>165</sup> The court applied a modified version of strict scrutiny to uphold the order, in part, on First Amendment grounds. Commentators criticized the decisions as imperiling the discovery process, and the Supreme Court soon had a chance to weigh in with *Seattle Times*.<sup>166</sup>

The case involved unique facts and competing First Amendment considerations.<sup>167</sup> Keith Rhinehart led a religious sect called the Aquarian Foundation. Over the course of years, the *Seattle Times* and *Walla Walla Union-*

Bulletin published several articles exposing unflattering details about the foundation and Rhinehart. According to the papers, Rhinehart led seances, supposedly communicated with the dead, expelled stones from his body, consorted with Incredible Hulk star Lou Ferrigno, and held concerts at a prison where his female followers allegedly danced nude.<sup>168</sup>

Upset with the coverage, Rhinehart filed a libel suit in Washington state court. Discovery ensued, and the newspapers sought information about the foundation's membership and donors.

According to Rhinehart, the newspapers had stated their intention to use discovery information in upcoming articles.<sup>169</sup> After some pretrial wrangling, the trial court granted a protective order with respect to member and donor information. The order forbade "publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case."<sup>170</sup>

*Seattle Times* presented a collision of First Amendment interests. The case involved a media defendant in a defamation action, with status of the "press," pitted against a religious organization with interests in freely exercising its faith. The information at issue pertained to individuals' associations with one another in a religious context, and to the financial affairs of a religious entity. The order at issue, in virtually every respect, appeared to be a prior restraint limiting the dissemination of specific content under the threat of contempt. And all of this took place after a court compelled production of the sensitive information in the first place.

***Seattle Times* presented  
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Ultimately, Justice Powell, writing for the court, observed that "the crucial question that this case presents is whether a litigant's freedom [of speech] comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used."<sup>171</sup> Critically, Justice Powell also wrote that "[i]t is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this court."<sup>172</sup>

The court thus recognized that protective orders restrict speech about discovery information but also that discovery was a special context. A look at the case and related materials also suggests that the approach was the product of compromise to hold a unanimous, though ideologically fractured, court together for largely pragmatic reasons.

A few things are clear from Justice Powell's majority, and a few things are left muddled. It is clear that the First Amendment played some role in the Court's analysis—the opinion says as much and even cited the intermediate scrutiny test in evaluating the lower court's actions.<sup>173</sup> On the other hand, it is equally clear that the First Amendment does not provide a right of *access* to discovery materials for litigants.

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analysis.**

To understand *Seattle Times*, it is important to distinguish between the right to *access* discovery materials and a person's right to *disseminate* materials obtained through the "legislative grace" of the discovery rules.<sup>174</sup> The Court had previously recognized the public's First Amendment right to access "court records."<sup>175</sup> But in *Seattle Times*, it noted that "[a] litigant has no First Amendment right of access to information made available only for purposes

of trying his suit.”<sup>176</sup> This does not mean—contrary to some readings of the case—that the First Amendment provides no protection for dissemination of those same materials once a litigant obtains them through discovery.<sup>177</sup>

Several other questions remain muddled, including the level of First Amendment scrutiny for protective orders and whether that scrutiny is paid to the *practice* of issuing protective orders generally or to *individual* protective orders. At least one plausible explanation for this muddling was Justice Powell’s desire to hold together a unanimous court and prevent a deeper split in the case with Justice Brennan and the court’s left wing.

On one end of the spectrum, several justices appeared to be quite concerned with the notion of federalizing state-court protective-order disputes.<sup>178</sup> The reasoning apparently went that, if discovery and protective orders were subject to the First Amendment, the Supreme Court would be the court of last resort for discovery disputes.<sup>179</sup> On the other end of the spectrum, Justices Brennan and Marshall were adamant, as evidenced in a concurrence authored by Brennan, that individual protective orders were speech restraints and subject to intermediate scrutiny.<sup>180</sup>

Perhaps splitting the difference, Justice Powell wrote an ambiguous opinion. This ambiguity led to a split among courts. Some courts appear to have concluded that the First Amendment plays *no* role in the protective-order analysis.<sup>181</sup> At the other end of the spectrum, at least one court has applied intermediate scrutiny to a protective order.<sup>182</sup> In the middle, courts have observed the First Amendment plays some lesser role in the analysis or have incorporated First Amendment considerations into the good-cause analysis.<sup>183</sup>

All of these readings ignore a profound implication of *Seattle Times*: a protective order that is not supported by good cause violates the First Amendment. This conclusion flows from the reasonable of two possible interpretations of the case. First, an *implausible* interpretation: good cause exceeds the level of protection afforded by the First Amendment, so a protective order supported by good cause also satisfies the First Amendment. This reading is implausible, however, because it implies that the First Amendment can be satisfied by a showing so minimal that it cannot be characterized as good cause. Surely, the First Amendment provides more protection than this, particularly in cases restraining the dissemination of content central to governance or relating to public safety. If not, it is hard to say that the Constitution plays *any* role in the analysis, and Justice Powell was quite direct in noting that the First Amendment plays *some* role, albeit reduced.

A more plausible reading of *Seattle Times*: protective orders satisfy the First Amendment if, and only if, they are supported by good cause.<sup>184</sup> This reading also makes the inverse true—a protective order unsupported by good cause violates the First Amendment. This reading accounts for the “lesser” protection for discovery dissemination that Justice Powell announced earlier in the opinion.<sup>185</sup> But it also recognizes, as Justice Powell implied, and as Justice Brennan stressed in concurrence, that the First Amendment applies to the issuance of individual protective orders, as opposed to the general practice of protective orders.<sup>186</sup>

**A more plausible reading of *Seattle Times*: protective orders satisfy the First Amendment if, and only if, they are supported by good cause.**

## 2. Implications of Constitutionalizing “Good Cause”

This reading has implications for the balance of power between state and federal courts in the secrecy context, the degree of control legislatures and the courts exercise over the “good-cause” definition, the standard of review for protective orders, and the extent to which the “good-cause” analysis should contemplate traditional First Amendment values.<sup>187</sup>

### **i. Federal v. State Power**

If protective orders indeed raise a First Amendment issue, they are subject to the supervisory power of the federal courts. This is true of both federal- and state-court orders.<sup>188</sup> Does that make the Supreme Court the court of last resort for all the nation's discovery fights?<sup>189</sup> The answer is no. First of all, *Seattle Times* clearly held that litigants have no First Amendment right of *access* to discovery materials.<sup>190</sup> Discovery rules are a matter of "legislative grace" and, as such, a party's entitlement to discovery does not raise a First Amendment concern.<sup>191</sup> Thus, state court discovery disputes over the appropriateness of particular discovery remain in state courts.

Second, the Court already supervises a vast federal discovery system and rarely wades into routine discovery disputes. Certiorari is a discretionary power. Third, comity and federalism concerns may limit the Court's willingness to wade into ongoing state court proceedings. Indeed, the Court has demonstrated its willingness to allow state court protective orders to stand. It denied review of a 2003 Colorado Supreme Court decision citing *Seattle Times* and applying intermediate scrutiny to a protective order.<sup>192</sup>

### **ii. Legislative Power**

Additionally, a constitutional version of good cause would limit the power of legislatures to increase court secrecy. Imagine, hypothetically, that Congress prescribed an automatic protective order in every case.<sup>193</sup> By doing so, Congress would effectively abrogate the requirement that a party show good cause to obtain such an order. These orders, entered on no evidentiary showing, would violate the First Amendment. Indeed, Congress's attempt to eliminate good cause would itself be unconstitutional. With no showing required, these orders likely violate the First Amendment.

### **iii. Appellate Review**

Treating the issuance of protective orders as a constitutional question also has implications for appellate review.<sup>194</sup> In particular, the standard of review for good-cause determinations is typically abuse of discretion. If protective orders are reviewed for constitutional infirmity, this standard of review is too deferential. Both the

application of First Amendment principles, along with fact finding in the First Amendment context, deserves less deference.<sup>195</sup> For example, courts engaged in the good-cause inquiry examine whether, e.g., the information to be kept confidential is of public interest or concern, as discussed below. Determining whether information is of public concern is not an inquiry of historical fact, shielded by a deferential review standard. Rather, the determination would define the contours of the First Amendment itself. Accordingly, appellate courts should pay less deference to "fact" finding in the area.<sup>196</sup>

**Treating the issuance of protective orders as a constitutional question also has implications for appellate review.**

### **iv. First Amendment Considerations and Rule 26(c)**

Good cause is, and should, be imbued with the First Amendment considerations. Courts across the country have utilized some version of the *Pansy* (or *Glenmede*) factors to evaluate whether there is good cause to issue (or sustain an existing) protective order:

- “(1) whether disclosure will violate any privacy interests;
- (2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- (3) whether disclosure of the information will cause a party embarrassment;



- (4) whether confidentiality is being sought over information important to public health and safety;
- (5) whether the sharing of information among litigants will promote fairness and efficiency;
- (6) whether a party benefitting from the order of confidentiality is a public entity or official; and
- (7) whether the case involves issues important to the public.”<sup>197</sup>

Moreover, good cause requires that a party must establish a substantial interest in confidentiality.<sup>198</sup> Indeed, the party must establish, through particularized evidence, substantial or serious harm in the absence of confidentiality.<sup>199</sup> And any protective order should be no broader than necessary to protect the asserted interest in confidentiality. Thus, free speech concerns already permeate the Rule 26(c) analysis, as they should.

**Good cause requires that a party must establish a substantial interest in confidentiality.**

### 3. Impact of a Constitutional Reading of “Good Cause” on Common Discovery Practices

What are the implications for common protective-order practices, like discovery sharing and umbrella orders? Discovery-sharing provisions should be required by application of ordinary Rule 26(c) principles and would, likewise, be required by the First Amendment.<sup>200</sup> With respect to umbrella orders, I have suggested that the practice survives, in large measure, by stipulation of the parties.<sup>201</sup> In later work I have suggested, as I do here, that stipulated, or agreed, confidentiality should be illegal for information obtained in litigation.<sup>202</sup> This raises a question: are umbrella orders permissible under either Rule 26(c) or the First Amendment without party agreement? The answer is no, for reasons explained below.

#### i. Discovery Sharing

Discovery sharing between similar cases is a practice protected by the good-cause standard and largely embraced by courts.<sup>203</sup> Courts are in conflict, however, concerning the timing and procedure by which to share discovery.<sup>204</sup> Two primary mechanisms enable litigants to share: “upfront sharing” protective orders and intervention-and-modification practice. Upfront sharing provisions define a sharing scope that allows litigants to share information within the scope without further court intervention.<sup>205</sup> Imagine, for instance, that a person is injured by a defective automobile, sues, and seeks discovery about the allegedly defective product. An upfront sharing provision might provide that the person and her attorneys can share information with other plaintiffs who allege a similar defect in cases involving the same or similar vehicles. The other plaintiffs receiving the information, under the terms of the order, are bound not to disseminate it outside of the context of their lawsuits.

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This arrangement has several benefits. First, it allows similar litigation to proceed without reinventing the wheel with similar discovery disputes in each case.<sup>206</sup> Second, it allows parties requesting discovery to compare responses and detect evasive or fraudulent discovery responses.<sup>207</sup> Indeed, the existence of sharing orders in a case might deter discovery misconduct in similar cases. Third, it allows plaintiff attorneys (who often work alone or in small groups) to collaborate and strategize because they can reveal discovery information to one another.

Some of these benefits are not fully realized by the other discovery sharing mechanism: intervention and modification. To understand the process, imagine that the protective order entered in the case described above did not have an upfront sharing provision. But also imagine that litigants and attorneys in other similar cases learned of the first case and suspected that documents produced in that case were relevant to their own cases. The litigant in the first case would be prohibited from disseminating the discovery. Another party, however, could seek to intervene and modify the protective order in the first case to allow discovery in that case to be shared. Many courts favor modification and intervention to upfront sharing provisions.<sup>208</sup>

A proper understanding of good cause, however, requires upfront discovery sharing in many instances. This is because orders that forbid sharing are often overbroad. Indeed, the denial of upfront sharing simply does not serve the asserted confidentiality interest and allowing sharing causes no harm to the party seeking the order.<sup>209</sup> Returning

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to the previous example: the interest asserted in keeping automotive designs confidential is usually a proprietary or competitive interest. The automaker asserts that the information has value by virtue of it being secret and that, if it is shared with competitors, the information will lose its value and injure the producing automaker.

But the problem with using this logic to forbid sharing orders is that injured plaintiffs are almost certainly not competing automakers.<sup>210</sup>

They desire the information to prepare and try their lawsuits, not to build competing automobiles. And they are also bound, by the terms of the sharing order, not to disseminate the information. There is at least some possibility that expanding the audience for the discovery materials to include plaintiffs with similar suits increases, by some degree, the chances of a protective-order breach increase to some degree.<sup>211</sup> But considering the prevalence of protective orders, breaches are exceedingly infrequent. Thus, restricting the flow of information to all but similar plaintiffs serves no legitimate purpose.

Non-sharing orders subject to later intervention and modification are also less desirable than upfront sharing for practical reasons. First, non-sharing orders do not yield the full litigation efficiency benefits of upfront sharing orders. Upfront sharing obviates the need for most additional disputes about sharing information between cases.<sup>212</sup> On the other hand, non-sharing protective orders tee up sharing fights via future intervention-and-modification proceedings. They consume party and court resources for each instance in which an intervening party seeks access to existing discovery. Second, non-sharing orders have a reduced deterrent effect for discovery misconduct. Upfront sharing orders present an enhanced possibility that inconsistent discovery responses will be detected, because previous responses will be shared with a wider audience of litigants.

**For doctrinal and pragmatic reasons, upfront sharing provisions should be available in most protective orders.**

For doctrinal and pragmatic reasons, upfront sharing provisions should be available in most protective orders. In many cases, good cause does not exist to deny sharing, and in those cases the orders violate Rule 26 and the First Amendment.

## **ii. Umbrella Orders**

Umbrella protective orders are ubiquitous in complex litigation.<sup>213</sup> The orders effectively delegate the court's Rule 26(c) power to the parties by allowing them to designate, without further court intervention, which materials

are confidential and subject to the order.<sup>214</sup> Among court confidentiality devices, umbrella orders play an outsized role in expanding the breadth of materials kept from public view.

I have previously contended that, absent a stipulation, umbrella orders do not satisfy Rule 26(c)'s good-cause standard.<sup>215</sup> The orders are often entered at the beginning of the case and before discovery is exchanged. Indeed, they are often entered before all discovery requests have been made. Thus, the party seeking umbrella protection has not even identified the information it will produce. In such circumstances, how could a party establish, through particularized proof, that failure to enter a confidentiality order would impose substantial harm, as the good-cause standard requires?

And how could courts, on sparse or non-existent factual records about hypothetical harm from the disclosure of yet-to-be-identified information, evaluate the good-cause factors? A court may have little to no information about the public health and safety effects of discovery information at the time it is asked to enter an agreed umbrella order.

In the umbrella-order context, courts rely on parties to make good faith designations and to contest lacking confidentiality designations. Yet, as discussed above, parties have little incentive to contest overbroad confidentiality. Umbrella orders are essentially a tacit recognition that confidentiality is the default.

But a better system, as discussed above, would forbid private agreement and require court involvement in confidentiality determinations.<sup>216</sup> Commentators have described umbrella orders as close to essential for a functioning discovery regime and that eliminating them would flood courts with work.<sup>217</sup> But alternative systems are feasible.

Protective orders should be requested, considered, and entered in the context of actual discovery requests and responses, not generalized hypothetical proof. At one end of the good-cause proof spectrum, generalizations and speculation by a moving party do not support a protective order.<sup>218</sup> At the other end, courts might literally review all the information that would be subject to the order. This does not mean, however, that courts must turn every page in a one-million-page document production to assess whether there is good cause for an order. To the contrary, when a party moves for a protective order based on actual discovery responses, it can provide granular proof in the form of live or affidavit testimony about categories of information produced, sworn summaries, or—potentially—technology-assisted review.

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Technology, indeed, has created part of the problem in this context (an explosion of discoverable material), but technology may also solve the problem. Courts have approved predictive coding and machine learning as a method to determine whether information is responsive to discovery requests.<sup>219</sup> Perhaps a similar method could be employed to reliably assess whether material ought to be confidential.<sup>220</sup> Even short of that, technology has made party and court review of vast amounts of information more feasible through other forms of technology-assisted review.<sup>221</sup> These gains would benefit a protective-order process that employs heightened court involvement.

If courts are required to make protective-order determinations on an evidentiary basis, many umbrella requests will fail. But this means that courts will be able to adequately account for the public and First Amendment interests at stake in the process, through proper application of Rule 26(c) or sunshine laws.

## D. Limitations on Sealing Judicial Records

Judicial records, as opposed to unfiled discovery, are subject to a presumption of public access.<sup>222</sup> This presumption flows from the common law and from the First Amendment, though there is some uncertainty as to the nature and degree of the First Amendment right.<sup>223</sup> In describing the common law right, the Supreme Court noted that access is necessary to allow the public to keep a “watchful eye” on government.<sup>224</sup> The presumption of public access is not absolute, however. While no rule expressly grants courts authority, they have inherent supervisory power to seal court files.

But sealing of judicial records must occur only after courts have made specific findings, on the record, that some “higher interest” overcomes the presumption of access. Possible interests that can weigh in favor of sealing include trade secret or proprietary concerns.<sup>225</sup> Moreover, courts have authority to limit access to information that may have been placed in their files to “gratify public spite or promote public scandal.”<sup>226</sup> Even if a party seeking to seal judicial records identifies a valid higher interest, the sealing order should be narrowly constructed to serve the asserted interest.<sup>227</sup>

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Just because a document, paper or electronic, is placed in a court file, however, does not mean that it is a “judicial record,” subject to the right of access.<sup>228</sup> And the sealing question becomes more complex when parties attach unfiled discovery (afforded no presumption of access) as exhibits to motions and other court papers.<sup>229</sup> This material is routinely attached to discovery

motions. But unfiled discovery documents—including discovery already deemed confidential and subject to a protective order—are also routinely filed as exhibits to merits-related motions.<sup>230</sup> This includes motions for summary judgment, motions for preliminary injunction, and motions in limine.<sup>231</sup> Many sealing disputes revolve around whether filed discovery documents, along with motions and court opinions that reference them, are “judicial records” subject to the presumption of access.

Most courts agree that most pure discovery motions, and related exhibits, are not judicial records subject to the right of access. By “pure discovery motion,” I mean motions where the sole issue before the court is whether information should be disclosed in discovery or whether a protective order should be issued to keep it secret.<sup>232</sup> More than one court has observed that these motions “play no role in the performance of Article III functions” and thus are not subject to an access presumption.<sup>233</sup>

This rationale falls short in at least some cases. Some of the most important decisions in the Article III system involve pretrial discovery—who will be forced to testify at deposition, which documents are privileged, and which will be produced in a case of public importance. Discovery rulings are so central to contemporary litigation that they can end cases or force them to settle. A plaintiff, facing information asymmetry, may lose a case at the dispositive motion stage because she was deprived—by court action—of access to proof at the discovery stage. Likewise, a defendant who faces a production order that would undermine some greater proprietary or reputational interest may settle to avoid producing the information.

A better rationale for not affording pure discovery motions a strong presumption of public access is a pragmatic one: if courts were forced to allow public access to discovery motion materials—especially those submitted en



camera for review—they would lose the power to protect those materials from disclosure. Still, there may be circumstances where discovery decisions, and the materials that putatively support them, are of such consequence that the presumption should attach.

Outside of the discovery motion context, some court filings, like summary judgment motions and exhibits, are plainly connected to the exercise of judicial power.<sup>234</sup> Accordingly, the presumption of public access ordinarily attaches and courts should seal the filings only if substantial countervailing concerns overcome it.<sup>235</sup> But courts have, at times, struggled to determine whether the presumption attaches to other motions. For a time, some courts evaluated whether motions were “dispositive” or “non-dispositive” to determine whether they warranted a public access right.<sup>236</sup>

**If courts were forced to allow public access to discovery motion materials—especially those submitted en camera for review—they would lose the power to protect those materials from disclosure.**

The Ninth Circuit recently rejected this binary approach.<sup>237</sup> In *Center for Auto Safety v. Chrysler*, plaintiffs in a defective-auto class action filed a motion for preliminary injunction to require an automaker to notify potential class members of alleged safety risks.<sup>238</sup> A public-interest group sought to intervene to unseal the filing. The district court denied the request, relying on cases holding that non-dispositive motions and exhibits can be sealed on a showing of good cause. The trial court noted the difficulty in distinguishing between dispositive and non-dispositive motions. Nonetheless, the court found that granting the motion for preliminary injunction would not award the ultimate relief sought in the case, and the motion was therefore non-dispositive. Accordingly, the district court applied the good-cause standard to sustain its sealing order, keeping the documents attached to the motion from public view.

The Ninth Circuit reversed, holding that the presumption of public access does not depend on any rigid distinction between dispositive and non-dispositive motions.<sup>239</sup> In doing so, the court emphasized the underlying rationale for the presumption, noting that it is “based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.”<sup>240</sup> Tying its analysis to this rationale, the court observed that “[m]ost litigation in a case is not literally ‘dispositive,’ but nevertheless involves important issues and information to which our case law demands the public should have access.”<sup>241</sup>

Noting apparent problems with the binary approach to the presumption, the court clarified, or perhaps announced, a test that looked to the substance of the filing at issue. Instead of focusing on whether a motion is dispositive, courts should focus on whether “the motion at issue is more than tangentially related to the underlying cause of action” or “merits.”<sup>242</sup>

Finding that the motion for preliminary injunction was technically non-dispositive, the court then evaluated whether it was more than tangentially related to the merits.<sup>243</sup> The court held that it was.<sup>244</sup> The plaintiffs’ complaint included a request for injunctive relief that, if granted, would have constituted a change in the status quo and a resolution of at least part of the claims. Accordingly, the motion was merits-related, and the presumption applied to it and any accompanying exhibits. Accordingly, the court remanded to the district court to determine whether the materials should remain sealed under the more stringent compelling reasons standard.<sup>245</sup>

The *Chrysler* court's approach is sensible, particularly when compared to the binary approach, because it connects the public-access presumption to its foundation—the public's need to observe the court's workings on most matters. The court noted that the test reaches filings beyond the summary-judgment context, like motions in limine and *Daubert* motions.

But the test, in application, may fall short to the extent courts use the phrase “only tangentially related to the merits” to withhold the presumption from those seeking access to discovery-related motions. For example, a discovery sanctions motion may resolve part or all of a case by dismissing it. Likewise, as discussed above, the grant or denial of a motion to compel discovery may as a practical matter result in a case settling or being dismissed. Careful application of the more-than-tangentially-related-to-the-merits standard would consider the

**The grant or denial of a motion to compel discovery may as a practical matter result in a case settling or being dismissed.**

gravity and likely consequences of the court's action. If it has the potential to resolve part of the case, directly or through likely consequence, the presumption should attach to the filings involved. Of course, countervailing considerations—like privilege, proprietary, or privacy concerns—might very well justify sealing.

Some courts have also withheld, or devalued, the presumption for summary-judgment papers in instances in which the court denied the summary judgment.<sup>246</sup> A recent case related to the Jeffrey Epstein sex-abuse matter addressed this issue.<sup>247</sup> The case, a defamation action against an Epstein associate, involved salacious allegations of misconduct made against prominent individuals.<sup>248</sup> Discovery in the case was hotly contested and motion practice was extensive. The district court entered a sealing order that effectively delegated the sealing power to the parties, in an order that resembled, in some respects, an umbrella order.

In all, 167 filings were sealed, nearly one fifth of the entire docket. These included motions for summary judgment, adverse inference instructions, motions in limine, and discovery-related motions. The media intervened, seeking to unseal the material, the district court denied the request, and the media appealed.

The Second Circuit reversed, unsealed the summary judgment record, and remanded for the district court to properly consider the presumption for the remaining material.<sup>249</sup> In the process, the court held that the district court erred by not applying the presumption to the summary judgment record. The district court had reasoned that the presumption did not apply to materials filed in connection with a denied summary judgment or to documents that the district court did not rely upon in reaching its decision. The appellate court disagreed on both fronts, holding that both the presumption of public access—emanating from both the First Amendment and common law—should have been afforded full weight. Moreover, the court held that the district court's failure to make factual findings in support of sealing order doomed its order.

With respect to the remaining documents, the court made clear that the presumption should apply to all items “relevant to the performance of the judicial function and useful in the judicial process.”<sup>250</sup> The weight given to the presumption, however, “must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.”<sup>251</sup> Addressing the degree of weight to be afforded the presumption in different contexts, the court went on to note that “the presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, in connection with dispositive motions such as motions for dismissal or summary judgment.” As such, the reasons needed to seal

such materials need not be as compelling as the reasons that would sustain sealing of a dispositive motion. The Second Circuit reversed and remanded for the court to conduct an individualized review.<sup>252</sup>

The case offers a few important lessons. First, umbrella-style sealing orders are fatally flawed. Courts should conduct individualized review before sealing judicial records. Second, all filed materials—even discovery motions—that are relevant to the court’s exercise of judicial power should be afforded the presumption of public access. The weight of this presumption may vary by the strength of connection of the material to the judicial function. An interpretation of the public access right that is at least this broad is probably correct.

The court went on to note that, as the Court noted in *Nixon*, there is some danger that court files become publicly accessible repositories of libelous material.<sup>253</sup> To counter this, courts should not reflexively seal material, but should instead rely on other powers. Indeed, courts may explain problems with the credibility of the proof on the record, they may strike material from the record utilizing Rule 12(f) on the basis that it is “immaterial” or “scandalous,” or (in certain circumstances) courts may sanction litigants for false filings.<sup>254</sup>

Sealing as a default, automatic procedure to protect the interests of litigants is not sustainable. Instead, courts should carefully examine the record, detail their findings, and balance any asserted interest in sealing against a properly weighted presumption of public access.

**Umbrella-style sealing orders are fatally flawed. Courts should conduct individualized review before sealing judicial records.**

## CONCLUSION

After decades of debate, court confidentiality continues to keep information from the public and regulators. This information, in some cases, would prevent injury, save lives, or improve the function of government. For various reasons, the solutions proposed so far have either lacked overwhelming political support or, when adopted, not gone far enough. Any sunshine law or other reform must adequately account for the actual player incentives in litigation. Reform must also take special account of the public role of courts and recognize that the taint from court-confidentiality scandals undermines the legitimacy of courts. The public is rightfully hesitant to accept the explanation that courts are just not all that involved in discovery or private confidentiality agreements.

**After decades of debate, court confidentiality continues to keep information from the public and regulators.**

Perhaps one of the most important lessons of the past 40 years is that protective orders and sealing orders are speech restraints. And the First Amendment should play a bigger role than it currently does in regulating them. Moreover, the convenient practice of umbrella protective orders should be curtailed. Feasible alternatives exist, and any increased burden on courts is justified in pursuit of court legitimacy and public safety.

Appellate courts that have recently resisted overbroad sealing in high profile cases deserve credit. But district courts—and courts overseeing MDLs in particular—should pay heed to the message: easy confidentiality in pretrial discovery should not give way to relaxed burdens when sealing court records.

## Notes

- <sup>1</sup> See, e.g., Benjamin Lesser, Dan Levine, Lisa Girion, & Jaimi Dowdell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019, 1:00 PM), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/>; see also *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts*, Before the Subcomm. on Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary (Sept. 26, 2019) (statement of Daniel R. Levine & Lisa Girion).
- <sup>2</sup> See, e.g., U.S. J.P.M.L., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (2018), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-FY-2018.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf); Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, ABA BUSINESS OF LAW, (Feb. 19, 2020).
- <sup>3</sup> See, e.g., FED. R. CIV. P. 5.2(a) (requiring redaction of information regarding “an individual’s social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number”); cf., e.g., *Pearson v. Miller*, 211 F.3d 57, 61–62 (3d Cir. 2000) (discussing privacy of medical and psychiatric records).
- <sup>4</sup> See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 3 (1st Cir. 1986) (reviewing district court’s issuance of protective order in a case involving allegations that a company poisoned a town’s water supply); Annysa Johnson & Ellen Gabler, *Archbishops Struggled with Vatican over Ousting Priests*, MILWAUKEE J. SENTINEL, July 2, 2013, at A1 (describing how a “broad protective order” kept information about pedophile priests from the public); See, e.g., Bill Vlasic, *Inquiry by G.M. Is Said to Focus on Its Lawyers*, N.Y. TIMES, May 18, 2014, at A1 (“G.M.’s unwillingness to share information it had about defective switches with regulators most likely cost lives in accidents.”). In some circumstances, courts rightfully protect the identity of minors, including the identities of their parents, from disclosure in court proceedings. Cf. *J.W. v. D.C.*, 318 F.R.D. 196, 202 (D.D.C. 2016) (“the Court finds that permitting Plaintiffs to proceed using only their initials is warranted in this case, and that the right of public access is outweighed by Plaintiffs’ ‘overriding interest’ in protecting J.W.’s identity and avoiding unnecessary publicity concerning his disability”). See also Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. COLO. L. REV. 817, 818, 822 (2007); Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785 (2014).
- <sup>5</sup> See Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 438 (2018) (examining the incentives driving discovery and confidentiality); cf. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 802–03 (2002) (noting examining the incentives in the discovery-confidentiality context).
- <sup>6</sup> Cf., e.g., Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2206 (2014) (discussing protective-order incentives in the repeating-claims context).
- <sup>7</sup> Many of these cases are now collected in multidistrict litigation. See Wittenberg, *supra* note 3.
- <sup>8</sup> See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1449–50 (2017) (examining the phenomenon of repeat-player plaintiff attorneys in MDL product-liability actions).
- <sup>9</sup> See Benham, *supra* note 6 at 440, (discussing the economic incentive to avoid reputation harm); Koniak, *supra* note 6, at 802–03.
- <sup>10</sup> See, e.g., Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 772–75 (1990) (describing how dissemination of discovery among similar cases may undermine defenses and advocating against plaintiffs’ right to disseminate, to the extent such a right exists).
- <sup>11</sup> Protective orders, and other confidentiality mechanisms, may also impose externalities on similar litigation when they restrict the flow of information between cases. See, e.g., *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 310–11 (Iowa 2009) (“When we add to the mix the time, money, and effort expended by counsel and support staff for the Iowa plaintiffs in organizing and analyzing the information after Microsoft produced it, the staggering cost of repeating the process in the Canadian litigation comes even more sharply into focus.”); see also Benham, *supra* note 7, at 2206–08.
- <sup>12</sup> See, e.g., *Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643, at \*1–2 (N.D. Tex. Feb. 1, 2002) (reviewing protective order of trade secret material in design defect case); Cf., e.g., *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998) (holding that courts should enter appropriate protective order after determining whether to order production of trade secret information); FED. R. CIV. P. 26(c)(1)(g) (permitting a court to issue a protective order to ensure that “a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way”).
- <sup>13</sup> In a common example, public disclosure of the formula for Coca-Cola would cause the company irreparable harm. This is true because of two features of the formula: Coca Cola takes substantial measures to keep it secret in the ordinary business and the nature of the information has high intrinsic value. Cf., e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 496 (1991); cf. also Benham, *supra* note 5, at 1825.
- <sup>14</sup> See, e.g., Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 332 (1998) (“Hoping to prevent further dissemination of [discovery] information, the defendant makes the plaintiff a generous settlement offer, but only on the condition that the plaintiff returns all discovery materials and promises not to discuss the case with the public or the media.”).
- <sup>15</sup> See, e.g., *id.*
- <sup>16</sup> See Benham, *supra* note 6, at 443 (“The value of reputation cost imposed through discovery depends on the power of at least one party to publicly disclose the information and the right of the party to contract away that power for something of value (money, for example).”).
- <sup>17</sup> See, e.g., Campbell, *supra* note 11, at 772–75 (contending that defendants would more aggressively resist disclosure if faced with restrictions on protective orders); Marcus, *supra* note 14, at 484 (“One basic problem is that presumptive public access would disrupt orderly pretrial preparation by fomenting opposition to broad discovery, forcing judges to resolve confidentiality issues . . .”).
- <sup>18</sup> See, e.g., Benham, *supra* note 6, at 443 (examining court incentives to keep litigation information confidential).
- <sup>19</sup> See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[S]tipulated ‘blanket’ protective orders are becoming standard practice in complex cases.” (citing MANUAL FOR COMPLEX LITIGATION § 21.431 (2d ed. 1985))); see also Model Stipulated Protective Order for Standard Litigation, N.D. Cal. [https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND\\_StandardProtOrd.pdf](https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.pdf) (last visited May 3, 2020) (hereinafter *N.D. Cal. Model Stipulated Protective Order*).
- <sup>20</sup> See, e.g., Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 486 (1991) (contending that restrictions on court confidentiality should not be allowed to “obscure the strong public interest in, and policy objectives furthered by, promoting settlement”).



- <sup>21</sup> See, e.g., Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 15 (1983) (noting the “assumption of the litigants and the courts that discovery compels the disclosure of information solely to assist preparation for trial”); Marcus, *supra* note 14, at 470 (the primary purpose of courts is “to decide cases according to the substantive law”). But see Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1567 (2004) (arguing that courts have a substantial public role in addition to private dispute resolution).
- <sup>22</sup> See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).
- <sup>23</sup> See Benham, *supra* note 6, at 460 (discussing third-party intervention procedures and incentives).
- <sup>24</sup> See, e.g., Mike Spector, Jaimi Dowdell, & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public*, REUTERS (Jan. 16, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/> (“Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.”).
- <sup>25</sup> See, e.g., *In re Dall. Morning News, Inc.*, 10 S.W.3d 298, 298–99 (Tex. 1999) (per curiam) (describing attempt by newspaper to intervene and obtain access to unfiled discovery and summary jury trial exhibits); cf. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999).
- <sup>26</sup> See, e.g., Spector, Dowdell, & Lesser, *supra* note 25 (“Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.”).
- <sup>27</sup> “David Friedman, a NHTSA official during the GM ignition-switch scandal, told Reuters that court secrecy blunts regulators’ subpoena power because if documents and other evidence are sealed, ‘how are you supposed to know about them?’” *Id.*
- <sup>28</sup> Miller, *supra* note 21, at 479 (noting that pleadings are available for public inspection even when unfiled discovery is not). But see Lesser, Levine, Girion, & Dowdell, *supra* note 2 (“[A]s lawyers began fleshing out their cases against the opioid industry in amended complaints, they redacted details of the companies’ conduct.”).
- <sup>29</sup> Cf., e.g., *Brown v. Maxwell*, 929 F.3d 41, 52 (2d Cir. 2019) “[P]leadings, complaints, and briefs—while supposedly based on underlying evidentiary material—can be misleading. Such documents sometimes draw dubious inferences from already questionable material or present ambiguous material as definitive.”).
- <sup>30</sup> Cf. *id.*
- <sup>31</sup> Cf., e.g., Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1654 (2015) (“Debate exists about how much ADR is used in courts, as well as what metrics to use to assess its impact. Yet, on two measures—the volume of rulemaking and the privatization of court-based interactions—the results are unambiguous: courts have promulgated hundreds of rules governing various forms of ADR, and those rules do not protect rights of the public to observe the processes or to know much about the results.”).
- <sup>32</sup> See, e.g., Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1482 (2006) (noting the incentives of parties to use confidential arbitration in lieu of a public court system). But see Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2006) (“[A]t both the state and the federal level, present law provides little reliable support for arbitration confidentiality when arbitration communications are sought for purposes of discovery or admission at trial.”).
- <sup>33</sup> See, e.g., Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> (describing movie mogul’s use of settlement agreements to keep sexual assault allegations secret).
- <sup>34</sup> See, e.g., *id.* (describing movie mogul’s use of settlement agreements to keep sexual assault allegations secret).
- <sup>35</sup> See, e.g., David Von Drehle, *Jeffrey Epstein’s Scandal of Secrecy Points to a Creeping Rot in the American Justice System*, WASHINGTON POST (June 14, 2019 7:00 PM), [https://www.washingtonpost.com/opinions/jeffrey-epsteins-scandal-of-secrecy-points-to-a-creeping-rot-in-the-american-justice-system/2019/06/14/3f100a44-8ecf-11e9-adf3-f70f78c156e8\\_story.html](https://www.washingtonpost.com/opinions/jeffrey-epsteins-scandal-of-secrecy-points-to-a-creeping-rot-in-the-american-justice-system/2019/06/14/3f100a44-8ecf-11e9-adf3-f70f78c156e8_story.html) (“According to superlawyer David Boies, ‘dozens’ of women who could give testimony about being sexually assaulted as girls by mysterious financier Jeffrey Epstein are silenced by settlements they reached with their alleged assailant.”); see also Loune-Djenia Askew, *Confidentiality Agreements: The Florida Sunshine in Litigation Act, the #metoo Movement, and Signing Away the Right to Speak*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 61, 63 (2019) (discussing use of NDAs in sexual misconduct cases).
- <sup>36</sup> See, e.g., Farrow, *supra* note 34 (describing elaborate confidentiality agreement to silence alleged victim).
- <sup>37</sup> See *id.*
- <sup>38</sup> *Id.*
- <sup>39</sup> Cf. Benham, *supra* note 6, at 461–62.
- <sup>40</sup> See, e.g., Von Drehle, *supra* note 36.
- <sup>41</sup> Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html> (highlighting state law efforts to limit secret settlements in the sexual assault context).
- <sup>42</sup> Cf., e.g., Richard Zitrin, *Time to Outlaw Secrets*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/opinion/letters/sex-abuse-secret-settlements.html> (“#MeToo secrecy is only the tip of this iceberg. For years, companies with deadly products have used hush money to force plaintiffs to agree to secret settlements . . . . This keeps the truth about deadly defects from public scrutiny, sometimes for decades.”).
- <sup>43</sup> Cf., e.g., Farrow, *supra* note 34.
- <sup>44</sup> Cf., e.g., Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1275 (2020) (giving “a window into what courts are doing in their everyday practice by examining a set of 100 orders on proposed stipulated protective orders from January 2018”).
- <sup>45</sup> See generally Benham, *supra* note 6.
- <sup>46</sup> See, e.g., N.D. Cal. Model Stipulated Protective Order, [https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND\\_StandardProtOrd.pdf](https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.pdf) (last visited 5/18/2020). But see *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (“The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties . . . .”); see also The Honorable Craig Smith et. al., *Finding A Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76a and Its Application to Unfiled Discovery*, 69 SMU L. REV. 309, 342–43 (2016) (“A standardized protective order can require the party seeking to expand the protection of the protective order to show that dissemination would harm the proprietary value of the confidential information. Going further the protective order could include a provision giving the judge authority to sign a protective order only after acknowledging that none of the discovery materials, with limited exceptions, concern matters that have a probable adverse effect upon the general public.”).
- <sup>47</sup> See, e.g., N.D. Cal. Model Stipulated Protective Order, at 3–4; see also MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004).

<sup>48</sup> See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

<sup>49</sup> See, e.g., Spector, Dowdell, & Lesser, *supra* note 25 (“In an analysis of some of the largest mass defective-product cases consolidated in federal courts over the past 20 years, Reuters found 55 in which judges sealed information concerning public health and safety. And among those, only three had protective orders containing language specifically allowing information exchanged by the litigants to be shared with regulators.”).

<sup>50</sup> See Endo, *supra* note 45, at 1275 (“The Case Set also illustrates courts’ tendency to approve proposed stipulated protective orders. Out of the 100 proposed orders, only five were denied.”); Ashley A. Kutz, Note, *Rethinking the “Good Cause” Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VAL. U. L. REV. 291, 303 (2007); see also *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[S]tipulated ‘blanket’ protective orders are becoming standard practice in complex cases.”). But see Elizabeth C. Wiggins et al., FED. JUDICIAL CTR., PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 4–5 (1996); see also Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 302 (1999) (reasoning that the Wiggins study “does not support claims that federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders”).

<sup>51</sup> See, e.g., Endo, *supra* note 45, at 1275 (“All of the orders [in the researcher’s case set] provide umbrella protections, permitting the parties to designate material ‘confidential’ and shield it from general disclosure.”).

<sup>52</sup> See Vlasic, *supra* note 5.

<sup>53</sup> See *id.*

<sup>54</sup> See Spector, Dowdell, and Lesser, *supra* note 28 (“A 2015 deferred prosecution agreement between GM and federal prosecutors showed the company scrambled for years to make sense of mounting reports of deaths and injuries while keeping regulators and the public in the dark about the switches, even after uncovering clear internal evidence they were defective.”); Vlasic, *supra* note 5 (“[T]he defect was essentially hidden for a decade until G.M. began recalling 2.6 million affected cars.”).

<sup>55</sup> Vlasic, *supra* note 5; see also Spector, Dowdell, & Lesser, *supra* note 28.

<sup>56</sup> See Spector, Dowdell, & Lesser, *supra* note 28.

<sup>57</sup> See *id.*

<sup>58</sup> See, e.g., Moskowitz, *supra* note 5, at 822 n.23; see also generally ADAM L. PENENBERG, TRAGIC INDIFFERENCE: ONE MAN’S BATTLE WITH THE AUTO INDUSTRY OVER THE DANGERS OF SUVs (2003).

<sup>59</sup> Moskowitz, *supra* note 5, at 822 n.23 (“Bridgestone and Firestone employed judge-enforced confidentiality orders in cases across America to hide information about injuries and deaths linked with the tread separation of their tires. As a result, for nearly a decade, the public and government agencies had little inkling of the issue and consumers continued to buy the potentially deadly tires.”); see also Keith Bradsher, *Documents Show Firestone Knew of Rising Warranty Costs*, N.Y. TIMES (Sept. 8, 2000), <https://www.nytimes.com/2000/09/08/business/documents-show-firestone-knew-of-rising-warranty-costs.html>.

<sup>60</sup> See, e.g., Moskowitz, *supra* note 5, at 822; see also Johnson & Gabler, *supra* note 5.

<sup>61</sup> See Johnson & Gabler, *supra* note 5.

<sup>62</sup> Cf. *id.*

<sup>63</sup> A few decades ago, there was a dispute about whether discovery materials were subject to a broad presumption of access because Federal Rule of Civil Procedure 5, at that time, required the materials to be filed. The dispute was resolved, in favor of a more confidential discovery process, when Rule 5 was amended to forbid the filing of most discovery. See Mary Elizabeth Keaney, Note, *Don’t Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 810–11 (2011).

<sup>64</sup> Cf., e.g., *Brown v. Maxwell*, 929 F.3d 41, 52 (2d Cir. 2019) (describing broad sealing of motions and exhibits) in case involving allegations of sexual assault).

<sup>65</sup> See N.D. Cal. Model Stipulated Protective Order, at section 12.3; cf. also N.D. Cal. Local Rule 79-5, cmt. (“Proposed protective orders, in which parties establish a procedure for designating and exchanging confidential information, must incorporate the procedures set forth in this rule if, in the course of proceedings in the case, a party proposes to submit sealable information to the Judge.”).

<sup>66</sup> Cf. Lesser, Levine, Girion, & Dowdell, *supra* note 2 (recounting that the judge in an early civil case examining opioid manufacturer’s conduct “was bound by West Virginia law to weigh secrecy against transparency and provide in the court record his reasoning. Like many judges in his position, he did neither. ‘This case was sealed because both sides agreed and asked me to seal it,’” the judge reportedly told Reuters.).

<sup>67</sup> See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

<sup>68</sup> See, e.g., Lesser, Levine, Girion, & Dowdell, *supra* note 2 (describing inculpatory materials sealed in opioid litigation).

<sup>69</sup> See Endo, *supra* note 45 (describing courts acceding to party protective-order stipulations in 95 out of 100 cases in researcher case set).

<sup>70</sup> See, e.g., *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919 (6th Cir. 2019) (“Protective Order also authorized the parties to file pleadings, motions, or other documents with the court that would be redacted or sealed to the extent they contained” protected information); see also N.D. Cal. Model Stipulated Protective Order, at section 12.3.

<sup>71</sup> See, e.g., *Maxwell*, 929 F.3d at 46–51 (2d Cir. 2019) (reversing district court’s refusal to unseal materials where original order delegated sealing decisions to parties without further court involvement).

<sup>72</sup> See *id.* at 45–46.

<sup>73</sup> See *id.* at 46.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 46–51.

<sup>76</sup> See *In re Nat. Prescription Opiate Litig.*, 927 F.3d at 923.

<sup>77</sup> Cf. Lesser, Levine, Girion, and Dowdell, *supra* note 2.

<sup>78</sup> See *id.*

- <sup>79</sup> *Id.*
- <sup>80</sup> See *In re Nat. Prescription Opiate Litig.*, 927 F.3d at 939.
- <sup>81</sup> See Lesser, Levine, Girion, and Dowdell, *supra* note 2.
- <sup>82</sup> See U.S. J.P.M.L., *supra* note 3; Wittenberg, *supra* note 3.
- <sup>83</sup> *Cf.*, e.g., Miller, *supra* note 21, at 480; Marcus, *supra* note 14, at 470.
- <sup>84</sup> Miller, *supra* note 21, at 480.
- <sup>85</sup> *Id.*
- <sup>86</sup> Lesser, Levine, Girion, & Dowdell, *supra* note 2.
- <sup>87</sup> *Id.*
- <sup>88</sup> *Id.*
- <sup>89</sup> See REUTERS, *Reuters Analysis of U.S. Court Secrecy: The Methodology*, (June 25, 2019 9:07 AM), <https://www.reuters.com/article/us-usa-courts-secrecy/about/reuters-analysis-of-u-s-court-secrecy-the-methodology-idUSKCN1TQ1NM>.
- <sup>90</sup> *Id.*
- <sup>91</sup> *Id.* An analysis of 90 million court actions, using machine learning, also discovered that 65 percent of products-liability actions involved sealing, though the information was too vague, etc. to allow analysis of whether public health and safety information was involved. *Id.*
- <sup>92</sup> *Cf.*, e.g., Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878–80 (2007) (describing confidentiality incentives in litigation and settlement); Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* §§ 6.16, 22.5 (9th ed. 2014) (recognizing the possibility that reputation harm may be traded for money in settlement negotiations).
- <sup>93</sup> *Cf.*, e.g., see Benham, *supra* note 6, at 437–41.
- <sup>94</sup> Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 821 (2008) (observing a South Carolina district court’s experience with court secrecy and a rule regulating sealed settlement agreements).
- <sup>95</sup> *Cf.*, e.g., Farrow, *supra* note 34 (reporting that settlement agreement in sexual-misconduct dispute “mandated the appointment of three ‘handlers,’ one an attorney, to respond to sexual-harassment allegations at Miramax. Miramax was obligated to provide proof that [alleged perpetrator] Weinstein was receiving counselling for three years or ‘as long as his therapist deems necessary.’”).
- <sup>96</sup> See FED. R. CIV. P. 41.
- <sup>97</sup> See Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 439 (2006) (“We found that the sealing of settlement agreements in federal courts is rare, and that typically the only part of the court record kept secret by the sealing of a settlement agreement is the amount of settlement.”).
- <sup>98</sup> See 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, 738 (2004) (“I would also contend, however, that the number of sealed settlements is greater than the index books or docket sheets would suggest. There is no standard procedure for designating settlements as sealed settlements in the index: Sometimes the index entry denotes that a settlement has been sealed, but sometimes it merely denotes an order approving a settlement. It is not until one seeks to retrieve the order, when the file package is produced from the bowels of the courthouse, that one learns that the settlement, or some aspect of the file, has been sealed. Even worse, sometimes the order approving and sealing the settlement does not appear as an entry on the docket sheet at all.”).
- <sup>99</sup> *Cf.*, e.g., Koniak, *supra* note 6, at 783–88 (considering, e.g., the use of private agreement in litigation confidentiality).
- <sup>100</sup> See, e.g., Garfield, *supra* note 15, at 292 (“Aside from seeking damages, a plaintiff suing for breach of a contract of silence can also seek equitable relief.”).
- <sup>101</sup> See, e.g., *id.* at 293 (“If a court enjoins a party from breaching a contract of silence, it raises constitutional concerns because the injunction is a prior restraint.”); *cf. also generally* Abigail Stephens, *Contracting Away the First Amendment?: When Courts Should Intervene in Nondisclosure Agreements*, 28 WM. & MARY BILL RTS. J. 541 (2019).
- <sup>102</sup> See, e.g., Garfield, *supra* note 15 at 358 (“On the one hand, state enforcement of a contract of silence is arguably legitimate content-neutral regulation of speech. Private parties, not the state, select the speech being suppressed, so one could call the regulation content-neutral and thus avoid the strict scrutiny applicable to content-based regulation of speech. In addition, this content-neutral regulation serves the indisputably legitimate governmental interest of maintaining the stability of contractual relations.”).
- <sup>103</sup> See *id.* (“In summary, if state action exists when a court enforces a contract of silence, then the state action should be treated as content-based regulation of speech.”).
- <sup>104</sup> See RESTATEMENT OF CONTRACTS (First) § 578 (1932); see also Garfield, *supra* note 15, at 310.
- <sup>105</sup> See MODEL PENAL CODE § 242.5; see also Koniak, *supra* note 6 at 793–94. *Cf. generally* John Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. REV. 829 (2004).
- <sup>106</sup> See, e.g., Koniak, *supra* note 6 at 793.
- <sup>107</sup> See MODEL PENAL CODE § 242.5; see also Koniak, *supra* note 6 at 793–94.
- <sup>108</sup> *Cf.* Koniak, *supra* note 6 at 794. With respect to contracts concealing non-criminal conduct that involves public harms, courts might invoke the Restatement’s general public policy balancing test. Section 178 provides, “A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.” RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). Strong public policy arguments exist against enforcing secrecy agreements that conceal active pedophiles, deadly environmental hazards, and other public health and safety issues. *Cf.*, e.g., Garfield, *supra* note 15, at 332–36 (1998). Nonetheless, courts enforce the agreements.
- <sup>109</sup> See ARIZ. REV. STAT. ANN. § 12-720 (2020); CAL. CIV. CODE § 1670.11 (West 2020); CAL. CIV. PROC. CODE § 1001 (West 2020); 820 ILL. COMP. STAT. ANN. 96/1-30 (West 2020); LA. STAT. ANN. § 13:5109.1 (2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2020); N.Y. C.P.L.R. 5003-b (McKinney 2020); N.J. STAT. ANN. §§ 10:5-12.7–12.12 (West 2020); NEV. REV. STAT. § 10.195 (West 2020); OR. REV. STAT. ANN. § 659A.370 (West 2020); TENN. CODE ANN. § 19-34-106 (West 2020); VT. STAT. ANN. tit. 21, § 495h (West 2020).
- <sup>110</sup> See, e.g., Harris, *supra* note 42 (highlighting state law efforts to limit secret settlements in the sexual assault context).

<sup>111</sup> See N.J. STAT. ANN. §§ 10:5-12.8 (West 2020) (“A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a ‘non-disclosure provision’) shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an ‘employee’) who is a party to the contract or settlement.”).

<sup>112</sup> See, e.g., CAL. CIV. CODE § 1670.11 (West 2020); CAL. CIV. PROC. CODE § 1001 (West 2020).

<sup>113</sup> See OR. REV. STAT. ANN. § 659A.370 (West) (“An employer may enter into a settlement, separation or severance agreement that includes [a confidentiality agreement] only when an employee claiming to be aggrieved by [prohibited conduct] requests to enter into the agreement.”).

<sup>114</sup> Zitrin, *supra* note 43.

<sup>115</sup> Zitrin, *supra* note 22, at 1565; cf. also James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 875 (2004).

<sup>116</sup> See, e.g., FLA. STAT. ANN. § 69.081 (West); TEX. R. CIV. P. 76a; LA. CODE CIV. PROC. ANN. art. 1426(D) (West); WASH. REV. CODE ANN. § 4.24.611; Gus Barber Antisecrecy Act § 12, MONT. CODE ANN. § 2-6-1020 (West); see also Benham, *supra* note 6, at 452–56 (describing sunshine efforts across the country).

<sup>117</sup> The law provides that: “Any 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, is void, contrary to public policy, and may not be enforced.” FLA. STAT. ANN. § 69.081 (West). The law goes on to define a public hazard as “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.” FLA. STAT. ANN. § 69.081 (West).

<sup>118</sup> See Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017); see also Jan Wolfe, *U.S. House Leader to Back Bill Limiting Court Secrecy*, REUTERS, (Sept. 26, 2019, 5:49 PM), <https://www.reuters.com/article/us-usa-courts-secrecy-congress/u-s-house-leader-to-back-bill-limiting-court-secrecy-idUSKBN1WB32P> (“House Judiciary Committee Chairman Jerrold Nadler, a Democrat from New York, said he planned to reintroduce the Sunshine in Litigation Act. The long-debated bill would allow parties in litigation to share evidence related to public health and safety with state and federal regulators—even if a judge agreed the evidence should be sealed in court.”); Marcus, *supra* note 14, at 465; Keaney, *supra* note 64, at 798 n.7 (noting that the original federal sunshine bill was considered in 1993).

<sup>119</sup> See Benham, *supra* note 6, at 456–59 (examining common failings of Sunshine Legislation).

<sup>120</sup> See Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 522–25 (Tex. 1998) (holding that courts are not obligated to raise sunshine issue sua sponte). But courts are free to raise the statutes sua sponte. See Ford Motor Co. v. Benson, 846 S.W.2d 487, 488 (Tex. App.—Houston [14th Dist.] 1993) (“The trial judge ruled, however, that compliance with Rule 76a was necessary before determining whether a protective order was appropriate.”).

<sup>121</sup> Cf. Ford Motor Co. v. Hall-Edwards, 21 So. 3d 99, 103 (Fla. Dist. Ct. App. 2009) (internal quotations omitted) (“The label ‘public hazard’ is not to be affixed to an allegedly-dangerous product like you would buckle a collar on a bird dog or paste a tag on an express package that is being forwarded to a friend. Attention to a proper evidentiary hearing and due process are plainly required. Such a label has significant and far-reaching consequences in a day when court orders can make it around the world before the sun sets on the day they are filed.”).

<sup>122</sup> See Stivers v. Ford Motor Credit Co., 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000) (holding that economic fraud resulting in only financial loss is not a “public hazard” within the Sunshine in Litigation Act).

<sup>123</sup> See LA. CODE CIV. PROC. ANN. art. 1426(D) (2016).

<sup>124</sup> Cf. FED. R. CIV. P. 26(c)(1)(g).

<sup>125</sup> See WASH. REV. CODE ANN. § 4.24.611(5)(a); Gus Barber Antisecrecy Act § 12, MONT. CODE ANN. § 2-6-1020(4) (West 2015); cf. TEX. R. CIV. P. 76a.

<sup>126</sup> See 26 U.S.C. § 162(q) (2018); see also Shane Rader, *The Weinstein Tax: Congress’ Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 329, 329 (2019).

<sup>127</sup> 26 U.S.C. § 162(q).

<sup>128</sup> See Rader, *supra* note 127, at 334–41. Additionally, by disincentivizing NDAs in the sexual harassment context, victims may be less likely to obtain an NDA and privacy protection that some victims desire. And the term “related to sexual harassment or sexual abuse” is quite vague and might be construed outside of the context in which the law was intended. *Id.* at 338–40.

<sup>129</sup> But cf. Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 5–6 (2004) (“Congress weaves together civil and criminal penalties to enforce these [tax-related] duties and leaves the ever unpopular Internal Revenue Service to swing the net. Like many clichés, however, voluntary self-assessment is true in a more significant sense than it is false. The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe – through withholding or otherwise – without overt government compulsion.”).

<sup>130</sup> See Benham, *supra* note 6, at 463–65; cf. Koniak, *supra* note 6, at 805 (“[A]greements to keep secret material indicating the existence of a public danger (whether past, present, or future) should be illegal.”).

<sup>131</sup> See, e.g., Zitrin, *supra* note 22, at 1579 (“A court, after all, is a publicly-funded institution; its main function should be to serve the broader interests of the public.”).

<sup>132</sup> Cf. e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 n.19 (1984).

<sup>133</sup> Cf., e.g., Zitrin, *supra* note 22, at 1579; Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 650–54 (2015).

<sup>134</sup> See, e.g., Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597–98 (1978); Zitrin, *supra* note 22, at 1572 (“Judicial action is often necessary to fulfill the judiciary’s ethical and moral responsibility to the public. A court that engages in judicial action to promote the health and safety of the public is serving the public trust in a manner consistent with the codes of judicial conduct. A court that does not so act is in danger of harming that public trust.”).

<sup>135</sup> Requiring the court to decide which litigation information becomes and remains confidential also has the collateral benefit of reducing the incentives of some parties to seek low-merits-value information for the purpose of “selling” confidentiality back to the producing party. See, e.g., Benham, *supra* note 6, at 463–65; see also Koniak, *supra* note 6, at 797–800 (“[W]e have to ask whether the willingness of courts to accept, and enforce, litigation-related agreements that compensate people in part for keeping quiet about information that they would otherwise be free to speak about . . . transforms litigation into precisely the kind of institution from which our blackmail laws are designed to save us . . .”).

<sup>136</sup> Professor Scott Moss came to an interesting conclusion: in a system that makes contracts to conceal litigation information unenforceable, more parties may settle claims before a lawsuit is filed to avoid the restriction. See Moss, *supra* note 93, at 882. Nevertheless, a restriction on contracts



for litigation information would give at least another degree of separation between public courts and harmful court secrecy. Legislatures should also consider limitations on private, court-enforceable contracts for secrecy in certain contexts. *Cf.*, e.g., N.J. STAT. ANN. §§ 10:5-12.8 (West 2020) (rendering confidentiality agreements unenforceable in the sexual harassment and assault context).

<sup>137</sup> These powers may be confined, to some degree, by the First Amendment. See a full discussion of the issue in *infra* Section III.C.

<sup>138</sup> See, e.g., FED. R. CIV. P. 26(c)(1)(G) (stating that courts may enter an order to restrict access to confidential commercial information and trade secrets); *cf.* *Pearson v. Miller*, 211 F.3d 57, 61–62 (3d Cir. 2000) (medical records).

<sup>139</sup> See Zitrin, *supra* note 22, at 1579 (“At the least, when such information reveals the danger of a public hazard or threat, the courts have an obligation to the public they serve to disclose this information, and the danger must trump any claim of privacy.”).

<sup>140</sup> See Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017).

<sup>141</sup> H.R. 1053.

<sup>142</sup> *Cf.* Benham, *supra* note 6, at 462–63.

<sup>143</sup> See, e.g., Marcus, *supra* note 22, at 9. (“Against this background, it should come as no surprise that in complex cases the parties customarily stipulate to protective orders negotiated by opposing counsel. In recognition of the general confidentiality of discovery, these negotiations normally focus on which protective devices the parties will use—e.g., limitations on access, separate storage, and the designation of persons eligible for access—rather than on the question of whether there should be an order limiting dissemination of discovery materials. These stipulated orders, which usually provide ‘umbrella’ protection for all materials designated confidential by the party producing them, have become the norm in many areas of federal practice.”); see also MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004).

<sup>144</sup> *Cf.* Benham, *supra* note 6, at 464.

<sup>145</sup> *Cf. id.*

<sup>146</sup> See Koniak, *supra* note 6, at 805. (“Merely rendering [confidentiality agreements for illegitimate secrets] unenforceable in court is simply not enough.”); see also Benham, *supra* note 6, at 465.

<sup>147</sup> FED. R. CIV. P. 41.

<sup>148</sup> *Cf.* Moss, *supra* note 93, at 882–83 (“[A]ll that is necessary to ban confidentiality [of settlements] is for Rule 41 to state that the court-filed dismissal stipulation must attach a copy of the parties’ settlement agreement.”).

<sup>149</sup> See Benham, *supra* note 6, at 465.

<sup>150</sup> MODEL RULES OF PROF’L CONDUCT r. 3.3(a) (AM. BAR ASS’N 1983); see also Zitrin, *supra* note 22, at 1602 (proposing ethical rule to limit attorney participation in confidentiality agreements).

<sup>151</sup> See Benham, *supra* note 6, at 466–67.

<sup>152</sup> See, e.g., *Brown v. Maxwell*, 929 F.3d 41, 45–46 (2d Cir. 2019) (media intervened to obtain access to, and later publish, information related to alleged sexual assaults).

<sup>153</sup> See *supra* Section II.A.

<sup>154</sup> See TEX. R. CIV. P. 76a (“Court records may be sealed only upon a party’s written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted . . .”)

<sup>155</sup> See Benham, *supra* note 6, at 466–67.

<sup>156</sup> A yet-to-be-seen impact of such a system might be on the scope of discovery. If courts and parties have less access to secrecy by agreement, might courts quietly use Rule 26 discretion to reduce access to information? Possibly. But decisions limiting discovery are subject to higher-court and public scrutiny. To the extent a trial court abuses its discretion in the area, it will be subject to reversal and be available for all to see.

<sup>157</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

<sup>158</sup> See, e.g., *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (“*Seattle Times* prohibits a court considering a protective order from concerning itself with first amendment considerations.”).

<sup>159</sup> See generally Benham, *supra* note 5, at 1781.

<sup>160</sup> *Seattle Times Co.*, 467 U.S. at 37.

<sup>161</sup> See Benham, *supra* note 5, at 1811–16.

<sup>162</sup> See *Int’l Prods. Corp. v. Koons*, 325 F.2d 403, 407–08 (2d Cir. 1963).

<sup>163</sup> See *In re Halkin*, 598 F.2d 176, 197 (D.C. Cir. 1979).

<sup>164</sup> See *id.* at 179–80.

<sup>165</sup> See *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981).

<sup>166</sup> See Marcus, *supra* note 22, at 2 (contending that protective-order regime was “threatened by a series of decisions based on an amalgam of common law and first amendment principles that require litigation of protective order issues and deprive protective orders, particularly those entered by stipulations, of their reliability”); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

<sup>167</sup> See *Seattle Times Co.*, 467 U.S. at 22–23.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 25.

<sup>170</sup> *Id.* at 27.

<sup>171</sup> *Id.* at 32.

<sup>172</sup> *Id.* at 31.

<sup>173</sup> See *Seattle Times Co.*, 467 U.S. at 32.

<sup>174</sup> See *id.*



- <sup>175</sup> See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).
- <sup>176</sup> *Seattle Times Co.*, 467 U.S. at 32.
- <sup>177</sup> *Cf.*, e.g., *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986).
- <sup>178</sup> See Transcript of Oral Argument at 23, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (No. 82-1721).
- <sup>179</sup> See, e.g., *id.* at 23–24.
- <sup>180</sup> See *Seattle Times Co.*, 467 U.S. at 37–38 (Brennan, J., concurring).
- <sup>181</sup> See *Cipollone*, 785 F.2d at 1119.
- <sup>182</sup> See *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003), *cert. denied*, 540 U.S. 1104 (2004) (applying *Procurier* intermediate scrutiny test to issuance of an individual protective order).
- <sup>183</sup> See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 n.2 (1st Cir. 1986) (reading *Seattle Times* to apply “heightened” scrutiny to the practice of issuing protective orders but allowing for a more flexible inquiry with respect to particular protective orders). Supreme Court decisions citing *Seattle Times* tend to support First Amendment protection for discovery dissemination. The Court has never explicitly revisited *Seattle Times*, but it has described and characterized its holding. In *Sorrell v. IMS Health, Inc.*, the court examined a state statute that restricted the dissemination of prescriber information that pharmacies collected. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011). The Court noted that “In *Seattle Times*, this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper’s disclosure of information it learned through coercive discovery.” *Id.* at 568. This reading of *Seattle Times* suggests that *greater* scrutiny than good cause might apply to courts’ issuance of protective orders.
- <sup>184</sup> As mentioned previously, I have contended elsewhere that the best reading of *Seattle Times* requires courts to apply intermediate scrutiny to individual protective orders in most contexts. See Benham, *supra* note 5, at 1811–16.
- <sup>185</sup> *Cf. Seattle Times Co.*, 467 U.S. at 34.
- <sup>186</sup> *Cf. id.* at 37–38 (Brennan, J., concurring).
- <sup>187</sup> *Cf. Benham, supra* note 5, at 1818–22 (considering the impact of applying the First Amendment to protective orders).
- <sup>188</sup> At oral argument, Justice Stevens raised the point. He inquired, “Isn’t it a virtual certainty that we are going to have a federal question in every case” in which a court issues a protective order? Transcript of Oral Argument at 23, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (No. 82-1721). After counsel for *Seattle Times* answered “Yes,” Justice Stevens continued, “That we’re going to have to we’re [sic] the last court of resort for discovery all over the country . . . ?” and “So every good cause for a protective order raises a First Amendment issue[?]” *Id.* at 24.
- <sup>189</sup> See *id.*
- <sup>190</sup> See *Seattle Times Co.*, 467 U.S. at 32 (“A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.”).
- <sup>191</sup> See *id.*
- <sup>192</sup> See *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003), *cert. denied*, 540 U.S. 1104 (2004).
- <sup>193</sup> *Cf. Endo, supra* note 45, at 1299 (observing that “Some systems—like Canada’s—treat unfiled discovery as presumptively confidential and prohibit its use beyond the confines of the instant case.”).
- <sup>194</sup> See Benham, *supra* note 5, at 1818.
- <sup>195</sup> Compare *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505–11 (1984) (appellate courts exercise independent judgment in First Amendment cases), with *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (district court did not abuse its discretion in making protective order ruling). See also Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229–30 (1985); *cf.*, e.g., *Ornelas v. United States*, 517 U.S. 690 (1996) (observing the clarifying power of de novo review of constitutional questions). But *cf. Martin H. Redish & William D. Gohl, The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 291, 307 (2017).
- <sup>196</sup> *Cf. Bose Corp.*, 466 U.S. at 505–11.
- <sup>197</sup> *Harmon v. City of Santa Clara*, 323 F.R.D. 617, 623 (N.D. Cal. 2018) (citing *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (making body camera footage public in excessive force case)).
- <sup>198</sup> See, e.g., *Allen v. City of N.Y.*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006).
- <sup>199</sup> See, e.g., *Glenmede Tr. Co.*, 56 F.3d at 483; *Allen*, 420 F. Supp. 2d at 302.
- <sup>200</sup> See generally Benham, *supra* note 7, at 2181.
- <sup>201</sup> See Benham, *supra* note 5, at 1826–27.
- <sup>202</sup> See Benham, *supra* note 6, at 463–64.
- <sup>203</sup> See generally Benham, *supra* note 7, at 2181.
- <sup>204</sup> See *id.* at 2202–13 (describing two different court approaches to discovery sharing).
- <sup>205</sup> See *Garcia v. Peeples*, 734 S.W.2d 343, 346–47 (Tex. 1987).
- <sup>206</sup> See, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (asserting that denying sharing between litigants “would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel”).
- <sup>207</sup> See *Peeples*, 734 S.W.2d at 347 (“Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.”); see also Benham, *supra* note 7, at 2207.
- <sup>208</sup> *Cf. Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (mandating “extraordinary circumstance or compelling need” to modify protective order); *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1301 (7th Cir. 1980) (concluding that collateral litigants in similar cases are “presumptively entitled to access” protected discovery), *superseded by rule as stated in Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009).
- <sup>209</sup> *Cf. Benham, supra* note 7, at 2227–29.
- <sup>210</sup> *Cf.*, e.g., *Pincheira v. Allstate Ins. Co.*, 190 P.3d 322, 337 (N.M. 2008) (“Ordinarily a protective order should permit discovery sharing among other

litigants and witnesses, *who are not competitors of the defendant. . .*” (emphasis added)).

<sup>211</sup> See Campbell, *supra* note 11, at 824 (contending that the likelihood of protective-order violations increases with each disclosure of discovery information).

<sup>212</sup> Cf. FED. R. CIV. P. 1 (mandating the Rules “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”).

<sup>213</sup> See Marcus, *supra* note 22, at 9.

<sup>214</sup> Cf., e.g., United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

<sup>215</sup> Benham, *supra* note 5, at 1826.

<sup>216</sup> See *supra* Section III.B.

<sup>217</sup> Cf. Marcus, *supra* note 14, at 500 (“The absence of careful scrutiny by the court is precisely the objective of the umbrella order, which is designed to facilitate discovery without miring the court or the parties in disputes about what is confidential. That task could be daunting in a case with large volumes of documents.”).

<sup>218</sup> See, e.g., Gelb v. Am. Tel. & Tel. Co., 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993) (“With respect to [a] claim of confidential business information, [the good-cause] standard demands that the company prove that disclosure will result in a clearly defined and very serious injury to its business.”); Parsons v. Gen. Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980) (finding the “good-cause” requirement “to mean that the party seeking the protective order must demonstrate that the material sought to be protected is confidential and that disclosure will create a competitive disadvantage for the party”).

<sup>219</sup> See City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 496 (N.D. Ill. 2018) (upholding TAR ESI production protocol as reasonable); see, also e.g., Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH. 2, 37 (2012) (“[C]onceptual searches find documents based on their relevance or similarity to the ideas expressed in the search query.”); Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 637–42 (2013).

<sup>220</sup> Cf. Manfred Gabriel, Chris Paskach, & David Sharpe, *The Challenge and Promise of Predictive Coding for Privilege*, ICAIL (June 14, 2013), <https://pdfs.semanticscholar.org/aa13/dc9888c3913c308c1cd4319cec1571e6e3f2.pdf> (exploring potential and limitations of technology assisted privilege review).

<sup>221</sup> “Technology Assisted Review (TAR) is a process of having computer software electronically classify documents based on input from expert reviewers, in an effort to expedite the organization and prioritization of the document collection. The computer classification may include broad topics pertaining to discovery responsiveness, privilege, and other designated issues.” *Technology Assisted Review*, EDMR, <https://www.edrm.net/resources/frameworks-and-standards/technology-assisted-review/> (last visited June 2, 2020).

<sup>222</sup> See, e.g., Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 598 (1978) (recognizing the common law right of access); see also, e.g., Bernstein v. Bernstein, 814 F.3d 132, 141 (2d Cir. 2016) (holding that complaint was subject to First Amendment right of access).

<sup>223</sup> Cf., e.g., Bernstein, 814 F.3d at 141 (acknowledging two distinct rationales underpinning First Amendment right of access); Dhiab v. Trump, 852 F.3d 1087, 1091–96 (D.C. Cir. 2017) (describing the limits of the First Amendment right and declining to extend it to classified national security information filed in court); cf. also 1 JAMES WM MOORE ET AL., MOORE’S FEDERAL PRACTICE – CIVIL § 5.34 (2020).

<sup>224</sup> See Nixon, 435 U.S. at 597–98.

<sup>225</sup> See, e.g., U.S. ex rel. Grover v. Related Companies, LP, 4 F. Supp. 3d 21, 25 (D.D.C. 2013) (“Public access may be denied, however, to protect trade secrets . . .”).

<sup>226</sup> See Nixon, 435 U.S. at 598.

<sup>227</sup> See, e.g., Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019).

<sup>228</sup> See, e.g., Dhiab, 852 F.3d at 1091–96.

<sup>229</sup> See, e.g., Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1095, 1102–03 (9th Cir. 2016) (evaluating whether right of access attached to motion for preliminary injunction and attached discovery documents).

<sup>230</sup> See, e.g., Maxwell, 929 F.3d at 47 (sealed motion for summary judgment and exhibits); cf. *In re Nat’l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019) (e.g., sealed pleadings and brief).

<sup>231</sup> See, e.g., Ctr. for Auto Safety, 809 F.3d at 1095 (motion for preliminary injunction); Maxwell, 929 F.3d at 47 (summary judgment).

<sup>232</sup> See, e.g., Maxwell, 929 F.3d at 50 n.33 (“[W]e have identified an important exception to [the] general rule: the presumption of public access does *not* apply to material that is submitted to the court solely so that the court may decide whether that same material must be disclosed in the discovery process or shielded by a Protective Order.”).

<sup>233</sup> See, e.g., S.E.C. v. TheStreet.Com, 273 F.3d 222, 233 (2d Cir. 2001) (internal quotes omitted).

<sup>234</sup> Cf., e.g., Maxwell, 929 F.3d at 47 (“With respect to the first category of materials, it is well-settled that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.”) (internal quotations omitted).

<sup>235</sup> See, e.g., Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1212 (9th Cir. 2002) (“strong presumption in favor of access . . . can be overcome” only by showing sufficiently important countervailing interests.) (internal quotations omitted).

<sup>236</sup> See, e.g., *id.* at 1213 (“[W]hen a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public’s right of access is rebutted, so that the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.”).

<sup>237</sup> See Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097–99 (9th Cir. 2016).

<sup>238</sup> See *id.* at 1095.

<sup>239</sup> See *id.* at 1097–99.

<sup>240</sup> *Id.* at 1096 (internal quotations omitted).

<sup>241</sup> *Id.* at 1098.

<sup>242</sup> *See id.* at 1099.

<sup>243</sup> In a concurrence, Judge Sessions wrote separately that he would have found that, even under the binary approach, the motion for preliminary injunction was literally dispositive. Thus, the presumption of access would have attached. *See id.* at 1103 (Sessions, J., concurring).

<sup>244</sup> *See id.* at 1102–03.

<sup>245</sup> *See id.* at 1103.

<sup>246</sup> *Cf., e.g.,* *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) (“As one moves along the continuum, the weight of the presumption declines. One judge has pointed out, for example, that where a district court ‘denied the summary judgment motion, essentially postponing a final determination of substantive legal rights,’ the public interest in access ‘is not as pressing.’”) (quoting *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1342 n. 3 (D.C. Cir. 1985) (Wright, J., concurring in part and dissenting in part)).

<sup>247</sup> *See Brown v. Maxwell*, 929 F.3d 41 (2d Cir. 2019).

<sup>248</sup> *See id.* at 45–46.

<sup>249</sup> *See id.* at 53–54.

<sup>250</sup> *Id.* at 49.

<sup>251</sup> *Id.*

<sup>252</sup> *See id.* at 53–54.

<sup>253</sup> *See id.*

<sup>254</sup> *See* FED. R. CIV. P. 12(f); *Maxwell*, 929 F.3d at 51–53.

## Oral Remarks of Professor Benham

Court secrecy is an area that I have studied for the better part of a decade at least, and I think it is a vital area, and I am glad to get to share some of my research and findings with you. Some of this research is new. Some of the research sews together ideas that I have been working on for a few years, but I think have been made more urgent by recent evidence.

The first thing I want to discuss is the idea that confidentiality is routine. I think at one point in time, this idea was more disputed. I think it has become more indisputable in light of some recent empirical research that we will discuss in more detail later. What are we seeing in standard litigation? We are seeing protective orders as a matter of course. We are seeing the sealing becoming more and more pervasive and we will talk in a bit about how protective orders link to sealing practice and make sealing more easily available in litigation. That in fact can be a troubling development on its own, this linking between secrecy at the protective order stage and the sealing stage.

Some new evidence from Reuters suggests that, in about half of the biggest product defect MDLs affecting public health and safety, there is sealed information related to public health and safety. In about 85 percent of those instances, the judges provided no explanation for the sealing order—and, in fact, many of those orders were entered on stipulated request by the parties, which is its own problem.

Multidistrict litigation, in itself, has the tendency to vastly accelerate secrecy in the courts. I think we have seen that trend. One recent study says that half of the federal docket is now in MDL, and in half of the products cases information is being sealed, and in 85 percent of those cases there is no explanation. We have pervasive secrecy in this country in cases involving the gravest public harms imaginable, including serious bodily injury, death, sexual exploitation, et cetera.

**In some instances, confidentiality ends up taking the lives of future victims when information that could have saved those lives resides in supposedly public courts.**

The debate has typically revolved around whether the public is harmed or not by court secrecy. I think that is an important debate. The public's relationship to the court, and the fact that the public funds the court, is critically important in analyzing whether we have too much secrecy, too much confidentiality, or too little.

I want to be the first to say that some confidentiality in the courts is absolutely justified and appropriate, but there is a line out there. And in some instances, confidentiality ends up taking the lives of future victims when information that could have saved those lives resides in supposedly public courts. Individual privacy concerns must have a place in the debate, but public safety is also an important interest to consider.

I want to shift the debate a little bit, because what we have seen is evidence of ongoing harm in instances of court confidentiality. These have turned into public press exposés that discuss the harms of court confidentiality.

**What are we seeing in standard litigation? We are seeing protective orders as a matter of course. We are seeing the sealing becoming more and more pervasive.**

Let us go back: Ford/Firestone, the Catholic priest sexual abuse scandal, the GM ignition scandal, Takata air bags, the recent sexual predator “#MeToo” scandals, and the opioid epidemic that was exposed by the investigative series called “Hidden Injustice”—the bombshell exposé that Reuters performed. You’re going to hear from Dan Levine, one of the primary architects of that study, during our lunch break.

Now, let us shift the debate. I think there is ample evidence that the public is being harmed by court confidentiality. But even if people agree or disagree that that is a legitimate interest that we ought to be considering, think of it from this perspective: every few years, the public is reading press exposés that publicly funded courts are keeping information secret that could have saved lives or prevented sexual exploitation. The courts are being tainted, *gravely* tainted, by these scandals. What is the response? We have seen it in law review articles, and we have seen it in congressional testimony. We have seen it across the board. People have said, “That discovery information, that is not in a court file, that is just exchanged between the lawyers, so the court does not have much to do with that.” More recently, we have heard the explanation, “Oh, that sealing. Those are stipulated requests. And the court does not have time to police stipulated matters.”

To civil procedure professors or judges, or well-trained lawyers, those explanations have some cogence. But what the public sees is a court system that is hiding or secreting away information that could save lives in cases that seem egregious. Over the course of time, this is eroding the public’s confidence in the courts. I believe that the courts need to step up and involve themselves more deeply in confidentiality determinations. We will get to that in just a bit.

Before we get there though, I want to talk a little bit about the typical players in litigation. I think this helps explain why we have a confidentiality problem in the first place. I know this is an overly simplified structure, because we have aggregate litigation that is way more complicated. You have multi-party litigation that is way more complicated. But let us take the simplest version. You have an individual plaintiff versus a defendant corporation, and you have the court. They are at the table in some type of products or personal injury litigation.

Let us talk about the incentives of each of those persons. What is the defendant’s incentive? The defendant wants to minimize judgment or settlement liability, and to minimize reputation harm. Confidentiality/secretcy helps the defendant accomplish both of those things. The defendant can keep the case under wraps and prevent future cases. The defendant can also minimize the public perception that its products or practices are dangerous by keeping this case secret. The defendant can also prevent follow-on claims. The defendant has a lot of incentives to keep the information secret.

Now, the plaintiff is typically incentivized to maximize the dollar value of the settlement. When you think about maximizing the dollar value of the settlement, one thing the plaintiff needs to do is to establish the case-in-chief that there is a defective product and that that product causes specific injury.

But the plaintiff also understands that, at some point, the defendant may want to settle the case, and part of that settlement may be an offer of money in exchange for a confidential settlement. At the point that the plaintiff is offered the confidential settlement, typically that is offered in quid pro quo fashion: “We can give you this amount, but we are going to demand a confidential settlement agreement.” When the plaintiff gets to that stage, one thing that is going to be critical is that there is information that is confidential, because if this has been blown all over the media before we even get to the settlement stage for whatever reason, then there is not a lot of information to trade back and exchange for money as part of the confidentiality agreement.



The plaintiff is in the business of proving his or her case and recovering money. The plaintiff is generally not some instrument for public justice on a crusade to expose the defendant. Some plaintiffs may be. But the plaintiff does not necessarily have time to wage a media campaign, and the media is often hesitant to listen to individual plaintiffs on unsubstantiated claims.

That leaves the final player, and that player is the court. The court is typically incentivized to minimize discovery disputes, and oil the wheels of litigation to keep it moving. The court probably loathes discovery fights, and that includes protective order and sealing fights. The courts are often judged on their efficiency, and that efficiency, at least in the conventional wisdom, could be compromised by undue confidentiality fights.

**The court is typically incentivized to minimize discovery disputes, and oil the wheels of litigation to keep it moving.**

Where do those incentives leave us? They typically leave us with a stipulated protective order, right out of the gate. Sometimes cases do not make it into court, because there are big incentives to settle pre-suit in some instances. But if the matter makes it into court, we begin the case with a stipulated protective order—because another thing the plaintiff has an incentive to do is get discovery, and that starts the ball rolling down the hill.

When the plaintiff wants discovery in the case, very often there could even be a standing protective order in the court to help smooth this matter over. There could be a defendant who has a standard protective order that says, “If you want this discovery without a fight, you are going to sign this protective order.” There is a big incentive to sign the protective order, to stipulate to the protective order to begin the process of litigation. The problem is, then, that that links up to other pieces in the case because those protective orders often contain language that say, “Do not file information that is protected under the protective order.” By the way, how do we know it is protected under the protective order? The parties just designate it “confidential.”

And then there is a provision that says, “If you file this in a court file where we need to meet the sealing standard, you have to go through special procedures to do that.” And that creates momentum towards secrecy, towards confidentiality.

## Three Ideas

I have three big ideas that I think can stop this inertia and that I think would help and would not unduly disrupt the courts. To the extent that there is disruption and cost I think it is well-justified disruption and cost, because the courts are being smeared with these confidentiality scandals every few years.

### 1. Outlaw Private Secrecy Agreements

First, we need to outlaw private secrecy agreements for litigation information. What I mean by this is information that is obtained with the power of the courts standing behind the litigant. The plaintiff obtained this information because the rules authorized discovery, and the court is standing behind this litigant. Information obtained through that process should not be kept confidential without a court signing off. This helps

**We need to outlaw private secrecy agreements for litigation information.**

change some of the incentive structure between the parties and reduces the market for confidentiality that I discussed earlier.

It also involves the court so the court can consider the public's interest. You see one problem in a typical structure is no one is there to represent the public's interest. Sure, we can have a media intervener, a public interest intervener. Typically, they are not there. The representative of the public in this process is the court. The *Pansy* factors<sup>1</sup> require courts to consider the public's interest when they issue protective orders. Who is going to do it on a stipulated protective order because of the incentives we discussed before? The court should be involved in making these determinations.

**Protective orders that are unsupported by good cause violate the First Amendment.**

## 2. Recognize First Amendment Implications

Protective orders that are unsupported by good cause violate the First Amendment. Many practitioners, and many judges, view the First Amendment as removed from the protective order analysis by the Supreme Court in *Seattle Times v. Rhinehart*.<sup>2</sup> That is just not the case. Let's look at an excerpt. This is a holding from *Seattle Times*:

"We . . . hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment."<sup>3</sup>

This could mean a couple of things. It could mean that the First Amendment's protection is less than good cause. If the order is supported by good cause, we satisfy the First Amendment. Or—and this is the reading that I view as more plausible based on other statements in the case, which you can see in my paper—if the First Amendment is satisfied, it is satisfied if and only if there is good cause for that order. Otherwise, we are saying that the First Amendment is satisfied by something less than good cause.

The First Amendment is co-extensive with good cause here. There are implications of that, which I discuss in the paper, for appellate review, standard of review, constitutional fact review. I go into some depth, but I do not think any of these are disruptive. And if anything, they just accentuate the lens through which we ought to view these issues, which is the public's interest and the court's interest, in addition to the party speaker's interest here.

## 3. Umbrella Orders Should Be Invalid

Finally, and third, contested umbrella orders do not satisfy Rule 26(c) or the First Amendment. Commentators and courts have recognized this for a long time. How do we get umbrella orders past good cause and under my argument, the First Amendment? Stipulation! "Let us just agree to the umbrella order, and then we can designate what is confidential, and maybe we will even roll that into a sealing order." You saw it in the Jeffrey Epstein case. They actually had a party-designated sealing order that looked like an umbrella protective order, except they were sealing information in court files. We need to stop this inertia towards umbrella protective orders that delegates a crucial confidentiality determination to the parties. We need to move it back to the court. The big opposition argument to this is going to be that "This is just going to be a landslide of work."

**Contested umbrella orders do not satisfy Rule 26(c) or the First Amendment.**

I have some ideas in the paper that might mitigate some of the work. I do not think it is going to be a landslide of work. Judges are not going to have to engage in page-by-page-by-page, million-page document reviews to determine whether each of these documents individually meet good cause. We could rely on aggregate information, summary information. Also, I think technology is pushing us in a direction where the courts are going to be able to rely on technology-assisted review to cull down the information that needs to be protected.

Here is the other thing. By requiring the court to make these determinations, we are going to put a big incentive on the parties seeking confidentiality to reduce the amount of material that they are requesting to keep confidential. Because if it is harder and more irritating to the court to make confidentiality determinations, parties will think twice about what should actually legitimately be kept confidential and what should not be protected by the protective order or sealing order if we get to that stage.

In any event, I appreciate your considering my paper and my thoughts in this regard. I look forward to your thoughts.

**By requiring the court to make these determinations, we are going to put a big incentive on the parties seeking confidentiality to reduce the amount of material that they are requesting to keep confidential.**

## Comments by Panelists

### PROFESSOR SETH ENDO

Professor Benham's account of the existing landscape of court confidentiality is, by itself, important descriptive work that offers insights into where we are and how we got there.

My comments proceed in three parts. First, I will share some of my research on stipulated protective orders to add to the picture. Second, I will briefly lay out several critiques and questions about Professor Benham's proposed reforms. Third, I will discuss several ways in which the reform proposals, whether enacted or not, are valuable.

### Stipulated Protective Orders

I recently examined how federal trial courts dealt with 100 proposed stipulated protective orders in January 2018. From this, the big findings support Professor Benham's concerns about protective orders. Within my set, 95 percent of the joint requests for protective orders were granted, and the majority of these entered orders had significant legal errors. More than half relied on generic language to describe the reasons for the protective order, obscuring an outside reader's ability to see the particularized need for confidentiality. In 15 of the cases, the orders conflated the standard for filing materials under seal with the much less demanding standards for keeping unfiled discovery confidential.

With that said, after following the cases for over a year, three additional observations mitigated some of my concerns about the prevalence of errors and the seemingly pro forma judicial supervision.

First, there were no interveners in any of the cases. But as Professor Benham has made clear in his paper, this is only weakly probative of a lack of public interest in cases given the uphill battles that potential jurors face.

Second, in only 21 cases did parties file any materials under seal at all. Even in the relatively small subset of civil cases in which the parties undertook the effort to obtain a stipulated protective order, only about one out of five actually used it. Of those 21 cases, four of them were patent cases, which might, as a category, warrant more restrictive access because of the omnipresence of trade secrets.

So, instead of judges simply rubberstamping flawed protective orders, the practice might be an exercise of rough justice in which judges have good intuitions about if and when the orders are really going to matter for the development of the public record. They may be willing to be a little more casual and help move the litigation along by reducing discovery costs when it looks like there is not going to be much of a public record at all.

Third, and related most directly to Professor Benham's public health and safety concerns, regulated entities involved in litigation appeared to be increasingly including provisions that permit disclosure to their regulators. For instance, in 2016, the National Highway Traffic Safety Administration (NHTSA) issued guidance calling for parties seeking any sort of protective order or confidential settlement agreement to include a provision that specifically allows for disclosures of relevant motor vehicle safety information to NHTSA and other applicable government authorities. The U.S. Consumer Product Safety Commission also has issued similar guidance.

**Most regulated entities are inclined to try to keep their regulators happy and avoid these fights.**

But my data only looks at the start of 2018. With that caveat, NHTSA's proposed provision seems to be showing up—I found a few cases of that. I also found a few confidentiality orders from the Bristol Myers-Squibb/McKesson MDL that exempted the FDA from their ambit. This is all consistent with my impression that most regulated entities are inclined to try to keep their

regulators happy and avoid these fights. With that said, the reason that NHTSA issued its guidance was because it was concerned about non-compliance with existing reporting mandates. So it is hard to know how this cashes out in actual practice.

## Professor Benham's Reform Proposals

Let me now turn to a few questions I have about Professor Benham's reform proposals.

As to the prophylactic ban on all private confidentiality agreements, I view the policy question as turning on an empirical question about the social utility of such agreements. I suspect banning all such agreements would significantly raise the cost of litigation, heighten attorney review times, and lead to more discovery fights and slower movement of cases through the courts because of the reduced bargaining zone and the need for more case management of disputes. And thus, I see increased costs as raising important access-to-justice concerns, as well as efficiency issues.

I also wonder if the marginal benefits would ultimately manifest themselves. I can easily imagine a world in which sophisticated litigants pick lawyers who are repeat players in an area, whose

**I see increased costs as raising important access-to-justice concerns, as well as efficiency issues.**



practices are known to involve key public statements and rare filings, implicitly conveying an intent to bargain outside of the public eye without any sort of agreement.

To the extent that Professor Benham is concerned about the dignity of the courts, if court transparency is fundamentally about permitting oversight of court decision making, I wonder how it reaches unfiled discovery. Still, the public oversight function strongly supports Professor Benham's proposal that judges should have to explain their reasons for their decisions, including those involving confidentiality agreements or protective orders. I view that very much in keeping with the long literature about the power of explanations and its relationship with the legitimacy of the courts.

Turning to the constitutional discussion, as to the practical implications of Professor Benham's proposal, I am more pessimistic about the amount of work and increased judicial fact-finding it would entail, but that is another open empirical question.

The notion that courts should be taking the good cause requirement seriously, as they are imbued with some First Amendment gloss, is hard to quibble with if one views courts as having any sort of public function. Nevertheless, I have some questions about the underlying jurisprudential theory. As a general conceptual matter, I worry about the Imperial First Amendment. That is the tendency of the First Amendment to swallow other areas of law.

And, as specifically applied to protective orders, de-linking the right of access to information from the right to disseminate that information does not seem to account sufficiently for how the government is compelling the speech of the producer of discovery. It strikes me that the First Amendment could also act *against* production, which raises the implication that the compulsion be read as narrowly as possible and/or permit restrictions on its use. Or if it operates on both sides, it is not obvious to me that the First Amendment would then put a thumb on the scale in favor of the requestor.

**To the extent that bringing in the First Amendment encourages litigants and courts to take more seriously the balance of interests at stake . . . this seems practically sound and very much in keeping with the formal "good cause" jurisprudence.**

I read that Professor Benham is less concerned about the compelled-speech issue, in part, based on the *Sorrell v. IMS Health*<sup>4</sup> case. I will not get into the specifics of that too much. But a subsequent case, *Maracich v. Spears*, at least for me, confirmed that the Court views litigation-related speech as a general exception to its free speech jurisprudence that is very strongly in favor of free speech and free expression.<sup>5</sup>

With that said, to the extent that bringing in the First Amendment encourages litigants and courts to take more seriously the balance of interests at stake, and prophylactically adds a thumb on the scale for the public interest and discovery sharing, which Professor Benham has written extensively about, this seems practically sound and very much in keeping with the formal "good cause" jurisprudence.

**The notion that courts should be taking the good cause requirement seriously, as they are imbued with some First Amendment gloss, is hard to quibble with if one views courts as having any sort of public function.**



All in all, I look forward to seeing how Professor Benham continues to build this out, and we will leave it to true First Amendment scholars to take a deeper dive into the doctrine.

## The Value in Professor Benham's Proposals

Unlike judges and legislators, scholars do not usually have direct authority to implement their proposed reforms, but they can guide these conversations. Regardless of whether Professor Benham's suggestions are adopted, his work should encourage everybody to reexamine the interests of litigants, the courts, and the public in litigation-related secrecy.

A few new or changing factors might cut either for or against some of the suggestions:

- One, there is the #MeToo movement, which has really reminded the public of the damage that secret settlements can do;
- Two, at the federal level, regulatory oversight is shrinking, leaving more enforcement to private parties;
- Three, in this digital age, there is a lot more discoverable material;
- Four, with respect to the massive troves of potentially discoverable emails, this type of information might be more likely to contain responsive information and non-material sensitive information in a single document which shows how in terrorem threats are not just related to information about liability;
- Five, the public general public has easier access now to court documents through PACER and other electronic databases;
- Six, individual members of the public have many more avenues for broadcasting messages; and
- Seven, MDLs and other forms of aggregate litigation might place more power in the hands of a few judges and lawyers.

In addition to these changes that might make us rethink our approach to confidential litigation, Professor Benham's work raises important first-order questions about civil procedure as the main job of courts to resolve cases for the parties if they have some public function. From this, in a world in which costs are a key factor in procedure and case-management decisions, what is the denominator when one is thinking about proportionality and cost of discovery? Is it the value of the individual case, the cost of the regulatory alternative, the benefit to society as a whole?

**Professor Benham's work raises important first-order questions about civil procedure as the main job of courts to resolve cases for the parties if they have some public function.**

Another big question, raised by both Professor Benham and Professor Campos, is to what extent private litigation is a reasonable substitute for adequate governmental regulation. Should they be?

These big, practical, and theoretical questions are not just of interest to academics. For example, in February, the Sixth Circuit issued a decision that addressed the question of the appropriate denominator of discovery cost in the *National Prescription Opiates Litigation*,<sup>6</sup> which illustrates the timeliness and salience of Professor Benham's research.

I have one final thought. On the Texas Tech website, Professor Benham's biography describes him as "a law teacher who devotes his time to improving the civil litigation system." His paper, *Foundational and Contemporary Court Confidentiality*, surely is doing just that by sharing his insights into a critical issue facing the courts, and prompting folks like the participants in this Forum to undertake deep, normative, doctrinal and practical inquiries into how to conceive of, and then balance, competing public and private interests.

## THE HONORABLE ERIN A. NOWELL

As Professor Benham puts it, there are a number of "off-ramps" that deprive the public of access to confidential information, including things like NDAs and arbitration agreements, which most often are the "sexier" things that people are talking about. But I want to focus my comments on his proposals related to litigation information—specifically, that private agreements to keep information confidential should be illegal absent court approval.

To be clear, I believe that confidential information in the context of litigation often creates a power differential between the parties. The current regime within the courts—with the parties agreeing amongst themselves, and production of documents and information subject to protective order or some other form of confidentiality—not only creates but, I feel, exacerbates the power differential. What you have is one party who needs certain information for their case to continue or to make their case. And you have another party who is desperate to keep information confidential. In both of those positions, these parties can feel like that is really their only option—to sign the agreement.

Now, when I am looking at this and viewing these circumstances as a judge, it compels me to ask the question, What role should the court play in the formation of these agreements? And more importantly, what role should the court play in determining what information should be considered confidential? What documents and information should have that stamp? And more importantly, what could be potentially removed from public access?

As you know, courts generally and often play the role of gatekeeper in litigation. For instance, they determine whether experts are qualified to opine on certain subjects, or whether certain claims should be dismissed based on legal or factual issues. That is a role that courts are accustomed to. Why then, in this context, should the courts cede this role when it comes to determining what information can be designated as confidential and the extent to which this confidentiality can prevent the public (including potential other parties, potential litigants, potential victims, regulatory agencies, and the press), from accessing this information?

**I think the courts should not relinquish this decision to litigants. They should not be doing what we have seen as kind of a rubber stamping of these agreed orders where they are basically patting the parties on the head and saying, "Good job for working this out so that I did not have to get involved."**

Quite frankly, I think the courts should not relinquish this decision to litigants. They should not be doing what we have seen as kind of a rubber stamping of these agreed orders where they are basically patting the parties on the head and saying, "Good job for working this out so that I did not have to get involved." I think it should be the opposite. I think the

courts should be embracing their gatekeeping role in this context, and that they need to be stepping back into the process.

I think Professor Benham's proposal to require court approval to designate any litigation information as confidential is a step in the right direction. His discussion points to two major steps in the litigation process. He talks about unfiled discovery information, and then he also talks about the sealing of filed records or sealing of filed documents, and that basically is where that confidentiality designation really starts to play a role.

And what I found most compelling in his argument, and most concerning, is how those two steps are intertwined, how those decisions basically create a problem down the line, such that an agreement to one thing, to one confidentiality designation, somehow becomes a concession later on in the process.

As he explains, courts generally sign or otherwise agree to discovery orders, even though the parties themselves are the ones who designate documents as confidential. That would mean a defendant would say, "No, here is the subset of documents that I want to be considered confidential, that you cannot produce to other parties or you cannot make public." And that is under an agreed order. And when the courts sign off on these, it is under the belief that the parties have negotiated those designations, and that they would alert the court if there was a problem or any concerns.

While this might make sense, especially as it relates to discovery information early on in the suit, or to claims that have not been proven, it is the next stage that for me is most troubling—because somehow the documents designated as confidential become the same documents that the court sealed, and that creates an issue with the public getting access to those documents.

**Who is looking at health and safety issues created by this process—basically the hiding of this information from the public? Shouldn't that be the court?**

What my concern stems from is the fact that the original designation only involves the parties. You have one side, which is the plaintiff, and they are looking at their interest. Their case is the one issue. The other side is the defendant, and they are considering their potential liability issues in the case.

But what I want to know is who is considering the interest of the greater public. Who is looking at health and safety issues created by this process—basically the hiding of this information from the public? Shouldn't that be the court? Or, as Professor Benham explains, shouldn't there be a framework that requires judicial involvement irrespective of the wishes of the parties?

I understand that this is a lofty goal, and that it is going to require legislative and procedural changes to the core of the court system, and that people are going to ask a lot of questions, like "How exactly can the court review all of the documents and information that are going to be designated as confidential. Shouldn't the onus be on the parties to bring forth any of these challenges?" I understand that. This is a lot of information. Part of my response to that would be that, if parties knew that judges were reviewing subsets of documents for confidentiality, I think the number and amount of documents that they put forth would change. That is one answer.

But the more important problem with placing the onus on the parties to raise concerns is that the parties are concerned with their own interests. But when the public is to be "shielded" from accessing information, shouldn't someone be considering, and to some extent fighting for, or representing, the interest of the public?

The role of the judicial branch is just that: to represent the interests of the public and to enforce the laws to benefit all of us, not taking the side of any party to the litigation. Given how the current system has become a process where individual parties are making decisions that consequently affect the rights of the public, isn't it time that the courts reclaim their judicial power, ensure confidence in the court, and protect the rights of the public that they serve?

## EMILY COUGHLIN

I want to compliment Professor Benham for the impressive scholarship of his paper. However, I would like to point out that there are valid and critical reasons for the use of confidentiality agreements prior to and during litigation.

Today, I will address: one, the need for protective orders and pre-trial discovery; two, the undesirable effects of limiting confidentiality agreements; and three, the use of sealing agreements to protect confidential proprietary information.

### The need for protective orders and pre-trial discovery

Protective orders issued for good cause under Rule 26 of the Federal Rules serve a vital function in the civil justice system. They enable plaintiffs and defendants to exchange trade secrets or other confidential business information needed to litigate or settle a dispute in a just, speedy, and inexpensive manner, while prohibiting disclosure of such information to current or potential competitors and the public.

In fact, the U.S. Supreme Court has expressly rejected the notion that the public has a right of access to discovery material exchanged between private litigants, holding that no right of such access existed at common law or in the U.S. Constitution. In the often-cited *Seattle Times v. Rhinehart*,<sup>7</sup> the Supreme Court held that pre-trial depositions and interrogatories are not public components of a civil trial, were not public at common law, and in general are conducted in private as a matter of modern practice.

**Protective orders issued for good cause under Rule 26 of the Federal Rules serve a vital function in the civil justice system.**

As a result, contrary to Professor Benham's suggestion, restraints placed on documents that have been produced in discovery, but have not yet been admitted, are not a restriction on traditionally public sources of information. Rather, as the court noted in *Seattle Times*, because it is clear from experience that pretrial discovery has a significant potential for abuse, protective orders temper the broader scope of discovery. In fact, the protective order is an ideal mechanism for minimizing the negative effects of modern discovery without eviscerating the value of the process.

There are many kinds of simple suits in which protective orders play a vital role. Their utility in facilitating discovery—and, in turn, judicial efficiency—cannot be overstated. Protective orders, particularly in mass torts, are designed to ease the discovery process while protecting the parties and judicial efficiency.

Although protective orders are commonly used in too many categories to catalogue, the production of proprietary and confidential scientific and financial documents that require such protection is very common in product liability, commercial, anti-trust, patent infringement, and intellectual property litigation. Yet in most



cases, only a small fraction of discovery documents containing confidential business information is actually filed in court. However, when they are filed, sealing of such documents is often necessary.

As the Supreme Court stated in the case of *Nixon v. Warner*, “the right to inspect and copy judicial records is not absolute. . . . [C]ourts have refused to permit their files to serve as . . . sources of business information that might harm a litigant’s competitive standing . . . .”<sup>8</sup>

## Undesirable effects of limiting confidentiality agreements

As such, limiting confidentiality agreements would have several significant undesirable effects.

First, settlements would be disturbed. As we all know, settlements are by definition agreements between willing parties, not adjudications of liability. And because a willingness to settle is not an admission of liability, the rules

**Limiting confidentiality agreements would have several significant undesirable effects.**

of evidence do not even allow juries to learn about efforts by the parties to reach a settlement. For the same reasons, I submit that the public is not made safer by eliminating confidentiality provisions for settlement agreements. Such agreements contain no adjudication of liability, no findings of fact, no substantiation of claims, and generally do not include expert reports or discovery materials that can theoretically provide the public with any insight. Rather, making settlements public and creating, in effect,

a database of unproven claims would clearly deter settlements. Defendants will not risk creating evidence against themselves that could then be misconstrued as corporate knowledge of safety-related problems with their products despite the unproven status of the claim being settled. Moreover, deterring settlement is not beneficial to either plaintiffs or defendants, and is not beneficial to the court system, which would be backlogged with cases and trials.

Second, discovery disputes would increase. If confidential information cannot be protected from public disclosure, then discovery requests seeking such information will be resisted by defendants. A company’s intellectual property and confidential business practices are not public goods. They are the lifeblood of productive enterprise. Presuming a public right to private property, one that was disavowed by the Supreme Court in *Seattle Times*, has Fifth Amendment Takings Clause implications, on the grounds that the burden of making public its most confidential information will put the company at a devastating competitive disadvantage. Companies will find it extremely difficult to get past an onerous discovery dispute by agreement. Will the proposed limitation of confidentiality force a company to make its intellectual property public? If not, the plaintiff is potentially deprived of information necessary to prove its case. If so, the company may face losses that go well beyond the potential liability of a lawsuit. Currently, this dilemma is avoided by allowing discovery in private litigation to remain private. Under the proposed limitation of confidentiality agreements, those stark choices are unavoidable.

Third, an inappropriate economic leverage would be created. The effect of the proposed limitation of confidentiality agreements would also create enormous economic pressure that is inconsistent with the truth-seeking goal of civil litigation. The mere filing of a complaint would give the plaintiff the ability to initiate discovery, the responding to which would be an outcome no company could allow and hope to stay in business. It is not difficult to imagine the filing of a complaint with a discovery request, designed to require production of the most confidential information, accompanied by a demand to settle prior to the response stage.



Under the proposed restrictions, the defendant must choose to settle, which would be taken as an admission of the plaintiff's safety-related allegations, or to fight, in which instance it either lives or dies, based on its ability to convince a judge to preclude discovery of confidential information all together.

## The use of sealing agreements to protect confidential proprietary information

Finally, let me turn to sealing agreements. Sealing is not automatic. Even when expressly contemplated by a stipulated protective order, whether or not a judicial record should be sealed depends on the judgment and discretion of the presiding judge. The judge is the primary representative of the public interest in the judicial process, and is duty-bound to review and balance any request to seal the record or part of it. However, after the court determines that the discovery document should be sealed, a motion by an opposing party to unseal the document should be viewed by the court with considerable skepticism.

Unfortunately, as the Ninth Circuit stated in *Kamakana v. City and County of Honolulu*,<sup>9</sup> the compelling reason standard adopted by the Ninth Circuit and others “sharply tips the balance in favor of production when a document formally sealed for good cause under Rule 26 becomes part of a judicial record.” The court noted that, at the very least, the compelling reason standard “upsets the balance between the common law right of access and Rule 26.” This high hurdle erected by the compelling reason standard is also self-defeating. Rather than deterring the use of court-filed confidential business information for vexatious or improper purpose, the compelling reason standard facilitates potential misuse.

**Sealing is not automatic. Even when expressly contemplated by a stipulated protective order, whether or not a judicial record should be sealed depends on the judgment and discretion of the presiding judge.**

In a 2015 article appearing in a journal of DRI's sister organization, the International Association of Defense Counsel's *Defense Counsel Journal*,<sup>10</sup> the authors point out that discovery sharing has evolved from the mere exchange of materials from one attorney to another to the practice of selling confidential discovery information for a profit, and the rise of plaintiffs' litigation support groups, creating databases of confidential discovery materials for open and ready dissemination to their paying or otherwise supporting members. As such, the potential exploitation of liberal discovery is the very reason for trial courts' authority to issue protective orders and seal documents. In fact, the Supreme Court emphasized in *Seattle Times* that, “because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c).”<sup>11</sup>

In conclusion, it must be remembered that defendants do not come willingly into court. They are required to respond to complaints lodged against them. Accordingly, they cannot legitimately be said to have waived their right to keep confidential information out of the public sphere simply by being named in a civil action. Thus, I submit that the consensus from the bodies charged with determining public policy in this area is that the current system of judicial discretion, court rulemaking, and legislative oversight is the correct one for balancing the rights of litigants and the public regarding discovery and protection of confidential materials produced in civil litigation.

## JENNIFER BENNETT

I think this paper makes several really good points, but there were two in particular that stood out to me as essential for thinking about how we approach secrecy in the court system.

The first is the First Amendment point. We are so used to protective orders as a regular part of litigations that it is easy to forget what they are: a court order, a government mandate, *not* to talk about something. That is clearly a First Amendment issue. I think Professor Benham is absolutely right that the Supreme Court in *Seattle Times* recognized that as a First Amendment issue, and that it is essential to have good cause before the court orders a party not to talk about something.

**We are so used to protective orders as a regular part of litigations that it is easy to forget what they are: a court order, a government mandate, not to talk about something.**

The second point that Professor Benham makes that I think is really important is thinking about how secrecy works in the court system in terms of incentives. I think I disagree with Professor Benham a bit on emphasis. I have not very often seen plaintiffs or public interest lawyers hoarding information from defendants so they can sell secrecy back to them. To me, the problem is actually

much more mundane. For plaintiff lawyers and public interest lawyers, their job and their ethical responsibility is to represent their client. Spending the money and the time to fight about secrecy before you even get discovery in a case may not align with that ethical responsibility to fight for the client if that is not also what the client wants. It is really more of a practical problem, I think, than necessarily a strategic problem, in which they might think, “I am going to keep all of this information and then sell it back to you.” But I agree, generally speaking, that the key thing to think of in this context is the incentives that people are under—that is why this problem occurs in the first place.

Professor Benham made several suggestions for policy changes, several of which I agree with. But I want to emphasize that there is a huge chunk of this problem that is not a problem with the existing law itself. It is an enforcement problem. For a big part of these issues, the law is already as it should be. The law already requires that there be good cause for a protective order. It already requires, in most cases, that there be a compelling interest to seal court records. But these laws are often only honored in the breach.

**There are a lot of things courts and judges can do right away to ameliorate the problems Professor Benham identifies.**

There is a lot of really low-hanging fruit here. There are a lot of things courts and judges can do right away to ameliorate the problems Professor Benham identifies, and the paper points to some of those things. I want to discuss two in particular.

### Hold the parties to their burdens

The first is holding parties that seek court orders, either to seal court records or to keep discovery secret, to their burden—make them prove that there is good cause to keep discovery documents secret, that there is a compelling interest to seal a court record that would show a danger to the public, for example.

There is a concern—and I think it’s a legitimate concern—that enforcing these rights is going to take time and effort from courts who are already overburdened, resolving disputes that the parties have actually raised, let alone

when everybody agrees that things can be kept secret. And Professor Benham talks about some ways to make this less burdensome on courts.

But I want to note that the law itself, in fact, provides a way to do this. Parties often just assert that something is a trade secret or that if it is made public, their competitors will just be able to copy it for less money. And those kinds of statements are impossible to evaluate without actually looking at the documents. In fact, in most cases, they are impossible to evaluate even if you *do* look at the documents. Judges are not usually experts in automobile parts or mortgages. It is difficult for them to tell, when a person or a company says something is a trade secret, that it actually is.

But those kinds of vague, conclusory statements also do not comply with the law. The law requires that there be a particular, specific demonstration of fact even just to keep discovery a secret, let alone *court records*. That would look much more like, “This tire has Feature X, which allows it to be safer at higher speeds, which means we can sell it for \$10 more than our competitors and our competitors do not have Feature X.” That is a very specific, particularized demonstration of fact, showing the harm it would cause if it were made public. If parties are required to give that kind of explanation—again, the explanation the law already requires—then that takes the burden off the courts, because courts can look at that explanation and see immediately whether or not it meets the relevant standard.

So the first thing is just holding parties to their burden—the standards the law already requires. That will both help to ameliorate the problem of unwarranted secrecy and minimize the burden on the court in doing so.

**The first thing is just holding parties to their burden—the standards the law already requires. That will both help to ameliorate the problem of unwarranted secrecy and minimize the burden on the court in doing so.**

## **Umbrella Protective Orders**

The second thing I want to note is about umbrella protective orders. Professor Benham suggests that these should just basically go away. I don’t think that these are going away any time soon. But I think there are things that courts and judges can do to make umbrella protective orders more compliant with the law, to prevent parties from using them to hide public safety issues and manipulate what information gets before the court and before parties, and to decrease the burden on the parties and the courts of enforcing the law with regard to secrecy.

**A model protective order can define what the standard is for keeping something secret, and can require that parties do not mark documents confidential unless they have a good-faith belief that it meets the standard for keeping it confidential.**

I think model protective orders are really important in this regard. And of course, they can be dangerous. I will not name names, but there are plenty that I see that do not comply with the law. But model protective orders that *do* comply with the law—where people have thought about

best practices ahead of time—really diminish these incentives problems, because then the parties are not fighting at the beginning of discovery in every case. Judges are not having to reinvent the wheel in every case. They have

a model that the parties have to comply with, that they thought about in advance, and that applies everywhere—a standard that complies with the law and best practices as well.

I'd like to propose a couple of provisions for these kinds of model protective orders that I think will help ameliorate some of the problems that Dustin pointed to.

A model protective order can define what the standard is for keeping something secret, and can require that parties do not mark documents confidential unless they have a good-faith belief that it meets the standard for keeping it confidential. Then it can back that up with sanctions. It can provide sanctions for parties that do not designate documents in good faith. And Professor Benham suggests the idea of certification, which I think is a great idea. I'd never thought of it before. Parties should certify to the court that if they marked documents confidential that they have done so with a good faith belief that they are in fact confidential, and courts can back that up with sanctions.

What that would do immediately is solve, or at least ameliorate, both the incentives problem and the burden problem—because, from the beginning, you do not have this massive stack of document that has been marked confidential when it should not have been. You have a smaller set of documents that the party certifies—in good faith, backed up by sanctions—actually should be confidential. We would be limiting the scope of the problem and the dispute to documents where it really should be there. That is the first provision I suggest.

The second provision is that a good model protective order would put the burden on the designating party to file a motion with the court to try to keep that designation if it is challenged. Right now, in most cases, as Professor Benham points out, one of the big incentive problems is that if a defendant marks a bunch of documents confidential, that should not be confidential, the plaintiff then has to go file a motion in court to get that confidentiality designation removed.

But a good model protective order would switch that burden. If you produce a bunch of documents you mark confidential and the other side says, “No, they are not,” then the designating party has to go into court and explain to the court why that confidentiality designation should stay there. That is really important because, again, it solves, or at least ameliorates, the incentive problem. It means that parties cannot mark a bunch of documents confidential that should not be marked confidential, knowing that the other side is not going to be able to take the time and the expense to challenge it.

I think there are several other provisions that Professor Benham points to that can be really helpful in creating a default if we are going to have these stipulated orders keeping documents secret that would help protect the public and diminish the burdens on the court and the parties.

## Response by Professor Benham

Thank you, everyone, for the fantastic, thorough comments. I am honored that so many distinguished people on the panel and also people in the audience have taken the time to read my work.

I want to start by addressing some of Ms. Coughlin's points. She gave very thorough, well-reasoned arguments. But I want to point out that several of these arguments were aimed at straw men, and to point out where her representation of my position differs from my actual position in the paper.



## Some litigation information should be confidential

First, I do not suggest that litigation information should never be confidential. In fact, in many ordinary circumstances, litigation information should absolutely be confidential. That ranges from intellectual property protection to trade secret protection, victim information, Social Security, and other identifier information. There is a wide swath of litigation information that should be held confidential. And Ms. Coughlin's points were aimed at an argument that litigation should be conducted in public. That is not my position, and it is not a tenable position.

My position is that courts should be involved in those determinations. And the courts should be involved in confidentiality determinations because much of the harm of confidentiality scandals is done to the courts, in addition to the public interest implications that were mentioned by other panelists.

Professor Endo made a great point that the traditional rationale for court transparency (and this is from *Nixon*) is that it is about supervision of judicial decision making. That is absolutely the doctrinal rationale for court transparency. But I think there are other rationales, too. One is that the public should be protected by the court system it funds. Another rationale (and I think this is an extremely important rationale that has not received a ton of scholarly attention yet) is that these repeated confidentiality scandals are undermining the legitimacy of the courts. The public is becoming aware that information that could protect and save lives or prevent serious injuries often ends up in "public" court files.

**The courts should be involved in confidentiality determinations because much of the harm of confidentiality scandals is done to the courts.**

## No public right of access to unfiled discovery

I also want to talk about a second straw man argument that I think I heard. I do not want to make a straw man about a straw man here so if I am misrepresenting Ms. Coughlin's position about my position, I would love to hear it. I do not contend that there is a public right of access under the First Amendment to unfiled discovery. As she correctly notes, *Seattle Times* foreclosed the public right of access to unfiled discovery.

**There is a speaker First Amendment interest—the speaker being the litigant holding the information, who has a First Amendment interest to disseminate it, absent the entry of a protective order entered upon good cause.**

What I do contend is that there is a *speaker* First Amendment interest—the speaker being the litigant holding the information, who has a First Amendment interest to disseminate it, absent the entry of a protective order entered upon good cause—and that the First Amendment standard in this context should be good cause.

One other thing I would say is that my reading of *Seattle Times* already reduces speech protection to a substantial extent in this area because speech protection with regard to much of the information that a litigant could disseminate would typically be strict scrutiny. These cases involve matters of public concern, corruption. And the Supreme Court did reduce First Amendment protection in this area. I have contended in previous writing



that the level of protection should be intermediate scrutiny, as suggested by Justice Brennan's concurrence in *Seattle Times*. But at a minimum (and this is the point of my current paper), the speech protection for the speaker's interest in disseminating litigation information should be good cause. It can go no lower and be consistent with a fair reading of the case.

I wanted to respond to Justice Nowell's comments about the power disparity in negotiating, stipulating confidentiality agreements. The way she characterized it, if I heard her correctly, was that you have a plaintiff desperate to get information, and you have some defendant desperate to keep it confidential. There are a lot of incentives running to confidentiality. I agree with her.

**Often, that power disparity runs against the plaintiff. It runs against the person who has been injured.**

I would slightly reframe it, though, and suggest that, often, that power disparity runs against the plaintiff. It runs against the person who has been injured. The private litigant's interest in dissemination may be quite low for a variety of practical reasons.

But that plaintiff, that person negotiating the stipulated protective order, the David versus the Goliath, who just wants discovery so that they do not end up in summary judgment, they are desperate to get this information, and they will agree to confidentiality even if they would like to tell the story.

Finally, I wanted to mention Ms. Bennett's point about it being an enforcement problem. That is absolutely true. Several states have "sunshine" legislation, as I detailed in the paper: Texas, Florida, Washington State, Montana, and others have "sunshine" legislation aimed at this target. The problem is that the law is not self-executing. And because the law is not self-executing, and because the incentives run against the parties raising a "sunshine" statute in a motion in front of the court, or contesting a confidentiality designation, because all the incentives run against that, these laws on the books, which could provide solutions in many instances, go underutilized. That is the same for the good cause factors under *Pansy*.<sup>12</sup> The good cause factors under *Pansy* for issuing a protective order in a contested good cause fight those look very similar to a First Amendment inquiry. They are underutilized because of stipulations to confidentiality orders.

**Several states have "sunshine" legislation . . . . The problem is that the law is not self-executing.**

That is the problem that my primary proposal is aimed at addressing. Rather than the court providing the force of law to stipulated protective orders, where everyone has an incentive to keep everything secret, even at peril to the public, even at peril to the court's reputation, the court ought to be more involved (to paraphrase Justice Nowell) than the court currently is.

What is my evidence that the court should be more involved? Again, you are going to hear more about it today. The latest Reuters investigation was really eye-opening. Troubling trends were identified in that exposé that I think speak to a lot of the need to avoid blanket stipulated orders.

To begin, those protective orders link up, as was mentioned by Ms. Bennett and others, to sealing orders, to sealing practice. And something that has already been deemed confidential at the protective order stage is very likely going to be deemed confidential at the sealing stage.

Ms. Coughlin mentioned *Nixon*. And one part of *Nixon* that I would like to emphasize is that *Nixon* provided a presumption of public access to information in court files. And *Nixon* said that that information should be open to public inspection absent compelling circumstances.

I will tell you that if you want to see the proof of when this situation goes wrong because of lack of enforcement of existing law, look at that Reuters exposé. You have half of these cases involving public safety issues critical to public health and safety. You have half of those with sealed information. Here is what I think is the eye-opening percentage, which I mentioned in my opening remarks: 85 percent of those sealing orders provided no explanation. I think one of the most egregious examples is the Jeffrey Epstein case, *Brown v. Maxwell*.<sup>13</sup> In that case, the trial judge entered an umbrella sealing order that delegated the sealing power of the court to the parties. Large swaths of information in that very tragic sexual abuse case were kept sealed from public view. Ultimately, the court of appeals reversed that. Revealing information to the media led to very important reporting across the country on an issue of significant public concern.

**With no media intervener, who is at the table to consider the public's interest? Who is at the table to consider the court's reputation? I contend that the person or persons at the table are the judges.**

But (and this goes back to Ms. Bennett's point), not every case is the Epstein case, and not every case has a media intervener. In a lot of cases, the incentives just are not there for the parties to contest confidentiality. With no media intervener, who is at the table to consider the public's interest? Who is at the table to consider the court's reputation? I contend that the person or persons at the table are the judges. And that increased judicial involvement in this area will yield significant benefits, both to the public and the courts.

## Questions from Participants

**Question:** Professor Benham, are there examples of courts that have rejected umbrella protective orders in large volume discovery cases, and how did that work?

**Professor Benham:** Off the top of my head, I cannot think of anywhere where a large volume discovery case had a rejected umbrella protective order. Much more common are confidentiality designation fights. Everybody is operating under this umbrella, and in some instances maybe a plaintiff gets incentivized to start contesting a large swath of designations. In those cases, the plaintiff faces an uphill fight. But typically, that is within the frame of the umbrella protective order.

**Question:** Professor Endo, do you think judges approach regulation of lawyers or courts differently than they approach other regulations?

**Professor Endo:** I do. And there is some forthcoming scholarship about this. In the case law around the First Amendment, as it goes to litigation speech, the interpretive methodologies courts apply (at least in the federal system) tend to reflect (perhaps correctly) that they have some degree of expertise over the issues and therefore are probably not inclined to go as deeply into the formal doctrine. A counter example that may speak very well in support of Professor Benham's approach is when it comes to pure civil rights or public interest types of cases like *NAACP v. Button*<sup>14</sup> or *Velazquez*,<sup>15</sup> or cases of that nature.

**Question:** Ms. Bennett, are we saying that even if parties agree, the court should do an independent review of proposed protective orders to ascertain whether to sign off?

**Jennifer Bennett:** Yes, for at least two reasons. The first is that that is what the law requires. Rule 26 requires that there be good cause for a court order, and the First Amendment requires that there would be at least good cause. Even if the parties agree, that does not mean that there is good cause for the agreement. I think it is important under the law for the court to do an independent review. The second reason is, again, this incentives problem that we have been talking about. A lot of times lawyers, particularly plaintiffs and public interest lawyers, basically have no choice but to agree to a stipulated protected order, because the defendant says, “We are not going to give any discovery until you do. You are not going to be able to start your case until you do.”

Having the courts review these agreements, and require that there be good cause, takes away that stick that defendants in particular can use to get plaintiffs and public interest lawyers to agree to secrecy when they otherwise would not. Court review ensures that any confidentiality really is warranted. I do think it is important that, even if the parties agree, that courts do an independent review.

**Having the courts review these agreements, and require that there be good cause, takes away that stick that defendants in particular can use to get plaintiffs and public interest lawyers to agree to secrecy when they otherwise would not.**

**Question:** Justice Nowell, in civil litigation between private parties, do you or your colleagues view the role of the courts of having a public function that is equally or more important than expeditiously resolving the party’s disputes?

**Justice Nowell:** Being appellate judges, obviously we look at things like writs of mandamus and that type of thing. And a lot of arguments to us are about public policy and that type of thing. Especially as an appellate lawyer, I think that the function of representing the public

interest should be at least equally important. I would not say that it is *more* important than resolving disputes expeditiously, because that in and of itself protects the public by allowing cases to move forward, by allowing individuals to get their day in court and allowing defendants to get past disputes. But I do think of looking at the interest of the public as equal to looking at resolving disputes.

**Question:** Ms. Coughlin, have you seen judges sanction lawyers and/or parties who propound overly broad discovery requests?

**Emily Coughlin:** Yes, I have, both in the federal system and in the state system. Requests have to be reasonable. More and more, the requests are ignoring that. Many discovery disputes, obviously, are handled between the parties, between the lawyers. There are emails and letters and correspondence and phone calls that go back and forth, and ultimately it gets before a court, and the court sees that a plaintiff’s overly broad discovery has led to this large discovery dispute that has gone before the court and has taken the court’s time, when the rules are clear that discovery requests need to be reasonable, and lead to the discovery of admissible evidence, and so forth. And if we go beyond that, courts absolutely have come into play, especially when it is taking up their own time.

I think I have had a couple of cases myself where that has happened, and usually it is the result of a long, protracted period of time where plaintiffs and defendants have gone back and forth arguing and then there is brief after brief and reply brief that the courts have to read. And the court looks through this and says, “Wait a

minute. You are asking for things that clearly are not leading to the discovery of admissible evidence.” I have seen sanctions being imposed in cases like that, usually in the form of legal fees.

**Question:** Professor Benham, many of the people in the audience are appellate court judges. If the parties jointly stipulate to confidentiality of a document or settlement, unless there is intervention, how does a confidentiality dispute get appealed?

**Professor Benham:** That is a great question. This goes to my point about the law not being self-executing. Very often, if the parties agree to the stipulation, and there is agreement in the lower court, who on earth is going to bring it to the higher court? That is actually a limitation of the “sunshine” proposals, and other reform proposals, because even if you have a trial judge who does get involved, the trial judge’s perspective may be the final say on the matter, because there has to be a willing appellant.

I will tell you, though, we talked about the typical incentives, but sometimes you have a litigant who is interested in speaking and they are unable to speak because of a protective order. Maybe they have learned something in discovery they did not expect. Now, they are ready to share. Without proper regulation at the trial court level, that person may never be able to alert the media or an intervener who might be a much more willing player at the trial court level and at the appellate level. It is absolutely a problem that, if there is no one to complain about a trial court ruling or an agreement, it is hard to get it in front of an appellate court.

**Sometimes you have a litigant who is interested in speaking and they are unable to speak because of a protective order. . . . If there is no one to complain about a trial court ruling or an agreement, it is hard to get it in front of an appellate court.**

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## Notes

<sup>1</sup> Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir.1994).

<sup>2</sup> Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199 (1984).

<sup>3</sup> 467 U.S. at 37, 104 S.Ct. at 2209-10.

<sup>4</sup> Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

<sup>5</sup> Maracich v. Spears, 570 U.S. 48, 133 S. Ct. 2191 (2013)

<sup>6</sup> In re Nat’l Prescription Opiate Litig., 956 F.3d 838, 845-46 (6th Cir. 2020).

<sup>7</sup> 467 U.S. 20 (1984).

<sup>8</sup> 435 U.S. 589, 598 (1978) (citations omitted).

<sup>9</sup> 447 F.3d 1172 (9th Cir. 2006).

<sup>10</sup> Joshua K. Leader & Gloria Koo, *Protective Orders and Discovery Sharing: Beware of Plaintiffs Bearing Sharing Agreements*, 82 Def. Couns. J. 453 (Oct. 2015).

<sup>11</sup> 467 U.S. at 34.

<sup>12</sup> Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir.1994).

<sup>13</sup> Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019).

<sup>14</sup> NAACP v. Button, 371 U.S. 415 (1963).

<sup>15</sup> Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001).





## LUNCHEON ADDRESS

### **A Full Accounting: How Transparency in the Courthouse Can Help the Country Heal**

#### **Dan Levine, Reuters Correspondent**

It is great to be sharing a screen with all of you here for this forum on confidentiality in the courts. I am incredibly grateful to the Pound Institute for asking me to take part. Obviously, we would all prefer to be sharing ideas and enjoying each other's company in the same room. I certainly wish I could have been speaking with you in person.

That said, given the situation, I would like to commend Jennie, Mary Collishaw, and everyone at the Pound Institute for pivoting and making the program a virtual reality. The events that have turned this into an online forum have also made the subject we are here to discuss—court secrecy—more important than ever.

I think it is fair to say that our country is in the midst of an ongoing trauma that is virtually unprecedented. The novel coronavirus, which was first documented on our shores in January and exploded in March, has brought a more radical transformation of our society than I think any of us have experienced in our lifetimes.

**Our country is in the midst of an ongoing trauma that is virtually unprecedented.**

To those of you who have seen loved ones or friends taken by this disease, I am so very sorry for your loss. All of our lives have been upended in some way over the past few months. I am in the cohort with young children, have a busy job, and a spouse with a busy job, and it is pretty exhausting. But my wife and I are constantly thankful that we have jobs and healthy, happy kids to exhaust us. So many of our countrymen and women are grappling with unpaid bills and empty stomachs, the product of economic devastation. I am sure every one of us has someone we are longing to see and give a great big hug, and we cannot.

At the same time, and long predating the pandemic, is the 400-year trauma that black people have experienced on these shores, which is once again at the front of white consciousness after the death of George Floyd on May 25, 2020.

[Observing a moment of silence out of respect for those we have lost, both to COVID-19 and to racial inequality in this country.]

#### **Challenges Ahead**

The upheaval facing us is momentous, and it is still very unclear what our country is going to look like in 2021 and beyond. But however it turns out, it is obvious that the trauma our nation is experiencing right now is going to play out in courts for years. The litigation deluge has already started. Lawsuit trackers from various firms have documented thousands of complaints since March from insurance disputes to employment cases over PPE, civil rights cases, to wrongful death. It will only grow, and it will be a tremendous test for our legal system.

**It is obvious that the trauma our nation is experiencing right now is going to play out in courts for years.**

Obviously, judges and court staff will have to manage the volume of cases in a climate of extreme budget austerity. But beyond that, the people who serve in our branches of government will have an enormous responsibility to help the country heal. I would submit that for judges, this will go beyond efficiently processing legal claims, encouraging settlements, and reaching fair, unbiased rulings on the merits.

When someone seeks psychological help after experiencing trauma, we are counting the details as a critical step on the road to stability and recovery. Don't worry. I am not about to suggest that judges should become the nation's therapists, but I would say that healing from the national traumas we are experiencing right now will necessarily require a full accounting of how they came to pass.

What will that accounting look like? Our legislation committees have begun hearings to understand what breakdowns in our public health system allowed the coronavirus to spread, and how unfit police are allowed to stay on the force. Executive branch inspectors general will conduct investigations into the failures of our institutions. And people will sue. They will conduct discovery. And the judges overseeing those cases have a duty to obey the case law and ensure that the public can access the information that can help provide a full accounting of how we ended up here.

## **The Role of Judges**

We have a public system of justice for a reason. I believe the steady development of case law is only one of those reasons. I would submit to you here that by vigorously enforcing the public right of access to the myriad legal proceedings these traumas will spawn, our judges can play a significant role in helping the country heal and in maintaining confidence in this critical branch of government.

At the same time, if judges treat this right as an afterthought, the consequences could be, quite frankly, deadly. Unfortunately, our work at Reuters has shown that, far too often, judges simply do not take the public right of access seriously, and simply fail to analyze whether information critical to the health and safety of citizens should be kept secret. We found that, had that information become public, it might have prevented thousands of serious injuries and death.

**By vigorously enforcing the public right of access to the myriad legal proceedings these traumas will spawn, our judges can play a significant role in helping the country heal and in maintaining confidence in this critical branch of government.**

Before I continue beating up on judges, let me be clear that in the course of reporting on the subject of court secrecy, I have never met a judge who is consciously hostile to the public's right to know, nor have I ever met a judge who somehow is conspiring to keep important information secret. In fact, since I am speaking to many appellate judges here, I point out that in most jurisdictions, the case law allowing public access to court files is pretty expansive. The problem we found is that many trial court judges just are not applying it.

As I will describe, the reasons for this do not stem from malice, but rather institutional incentives as the paper presented by Professor Benham here emphasized. For many trial judges managing busy dockets, the case law

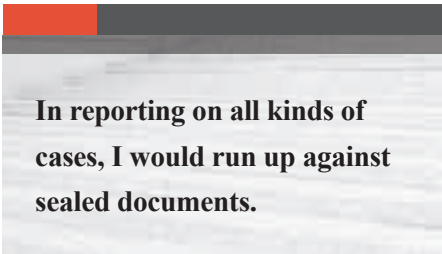
requiring that they analyze secrecy requests, even if no party asks them to do it, has become a kind of unfunded mandate, demanding that they spend valuable time that they think they just cannot spare. Unless those trial judges in the trenches understand the real-world harm of putting public access on the back burner, the mistakes we documented in our series will continue to course through the system at this momentous time.

## The Reuters *Hidden Injustice* Investigation

Let me tell you a little bit about how I became interested in this subject and how Reuters embarked on the *Hidden Injustice* project. I have been a journalist since I got out of college, and I started covering the U.S. legal system about 15 years ago. I wound up as a federal courts reporter at the *Recorder*, which is the American Lawyer Media daily newspaper in San Francisco. I covered the Northern District of California, the Ninth Circuit, and the Justice Department. From there I came to Reuters, and I have been covering some of the world's biggest cases over the past ten years. Now, I am doing investigative projects about COVID-19 full-time, but I loved the legal beat—the cases, of course, but also the people.

San Francisco is actually kind of a small town, and I found the legal community to be warm and to really care about keeping their word—particularly the judges I got to know. I realized that I was dealing with a select subset of the profession, and that maybe not all lawyers are such upstanding folks, but it was a decidedly different experience than covering politics or corporate America.

In reporting on all kinds of cases, I would run up against sealed documents. This made some sense, of course, in intellectual property matters or for stuff like Social Security numbers or patients' medical records. But more and more, I saw secret filings and blanket protective orders as a matter of routine. Sometimes it seemed to be shielding stuff that one side felt was just embarrassing. And almost always, both sides in a lawsuit stipulated to the secrecy, and so the judge would just approve it without a second thought. Of course, that is not what the case law in most jurisdictions says is supposed to happen. Even if both sides agree, judges are supposed to conduct their own analysis to determine if the reasons for secrecy outweigh the public right of access. I saw this on the legal beat. But I had no way of knowing whether the practices I saw were routine across the country—and, frankly, whether it would even be that big a deal if it were.



**In reporting on all kinds of cases, I would run up against sealed documents.**

As it happens, some very smart colleagues of mine across the country had similar questions. These were journalists in our unit who specialize in analyzing large databases. And my news outlet is part of Thomson Reuters, so Westlaw is our sister company. These reporters and I teamed up to try to answer a few core questions: how common is it for records to be filed under seal in federal civil court actions; the nature of the material filed under seal; and whether this has any impact on public health and safety.

## Filings Under Seal

I will not go into all the gory details of our methodology with you here. You can find that in our stories.<sup>1</sup> But to answer the first question, based on Westlaw data, we could see that judges allowed litigants to seal information at least 65 percent of the time in product liability cases.

But we wanted to know the nature of any sealed material or the judges' reasoning in allowing secrecy, which was essential information for our analysis. Is it people's private medical information, Social Security numbers, pure trade secrets, or information relevant to public health and safety that has a heavy access presumption?

To answer that, we manually reviewed docket entries for 115 of the largest MDL product liability cases going back 20 years. Those cases comprised nearly 250,000 individual death and injury lawsuits, involving dozens of products used by millions of consumers: drugs, cars, medical devices, and other products.

**What we found was that at least 48 percent of the 115 MDLs we reviewed contained sealed public health and safety evidence.**

What we found was that at least 48 percent of the 115 MDLs we reviewed contained sealed public health and safety evidence. We then checked the court dockets to see if the judge offered any justification for the secrecy. We found that in 85 percent of the cases with sealed health and safety materials, judges offered no reasoning in the court record—none.

This was a striking finding for us because, as I noted earlier, circuit case law nearly everywhere says that court filings are presumed to be public, and judges must state specific reasons for keeping them secret. This suggested to us that many judges were not fulfilling their obligation to ensure transparency.

## **Impact on public health and safety**

That answered the second question—what is the nature of the material that is filed under seal? But we also sought to quantify the harm of secrecy, which was difficult. For any particular allegedly harmful product, we had to establish a timeline from the earliest time when a judge sealed information about a product defect until the secret finally became public, and then we would count deaths and injuries in intervening years. Ultimately, we were able to report that hundreds of thousands of people were killed or seriously injured by allegedly defective products after judges in just a handful of cases allowed litigants to file, under seal, beyond public view, evidence that could have alerted consumers and regulators to potential danger.

Our primary example was a product that has gotten a lot of attention: OxyContin. What happened in the early OxyContin litigation is exhibit A of why the public right of access to court is so important.

In 2001, West Virginia was the first state to sue Purdue Pharma over its marketing practices for OxyContin. The AG accused the drug maker of duping doctors into prescribing the narcotic widely by minimizing its risks: convincing them that it was less addictive than other opioids, because just one dose delivered steady relief for 12 hours. Purdue asked for summary judgment, and the AG's office opposed it. In opposing, they filed documents that they had received in discovery, that described Purdue's marketing strategies.

In this case, as is routine, the AG filed the material under seal—both the exhibits and the briefs, entirely under seal, without a word of protest. Of course, Purdue did not complain. And the judge failed to conduct his own analysis, and allowed all of that evidence to remain sealed, without any explanation. Those documents show that, contrary to its claims, Purdue knew that OxyContin did not work for 12 hours for many patients. That meant that many patients, particularly those who followed the rules and followed directions on the label, were going into withdrawal every day. That led to their addiction and, often, overdose.



The case settled before it went to trial, so that evidence remained hidden out of the sight of regulators, doctors, and patients. Over the next few years, as OxyContin sales and opioid-related deaths climbed, more than a dozen other state and federal judges overseeing similar lawsuits against Purdue took the same tack, keeping the company's record secret. It was not until the *Los Angeles Times* reported on the content of some of those sealed documents in 2016, more than a decade later, that doctors and patients would learn what had been sitting in a court file in West Virginia for many years. That is just one example. I would encourage you to read our stories to learn about others.

But I would again emphasize that what the AG's office did here, in not protesting against secrecy, is entirely common for plaintiff lawyers. In nearly all of the 55 MDLs where we found public health and safety information under seal, it was plaintiff lawyers who filed it secretly. They cited the protective orders they signed to get the discovery in the first place.

While our story went into great detail about the West Virginia judge who kept the OxyContin documents sealed, it also took pains to point out that he was no outlier. We were dealing with a systemic problem.

In thinking about it as a system of incentives that are all pointing the wrong way, it is so important, at this moment in particular, for individual judges to expend the energy to go against what feels so easy. It helps to understand how protective orders and sealed documents became so ubiquitous. We spent many hours on historical research as part of our project, reading decades of old minutes from federal Judicial Conference meetings, to Supreme Court memos, and examining mass torts from the era before routine secrecy. What we found was striking.

**It is so important, at this moment in particular, for individual judges to expend the energy to go against what feels so easy.**

## Who Owns Discovery?

Nearly everyone today believes discovery is fundamentally private. But that was not always the case. The drafters of the original federal rules of civil procedure, in the 1930s, were men of the progressive era. (Yes, they were all men.) And they believed that transparency was essential for public institutions to govern effectively. In their view, secrecy impaired the public's ability to gauge whether the court decided cases fairly. One of them, Edson Sunderland, once wrote, "The spirit of the times calls for disclosure, not concealment, in every field." The original rules required litigants to file key forms of pretrial discovery in court, including witness depositions, interrogatories, and documents produced in response to requests for information from opposing parties.

Then, in the late 1970s, the era of mass torts truly began, and they exploded in number. Judges and court staff found themselves overwhelmed with paper and facing the unwelcome task of refereeing massive discovery exchanges.

The protective order soon became the standard method for courts to officially process the cases. Plaintiff lawyers would get the evidence they needed. Defendants could be assured that nothing damaging would become public. And the whole process took place outside the courthouse, and away from the court, and off the docket so it would not be crowded with it. Ultimately, the federal judiciary changed the rules to actually *forbid* litigants to file discovery in the courthouse unless it was part of the motion.



## The Purpose of the Legal System

It is important here to make it clear that this triumph of efficiency was cheered by some scholars, who argued that the legal system exists as a dispute resolution mechanism solely for the parties involved in any particular case. In their view, justice in a civil lawsuit is solely about deciding who pays whom and deciding it fairly.

I have to say that, when I read these arguments, I was surprised by their narrowness—mostly because my Reuters colleagues and I have spent a great deal of time actually getting to know people who have been injured, and their families, who have turned to the courts for relief. And what you hear from them, over and over, is that they want to know what happened to them or to their husband or to their daughter.

**This triumph of efficiency was cheered by some scholars, who argued that the legal system exists as a dispute resolution mechanism solely for the parties involved in any particular case.**

We listened to Kelly Pfaff, who alleges that a popular anti-baldness drug drove her husband to suicide. She said, “If I can save a family from losing their husband, if I can save just one, that would mean the world to me.” Or look at the parents of children who died of opioid overdoses, protesting outside the courthouse in litigation that is

brought by governments. Technically, they are not even plaintiffs in those cases. But of course, this is their case too. They want to expose wrongdoing. They want the perpetrators to be held to account.

Now, are there bogus cases? Of course. Does money almost always play some role in the litigation calculus of whether to pursue or give up on a case? Obviously. But to argue that justice is “all” about getting paid is just incredibly disrespectful to thousands of people who have suffered a great deal of pain. Lucky for them, our justice system is public.

And what of the efficiency argument, which smoothed to routinization the protective orders and sealed court filings? Clearly, the old worries about clerk’s offices stuffed full of deposition transcripts is now irrelevant in the age of electronic filing.

## What Judges Can Do

Beyond that, some trial judges are demonstrating that it is quite possible to enforce the public right of access and still get their work done. Consider Massachusetts Superior Court Judge Janet Sanders, who said that, when lawyers submit a raft of sealed filings with no justification, she just denies it without prejudice. She sends the lawyers back to the drawing board to do the work themselves, to actually come up with concrete reasons for secrecy on each filing. And then, when they come back to court, invariably, the secrecy request is far narrower—as is the work for her chambers to sort through it. I have noticed several judges in Northern California make use of the same tactic.

As for protective orders, after our story came out, one federal judge in San Francisco, William Alsup, issued a new protective order, which included this language: “Only for the most compelling reason will the court grant any sealing request covering information that relates to potential hazards to the health, safety, or wellbeing of the public. Therefore, when anyone seeks to seal or redact anything filed with the court, the request must specifically draw attention to any proposed sealing or redaction of information that implicates those issues.”

Judge Alsup also explicitly reminds parties to a protective order that massive over-designation could very well lead to massive de-designation. On the plaintiff lawyer side, some are starting to push back against protective orders that explicitly forbid them from sharing evidence of wrongdoing with government regulators.

Congress, and some states, are mulling legislation, which may make it harder to keep materials secret. But in advance of that, I believe that the best hope for change lies in the will of individual judges to do the right thing and take their responsibility to the public seriously.

I would say this to the appellate judges here: next time you are with your brothers and sisters on the trial court, whether it is at a virtual conference, a judicial council meeting, or wherever, make this a priority for discussion. Seek out your colleagues like Judge Sanders and Judge Alsup and ask them to share their experiences and their best practices. Because in the coming years, it will be up to you to ensure that public access to the courts is not an empty promise. And in that way, the justice system can help the country heal.

Thank you so much and please stay safe.

**Next time you are with your brothers and sisters on the trial court, whether it is at a virtual conference, a judicial council meeting, or wherever, make this a priority for discussion.**

## Questions from Participants

**Question:** What about the use of special masters to review information and advocate for the public interest instead of putting the judge in that advocacy role?

**Dan Levine:** I think that is certainly an idea worth exploring if judges feel that they do not have the bandwidth to do it. It is certainly, I think, beneficial for *someone* to be doing it as opposed to it not being done. I have seen that being done. I think particularly in the opioid MDL in Cleveland right now, they are using special masters for that purpose. But ultimately, I do think judges need to look at this as one of their core functions.

Warrant review is not a perfect analogy, but I would almost analogize this to the warrant reviews that magistrates and other judges carry out. In a warrant situation, the targets of the warrant are not there to advocate for themselves. In that instance, the judge is the embodiment of the Fourth Amendment. And, again, it is not a perfect analogy by any means, but in the area of court secrecy, the judge is the embodiment of the First Amendment. I think that they should look at themselves and take that role very seriously.

**Question:** In a matter of public interest that is on appeal, even if the parties want to dismiss the appeal, should the court publish the opinion and decline to dismiss?

**Dan Levine:** Should the court publish the opinion and decline to dismiss? Full disclosure: I am not an attorney. I am probably going to stumble over this one. But I would think that it would probably depend on each individual case. If there is a public entity involved, I could see that maybe there is more of an argument for not dismissing. How far the case has been briefed, how far it is teed up, all those considerations I would imagine coming into play.

**Question:** How would the court and/or attorneys handle the fallout from undoing a settlement based on an adverse ruling on a confidentiality agreement?

**Dan Levine:** Interesting. I can certainly see the concern from the courts over doing that. From the attorney's point of view, I think that, as an attorney would on many issues, they would have to be upfront with the client that judges may take a negative view of this part of the settlement agreement, and that they need to prepare for the possibility that that element is going to be rejected, and to think through what they would do in that instance. Then the client is not taken by surprise if that happens. From the court's point of view, if it means that the litigation

continues, then that means more work, and it stays on the docket, but the public right of access is important. If that is the cost of public access, then the court has to be prepared for that, too.

**From the court's point of view, if it means that the litigation continues, then that means more work, and it stays on the docket, but the public right of access is important. If that is the cost of public access, then the court has to be prepared for that, too.**

**Question:** Have you found that the manner in which the judge was selected is a factor in the investigation—judges who are appointed v. judges who are elected?

**Dan Levine:** That is a great question. I wish I had an answer for it. I do not, because our data analysis really only focused on federal judges. There is such wide variation in the way the state courts handle their dockets, and handle their data, that a wide systemic analysis would have been almost impossible. That is why we narrowed it to the federal judiciary, because at least there is some consistency across districts and how dockets are managed. Obviously, all federal judges are appointed. We did not get into that, but I would love to know the answer.

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## Notes

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## Confidentiality in the Courts: Privacy Protection or Prior Restraint?

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### EXECUTIVE SUMMARY

*In civil litigation, courts often deal with information that is subject to a previously imposed restraint on the ability of a court or others to use the information. Such “evidentiary prior restraints” arise most prominently in settlement agreements, which may include nondisclosure provisions that prevent information concerning the settlement from being used by parties to the agreement. But evidentiary prior restraints can also arise from prior court action, as when parties seek information subject to a protective order or sealing order made by a different court. Although evidentiary prior restraints have received great attention given recent controversies concerning sexual harassment, products liability, and other areas of the law, the issue has not received much attention from scholars.*

*This essay examines the effects of evidentiary restraints on the enforcement function of civil litigation. In general, the essay concludes that privacy interests alone do not justify the enforcement of litigation restraints because these privacy interests can, and often do, prevent courts from accurately assessing the liability of the parties. Moreover, such restraints prevent market pressure from regulating the conduct of market participants, leading to more harm. Nevertheless, the essay does discuss situations when the protection of privacy interests may aid, rather than hinder, enforcement objectives. Accordingly, the essay concludes that more empirical research should be done to guide courts in determining when evidentiary prior restraints should not be enforced.*

### INTRODUCTION

In his recent book *Catch and Kill*, Ronan Farrow describes a nondisclosure agreement (“NDA”) entered between Harvey Weinstein and Ambra Gutierrez, one of his many alleged sexual assault victims.<sup>1</sup> Weinstein and Gutierrez signed the NDA shortly after Gutierrez recorded Weinstein admitting that he groped her without her consent.<sup>2</sup> In exchange for her silence, Gutierrez was paid \$1 million.<sup>3</sup> Gutierrez would later show a copy of the agreement to Farrow:

The document was eighteen pages long. It was signed, on the last page, by Gutierrez and Weinstein. The lawyers involved in drafting it must have been so convinced of its enforceability that they never considered the possibility of it emerging. The contract ordered the destruction of all copies of audio recordings of Weinstein admitting to the groping. Gutierrez agreed to give her phone and any other devices that might have contained evidence to Kroll, a private-security firm retained by Weinstein. She also agreed to surrender the passwords to her email accounts and other forms of digital communication that could have been used to spirit out copies. “The Weinstein confidentiality agreement is perhaps the most usurious one I have seen in decades of practices,” one attorney who



represented Gutierrez told me. A sworn statement, pre-signed by Gutierrez, was attached to the agreement, to be released in the event of any breach. It stated that the behavior Weinstein admitted to in the recording never happened.<sup>4</sup>

The NDA contained a liquidated damages clause but not an arbitration clause, even though arbitration clauses are common in such Draconian agreements.<sup>5</sup> Despite its onerous terms, the agreement did not prevent the recording of Weinstein's admission from becoming public.<sup>6</sup>

The theme of this conference is "Dangerous Secrets: Confronting Confidentiality in Our Public Courts," and NDAs like the one entered into between Weinstein and Gutierrez are commonly used to keep "dangerous secrets" from being disclosed in court proceedings. Along with minimizing reputational harm, perpetrators utilize NDAs and other mechanisms to prevent criminal prosecution or civil liability by preventing victims from producing evidence of the perpetrators' conduct. Indeed, NDAs are typically signed shortly after court proceedings are either threatened or initiated.<sup>7</sup> For example, Weinstein sought an NDA with Gutierrez because he learned that,

in recording Weinstein, Gutierrez was participating in a "New York Police Department sting operation" to gather evidence to support criminal charges against Weinstein.<sup>8</sup> NDAs, in fact, have garnered heightened public scrutiny recently in light of the publicity they have received from the "#MeToo" movement, as they have deterred victims from disclosing acts of sexual harassment or assault committed against them.<sup>9</sup>

**Along with minimizing reputational harm, perpetrators utilize NDAs and other mechanisms to prevent criminal prosecution or civil liability by preventing victims from producing evidence of the perpetrators' conduct.**

The use of restraints like NDAs to prevent the disclosure of information in court proceedings raises a wide variety of issues for state courts. In this essay I want to examine only a subset of these issues. Specifically, I focus on situations in which

1) NDAs or similar restraints created in the context of *prior* litigation 2) prevent the disclosure of information in subsequent civil litigation or to the public. For purposes of this essay I call such restraints created in prior litigation "evidentiary prior restraints."

Defined in this way, "evidentiary prior restraints" can arise not just from NDAs, but from other nonprivate sources, such as protective orders<sup>10</sup> and orders to permit the filing of documents under seal,<sup>11</sup> which may be enforceable outside the litigation in which the orders were issued. For example, a public interest group may file a motion to obtain discovery materials from a prior lawsuit brought by an individual smoker against a tobacco company in which the discovery materials were subject to a protective order.<sup>12</sup> In addition, a third party may seek documents that were sealed in prior litigation, and which may contain pertinent information about, for example, government attempts to coerce social media platforms to spy on their users.<sup>13</sup> Like the NDAs employed in sexual misconduct cases, protective orders and sealing orders can restrain the sharing of information necessary to prove facts in subsequent cases. More importantly, all of these evidentiary prior restraints may prevent third parties or the public from learning important information that, once known, may prevent future harm.

**"Evidentiary prior restraints" can arise not just from NDAs, but from other nonprivate sources, such as protective orders and orders to permit the filing of documents under seal, which may be enforceable outside the litigation in which the orders were issued.**



Admittedly, the term “prior restraint” has a well-established meaning in the law, and is used in the First Amendment context “to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”<sup>14</sup> Moreover, the term “prior restraint” has a decidedly negative connotation, as the Supreme Court has stressed that “[a]ny system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity.”<sup>15</sup>

Although protective orders and sealing orders are judicial orders, NDAs obviously are not. Moreover, NDAs, protective orders, and orders to seal do not necessarily, or even typically, restrain the type of political expression that is at the core of First Amendment concern.<sup>16</sup> Instead, the restraints discussed in this essay are restraints on the use of information as *evidence*, either to prove material facts in a subsequent proceeding or to unearth facts that are important for the public to know.

Nevertheless, in using the term “evidentiary prior restraints,” I want to leverage both the legal meaning and negative connotation of prior restraints in the First Amendment context. Despite their differences, the “evidentiary prior restraints” I discuss here, like prior restraints in the First Amendment context, are designed to *prevent* disclosure, not to mitigate it. More importantly, and as I argue in more detail below, evidentiary prior restraints, like prior restraints in the First Amendment context, should be presumptively disfavored and subject to significant scrutiny by courts. This does not mean, of course, that evidentiary prior restraints should be prohibited altogether. As I discuss below, they can have justifiable uses. Instead, I argue that they should be presumptively disfavored, and that the burden should be on the parties seeking to impose evidentiary prior restraints to justify their use.

**NDAs, protective orders, and orders to seal do not necessarily, or even typically, restrain the type of political expression that is at the core of First Amendment concern.**

In what follows I discuss various examples of “evidentiary prior restraints” that can arise from a variety of sources. In general, and as others have argued,<sup>17</sup> NDAs, protective orders, and similar evidentiary prior restraints

**Evidentiary prior restraints may be justified to protect proprietary interests such as the confidentiality of trade secrets.**

should *not* be enforced when there is a significant public interest in the information. Admittedly, this is the most obvious and compelling circumstance in which evidentiary prior restraints are the least justified, and the law typically recognizes that significant public interest in the information can justify the non-enforcement of confidentiality.<sup>18</sup> Conversely, evidentiary prior restraints may be justified to protect proprietary interests such as the confidentiality

of trade secrets.<sup>19</sup> In those circumstances, evidentiary prior restraints are serving as adjuncts to nondisclosure policies external to the litigation, and thus are justified to the extent that these external nondisclosure policies are themselves justified.<sup>20</sup>

Here I want to focus on the argument that, in the absence of a showing of significant public interest, and in the absence of an external nondisclosure policy like the protection of proprietary interests, such evidentiary prior restraints should be enforced to protect the privacy interests of the parties,<sup>21</sup> who may seek to avoid “embarrassment”<sup>22</sup> or harm to their reputation.<sup>23</sup> Privacy concerns can be, in themselves, compelling reasons. As put by Arthur Miller in criticizing efforts to reduce confidentiality in courts:

A legal system that does not recognize the right to keep private matters private raises images of an Orwellian society in which Big Brother knows all. Although proponents of increased public access may not have that result in mind, there is no doubt that unfettered authority to collect and disseminate private information through the judicial process could lead to that end.<sup>24</sup>

I do not want to challenge the importance of protecting privacy interests, but I do want to argue that privacy interests alone are not sufficient to justify the enforcement of evidentiary prior restraints. This is because protection of privacy interests can be, and often are, in tension with the enforcement function of civil liability and the civil litigation system.

**Protection of privacy interests can be, and often are, in tension with the enforcement function of civil liability and the civil litigation system.**

As I discuss in more detail below, a primary function of civil litigation is to ensure compliance with the law.<sup>25</sup> Civil litigation performs this either through specific performance in the form of injunctive remedies<sup>26</sup> or, more commonly, by deterring individuals from noncompliance through the threat and imposition of damage or similar monetary remedies.<sup>27</sup> Thus,

unlike other regulatory tools, civil litigation often operates after the fact. It allows parties to act and later seek forgiveness, rather than requiring parties to seek permission before acting.

One advantage of the after-the-fact nature of civil litigation is that it allows a court to use hindsight—the historical facts of what happened—to assess liability accurately. In doing so, and ensuring that defendants incur the full liability of their misconduct, litigation deters others from engaging in future misconduct.<sup>28</sup> Evidentiary prior restraints hinder this hindsight advantage of civil litigation by preventing access to the information necessary for a court to determine liability accurately. This can lead to less deterrence and, thus, more harmful misconduct.<sup>29</sup> Moreover, even in the absence of liability, the restraint of public information may distort markets, and thus allow wrongdoers to avoid market pressure that it *should* incur given its conduct.<sup>30</sup> Accordingly, evidentiary prior restraints should not be enforced for privacy reasons alone when those privacy reasons are, at bottom, attempts to avoid liability or market pressure.

Nevertheless, I argue that even evidentiary prior restraints based on privacy alone may be justified in very limited circumstances. First, the failure to enforce evidentiary prior restraints may give potential defendants greater incentive to *conceal* the information. In the case of sexual harassment, this may not be possible, given that the victims will have first-hand knowledge of the harassing conduct. But in the case of product defects or potentially toxic chemicals, as in the case of tobacco, companies may engage in greater efforts to conceal the information to prevent their discovery. Thus, and somewhat counterintuitively, the lack of evidentiary prior restraints may make it harder, not easier, to unearth information.

**The failure to enforce evidentiary prior restraints may give potential defendants greater incentive to conceal the information.**

Second, the unavailability of evidentiary prior restraints may give potential defendants incentives to “play dumb” by not gathering information that may be harmful. For example, in the absence of regulatory requirements to test products, companies may decide not to test for safety at all. Even if testing is required, companies may fail to keep records to avoid a paper trail that can be discovered in the first place.<sup>31</sup> Incentives to “play dumb” may

be decreased if, for example, information is limited for use by regulatory authorities and courts but kept from the public to avoid unjustified panics or unjustified reputational harm. In this way protective orders or motions to seal may be justified for some limited circumstances.

**Evidentiary prior restraints should presumptively not be enforced.**

Again, it is important to stress that this essay ultimately argues that evidentiary prior restraints should presumptively not be enforced. Accordingly, I ultimately argue that courts should subject evidentiary prior restraints to significant scrutiny, particularly when the arguments for these restraints are solely based on privacy concerns. But I am also arguing that this scrutiny must be informed by the enforcement objective of civil litigation, and that we must be

careful to identify and distinguish those situations when confidentiality *aids* enforcement from those situations in which confidentiality may hinder enforcement. Accordingly, courts and scholars should engage in empirical research to identify those industries or subject matter areas where evidentiary prior restraints may be justified.

## I. EVIDENTIARY PRIOR RESTRAINTS

As I noted earlier, I define an “evidentiary prior restraint” as

1. any restraint on
2. the use of information that is
3. imposed in the context of prior litigation.

Furthermore, an “evidentiary prior restraint” as used here is defined broadly to include restraints created by private agreement, such as nondisclosure agreements reached as the result of anticipated or pending litigation. Despite this broad definition, I will limit my focus to only those evidentiary prior restraints that are motivated solely by the parties’ privacy interests, and set aside those evidentiary prior restraints that are based upon proprietary interests or other external nondisclosure policies.

In this Part, I briefly discuss different sources of evidentiary prior restraints and their current treatment under the law.

### A. Nondisclosure Agreements

Perhaps the most high-profile source of evidentiary prior restraints are nondisclosure agreements. As I mentioned earlier, NDAs have gained significant attention because of their exposure by the “#MeToo” movement, but their use is ubiquitous in civil litigation. Indeed, it is typical for a settlement agreement to contain a nondisclosure clause, at the very least, if not a separate nondisclosure agreement.<sup>32</sup> Evidence of NDAs and their terms is obviously anecdotal—after all, by their terms, NDAs are not supposed to be known. But the anecdotal evidence is ubiquitous, as any experienced litigator can attest.<sup>33</sup>

**Perhaps the most high-profile source of evidentiary prior restraints are nondisclosure agreements.**

Consider the following example of a nondisclosure provision in an actual, albeit heavily redacted, settlement agreement:

This Settlement Agreement, and any terms or conditions of this Settlement Agreement, shall not be disclosed by Franchisee to any other person or entity subject to the following exceptions. Franchisee may disclose the terms of this Settlement Agreement: (i) to the extent required by any law or regulation, or by order of any court; (ii) to auditors, business agents, insurers and bankers having a need to know and who shall be obligated to maintain such information in confidence, and; (iii) to the extent mutually agreed upon in writing by all of the Parties. Before making any disclosures under (i), Franchisee shall first notify Franchisor by giving reasonable notice of the same, which shall be, if reasonably possible, to counsel for Franchisor at least seven (7) days before making any such disclosure. In the event of any disclosure under “(i)”, the Parties shall take or cooperate in all steps reasonably necessary, including the entry of a more restrictive protective order, to ensure that any terms of this Settlement Agreement will not be publicly displayed or revealed, with the costs to do so being borne solely by Franchisee.

Subject to the above Paragraph, this Settlement Agreement shall not be filed with any court in the interest of confidentiality. As the sole exception to this Paragraph, any of the Parties to this Settlement Agreement may disclose terms of this Settlement Agreement to such Court enforcing the terms of this Settlement Agreement. In such case, the Party seeking to disclose terms of this Settlement Agreement to such Court shall first provide notice to the other Party at least seven (7) days before making such disclosure and shall take or cooperate in all steps reasonably necessary, including the entry of a protective order, to ensure that any Settlement Agreement terms filed with such Court will not be publicly displayed or revealed.

Notwithstanding anything in this Settlement Agreement to the contrary, Franchisee and their attorneys may represent to third parties that the Parties had a difference of opinion, resolved the same and ended their relationship on mutually satisfactory and amicable terms.<sup>34</sup>

These nondisclosure terms are typical of NDAs, as they prevent the parties from disclosing information about the Settlement Agreement, or “any terms or conditions of this Settlement Agreement.”<sup>35</sup> The scope of an NDA may go further, and prevent even the disclosure of the underlying acts that served as the basis of the NDA.<sup>36</sup> Still others further prohibit the parties from assisting the claims of others who are not parties to the NDA.<sup>37</sup> And still others, as evidenced by the Weinstein-Gutierrez NDA above, may require the actual destruction of evidence or a false statement upon disclosure denying the truth of the events covered by the NDA, although it is certainly questionable whether these extreme provisions would be enforceable.<sup>38</sup>

In general, NDAs are contracts, and thus, with some exceptions, are subject to state contract law. Thus, NDAs are enforceable so long as state law contract requirements are met.<sup>39</sup> Indeed, as noted by the California Supreme Court,

The privacy of a settlement is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality. Routine public disclosure of private settlement terms would “chill the parties’ ability in many cases to settle the action before trial. Such a result runs contrary to the strong public policy of this state favoring settlement of actions.”<sup>40</sup>



**Despite its recent endorsement by the California Supreme Court, some commentators have questioned the “chilled settlements” argument in favor of NDAs.**

Despite its recent endorsement by the California Supreme Court, some commentators have questioned the “chilled settlements” argument in favor of NDAs.<sup>41</sup> Nevertheless, other states have recognized a similar “strong public policy” in the enforcement of settlement agreements,<sup>42</sup> and, to promote settlement, many states have adopted subsidiary rules such as making settlement negotiations or their terms inadmissible.<sup>43</sup>

Despite the general enforceability of NDAs, there are limits to their enforcement. It is notable, for example, that the sample nondisclosure terms above make an exception to nondisclosure “to the extent required by any law or regulation, or by order of any court.” Such a term is typical of NDAs, and show that NDAs, at the very least, yield to the court or to regulators when disclosure is required or ordered by law.<sup>44</sup> Indeed, the Supreme Court has held that an attempt to use a stipulated injunction to prevent compliance with a court order to testify in unrelated litigation in a different state would not be entitled to full faith and credit,<sup>45</sup> and may not even be enforceable within the home state.<sup>46</sup> Nevertheless, as evidenced by the Weinstein-Gutierrez NDA discussed in the introduction, such a term making an exception for court orders may not be present,<sup>47</sup> and may thus undermine compliance with subpoenas or other court orders.

Moreover, some states have passed rules or statutes that limit the enforceability of NDAs in limited circumstances. For example, in 1990, my home state of Florida enacted the “Sunshine in Litigation Act,” which expressly provides, among other things, that “[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard . . . is void, contrary to public policy, and may not be enforced.”<sup>48</sup> Similarly, although more narrowly, California has prohibited the use of any nondisclosure agreements which “prevents the disclosure of factual information . . . that may be prosecuted as a felony sex offense.”<sup>49</sup> Other states, no doubt motivated by the #MeToo movement, have either proposed or adopted similar legislation with respect to NDAs concerning sexual misconduct claims.<sup>50</sup>

Along with state restrictions on the enforcement of NDAs, there are some federal restrictions that are of interest. Most notably, federal tax laws have been amended to eliminate tax deductions for settlements, payouts, and attorney’s fees in sexual harassment cases if such payments are subject to a nondisclosure agreement.<sup>51</sup> In addition, federal courts have refused to enforce settlement agreements that prohibit *voluntary* cooperation with public regulators such as the Equal Employment Opportunity Commission (“EEOC”).<sup>52</sup> Similarly, the Securities & Exchange Commission (“SEC”) has issued guidance suggesting that NDAs that prevent voluntary cooperation with SEC investigation efforts may violate SEC rules.<sup>53</sup>

A common theme emerges when one reviews the restrictions on the enforceability of NDAs. Almost all of the restrictions prohibit enforcement of NDAs when doing so would undermine enforcement objectives. For example, the Florida Sunshine in Litigation Act flatly prohibits NDAs which prevent disclosure of “public hazards,” as such information is necessary for enforcement to fulfill the objective of preventing harm. Similarly, the unenforceability of provisions which directly impede public enforcement efforts supports a general consensus that the privacy interests of the parties, as reflected in the NDA, must yield when it is in tension with enforcement.

**Almost all of the restrictions prohibit enforcement of NDAs when doing so would undermine enforcement objectives.**



## B. Court Orders

### 1. Protective Orders

It is worth noting that the sample nondisclosure terms quoted above provide that if information subject to its terms must be disclosed by court order, then “the Parties shall take or cooperate in all steps reasonably necessary, including the entry of *a more restrictive protective order*, to ensure that any terms of this Settlement Agreement will not be publicly displayed or revealed.” Thus, even NDAs can contemplate the use of protective orders to restrain information.

In general, protective orders are orders issued by a court to, among other things, “forbid[] the disclosure or discovery” of otherwise discoverable information “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”<sup>54</sup> To obtain a protective order under federal rules and state analogues, a party must show “good cause.”<sup>55</sup> Unlike NDAs, protective orders, by their nature as court orders, cannot prevent the disclosure of information to the court itself, or to parties or witnesses involved in the litigation.<sup>56</sup> However, protective orders can, and are frequently used to, limit disclosure of information to the public.

As the Supreme Court has recognized, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”<sup>57</sup> Given this general right, and because protective orders typically require a showing of “good cause,” some federal circuits have concluded that “the public has a presumptive right of access to discovery materials.”<sup>58</sup>

**A majority of circuits have concluded that the public does not have presumptive access to pretrial discovery materials.**

However, a majority of circuits have concluded that the public does not have presumptive access to pretrial discovery materials because “a holding that discovery motions and supporting materials are subject to a presumptive right of

access 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.”<sup>59</sup> Thus, for these circuits a protective order is not necessary to prevent disclosure of discovery materials.<sup>60</sup>

State courts similarly recognize a right to public access, and similarly do not extend it to discovery materials unless the materials are otherwise filed with the court or relied upon in the adjudicatory process.<sup>61</sup> Moreover, state courts often consider federal court decisions and other federal materials in addressing issues of public access to judicial records.<sup>62</sup>

Although motions for protective orders are frequently filed by single parties, a common practice is for the parties to negotiate and file a joint motion for a protective order.<sup>63</sup> Such joint motions for protective orders often attach a draft “umbrella” protective order, which is an agreement between the parties as to how discoverable materials are to be disclosed.<sup>64</sup> Indeed, when parties file a joint motion for a stipulated umbrella protective order, such motions are routinely approved, although the good cause requirement still has to be met.<sup>65</sup>

Because protective orders prevent third parties from obtaining information produced in prior litigation, third parties sometimes intervene in the prior litigation to seek modification of the protective order.<sup>66</sup> However, courts

are divided as to which party has the burden concerning a motion to modify—the party seeking modification, who would have to argue against a presumption that good cause supports the existing protective order, or the party seeking to maintain the protective order, who would have to show that good cause remains.<sup>67</sup>

Finally, as with NDAs, protective orders may also be subject to restrictions in their enforcement. For example, Florida’s “Sunshine in Litigation Act” expressly provides that “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,”<sup>68</sup> and that prohibition extends to protective orders.<sup>69</sup>

## 2. Sealing Orders

Like protective orders, orders to permit the sealing of documents are often used to prevent the disclosure of court documents to the public. With some exceptions, motions to seal seek to prevent disclosure of specific documents, or specific information, and parties do not seek the type of “umbrella” orders that are commonly seen when parties move for protective orders.

However, sealing orders differ from protective orders in two important respects. First, unlike protective orders, sealing orders are governed by a hodgepodge of legal sources. In federal court, for example, motions to seal are not governed by Federal Rules of Civil Procedure, but instead are governed by local rules, which can vary from jurisdiction to jurisdiction.<sup>70</sup> The local variability found in federal court may not be true in state courts, where some states, such as Texas, have highly detailed rules on the sealing of judicial records.<sup>71</sup>

Second, sealing orders tend to be more disfavored than protective orders, and thus courts will only grant a motion to seal if “compelling reasons” are shown, a standard that is actually greater than the “good cause” showing required for a protective order.<sup>72</sup> However, courts tend to limit the use of the “compelling reasons” standard in motions to seal dispositive motions such as motions for summary judgment, as “the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events.”<sup>73</sup> For nondispositive motions, federal courts utilize the lower, “good cause” standard, as “those documents are often unrelated, or tangentially related, to the underlying cause of action.”<sup>74</sup>

As emphasized by the Supreme Court, the decision to seal documents “is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”<sup>75</sup> In exercising this discretion, “[c]ourts have weighed competing interests in a variety of contexts in determining whether to grant access to judicial documents.”<sup>76</sup> Such interests can include “enforcement concerns, judicial efficiency, and the privacy interests of the parties.”<sup>77</sup> Courts consider the same factors in determining whether to *unseal* documents, balancing such concerns with “the presumption of access.”<sup>78</sup> As with protective orders, third parties who seek information filed under seal typically move to intervene in the proceeding and then move to unseal the documents. Examples abound.<sup>79</sup>

**Orders to permit the sealing of documents are often used to prevent the disclosure of court documents to the public.**

## II. ENFORCEMENT OF SUCH RESTRAINT

In Part I, I have discussed the concept of an evidentiary prior restraint and discussed the sources of such restraints, such as nondisclosure agreements, protective orders, and sealing orders. The sources discussed were not meant to be exhaustive, and certainly evidentiary prior restraints can also arise in such diverse contexts as prior arbitration proceedings or the disclosure rules of regulatory agencies. However, by focusing on NDAs, protective orders, and sealing orders, I hope to both simplify the analysis by focusing on the most typical sources. Moreover, I hope that by focusing on these typical restraints I can create some workable conclusions that can be tested in less conventional settings.

In Part II, I discuss whether evidentiary prior restraints should be enforced. As noted earlier,<sup>80</sup> I focus on evidentiary prior restraints that are created primarily, or solely, to protect the privacy interests of the parties who obtained the restraint. Thus, I do not discuss evidentiary prior restraints that are designed to be adjuncts to other, external nondisclosure policies, such as policies in favor of protecting trade secrets or other proprietary

information.<sup>81</sup> Those prior restraints are justified to the extent that the external nondisclosure policies are themselves justified. Indeed, even Florida's "Sunshine in Litigation Act," which prohibits restraints on the disclosure of "public hazards," provides that "[t]rade secrets . . . which are not pertinent to public hazards shall [remain] protected."<sup>82</sup>

**Evidentiary prior restraints that solely protect the privacy interests of the parties should be subject to significant scrutiny.**

Instead, I focus on whether the privacy interests of the parties alone are sufficient to support enforcement of an evidentiary prior restraint. As I discuss in more detail below, the sufficiency of those interests will depend on their effect on the enforcement objectives of

the litigation. In general, I find that there can be a tension between the privacy interests of the parties in avoiding reputational harm and the goal of civil litigation to enforce the law and remedy unlawful or dangerous conduct. Thus, I ultimately conclude that evidentiary prior restraints that solely protect the privacy interests of the parties should be subject to significant scrutiny. Nevertheless, I further explore situations in which protection of the privacy interests of the parties may actually aid, rather than hinder, the enforcement of the law, and thus I try to carve out situations where privacy-based evidentiary prior restraints actually are justified.

### A. Privacy and Enforcement

In order to explore whether evidentiary prior restraints should be enforced, I think it is helpful to use a simple model of litigant behavior in civil litigation, one that is generally accepted by economists who study litigation.<sup>83</sup> A simple model can be helpful for identifying relevant and irrelevant matters, and, more importantly, to gain insights that can be tested in more realistic settings. In many ways the model I use here is like a paper road map. A road map purposefully omits details, like people, houses, or farm animals, and instead provides stylized information about roads, landmarks, and city and state boundaries. Indeed, a road map that was more realistic would be useless, as it would be hard to read or discern where you are with respect to roads or places.

When one complains about the "unrealistic" nature of economic models, I often think of the Jorge Luis Borges short story "On Exactitude in Science." The story describes an ancient empire so devoted to cartography that its cartographers created a map "whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast Map was Useless."<sup>84</sup>

## 1. The Enforcement Function of Civil Litigation

Before setting forth a simple model of litigation, it is important to discuss one important aspect of civil litigation and its role in enforcement. To fully understand the enforcement function of civil litigation, one must recognize that, prior to any contemplated litigation, a potential defendant can choose conduct that can change its potential liability.<sup>85</sup> For example, to use the examples discussed so far, a potential defendant can choose to engage in sexual misconduct or not. Similarly, a potential defendant can choose to market a defective product or not, or choose between warning, and failing to warn, of the dangers of smoking cigarettes. This observation should not be controversial. Parties, particularly corporate parties, typically try to modify their behavior before the fact to avoid potential harmful consequences such as litigation. These efforts are not limited to liability imposed by a court. It can also include efforts to modify prior conduct to avoid harm to reputation, as reputational harm may lead to decreased business opportunities or decreased sales.<sup>86</sup>

**Prior to any contemplated litigation, a potential defendant can choose conduct that can change its potential liability.**

Ideally, litigation would be costless and perfect, and thus any harm (call it  $h$ ) created by a defendant's act will be remediable, for example through a damage award.<sup>87</sup> If litigation were perfect and costless, then it would have the benefit of deterring a potential defendant from engaging in unlawful conduct that would cause harm  $h$ .<sup>88</sup> Instead, the potential defendant would be induced to consider, and ideally choose, conduct that reduces or eliminates harm  $h$ .<sup>89</sup> The potential perpetrator would not engage in sexual misconduct, or the company would try to design safer products.

Conversely, if a potential defendant did not have to pay  $h$  to compensate its victims for the harm it caused, the potential defendant, if it is rational, will not let the potential harm affect its choice of conduct. This point, I hope, is intuitive, and is backed up by experience. If anyone has ever slowed down when a police car is nearby, and then sped up when the police car was *not* nearby, then one can attest to the power of potential liability in changing one's prior behavior.

Again, assuming that liability is costless and perfect, then it has a number of advantages as a tool for the regulation of prior behavior. Perhaps the most important advantage is that it reduces the informational costs of the regulator, understood broadly to include any regulator, including courts.<sup>90</sup> Consider, for example, a regime whereby a party could not engage in acts, such as selling a good, unless it received preclearance or permission from a regulator. This type of "permission" regime is ubiquitous, and is how U.S. pharmaceuticals and medical devices are regulated.<sup>91</sup> Courts can also engage in this type of "permission" regulation, as when it issues an injunction enjoining a party from acting prior to court approval.<sup>92</sup> But imagine seeking permission from a court as to the safety of a car before introducing the car into the market. A court would be tasked with evaluating numerous and highly technical design issues, which would tax the resources of the court, or any regulator.

**Civil liability and its subsequent litigation tends to develop a "forgiveness" regime, in which parties are permitted to act, but may have to make amends after the fact if they injure others.**

In contrast to a "permission" regime, civil liability and its subsequent litigation tends to develop a "forgiveness" regime, in which parties are permitted to act, but may have to make amends after



the fact if they injure others. Thus, courts do not engage in pre-market testing of cars, but essentially permit carmakers to make whatever cars they want, subject to the potential of liability.<sup>93</sup> In a very real sense, carmakers have an “option” to injure persons so long as they pay the “strike price” of damages if the carmaker is found to be liable.<sup>94</sup>

Because carmakers risk being held liable for their conduct after a loss, they have an incentive to design their cars in the first instance in such a way as to avoid or reduce their potential liability as much as practicable. Indeed, under the risk-utility standard employed in many product defect claims, whether a defendant is liable will depend on “whether the aggregate costs of adding some safety feature proposed by the plaintiff is or is not outweighed by the aggregate benefit of preventing foreseeable accidents like that which injured the plaintiff.”<sup>95</sup> In other words, under the “risk-utility” standard, a carmaker can avoid liability by making its cars as safe as practicable, and thus is *deterred* from making unsafe cars by the threat of potential damages in a lawsuit.

If an accident does happen, and a claim is brought, a court does not necessarily have to engage in the kind of all-encompassing review of the safety of the car it would have to carry out under a “permission regime.” Instead, the court has the benefit of both the limited nature of the inquiry (i.e., Is THIS design defective? What is the amount of harm?)<sup>96</sup> and the benefit of hindsight. Although the court’s inquiry after the fact is limited, the carmaker will leverage all of its own information in advance to design a car that will not lead to lawsuits and liability. Thus, “*the virtue of the liability rule is that it allows the state to harness the information that the injurer naturally possesses about his prevention cost.*”<sup>97</sup>

## 2. The Tension Between Privacy and Enforcement

Of course, civil litigation is not perfect or costless. In fact, it is famously riddled with costs. Under a simple model of litigant behavior, the parties seek to maximize their returns and minimize their costs. Moreover, the model assumes that the “American Rule” applies, and thus the parties bear their own costs of litigation.<sup>98</sup> Accordingly, under this model, the plaintiff seeks to maximize his or her net expected return on the litigation, while the defendant seeks to minimize its total litigation costs.<sup>99</sup>

Obviously, this model is much too simple to describe actual litigation. Parties can be risk averse, or have nonpecuniary reasons for suing. But simplifying litigation in terms of recovery and costs has the advantage of providing some insights about litigation that can be extended to more realistic situations. One of the most important insights one can glean from this model is that, in general, the private interests of the parties in litigation often diverge from the public, or social, interest in the litigation.<sup>100</sup> As noted earlier, if litigation were perfect and costless, then defendants would always have to pay  $h$  when they were actually liable. Moreover, society benefits from the imposition of  $h$  because it would optimally deter potential defendants from engaging in harmful unlawful activity.<sup>101</sup>

But, again, litigation is not perfect, and it is riddled with costs. Thus, a plaintiff will not file a lawsuit every time a defendant has unlawfully harmed him or her. The plaintiff will only do so if he or she can expect a positive return, or when  $ph - c_p > 0$ . Thus, the costs of litigation may deter lawsuits that should be filed, leading to potential defendants *not* being deterred from engaging in unlawful conduct.<sup>102</sup> Moreover, because the parties bear their own costs, all parties have an incentive to settle to reduce or avoid costs.<sup>103</sup> Although, privately, the parties benefit from settlement, settlement may lead to the filing of nuisance suits that have no merit, and thus may over-deter potential defendants who want to avoid such suits.<sup>104</sup> But more generally, because the parties have to consider the costs of



litigation, and, more importantly, may fail to consider the costs of their litigation on third parties and the court, they may not make decisions regarding litigation that would be optimal from a social perspective.

Although the private interests of the parties do not necessarily align with the social interest in litigation, mechanisms like class actions, recovery of attorney fees, statutory damages, and other procedures can better align those interests.<sup>105</sup> But this divergence between the private and social interest in litigation can be further exacerbated by evidentiary prior restraints. Here the simple model can provide some insight as to why evidentiary prior restraints based on privacy interests alone further undermine the socially optimal functioning of litigation.

Consider, for example, NDAs in the context of settlement agreements. Even in the absence of NDAs, the effect of settlement agreements on the enforcement function of litigation is, at best, ambiguous.<sup>106</sup> On one hand, defendants can use settlement to reduce or avoid their liability, and, knowing that they can settle any claim against them, they have a reduced incentive to avoid unlawful conduct. However, because settlements reduce the costs of litigation, they can also encourage the filing of claims that would not otherwise be filed, and thus augment deterrence rather than undermine it.<sup>107</sup>

**Although the private interests of the parties do not necessarily align with the social interest in litigation, mechanisms like class actions, recovery of attorney fees, statutory damages, and other procedures can better align those interests.**

But NDAs, particularly in the context of sexual misconduct claims, point in the direction of less deterrence, not more. Ideally, insistence on an NDA would result in a higher payment to the victim to settle the claim.<sup>108</sup> This higher payment, moreover, would ideally mimic the liability a perpetrator would face from actual litigation, and thus one can imagine that NDAs could provide the same deterrence that would result from the claims being litigated in court.

But there are important reasons to believe that the settlement amount would result in less deterrence, not more. One reason has to do with asymmetric information. If the perpetrator is a repeat offender, then he probably has used NDAs before. Thus a victim, in negotiating an NDA, would be deprived of information about the amounts of previous settlements. In fact, for that reason, NDAs tend to enable repeat offenders because “potential future victims of the perpetrator” would not be warned of prior misconduct.<sup>109</sup>

Second, there is reason to believe that victims of sexual misconduct may not be in the best bargaining position to insist on compensation. Power imbalances that lead to the sexual misconduct in the first place may manifest themselves again in settlement negotiations. Moreover, many victims themselves may prefer NDAs themselves, and thus not insist on a higher payment for them, as a way to avoid the stigma of “being known as a person who makes sexual misconduct allegations.”<sup>110</sup>

It is important to stress that the asymmetric information and power imbalances that may be present in the negotiations of NDAs involving sexual misconduct claims are not unique to those claims. One can imagine that NDAs involving claims related to employment conditions such as workplace safety, retaliation for asserting rights, or gender or racial discrimination may suffer from the same problems of asymmetric information and imbalance of power. Similar problems may actually be found outside the employment context, particularly in situations of mass tort or toxic tort where potential defendants may use NDAs not only to prevent disclosure of harmful conduct, but also as a way to divide and conquer potential victims from working together to bring claims.<sup>111</sup>

Unlike NDAs, evidentiary prior restraints arising from court orders like protective orders or sealing orders at least permit disclosure to a court in the course of litigation. Thus, in theory, the evidentiary prior restraints would not undermine the enforcement objectives of the litigation because the litigation itself would not be hindered by disclosure restraint, although, admittedly, the information would not be available for future litigation.

But protective orders and sealing orders can similarly impair deterrence insofar as they reduce the *reputational* harm that can result from the defendant's misconduct, a point that I have stressed in my prior writing.<sup>112</sup> Ideally, the liability imposed by the court would mimic the reputational harm the defendant would suffer, and thus fully deter the defendant from engaging in unlawful conduct. But civil litigation may not perfectly do so,<sup>113</sup> and a failure to do so can reduce the deterrence impact of the litigation.

**Protective orders and sealing orders can similarly impair deterrence insofar as they reduce the reputational harm that can result from the defendant's misconduct.**

Moreover, in products liability situations, the risk of reputational harm is necessary to regulate conduct because it allows market pressure to work with civil liability to deter harmful conduct.<sup>114</sup> If consumers know that a product is unsafe, or the product is more expensive because of the manufacturer's liability,<sup>115</sup> consumers

will buy less, and such market pressure can induce potential defendants to create safer products. Thus, "product liability litigation may result in publicity about product problems and thereby enhance market forces and spur regulation."<sup>116</sup> But if this publicity is eliminated by a protective order or sealing order, potential defendants' incentives to create safe products may be reduced, leading to more harm.

Indeed, the sealing of information that may be harmful to others may prevent nonparties to the litigation from taking protective measures, and thus expose future victims to harm that could have been avoidable.<sup>117</sup> Moreover, and as I noted when discussing NDAs, protective orders and sealing orders can allow defendants to "divide and conquer" victims, preventing victims of mass torts to coordinate the investment and development of common issues.<sup>118</sup>

**The sealing of information that may be harmful to others may prevent nonparties to the litigation from taking protective measures, and thus expose future victims to harm that could have been avoidable.**

In sum, although there is an inherent divergence between the private and social interest in litigation, evidentiary prior restraints like NDAs, protective orders, and sealing orders exacerbate that divergence by:

- 1) reducing the information that courts and third parties have about the wrongdoing; and
- 2) exacerbating power imbalances between the parties.

For that reason, evidentiary prior restraints should be disfavored.

## B. Possible Exceptions

Although evidentiary prior restraints tend to undermine the enforcement objectives of civil litigation, I want to briefly discuss situations in which some privacy protection may actually aid, rather than hinder, the enforcement function of the litigation. As I mentioned earlier, one significant advantage of civil litigation as a regulatory tool

is that it “it allows the state to harness the information that the injurer naturally possesses about his prevention cost.”<sup>119</sup> Thus, in what follows I explore situations in which the absence of evidentiary prior restraints may result in the injurer concealing, or otherwise not producing, the information necessary for civil litigation to perform its enforcement function.

## 1. Concealing Behavior

Counterintuitively, the nonenforcement of evidentiary prior restraints may lead to less information, not more, if it would increase the incentive of parties with damaging information to conceal that information. Although counterintuitive, this rationale should ring true to experienced litigators, because this is the rationale that underlies the work product doctrine.

In federal courts, documents created “in anticipation of litigation or for trial” are presumptively not discoverable, and, even if discoverable, a court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”<sup>120</sup> As famously put by the Supreme Court in *Hickman v. Taylor*, such protection is necessary to the proper function of the judicial system:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.<sup>121</sup>

**The nonenforcement of evidentiary prior restraints may lead to less information, not more, if it would increase the incentive of parties with damaging information to conceal that information.**

In other words, the Court in *Hickman* anticipates that, in the absence of work product protection, attorneys would take greater efforts to conceal their “mental impressions,” leading to inefficiencies in the provision of legal services and in the ultimate product of the judiciary. Thus, the “work product doctrine” is a classic example where a restraint on disclosure actually leads to more information, not less, as it allows for a candor that would not exist in the absence of such a restraint.<sup>122</sup> Of course, the information is never made public, but at least it is accessible for the persons who need it the most.

In the context of sexual misconduct claims, it is not hard to imagine that, in the absence of NDAs, less information about sexual misconduct may result, not more. This is because victims may be deterred from even coming forward because they “reasonably fear that being known as a person who makes sexual misconduct allegations will reduce their future employment prospects or lead to being accused or suspected of lying or a variety of other negative consequences.”<sup>123</sup> Thus, and counterintuitively, the absence of an NDA may allow a perpetrator to commit sexual misconduct with impunity.

Even outside the context of sexual misconduct claims, one can imagine that, in some limited contexts, enforcement of evidentiary prior restraints may have a similar effect in revealing information that would otherwise be concealed completely from others. For example, imagine a potential defendant who manufactures a product

that may expose a consumer or third party to a toxic chemical.<sup>124</sup> Further assume that a consumer is exposed to the substance, and is injured, and sues the defendant.

If the defendant knows that information about its conduct will be made publicly available, and cannot use an NDA, protective order, or sealing order to prevent its public disclosure, then the defendant may engage in conduct

**If the defendant knows that information about its conduct will be made publicly available, and cannot use an NDA, protective order, or sealing order to prevent its public disclosure, then the defendant may engage in conduct to further conceal the information.**

to further conceal the information. For example, the defendant may seek to dismiss the case prior to discovery, or fight tooth and nail in discovery to prevent the disclosure of any information from being revealed. The re-emphasized “proportionality” requirement for discovery requests under the Federal Rules, for example, make it easier for a potential defendant to claim that discovery requests are not “proportional” in order to conceal information.<sup>125</sup> Such hardball tactics may, in effect, dissuade plaintiffs from coming forward and prevent the discovery of important information.

In essence, because public disclosure increases the potential liability of the defendant, the defendant has greater incentives to hide it.<sup>126</sup> Thus, even if any protective order issued in this litigation would not be enforced in a collateral proceeding, there would be no protective order because nothing would be disclosed in the first place.

But it is important to recognize that there are common techniques to deal with a defendant’s concealing behavior that stop short of enforcing an evidentiary prior restraint. In the case of sexual misconduct claims, procedures that permit a victim to report confidentially or anonymously, at least at first, may induce the filing of claims without necessarily requiring the concealment of the perpetrator’s conduct.<sup>127</sup> Similarly, and perhaps even more counterintuitively, courts could refrain from fee-shifting or an insistence on proportionality, and thus prevent defendants from using discovery rules to conceal information that should otherwise be disclosed.

## 2. Production of Information

A perhaps harder issue concerns the production of information. Consider a modified version of the toxic tort example above. Imagine that a potential defendant knows that a product may be subject to litigation. Rather than engage in product testing, it may “play dumb” and fail to test or otherwise keep records that would be discoverable in the first place.

For example, in a famous section of *A Civil Action*, the plaintiff’s attorney, Jan Schlichtman, seeks records of a defendant, a tannery, and its use of a carcinogenic substance which may have seeped in the groundwater and caused a spike in leukemia among children who lived nearby. The owner of the tannery denies using the substance and, more importantly, kept no records of its use which could be discovered.<sup>128</sup> Thus, unlike in the concealment context above, potential defendants may not even create the information that would need to be concealed in the first place.

Playing dumb as a tactic may not be viable in situations where regulatory measures require the keeping of information, and thus may subject a potential defendant to liability regardless of whether the damaging



information is collected or not. Moreover, playing dumb is unlikely to be a strategy in the context of claims like sexual misconduct when the victim has the same information as the defendant (after all, they were both there). But “playing dumb” may be a tempting strategy in toxic tort cases like the one above, where the misconduct occurs prior to the toxic exposure, and out of view of the victims who are harmed.

In such cases, a commitment to the enforcement of evidentiary prior restraints may induce the production of valuable information insofar as such evidentiary prior restraints can provide some protection against the harmful consequences of the information, primarily the defendant’s risk of being held liable as well as any reputational harm. In fact, such protections may be necessary in some contexts when the “reputational harm” may not be rational, as in situations where the public may impose reputational harm on a company that is unjustified because the public is panicked.<sup>129</sup>

Although a defendant’s disinclination to produce information may justify the enforcement of evidentiary prior restraints, it is unlikely that these situations would be common. This is because, in most situations, the potential reputational harm associated with producing information is justified, because such harm is necessary for market pressure to regulate conduct. Thus, enforcement of evidentiary prior restraints to induce the production of information would most likely be limited to very narrow circumstances where the risk of panic or other irrational responses is apparent.

## CONCLUSION

In this essay I have discussed evidentiary prior restraints and when they should be enforced. In general, I have argued that such restraints, when based upon privacy interests alone, should be subject to significant scrutiny and should be highly disfavored. This is because evidentiary prior restraints interfere with the enforcement

function of the litigation. Nevertheless, I have also tried to identify situations when evidentiary prior restraints may be justified, as when they are needed to protect the very information that the restraints will prevent from being disclosed.

I suggest that more empirical research is needed to better understand the consequences of non-enforcement of restraints in some contexts. Here I have discussed claims involving sexual misconduct and products liability contexts where the tension between privacy and enforcement has garnered the most attention. However,

courts, regulators, and scholars should consider other contexts, such as litigation involving pharmaceuticals, toxic substances, government practices, antitrust, securities regulation, and other areas where the same tensions are present.

**Playing dumb as a tactic may not be viable in situations where regulatory measures require the keeping of information, and thus may subject a potential defendant to liability regardless of whether the damaging information is collected or not.**

**Courts, regulators, and scholars should consider other contexts, such as litigation involving pharmaceuticals, toxic substances, government practices, antitrust, securities regulation, and other areas where the same tensions are present.**



As evidenced by Florida's Sunshine in Litigation Act,<sup>130</sup> as well as efforts to curtail the enforcement of NDAs involving sexual misconduct claims, it appears that such an assessment is underway. I hope my thoughts are helpful in guiding further reform.

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## Notes

<sup>1</sup> RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS 63 (2019). Recent reporting has questioned the veracity of Ronan Farrow's reporting on the issue. See David Folkenfink, *Opinion: 'New York Times' Argues Ronan Farrow Stretches the Facts. It's Messy*, NPR.ORG (May 20, 2020, 5:50 PM), <https://www.npr.org/2020/05/22/860161652/opinion-new-york-times-argues-ronan-farrow-stretches-the-facts-it-s-messy>. Nevertheless, I will continue to use Farrow's reporting for illustrative purposes, and nothing I say here depends on the veracity of his reporting.

<sup>2</sup> *Id.* at 58-62.

<sup>3</sup> *Id.* at 62.

<sup>4</sup> *Id.* at 63-64; see also Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.

<sup>5</sup> FARROW, *supra* note 1, at 72.

<sup>6</sup> Roisin O'Connor, *Ambra Gutierrez: Model says she was 'forced into exile' after trying to take down Harvey Weinstein*, INDEPENDENT (Dec. 17, 2017, 3:57 PM), <https://www.independent.co.uk/arts-entertainment/ambra-gutierrez-harvey-weinstein-exile-hotel-room-audio-a8115496.html>.

<sup>7</sup> *Id.* (noting that "[s]uch agreements have been a requirement for years in virtually every out-of-court settlement for sexual misconduct.>").

<sup>8</sup> Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

<sup>9</sup> See Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (Jun. 15, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html>.

<sup>10</sup> See FED. R. CIV. P. 26(c) (permitting any "person from whom discovery is sought" to seek a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); see also FLA. R. CIV. P. 1.280(c) (same).

<sup>11</sup> See, e.g., S.D. FLA. R. 5.4(b) (detailing procedure for filing under seal in civil cases); FLA. R. JUD. ADMIN. 2.051(c)(9) (permitting the sealing of court records if it is required, among other things, "to prevent a serious or imminent threat to the fair, impartial, and orderly administration of justice").

<sup>12</sup> E.g., *Public Citizen v. Liggett Group*, 858 F.2d 775 (1st Cir. 1989).

<sup>13</sup> E.g., *In re U.S. Dep't of Justice*, 357 F. Supp. 3d 1041 (E.D. Cal. 2019) (The ACLU, among others, seeking to unseal documents relating to the federal government's efforts to coerce social media platforms to aid in governmental surveillance).

<sup>14</sup> *Alexander v. United States*, 509 U.S. 544, 549-50 (1993).

<sup>15</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

<sup>16</sup> *McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 203 (2014) ("[T]he First Amendment safeguards an individual's right to participate in . . . public debate through political expression and political association."). In fact, the Supreme Court has explicitly stated that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (examining a protective order). This language is not essential to the paper, but I do want to at least acknowledge that the Court has addressed whether protective orders are, in fact, prior restraints.

<sup>17</sup> This has been noted by scholars. 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 (2003) (arguing in favor of document public access and against court-imposed secrecy); Dennis J. Drasco, *Public Access to Information in Civil Litigation vs. Litigant's Demand for Privacy: Is the Vanishing Trial an Avoidable Consequence?*, 2006 J. DISP. RESOL. 155 (discussing the impact of electronic filing on the public's access to trial dockets); T.S. Ellis III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939 (2008) (proposing that minimizing court document sealing and justifying sealing on the public record will bolster judicial independence); Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. COLO. L. REV. 817 (2007) (advocating that the public's legitimate interests in materials gained through discovery should require the filing of discovery materials).

<sup>18</sup> See *infra* Part I (discussing sources of evidentiary prior restraints and exceptions to their enforcement).

<sup>19</sup> See FED. R. CIV. P. 26(c) (permitting the nondisclosure of "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way").

<sup>20</sup> Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 467-470 (1991) (defending privacy protections for proprietary information).

<sup>21</sup> See *Dependable Sales & Serv., Inc. v. Truecar, Inc.*, 311 F. Supp. 3d 653, 665 (S.D.N.Y. 2018) (in deciding on motion to seal, court must weigh presumption of access "against 'countervailing factors,' including 'the privacy interests of those resisting disclosure'" (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006))).

<sup>22</sup> See FED. R. CIV. P. 26(c) (permitting protective orders "to protect a party or person from . . . embarrassment").

<sup>23</sup> Miller, *supra* note 20, at 464-67 (rejecting court reforms increasing public access to discovery documents as, among other things, jeopardizing privacy).

<sup>24</sup> *Id.* at 465-66 (footnote omitted).

<sup>25</sup> This has been one of the key tenets of the law-and-economics approach. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 389-418 (2004) (examining the basic theory of litigation); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 278 (1987) (discussing tort liability as an "ex post" approach to the regulation of risky behavior). However, I am not an economist, and I am not in complete agreement with all of the normative positions of law-and-economics scholars, to the extent that law and economic scholars even have shared or homogenous views.

Nevertheless, I find compelling the importance that law-and-economics scholars place on prevention, and I agree that that preventing injuries, particularly injuries like loss of life, cancer, or other harms where a victim cannot possibly be made whole, is preferable to permitting such injuries and imperfectly compensating for them. Accordingly, I strongly believe that courts, legislators and regulators should design civil litigation and its procedures with an eye towards reducing the “costs of accidents,” with a preference for preventing irreparable harm as much as possible. I discuss and expand on this view in more detail below. *See infra* Section II.A.

<sup>26</sup> *See* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 8-18 (1978) (discussing the functions of injunctions).

<sup>27</sup> *See* SHAVELL, *FOUNDATIONS*, *supra* note 25, at 391-93.

<sup>28</sup> SHAVELL, *ACCIDENT*, *supra* note 25, at 133-34.

<sup>29</sup> For a discussion of this in the context of motions to seal, *see* Sergio J. Campos & Cheng Li, *Discovery Disclosure and Deterrence*, 71 *VAND. L. REV.* 1993 (2018).

<sup>30</sup> A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 *HARV. L. REV.* 1437, 1442 (2010) (noting importance of market pressure in regulating conduct).

<sup>31</sup> A classic example of a failure to keep records can be found in JONATHAN HARR, *A CIVIL ACTION* (1995). I discuss this example in more detail below. *See infra* Section II.C.2.

<sup>32</sup> Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 *UCLA L. REV.* 663, 675-76 (2001) (interviewing attorneys for corporate defendants and insurance companies and finding that most attorneys insist on nondisclosure provisions in settlement agreements); *see also* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *NW. U. L. REV.* 469, 511 (1994) (based upon Judge Weinstein’s “own experience in helping to settle thousands of cases,” that “it is almost impossible to settle many mass tort cases without a secrecy agreement”).

<sup>33</sup> *See id.* (interviewing numerous attorneys regarding NDAs).

<sup>34</sup> Settlement Agreement, on file with author. The nondisclosure clause was redacted and used with permission. Many thanks to Attorney Jordan Shaw, a partner at Zebersky Payne Shaw Lewenz LLP, for providing it.

<sup>35</sup> *See* Fromm, *supra* note 32, at 675-76 (“Defense attorneys, for example, often feel that because disclosure about a settlement can harm their client’s reputation or expose their client to additional liability, it is their duty to draft confidential settlement agreements. Thus, it has been the ‘practice of many large corporate defendants . . . to insist on confidentiality in settlement agreements.’”).

<sup>36</sup> Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 *OR. L. REV.* 481, 491 (2008) (“An unknown, but undoubtedly significant, proportion of settlements also prohibit disclosures of factual information relating to the lawsuit.”).

<sup>37</sup> *Id.* at 490 (“Settlement agreements that prohibit a settling party from voluntarily providing evidence in other proceedings appear to be common.”).

<sup>38</sup> *See* Ian Ayres, *Targeting Repeat Offender NDAs*, 71 *STAN. L. REV. ONLINE* 76, 82 & n.21 (2018) (in discussing the Weinstein-Gutierrez NDA, noting that “[o]f course, promises to lie about sexual misconduct should be unenforceable as against public policy.”).

<sup>39</sup> *E.g.*, *Brunobuilt, Inc. v. Strata, Inc.*, 457 P.3d 860 (Idaho 2020) (“A settlement agreement stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally.”) (citations and quotation marks omitted); *cf.* *Rivendell Forest Prod., Ltd. v. Georgia-Pacific Corp.*, 824 F. Supp. 961, 968 (D. Colo. 1993) *rev’d on other grounds*, 28 F.3d 1042 (10th Cir. 1994) (NDA signed a year after employment when employer became concerned about protecting software found to lack consideration).

<sup>40</sup> *Monster Energy Co. v. Schechter*, 444 P.3d 97, 105 (Cal. 2019) (quoting *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*, 51 Cal. App. 4th 233, 241 (1996)).

<sup>41</sup> James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 *S.C. L. REV.* 859, 870 (2004) (“Despite the fervor of the corporate-side arguments that ‘sunshine’ provisions adopted by courts and legislatures to restrict secrecy will chill settlements, some evidence is emerging from publicly collected and maintained court statistics that undercuts claims that restrictions on secrecy discourage settlement.”).

<sup>42</sup> *E.g.*, *Joseph v. Huntington Ingalls Inc.*, NO. 2018-CC-02061, 2020 WL 499939, at \*18 (La. Jan. 29, 2020) (in a case involving the settlement of asbestos claims, stating that “[t]he law in its wisdom, and out of solicitude to end or avert threatened litigation, encourages settlement of disputes by compromise, and does not sanction the solemn acts of contending parties settling their disagreements being lightly brushed aside, unless there be present evidence of bad faith, error, fraud, etc.”); *Saleeby v. Rocky Elson Const., Inc.*, 3 So.3d 1078, 1083 (Fla. 2009) (noting “Florida’s public policy favoring settlement”).

<sup>43</sup> *See, e.g.*, *Saleeby*, 3 So.3d at 1083 (pointing to Fla. Stat. § 90.408, which provides that evidence of settlement offers or negotiations are “inadmissible to prove liability or absence of liability for the claim or its value”).

<sup>44</sup> Bauer, *supra* note 36, at 492 n.21 (“Confidentiality clauses in settlements frequently contain an exception for disclosures required by subpoena or court order.”).

<sup>45</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998). The opinion is somewhat ambiguous as to the holding, but Justice Ginsburg, writing for the plurality, stressed that “the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.” *Id.* at 239 (Ginsburg, J., plurality).

<sup>46</sup> *Id.* at 251 (Kennedy, J., concurring) (concluding that Michigan law “would not seek to bind the Bakers to the injunction”).

<sup>47</sup> Bauer, *supra* note 36, at 492 n.21 (“Sometimes even this is lacking.”).

<sup>48</sup> FLA. STAT. § 69.081(4).

<sup>49</sup> CAL. CODE CIV. P. § 1002(a)(1).

<sup>50</sup> *See* Harris, *supra* note 9.

<sup>51</sup> 26 U.S.C. § 162(q).

<sup>52</sup> *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 745 (1st Cir. 1996) (concluding that “non-assistance covenants which prohibit communication with the EEOC are void as against public policy”).

<sup>53</sup> *See* Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW360 (Mar. 14, 2014, 5:16 PM), <https://perma.cc/45RA-2QXN> (discussing how NDAs designed to prohibit cooperation with the SEC may violate 17 C.F.R. § 240.21F-17(a)).

- <sup>54</sup> FED. R. CIV. P. 26(c); *see also* Fla. R. Civ. P. 1.280(c) (same); MASS. R. Civ. P. 26(c) (same).
- <sup>55</sup> FED. R. CIV. P. 26(c); Fla. R. Civ. P. 1.280(c); MASS. R. Civ. P. 26(c).
- <sup>56</sup> Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1260 (2020) (noting that under protective orders, “[a]ccess to the materials designated as confidential is then frequently limited to the court, parties, attorneys, and witnesses”).
- <sup>57</sup> *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).
- <sup>58</sup> *See In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145–46 (2d Cir. 1987) (“Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order [under Rule 26(c)] since the public would not be allowed to examine the materials in any event.”); *see also* Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 790 (1st Cir. 1988) (modifying a protective order under Rule 26(c)).
- <sup>59</sup> *Leucadia Inc. v. Applied Extrusion Tech. Inc.*, 998 F.2d 157, 164 (3d Cir. 1993); *see also* SEC v. TheStreet.com, 273 F.3d 222, 233 (2d Cir. 2001) (concluding that discovery materials “do not carry a presumption of public access”); *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.”)
- <sup>60</sup> *Cryovac*, 805 F.2d at 13; *Leucadia*, 998 F.2d at 165 (“The public policy implications of an expansion of the common law presumption of access to discovery motions are unclear, and this alone should counsel restraint.”); *see also* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (noting that “pretrial deposition and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law and, in general, they are conducted in private as a matter of modern practice.”).
- <sup>61</sup> *E.g.*, *Fiorella v. Paxton Media Grp., LLC*, 424 S.W.3d 433 (Ky. Ct. App. 2014) (concluding that “once filed with the courts, ‘the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public.’”); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 36 (2008) (concluding that “raw discovery materials exchanged among parties, but not filed with the court, are not open to the public.”).
- <sup>62</sup> *See, e.g.*, *Fiorella*, 424 S.W.3d; *Rosado*, 292 Conn.
- <sup>63</sup> Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999); *see also* Endo, *supra* note 56 (“Stipulated protective orders have long been an important part of civil litigation and are used in a wide range of cases,” citing sources.).
- <sup>64</sup> Endo, *supra* note 56, at 1257–61 (describing how “stipulated protective orders work”).
- <sup>65</sup> *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.”); Endo, *supra* note 56, at 1259 & n.55 (same, quoting *Zenith*).
- <sup>66</sup> *E.g.*, *Public Citizen*, 858 F.2d at 778 (filing motion to modify, although formally not moving to intervene under Rule 24); *Leucadia*, 998 F.2d at (intervening under Rule 24 and seeking modification of protective order).
- <sup>67</sup> Doré, *supra* note 63, at 357 (citing sources).
- <sup>68</sup> FLA. STAT. § 69.081(3).
- <sup>69</sup> *See* *State Farm Fire & Cas. Co. v. Sosnowski*, 830 So. 2d 886 (Fla. Dist. Ct. App. 2002) (concluding that protective order did not contain information concerning a “public hazard” to be subject to the Act).
- <sup>70</sup> *See, e.g.*, S.D. FLA. R. 5.4(b) (detailing procedure for filing under seal in civil cases).
- <sup>71</sup> *See* TEX. R. CIV. P. 76(a) (providing for the “[s]ealing of court records”); *see also* Jillian Smith, *Secret Settlements, What You Don’t Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 244–47 (discussing, and critiquing, Texas Rule 76a).
- <sup>72</sup> *Apple, Inc. v. Samsung Elec. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013).
- <sup>73</sup> *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (citations omitted); *see also* *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 252 (4th Cir. 1988).
- <sup>74</sup> *Kamakana*, 447 F.3d at 1179 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).
- <sup>75</sup> *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978).
- <sup>76</sup> *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (citing cases).
- <sup>77</sup> *Dependable Sales & Serv., Inc. v. Truecar, Inc.*, 311 F. Supp. 3d 653, 665 (S.D.N.Y. 2018) (in deciding on motion to seal, court must weigh presumption of access “against ‘countervailing factors,’ including ‘the privacy interests of those resisting disclosure’” (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006))).
- <sup>78</sup> *See* *Diversified Grp., Inc. v. Daugerdas*, 217 F.R.D. 152, 159 (S.D.N.Y. 2003) (noting that, in determining whether to *unseal* documents, such “countervailing factors” must be considered against “the presumption of access” of certain judicial documents).
- <sup>79</sup> *U.S. ex rel. Joshua Harman v. Trinity Indus., Inc.*, 622 F. App’x 448 (Mem) (5th Cir. 2015); *O’Keefe v. Schmitz*, Case No. 14-C-139, 2014 WL 2779091 \*1, \*1–\*7 (E.D. Wis. June 19, 2014); *Milton Hershey Sch. v. Penn. Hum. Relations Comm’n*, 226 A.3d 117, 120–124 (Pa. Commw. Ct. Feb. 11, 2020).
- <sup>80</sup> *See supra* Introduction.
- <sup>81</sup> *See* FED. R. CIV. P. 26(c); *see also* Fla. R. Civ. P. 1.280(c) (same); MASS. R. Civ. P. 26(c) (same).
- <sup>82</sup> FLA. STAT. § 69.081(5) (providing that trade secrets “not pertinent to public hazards shall be protected pursuant to chapter 688” of the Florida statutes).
- <sup>83</sup> *See* SHAVELL, FOUNDATIONS, *supra* note 25, at 389–418 (examining the basic theory of litigation). The model and its basic assumptions are generally accepted and have been used by other procedural scholars. *See, e.g.*, ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 34 (2003) (modeling litigant behavior in decisions to file suit using the same factors); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04, Reporters’ Notes and cmt. a (AM. LAW INST. 2010).
- <sup>84</sup> Jorge Luis Borges, *On Exactitude in Science*, in COLLECTED FICTIONS 325–33 (Andrew Hurley trans. 1999).

<sup>85</sup> For an early and famous articulation of this approach, see Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

<sup>86</sup> See Kishanthi Parella, *Public Relations Litigation*, 72 VAND. L. REV. 1285 (2019) (discussing importance of reputation to firm’s decisionmaking regarding litigation).

<sup>87</sup> For purposes of clarity I will focus on damage remedies, although courts can certainly impose injunctive or specific performance remedies in certain contexts. For a discussion of the injunctive and damage remedies and their similarities, see FISS, *supra* note 26, at 8-18.

<sup>88</sup> Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357 (1984) (noting that after-the-fact liability rules regulate conduct “indirectly, through the deterrent effect of damage actions that may be brought once harm occurs.”); Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 677 (7th Cir. 2013) (recognizing that “litigation in general . . . has a deterrent as well as a compensatory objective.”).

<sup>89</sup> Admittedly, in some contexts, such as those involving inherently dangerous activities like the use of explosives, the goal of the liability is not to induce reasonable care, but to induce potential defendants to engage in the optimal level activity. In those contexts, a strict liability regime is optimal, not because it prevents the harmful activity altogether, but because it provides the proper incentives to engage in the optimal amount or level of activity. See SHAVELL, ACCIDENT, *supra* note 25, at 17. For the sake of simplicity, I want to focus on negligence and similar liability regimes.

<sup>90</sup> See IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* (2005) (discussing the informational advantage of after-the-fact liability rules).

<sup>91</sup> W. Nicholson Price II, *The Cost of Novelty*, 120 COLUM. L. REV. 769, 772 (2020) (“To develop a new drug similar to an existing drug, the developer needs to undergo the entire process of preclinical work, clinical trials, and Food and Drug Administration (FDA) approval, at a cost of many millions of dollars.”).

<sup>92</sup> FISS, *supra* note 26, at 8-18.

<sup>93</sup> Of course, a hybrid system regulates car safety, with, for example, the National Highway Traffic Safety Administration (“NHTSA”) monitoring accidents and imposing recalls in some instances. See <https://www.nhtsa.gov/>.

<sup>94</sup> AYRES, *supra* note 90, at 5.

<sup>95</sup> See DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 8.5 (2005) (discussing the risk-utility standard in the context of design defects).

<sup>96</sup> Obviously, the inquiry is much more limited in strict liability regimes, where the court would only have to determine causation and harm. See SHAVELL, ACCIDENT, *supra* note 25, at 17.

<sup>97</sup> Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 725 (1996) (emphasis in original).

<sup>98</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975) (defining the “American rule,” stating that “[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”).

<sup>99</sup> More precisely, and for those interested in math, under the model used here, the parties seek to optimize their gains and losses based on three factors:

- (1) the damages recoverable (or the liability that may be imposed) ( $h$ );
- (2) the probability ( $p$ ) of  $h$  being imposed by the court; and
- (3) the costs of the litigation process itself (for example,  $c_p$  for plaintiffs and  $c_d$  for defendants).

Under this model, plaintiffs seek to maximize their net expected recovery, or  $ph - c_p$ , while defendants seek to minimize their total expected litigation costs, or  $ph + c_d$ .

The model is generally well-accepted by law-and-economics scholars, and is frequently used in the literature. See SHAVELL, FOUNDATIONS, *supra* note 25, at 389–418 (examining the basic theory of litigation). For more robust versions of this simple model, see, e.g., I.P.L. Png, *Litigation, Liability, and Incentives to Care*, 34 J. PUB. ECON. 61 (1987); see also A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99 (1989) (providing a survey of the literature). A version of this model has been used in my previous writings. See, e.g., Campos & Li, *supra* note 29, at 1998–2000; Sergio J. Campos, Christopher S. Cotton, & Cheng Li, *Deterrence Effects Under Twombly: On the Costs of Increasing Pleading Standards in Litigation*, 44 INT’L REV. L. & ECON. 61 (2015).

<sup>100</sup> See Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

<sup>101</sup> *Id.*

<sup>102</sup> SHAVELL, FOUNDATIONS, *supra* note 25, at 397.

<sup>103</sup> *Id.* at 402.

<sup>104</sup> David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT’L REV. L. & ECON. 42 (2006). It is also worth noting that plaintiffs attorneys play an important gatekeeping role by policing nonmeritorious claims and choosing which ones to file. See *id.*

<sup>105</sup> SHAVELL, FOUNDATIONS, *supra* note 25, at 398–401 (discussing these interventions).

<sup>106</sup> *Id.* at 412 (discussing this ambiguity).

<sup>107</sup> *Id.*

<sup>108</sup> Ayres, *supra* note 38, at 77 (“When unlawful sexual misconduct did in fact occur, the promise of nondisclosure might be valued by the survivor solely because it secures for the survivor a larger settlement payment.”).

<sup>109</sup> *Id.* (noting that “[a] central concern with enforcement is that NDAs do not adequately manifest the assent of potential future victims of the perpetrator.”).

<sup>110</sup> *Id.*

<sup>111</sup> See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1077–79 (2012) (discussing why class actions are necessary to allow for coordinated investment in common issues); David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 305–06 (2014) (arguing that class action treatment is preferable when the plaintiffs are numerous, but their claims share common issues of law and fact).



<sup>112</sup> See Campos & Li, *supra* note 29, at 2003 (using a simple game theoretic model to show that sealing reduces reputational losses, and thus “makes the [liability] action more attractive to D and D is thus more likely to take the [liability] action”).

<sup>113</sup> Arguably inadequate damages can be supplemented with punitive damages, although this can be tricky. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003) (discussing the use of punitive damages to account for losses that are not recoverable).

<sup>114</sup> Polinsky & Shavell, *supra* note 30, at 1454-55.

<sup>115</sup> *Id.* at 1459 (“[B]ecause product liability causes prices to rise to reflect product risks, it may beneficially discourage consumers from buying risky products”).

<sup>116</sup> *Id.* at 1454.

<sup>117</sup> SHAVELL, FOUNDATIONS, *supra* note 25, at 413 (noting that “if the public learns about the defect, perhaps people can take precautions to reduce harm”).

<sup>118</sup> Campos, *supra* note 111; Rosenberg & Spier, *supra* note 111.

<sup>119</sup> Kaplow & Shavell, *supra* note 97, at 725 (emphasis omitted).

<sup>120</sup> FED. R. CIV. P. 26(b)(3)(A) & (B).

<sup>121</sup> *Hickman v. Taylor*, 329 U.S. 495, 393-394 (1947).

<sup>122</sup> See Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 405-07 (1991) (arguing that work product protection may be necessary to encourage the sharing of information between an attorney and his client, but arguing for more empirical evidence).

<sup>123</sup> Ayres, *supra* note 38, at 77.

<sup>124</sup> See, e.g., *In re Roundup Prods. Liab. Litig.*, MDL No. 2741 (N.D. Cal. July 5, 2017).

<sup>125</sup> See FED. R. CIV. P. 26(a). I am working with David Rosenberg on a project about discovery costs and how defendants can use costs to prevent disclosure of information.

<sup>126</sup> Using the mathematical model above, in essence, because public disclosure increases the potential harm ( $h$ ) of the litigation, the defendant now has greater incentives to increase its costs ( $c_D$ ) to reduce the probability ( $p$ ) that this information is ever disclosed.

<sup>127</sup> Ian Ayres, in fact, suggests that NDAs may be permitted, but they must meet “particular disclosure, condition, and escrow requirements” to prevent repeat offenders from hiding behind the terms of the NDA. See Ayres, *supra* note 38, at 79.

<sup>128</sup> JONATHAN HARR, A CIVIL ACTION c. 6, Discovery (1995).

<sup>129</sup> See Campos & Li, *supra* note 29, at 2006-07 (discussing the possibility of sealing orders to protect against panics).

<sup>130</sup> *Supra* note 48.



## Oral Remarks of Professor Campos

In this presentation I am going to focus less on the attempt to limit disclosures and more on limitations already obtained in prior litigation and the extent to which they should be enforced in subsequent litigation or subsequent proceedings.

I am going to focus on four particular topics. I will discuss the legal sources or the law that supports the right for the public to have access to court records and court proceedings. I then will talk about limits to that disclosure and, in particular, I will focus on mechanisms that parties can use to limit disclosure to the public such as non-disclosure agreements, protective orders, and sealing orders. I will focus in particular on those mechanisms that are motivated by privacy, and set aside mechanisms that are motivated by proprietary interests, because I think those are different and should be treated separately. I will then discuss the inherent tension between the privacy interests of the parties and the functioning of the enforcement function of civil litigation. And I will discuss the exceptions in which the privacy interest of the parties may actually align with the enforcement function of the litigation.

### Right(s) to Disclosure

When I began this project, I had assumed that the source of law for the public's right of access was based upon the First Amendment. But I saw that courts actually rely much more upon the common law rather than the Constitution. As articulated clearly in *Nixon v. Warner Communications*,<sup>1</sup> a 1970 Supreme Court case that arose from the Watergate scandal, the courts have said quite clearly that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In *Nixon* the court not only cited federal cases in support of this general common law right, but also state cases. As it turns out, state courts have also recognized this general common-law right. In some instances, they actually have a much broader conception of the right than is recognized by the federal courts.

**I had assumed that the source of law for the public's right of access was based upon the First Amendment. But I saw that courts actually rely much more upon the common law rather than the Constitution.**

This right of access is typically limited to materials on file with the court. Unfiled litigation documents such as raw discovery tend not to be presumptively public or tend to be documents to which the public does not have presumptive access.

There are other sources of law that support the public's access to court documents. The First Amendment is mentioned in some of the case law—and as discussed in the morning session and the morning paper, there is a persuasive argument to be made that the First Amendment should play a larger role in the regulation of confidentiality in the court system. There are also both statutes and court rules that imply a public right of access to court documents.

The Florida Sunshine Litigation Act,<sup>2</sup> for example, an act that was passed by the legislature in my home state, provides that things like nondisclosure agreements are unenforceable to the extent that they prevent the public from learning about a “public hazard,” with public hazard defined broadly under the terms of the statute. And then

you have court rules like Texas Rule of Civil Procedure 76(a).<sup>3</sup> Although it is, on the surface, a rule concerning sealing and motions to seal, the rule states unequivocally that court records are presumptively accessible by the public. Moreover, it has a broad definition of what are “court records,” including unfiled settlement agreements and unfiled discovery that may involve or implicate information that could be important for public health or safety.

We have a general common law right, buttressed by the First Amendment and various statutes and court rules, that support a public’s right to access. So how can the parties limit that disclosure?

Again, here, I want to focus on mechanisms that the parties can use in order to prevent disclosure for privacy purposes. I want to focus on three particular types of mechanisms: nondisclosure agreements; protective orders; and sealing orders.

**Nondisclosure agreements** are basically contracts requiring parties not to disclose certain information. They are typically enforceable. However, as a result of the #MeToo movement, there have been efforts at the state level, and even at the federal level, to prevent the enforceability of NDAs if they involve claims of sexual violence or sexual harassment. But on the whole, these agreements tend to be enforceable if a breach of contract claim is brought in state court.

**As a result of the #MeToo movement, there have been efforts at the state level, and even at the federal level, to prevent the enforceability of NDAs if they involve claims of sexual violence or sexual harassment.**

**Protective orders** are orders that are entered by the court that forbid the disclosure of discovery to protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. Typically, they require the parties to show good cause, and they apply mostly to raw discovery. But in practice, what you see in complex cases is that the parties will often negotiate and submit comprehensive or “umbrella” protective orders that cover just about anything that is disclosed or exchanged in the litigation and may include duties not to disseminate the information to third parties. There is the ability to prevent disclosure to the public; however, unlike NDAs, protective orders do at least allow disclosure to the court.

Finally, **sealing orders**, unlike protective orders, apply to filed documents rather than raw discovery. They typically require a higher showing for dispositive motions—typically a showing of “compelling interest”—although, for non-dispositive motions, courts have often relied upon a lower “good cause” standard. And the sources of law for sealing orders or motions to seal tend to be scattered. Sometimes, as in Texas, they are in the actual state civil rules of procedure. In federal practice, they are scattered among the local rules, and there can be some variation in how they are treated by the law.

There are three different methods of limiting disclosure and some of the features of these limitations. All three have the potential to prevent the public from accessing court materials.

The non-disclosure agreement prevents even the court from discovering the materials to which it applies, but protective orders and sealing orders at least allow disclosure to the court. Finally, while NDAs can be comprehensive and cover just about anything, and protective orders cover raw discovery, sealing orders only cover *filed* materials. Nevertheless, they tend to work in tandem with comprehensive protective orders, often requiring the parties to file motions to seal for certain documents that are considered confidential.

## Privacy v. Enforcement

I turn now from these mechanisms that are used to limit disclosure to the public to the tension that these mechanisms can create between (1) the privacy interests of the parties and (2) the enforcement function of the litigation.

I want to start by showing a purposefully simplistic picture of the timeline of litigation. As a civil procedure professor, I tend to focus on the litigation itself, which is the very last event in this timeline. However, one can actually go further back. One can go back to the point at which damages were incurred by the plaintiff, go further back to a situation in which the conduct caused the injury suffered by the plaintiff, and go even further back to the decision that the defendant makes whether to engage in unlawful conduct (X) or to engage in lawful conduct (not X). It is this particular decision point that is of key interest for the liability determination of any civil law claim. But more importantly, it is this decision point that is of key interest for all regulators and other government officials in terms of ensuring compliance with the law.

Now, one can imagine two general strategies for making sure that the defendant makes the right decision at that point. One strategy can be called “regulation,” which would involve government officials exercising direct control over what the defendant does. The other is what I will call “liability,” and this is how civil litigation generally works. Direct control requires a defendant to ask permission of a regulator in order to act. A liability system simply allows defendants to act any way they want. However, under a liability system the defendants suffer the consequences if they act in the wrong way.

One benefit of this kind of indirect, deterrent method of regulating behavior is that it reduces the information load of the regulator, or of the court in this case. In fact, by assigning sanctions for unlawful behavior, what the court is doing with after-the-fact litigation is, in effect, inducing a defendant to use their own information to make the right choice.

**You can get the same result whether you use regulation (or what can be called a “permission” regime), where the defendant has to ask for permission, or use liability (or a “forgiveness” regime), where a defendant can act as they want but ask for forgiveness later.**

One thing I really want to stress is that you can get the same result whether you use regulation (or what can be called a “permission” regime), where the defendant has to ask for permission, or use liability (or a “forgiveness” regime), where a defendant can act as they want but ask for forgiveness later. In fact, litigation may be better for a variety of reasons—particularly this reduction in information cost.

But limitations on disclosure to the public can interfere with enforcement in two important ways. One obvious way is that NDAs, protective orders, and sealing orders can reduce the deterrent effect of the litigation itself. This is most obvious with NDAs, such as NDAs involving sexual harassment claims. In those situations, you can imagine a plaintiff not negotiating a payment that would fully reflect the damages or the judgment that the defendant would receive in regular litigation. In such situations, the defendant incurs less of a consequence for their wrongful conduct and therefore the defendant has actually more incentive to engage in that unlawful conduct in the first place.<sup>4</sup>

The same thing could happen with sealing orders and protective orders. Even though they allow the court to assess liability, sealing orders and protective orders can disrupt market forces, in which the markets would use

reputational harm to ensure that the defendant complies with the law. And many of our regulatory systems in the United States rely on both market forces *and* liability, for example to ensure that defendants create safe products.

**If you have a defendant who is a potential or actual repeat offender, the settlement would allow some payment for the first victim, but a potential subsequent victim would have no idea that the defendant is a potential offender. Therefore, the potential subsequent victim cannot take any type of action to mitigate or prevent future harm caused by the defendant.**

The second way in which these mechanisms can disrupt the enforcement function of civil litigation is by reducing the amount of information available to third parties. Take, for example, the instance of an NDA involving sexual harassment claims. If you have a defendant who is a potential or actual repeat offender, the settlement would allow some payment for the first victim, but a potential subsequent victim would have no idea that the defendant is a potential offender. Therefore, the potential subsequent victim cannot take any type of action to mitigate or prevent future harm caused by the defendant. And one thing that you see with respect to NDAs involving sexual harassment claims is that repeat offenders use these NDAs in order to offend with impunity, without any of the other potential victims having any awareness of what is going on.

The same thing could happen with protective orders and sealing orders. They prevent not only future victims from mitigating potential harms from dangerous products, but prevent regulators from acting to reduce or prevent any of that harm.

## Exceptions

Now that you can see the potential for disruption of enforcement, I want to discuss two possible exceptions. I want to discuss some situations in which disclosure limitations/privacy interests might actually *aid* rather than interfere with enforcement.

One can imagine is a situation where a defendant, in the absence of the availability of something like an NDA or a protective order, may simply decide that if they go to the litigation, they are going to fight tooth and nail to make sure that nothing is disclosed, whereas with a protective order, you would at least allow some disclosure between the parties and the court. You may have the non-intuitive result that, in the absence of an NDA or protective order, a defendant uses delay, expense, or discovery defenses to make sure that *nothing* is ever revealed.

A more sinister possibility is that a defendant, in the absence of any sort of protection against disclosure to the public, may decide not to collect the information at all. This is unlikely because, in a lot of regulatory contexts, there are other duties to maintain records or to file information with regulators that operate independent of litigation itself. But in some situations where you do not have these independent duties, you can imagine a defendant deciding that it is simply not worth knowing whether their product is safe or not, and simply deciding that ignorance is bliss.

I had talked about this somewhat hypothetically, but I am curious to talk with the participants here at the conference about whether they find this persuasive or whether they can think of concrete examples.

With those possibilities in mind, I thank you all for listening to my presentation and I look forward to your comments and questions.



## Comments by Panelists

### PROFESSOR MINNA KOTKIN

Thank you so much for this opportunity to address this distinguished group of jurists. And thank you, Professor Campos, for your very timely and cogent essay that addresses the seldom-discussed issue of confidentiality that goes well beyond all of the attention to NDAs.

Professor Campos considers the social utility of permitting protective orders and sealed documents relative to their impact on future litigation. He suggests that, in many cases, the alleged privacy interests of defendants should not trump the public interest in open proceedings.

For a long time, I have litigated and written about discrimination law, with a particular emphasis on confidentiality. In fact, I first raised the issue of NDAs in civil rights cases about 15 years ago. It attracted very little attention until the #MeToo movement began. But now, obviously, it has captured the judicial and public imagination, and it is a significant issue, and there have been significant reforms. I recently wrote an article that outlined the various states' responses legislatively to NDAs.<sup>5</sup> But I am not going to go there right now.

### Secrecy Contrary to Values

Basically, I take the view that these “prior restraints,” as Professor Campos calls them, are contrary to the values of our judicial system and should be presumptively prohibited. They only magnify the damage already created by pre-litigation NDAs.

It is important to remember that once a party files a complaint in court, the parameters of the dispute are a matter of public record. The plaintiff has seated ceded confidentiality, and has also revealed in many cases the alleged bad actors at the defendant's place of work. And here, you should know that I am basically addressing discrimination and harassment issues. Tort and products liability issues are very involved questions of trade secrets that do not really impact on civil rights cases.

**I take the view that these “prior restraints,” as Professor Campos calls them, are contrary to the values of our judicial system and should be presumptively prohibited. They only magnify the damage already created by pre-litigation NDAs.**

**There is plenty of opportunity prior to the filing of a complaint for the parties to negotiate and determine the parameters of confidentiality.**

Most judges will not permit the filing of pseudonymous papers. After the complaint is filed, really there is no basis for sealing discovery or summary judgment motions absent the most unusual circumstances. If the privacy of other employees is at issue, the answer is redaction, not sealing. If other employees' records are being produced, if other complainants' records are being produced, whether they are on the plaintiff side or the defendant side, they can be easily redacted and then generally available.



Concerns about confidentiality beyond that should be addressed in the pre-litigation settlement sphere. There is plenty of opportunity prior to the filing of a complaint for the parties to negotiate and determine the parameters of confidentiality.

## Two Developments

It is also worthwhile to consider this issue from the perspective of changes in the litigation process over the last 50 or so years. From the time that I started practice (not quite 50 years, but a while ago!), there have been two developments that have both vastly increased and vastly decreased litigation transparency.

First, it used to be that discovery product had to be filed with the court, at least in federal court. Even depositions had to be filed. And unless they were sealed, which was very unusual, they were publicly available. The same for discovery motions. They had to be filed, and they would reveal a great deal about the discovery product. That basically ended, for two reasons. First of all, the courts were overwhelmed with paper. And by local rule and then federal rule, discovery materials were no longer filed.

The second development that decreased transparency was that formal discovery motions basically have fallen away, at least in the federal courts. They have practically disappeared. Disputes are decided informally by magistrate judges. There may be a short form order, but really, in the docket, there is no real reflection of the discovery product. That is the decrease in transparency.

**Now, we can search easily and efficiently, finding every case filed against a particular defendant, and retrieve all of the papers filed. The problem is now that the paper reveals very little, either because of protective orders or sealing or simply because of informal resolutions.**

There has also been an *increase* in transparency in some ways. While in olden days papers may have been in the courthouse, they were almost impossible to retrieve. There was no PACER system, which obviously enables defendant name searches. You could use Lexis and Westlaw, but that would only reveal reported decisions, not the other papers. And even if you had a lead on the case, you had a name, you had to go to the courthouse to retrieve the documents, which was difficult enough if it was a local case and impossible if it was not a local case.

Of course, now, we can search easily and efficiently, finding every case filed against a particular defendant, and retrieve all of the papers filed. The problem is now that the paper reveals very little, either because of protective orders or sealing, or simply because of informal resolutions.

## Empirical Research

This brings me to Professor Campos's recommendation for empirical research, which is not fully explored in this paper, but certainly raises interesting possibilities. I hope he will pursue those possibilities.

I am not sure we can in fact draw any definitive conclusions with regard to empirical research, however. For example, it might be worthwhile to determine the percentage of protective orders and sealing orders entered in employment discrimination or harassment cases. At least then we would have a benchmark of how prevalent they actually are, and it would also call attention to the issue, and judicial resources could be focused on it. However, that assumes that there are actual court orders, rather than side agreements not filed with the court. It has been my

experience, in fact, that some of these protective orders are simply contracts between the parties and never reach judicial attention.

It's the same problem with settlements. Settlements have become totally invisible, because they are not filed with the court in virtually any discrimination/harassment case. That is a whole other subject that is worth exploring. I just note that this confidentiality with regard to settlement is not a given. Fair Labor Standards Act cases require court approval of settlements, and the world does not come to an end over that.

**Settlements have become totally invisible, because they are not filed with the court in virtually any discrimination/harassment case.**

To conclude, I am not sure how productive empirical research would be. I would love to hear from Professor Campos. I just suggested one avenue before empirical work, but I am sure Professor Campos has others in mind. I hope in our further discussion today, we can explore ideas for that in greater depth.

## THE HONORABLE JOHN CANNON FEW

I really appreciate the quality and depth of thought in Professor Campos's paper.

To give you a little perspective on my remarks, when I was a trial lawyer over 20 years ago, I represented plaintiffs in products liability cases and spent pretty much my entire time fighting against secrecy and confidentiality. But nevertheless, I have fully come to recognize that there are confidentiality interests that the law correctly protects, and I do not want to sound this afternoon like I undervalue those legitimate interests.

### Existing Judicial Duties

Professor Campos talks about the enforcement role of the civil courts, and I want to begin my response by sharing my perspective on that role. If an adult plaintiff in a civil lawsuit and the insurance company defendant settle the lawsuit and present to the court a settlement and dismissal order, the court has before it only the private interests of the parties to consider. The court does not play a role in the substance of the decision.

However, if the plaintiff is a minor, or a minor's representative, then there are other interests the court must consider. In South Carolina, as I am sure is true in your state, we call that "the best interest of the minor." Until the minor's interests are invoked, the court's role is simply to accept the agreement of private parties to resolve their dispute. But after that, the court has a legally recognized interest that it is duty bound to protect.

**In a contested matter, it is easy for the court to see its role. One side argues for concealing or protecting the information, and the other side argues for disclosing it. The court considers the dispute in terms of the law, which includes the public interest.**

Professor Campos focuses us in on a similar feature of confidentiality litigation. When private parties enter into an agreement for confidentiality that is not part of a court order, that is a private matter. However, once the parties are asked to invoke the power of the sovereign to protect their otherwise private interests through a secrecy order, a sealing order, or a protective order, the court has a legally recognized interest and is duty bound to protect that interest.

In a contested matter, it is easy for the court to see its role. One side argues for concealing or protecting the information, and the other side argues for disclosing it. The court considers the dispute in terms of the law, which includes the public interest that Professor Campos has referenced and discussed for us, and the court makes a ruling.

## “Apparent Consent”

It is a sneaky thing, however, to have such an issue come to a court with the apparent consent of the litigants. Even, if not *especially*, when a confidentiality or secrecy order is presented on the consent of private parties, the court has a legally recognized interest it is duty bound to protect.

I do not think any court would sign a consent order approving a minor settlement without hearing evidence that the settlement is in the best interest of the minor. And similarly, from my perspective, a court should never sign a consent protective order or sealing order without independently verifying that the order is warranted under law. The public interest requires it.

But I want to emphasize the legitimacy of the private interests of the litigants in protecting or exposing the information. We, as judges, are duty bound to enforce the law—to order confidentiality when the law permits or requires it, and to deny secrecy or confidentiality when the law should not permit it. At the same time, it is important to understand that the litigants and their lawyers are trying to win a lawsuit. There may be strategic reasons why a lawyer would refuse secrecy or confidentiality. The parties, however, should not be expected to play the role that the court is supposed to play, of protecting the public interest on confidentiality. We should welcome and respect that lawyers will argue forcefully for the outcome of a confidentiality dispute that favors their client’s interest.

## “Sound Discretion”

At footnote 57 of his paper, Professor Campos mentions discretion, in connection with the *Nixon v. Warner Communications* case. Nixon probably does not advocate for very wide discretion on this point. But as to the manner in which a trial court would go about deciding such a question, or the trial court’s “discretion,” there are two things that I want us to keep in mind.

**Discretion is limited by law. In my state, and also probably in other states, there remains the casual belief, often repeated thoughtlessly, that such and such a decision is “within the sound discretion of the trial court.” I regret to admit that I have written those meaningless words myself. I have subsequently tried to take them back, but have not succeeded.**

First, discretion is limited by law. In my state, and also probably in other states, there remains the casual belief, often repeated thoughtlessly, that such and such a decision is “within the sound discretion of the trial court.” I regret to admit that I have written those meaningless words myself. I have subsequently tried to take them back, but have not succeeded. But

the law sets boundaries for discretion. It has always been important to me as an appellate judge to enforce those boundaries. It is only when he or she has operated within those boundaries that the trial court’s discretion should be deferred to.

The second thing I want to keep in mind, though, is that, in exercising the discretion, the trial judge is probably the only person who will stand up for the public interest. The law requires the trial court to fill that role.

My last point is that most of this action actually takes place, as we know, not in appellate courts, but in trial courts. These issues are addressed in volume in trial courts, and even in more volume in conferences between attorneys over the telephone or around conference tables. In other words, most of the activity is in the trial court, but even beyond that in negotiations of discovery disputes, of settlement agreements, and so forth. These negotiations turn on what we appellate judges say about confidentiality. Appellate courts do not get very many opportunities to set the law straight on confidentiality—when the law permits secrecy, when the law permits files to be sealed, and so forth.

My own approach as an appellate court judge has been to look for opportunities in cases involving secrecy or confidentiality, and to take advantage of those opportunities when they present themselves, and try my best to make sure that the public interest is being carried out in trial courts and in those private conversations that are going on out there in litigation among parties. I want to end with that and thank you very much for this opportunity to participate in the panel.

## ELLEN REISMAN

Professor Campos's very thoughtful and very interesting paper is premised on the assumption that a primary function of civil litigation is enforcement of compliance with the law. That is, to deter noncompliance with laws by threat or imposition of damages. I do not disagree that that is a function, but not necessarily the primary function, of civil litigation.

What flows from his premise is that “evidentiary prior restraints,” otherwise known as confidentiality agreements or protective orders or sealing orders, which are either agreed upon by civil litigants or ordered by the court presiding over the litigation, should be presumptively disfavored. In other words, it argues that in civil litigation, even where private litigants have agreed or a court has ordered that certain information should be kept confidential, such agreements or orders should presumptively not be honored because other parties, non-parties, or society as a whole, might have an interest in having the information.

I think we really need to look at what is the primary purpose of civil litigation as a starting point—again, without disputing that civil litigation does serve an enforcement function, as demonstrated by the fact that punitive damages can be sought and awarded in many types of cases. Another, arguably more significant, function of civil litigation is to serve as a mechanism to resolve efficiently private disputes among private citizens. We want private civil litigation to be conducted in an efficient way that does not unduly burden the court system, and to be brought to resolution without having to try every case (which is of course an impossibility).

**I think we really need to look at what is the primary purpose of civil litigation as a starting point—again, without disputing that civil litigation does serve an enforcement function, as demonstrated by the fact that punitive damages can be sought and awarded in many types of cases.**



## Two Roles for Confidentiality

Confidentiality plays at least two important roles: one, the efficient conduct of discovery and litigation; and two, and one I am most familiar with, facilitating resolution of disputes, thus serving the interest of judicial economy.

Striking the appropriate balance between transparency and confidentiality is necessary for the fair and efficient functioning of our judicial system. Presumptively disfavoring all or most confidentiality agreements or orders may not be the best way to strike that balance.

I would like to first discuss settlement agreement confidentiality provisions. First, most settlement confidentiality provisions (and I have done a lot of them) are fairly limited. They tend to keep confidential the amount of the settlement—and in some cases, typically involving business disputes, certain key terms. For example, how many products Company A is going to sell to Company B in the future for how many years, and on what terms? They do not routinely require nondisclosure of facts or destruction of evidence (as the egregious, and I would say atypical and likely unenforceable, Weinstein agreement did). Most or all that I am aware of have escape clauses that information can be disclosed as required by law or by order of a court of competent jurisdiction.

It is said that “hard cases make bad law,” and by focusing on agreements like the Weinstein agreement, relating to allegations of sexual assault and involving destruction of evidence, I think we can lose sight of the important functions that confidentiality serves in our legal system. I would say that the Weinstein agreement is arguably already subject to a known exception to confidentiality protection, in that it contains terms that are contrary to public policy.

**To the extent that others need to know or want to know what a case is about, a public document with information sufficient to alert others to the conduct alleged is the complaint in that litigation.**

To the extent that others need to know or want to know what a case is about, a public document with information sufficient to alert others to the conduct alleged is the complaint in that litigation—keeping confidential key terms in the settlement agreement, where the dollar amount does not preclude other plaintiffs from pursuing their claims against the potential defendant and obtaining the information necessary to do so.

A settlement by definition is not an admission of liability, and is not admissible under most states’ rules of evidence. It is not an evidence-restricting agreement. It is simply a private contract in which both sides give up their right to a trial in exchange for a cash payment and a release that they think justifies the compromise. The fact that litigation is settled remains public, as reflected on the docket, and it is not difficult for other plaintiffs’ lawyers to identify the defendant as a litigation target where there is reason to do so.

## Confidentiality Facilitates Resolution

There is no doubt in my mind (and I do a lot of settlements) that the availability of confidentiality protections does facilitate resolution of civil litigation. Clearly, it would be an overstatement to say that no cases would settle without confidentiality, but fewer would. And those that did settle would likely settle later in the process, imposing a greater burden on the courts.



In the mass tort world, where I practice, litigation sometimes involves hundreds of thousands of cases, more than can possibly be tried in the courts. Settlement is clearly to be encouraged. Mass torts almost always resolve in settlements. Virtually all settlements have confidentiality provisions, typically as to the settlement amount. Why is that necessary?

There is, of course, free flow of information among the counsel and among the plaintiffs themselves these days. If the amounts of settlements are disseminated, it will invariably drive up the price of settlement, possibly prohibitively so. Not every case is worth the same amount, and not every plaintiff's lawyer can command the same price. The strength of the case, the ability to try it, the venue of the case, timing, and other factors affect the valuation of cases or groups of cases.

Were there no confidentiality, everyone—clients and lawyers—would be looking to obtain the highest amount, and that could lead to situations where it is simply too costly for a defendant to settle. Further, disclosure of settlement amounts can generate more litigation, whether those cases are legitimate or not and regardless of the strength of the cases. This has the potential to drive up the cost of settlement and make it harder to settle.

Diminishing the ability to settle in the mass tort context can have significant unintended consequences: more trials, delays in compensating injured parties, bankruptcies of defendants, and thus the inability of injured parties to be adequately compensated.

Similarly, in the context of business disputes that have resulted in litigation, both parties may have reasons not to want competitors or business partners to learn of the terms of the settlement, because doing so may put them at a competitive disadvantage in other, unrelated, contexts. I have mediated some business disputes that I doubt would have settled without the availability of confidentiality.

Finally, it is important to remember that confidentiality provisions are agreed upon by private litigants as part of the consideration for ending the litigation. The plaintiffs who chose to bring the litigation in the first place make a determination that the dollars, and the terms offered in the settlement, are sufficient to induce them to dismiss the case. Those private litigants who want to pursue the enforcement function of litigation are always free to do so. They can forego the monetary compensation offered and push forward with the litigation, seeking punitive damages or injunctive relief to deter or to punish the conduct of defendants.

## Utility of Protective Orders

I want to say a word about protective orders as well. Protective orders serve a very useful purpose in the efficient conduct of litigation. As the paper acknowledges, they often facilitate and expedite the production of information without having to go item-by-item through discovery requests. Courts often require their negotiation early in the case to promote efficient discovery. Some local rules require it. And, as with confidentiality provisions in the settlement agreement, they do not necessarily prevent information, key information, from becoming public. If a case goes to trial, information produced even pursuant to a protective order may be used and become public. That threat of publicity may of course put pressure on a defendant to settle the case under terms acceptable to a plaintiff—again, helping to facilitate efficient resolution of litigation.

**There is no doubt in my mind (and I do a lot of settlements) that the availability of confidentiality protections does facilitate resolution of civil litigation.**

**The courts, as the law stands today, have the tools to assure that the proper balance is struck between disclosure and confidentiality.**

The courts, as the law stands today, have the tools to assure that the proper balance is struck between disclosure and confidentiality. Agreements containing terms that are against public policy, or NDAs where there was fraud in the inducement can be nullified by courts.

A presumption against all confidentiality would tip the scales unnecessarily, and have adverse and perhaps unintended consequences for the judicial system. Transparency and public

access to information are certainly important features of ongoing civil litigation. However, at the stage in the litigation where there has been no finding by a jury of wrongdoing, they must be weighed against other values such as protection of sensitive personal or business information and encouragement of resolution of private civil litigation, thus preventing undue burdens on our court system.

## CHRISTOPHER PLACITELLA

The right to open courts has been guaranteed by New Jersey law for more than 300 years.<sup>6</sup> My presentation really focuses on the practical effect of the confidentiality order. I selected the longest-running litigation in the United States, which is asbestos, starting back in the early 1930s.

The first asbestos case was actually filed in 1924 by a woman named Nellie Kershaw. Nellie Kershaw worked in a factory, and her case was settled quietly. It ended up on the docket as “dismissed,” and no one ever heard about Nellie Kershaw’s case for 50 or 60 years. Had it been heard of earlier, maybe a lot of people’s lives would have been saved.

Shortly thereafter, a lawsuit was brought against Johns Manville by one of its employees. That case was settled in the early 1930s. In the minutes of the 1933 John Manville Board of Directors meeting, they talked about settling the case with the promise by the plaintiff’s attorney that no more cases would be brought.

The first modern-day asbestos products liability case was filed by a man named Frederick Legrande in 1958. It was probably the first products liability case in the modern era. The case was brought in Newark Federal Court. Mr. Legrande actually took the stand, and there was a trial. After he took the stand, using his oxygen apparatus, this case too was quietly settled. When the case settled, the parties, with the approval of the court, listed it in the record as something other than what Mr. Legrande was suing for. No one who looked at the record would know what the suit was about, and the truth was buried forever.

### Talc Litigation

We hear a lot in the news these days about talc, and talc litigation. Talc has been found to contain asbestos. One of the early talc cases was actually filed by a man named Westfall in Rhode Island in 1979. He had mesothelioma. In that case, discovery actually went forward. The scientists for the company that was being sued actually testified. They testified that the company did their own tests on the talc that the man used, and they found asbestos in the talc.

What happened next? Well, as part of that case, a confidentiality order was signed. That confidentiality order required that, when the case was settled (quietly), all the material that was discovered in that case would be given

back to the defendant, never to see the light of day. And that is in fact what happened. The case was settled, the man was compensated, and all of the depositions that were taken were removed from the record and returned to the defendant.

Thereafter, any time anyone sued that company claiming injury from the talc, what the lawyers were told, and the litigants were told, was that there was no evidence whatsoever of asbestos in that talc. That was actually told to the MDL judge who was in charge of the asbestos litigation back then, and you

will see an excerpt from the case where the lawyers are actually complaining about the fact that the cases were still pending. They said, “There is no evidence.” Thousands of cases all across the United States were dismissed on the premise that no evidence existed of asbestos in the talc. And that was all made possible by the confidentiality order signed way back in early 1980s.

Ultimately, the truth came out and the same scientists and some others testified in litigation that yes, in fact, there was asbestos in the talc, and that the representations that were made in the earlier litigation were not accurate.

**The scientists for the company that was being sued actually testified. They testified that the company did their own tests on the talc that the man used, and they found asbestos in the talc.**

## Who Is Harmed by Confidentiality?

The question then becomes, who was harmed by the confidentiality here? People lost their rights. People probably lost their lives. Even when it was known that the product was dangerous, and that confidentiality kept the truth under wraps, people continued to use the products. The question is how many injuries could have been avoided, and how many people lost their constitutional right to a jury trial?

Who was harmed by the confidentiality? We could talk about statistics. But Irving Selikoff, who was one of the deans of asbestos medicine, once told me that “statistics are really people with their tears wiped away.” There are practical effects of having confidentiality orders with no safeguards. I have spent a lot of time going through the papers that were submitted here by the professors, and I agree with them and everything they have to say.

**Irving Selikoff, who was one of the deans of asbestos medicine, once told me that “statistics are really people with their tears wiped away.”**

The only comment that I would make in addition is that a lot of times lawyers get put in an awkward position. Somebody says, “We are going to pay your client X dollars.” You have to present that offer to your client. But part of the requirement is a confidentiality order. I believe that secrecy agreements, confidentiality agreements that impact the public health, that put public health at risk, should be illegal, so that the lawyer is not put in that position. I think the rules of civil procedure need to be amended to actually say that. When public health is at risk and you are talking about a dangerous product, a lawyer should not have to be in that position.

That is my presentation. I am on my own quest to fight these issues, not agree to them automatically. I understand the need in litigation to move the litigation forward, but blanket confidentiality orders without guardrails are not good for the public health. Privilege logs are often constructed with little analysis or regard for the law. I recall, as

an example, a case I was involved in maybe ten years ago. I was looking through the privilege log and I looked and there was a designation that I challenged. The document that was withheld had some mention in it of a meeting that was held at a Legal Sea Foods restaurant. Because “Legal Sea Foods” was mentioned in the document, it was not produced, and we had to fight to get it. There was no basis in the law for the designation.

Thank you for including me in this very important conference. I know the people here on all sides of the bench, the bar, even the defense side, all want to do the right thing. I appreciate the privilege of being here.

## Response by Professor Campos

I want to thank the panelists for taking the time to read my paper closely and for their wonderful comments.

I would like to respond to just two points that were made by Professor Kotkin and by Christopher Placitella about the difficulties of doing empirical research, the kind of empirical research that I suggest in the paper. And then I would like to address a point that I think is shared by both Justice Few and Ellen Reisman having to do with the public versus the private functions or objects of civil litigation in general.

### Empirical Research

With respect to the empirical research project, I think the point is well taken—the difficulty that you have in trying to do any type of empirical research in this field is that a lot of the material or evidence that you would want is secret by definition. It is hard to look for something that you cannot possibly get hold of.

But I think, as Christopher Placitella’s presentation shows, there is actually some empirical work that can be done with the benefit of history and hindsight, that allows us to make inferences about how nondisclosure agreements or protective orders or other forms of confidentiality could impact public safety.

**The difference between those types of claims and claims involving, for example, products liability issues involving product defects, is that in the context of sexual harassment or sexual assault claims, often the parties themselves have personal knowledge of what exactly happened. There could be a dispute as to exactly what happened, but they were “in the room where it happened,” to paraphrase *Hamilton*.**

One thing I would like to note is that there is a major difference between, for instance, products liability cases and situations involving claims of sexual violence or the sexual harassment situations that Professor Kotkin has spent time not only studying, but also litigating. She was ringing the bell on the dangers of NDAs well before it became fashionable. The difference between those types of claims and claims involving, for example, products liability issues involving product defects, is that in the context of sexual harassment or sexual assault claims,

often the parties themselves have personal knowledge of what exactly happened. There could be a dispute as to exactly what happened, but they were “in the room where it happened,” to paraphrase *Hamilton*.



But with respect to products liability claims, you tend to have an organizational defendant, in which the top executives who speak and act on behalf of the company really have to spend a little bit of time to figure out what actually happened, and oftentimes they do their own due diligence or internal investigations to figure out what exactly happened.

In the situations involving sexual violence, these types of claims tend to be settled well before any complaint is filed. The issue of waiving any type of privacy interest due to the filing of a complaint just never even occurs. You can see this in some of the Harvey Weinstein examples, where they have negotiated nondisclosure and settlement agreements well before any complaint was even contemplated, whereas in products liability cases sometimes the complaint is the notice that is served upon the defendant that something went wrong. In those situations, what the defendant is really worried about is discovery, and finding out for themselves what happened.

What this suggests as an empirical project is that we need to really look at specific industries and try to figure out the extent to which confidentiality works and how it could be disruptive of the objectives of the law.

## The Public/Private Distinction

The next topic I would like to address is the public v. private distinctions that were taken up so eloquently by both Justice Few and by Ellen Reisman. I do not suggest that there is no tension between the privacy interest of the parties and the enforcement function that I articulated in the paper. In fact, I hope I am not interpreted as being dismissive of these privacy interests. I think they are actually very important. They are very powerful. I care about privacy. In many cases, particularly in #MeToo situations, both parties have a really important interest in maintaining the privacy of the circumstances of the claims and what happened.

I'm not sure there is a "public v. private" kind of choice that one has to make with respect to the function of litigation. Rather, what I would say is that litigation involves the interest

not only of the parties before the court, but everybody's. It involves decisions that judges make, particularly appellate judges, that affect persons not before the court. The judges at this very conference are not only going to impact the parties that are before them, but the rules that they are going to adopt and rule upon are going to have an impact on what happens in litigation going forward—and not only litigation going forward, but the primary conduct of the parties that may potentially come before the court.

On one hand, I am actually quite sympathetic to having more efficient resolution of claims, and certainly confidentiality helps to expedite the process. As any appellate attorney probably recognizes, or any appellate judge probably recognizes, oftentimes the rule you make may make the cases that come before you easier, but at the same time, it may also actually result in more cases.

For example, if the only concern was administrative cost, one easy way to really reduce administrative cost to the court is to say that there should be no liability whatsoever in a wide swath industries or other areas of American life. Would that cut cost for the courts? Certainly. But would that be beneficial for the public as a whole? Of course not, because in the absence of liability, you'll have a sort of pre-FDA, pre-regulation environment, as in the 1930s and the Great Depression. You will have people just getting hurt and getting sick from buying dangerous products, being exposed to hazardous conditions at work, or being exposed to hazardous toxins from industrial activity.

**I'm not sure there is a "public v. private" kind of choice that one has to make with respect to the function of litigation.**



I would say that you really do not have to choose between public and private. What I would want judges to do, as well as legislators and others who are trying to figure out how to structure these rules, is to realize that the interests involved are not limited to the parties before the court. And certainly, as Justice Few points out, if the parties before the court are in agreement, there is really no one there advocating for the interests of others.

## Interests of Others Are Always Present

But I think the interests of others are always present, particularly if you are an appellate judge and you know that the rule you are going to choose is going to have an impact on litigation and primary conduct going forward. The reason why I say that a primary function of litigation is enforcement is because of my own personal preference that if you can choose a rule that would *prevent* harm, rather than simply compensate for it after the fact, then you would pick the rule that prevented harm. Certainly, if someone gets cancer, you can provide remedies, but there is no cure for cancer yet. If someone loses a loved one, there is really nothing you can do to replace that loved one. If rules can be chosen in such a way as to deter defendants from even engaging in wrongful conduct in the first place, at minimum cost, then we should do that rather than pick rules that make it easier for courts to process cases, which just results in more injuries and death.

**All I am asking is that we be more aware of this and allow the public interest, in some cases, to trump the privacy interests of the parties when we could prevent some significant harm to others.**

What I really want to stress here is that confidentiality rules regimes have an impact on the interests of others who are not before the court, and that we have to be aware of those interests.

I want to stress again that what I am talking about here is not a subordination of privacy interests to public interest, but rather that there is a tension there. There may be situations where interests are actually aligned, but we just simply cannot ignore the tension. The United States in particular

relies a great deal on civil liability in order to police the conduct of so many private actors within our economies. It has been pretty clear that confidentiality rules have an impact on these actors' conduct, and whether they harm the customers or others who are exposed to their particular conduct. All I am asking is that we be more aware of this and allow the public interest, in some cases, to trump the privacy interests of the parties when we could prevent some significant harm to others. Thank you again for taking the time to read my paper. I look forward to questions from the conference attendees.

## Questions from Participants

**Question:** Professor Campos, if preexisting NDAs should be set aside, how far back should courts be able to go? Should there be something like a statute of limitation or a statute of repose?

**Professor Campos:** It is an interesting question. I am assuming that what you mean is not so much a statute of limitation or statute of repose with respect to the claims, but a statute of limitation with respect to how far back in history one can look to. I am kind of uncomfortable suggesting that there should be any limitation on the court looking back at history, so long as it is relevant and non-privileged and meets the other requirements

**I am kind of uncomfortable suggesting that there should be any limitation on the court looking back at history, so long as it is relevant and non-privileged and meets the other requirements that fit within the scope of discovery.**

that fit within the scope of discovery. I think that existing statutes of limitations or statutes of repose do a pretty good job of achieving peace or finality after a long period of time for certain types of wrongs. But in the evidentiary context, it is hard for me to identify a principal limitation on the court's ability to look at relevant evidence. If it is relevant, they should be able to look as far back as practicable.

**Question:** Professor Kotkin, in general, do you think it is getting easier to avoid or set aside confidentiality agreements?

**Professor Kotkin:** Well, certainly in the sexual harassment context, I do think it is becoming easier. I think there is an argument available to many parties plaintiff that the agreement was signed under duress, that it was not thoroughly understood, and that it was unconscionable. All the general kinds of contract defenses are coming more to the fore. There have been very few actual litigated matters on confidentiality agreements, and even now I think you do not see that much litigation. You see public statements and defendants releasing parties from their agreements.

## Impact of Secrecy on the Courts

**Question:** Justice Few, what do you think has been the overall impact of court confidentiality on the courts themselves?

**Justice Few:** I will address two parts of that. First, I hear this sort of slippery slope, "the sky is falling" type refrain a lot about the volume impact that courts would face if they dive into questions like whether or not a confidentiality order should be signed without a particularized inquiry. I think that is a myth. I totally believe that the amount of time that judges have to spend protecting the public interest in open courts is not significant. That is the first point.

The second point is that the ability of courts to carry out what Professor Campos calls the enforcement function is greatly enhanced by the proper application of the law to the question of confidentiality or protective orders, so that there is no confidentiality except when the law permits it. That proper application of the law has greatly benefitted the court to pursue and fulfill its role to the public.

**Question:** Ms. Reisman, have you ever encountered a plaintiff who refused to agree to a sealing order, a protective order, or an NDA? If so, did the case eventually settle?

**Ellen Reisman:** That is a good question. I know there have been situations where we have had back and forth in discussions about it. I assume the question is did it ever settle without confidentiality. Honestly, I am not remembering a case like that. I am sure there have been.

**I am not saying no case will ever settle if you do not have confidentiality provisions. Some will, undoubtedly. . . . But it will make it harder to settle cases.**

I am not saying no case will ever settle if you do not have confidentiality provisions. Some will, undoubtedly. If the defendant decides that it wants to get rid of the case badly enough, yes, they will probably settle without

confidentiality. But it will make it harder to settle cases. Cases will settle later, I believe. There will be a lot more back and forth. The money will be not in the injured parties' hands for a longer period of time. I think in the mass tort world, which is where I practice primarily, it would be very hard to do the large group settlements that are frequently done in the inventory settlements without confidentiality provisions, and most defendants will just refuse to do them.

## Case Management

**Question:** Mr. Placitella, without granting confidentiality requests, how can courts best manage cases like MDLs, where there are thousands of factually related cases?

**Chris Placitella:** First of all, Ellen Reisman probably knows that I am one of those lawyers who refuse to sign confidentiality agreements. If the court makes me abide by it or sign it, I am fine with that. But dealing with the facts are different.

One of the big problems that we face, even in mass tort cases, is that once the agreements are in place, the orders are abused. Everything and anything under the sun is designated as confidential. If a lawyer gets a copy of a memo, even though it has nothing to do with legal advice, that is almost universally treated as privileged.

If there really was not an earnest attempt to use the confidentiality orders the way that they were intended (which is for business and trade secrets), it would be fine. But what happens often is lawyers will just agree to the order to get the facts out, thinking they can fight about it later. But oftentimes that fight does not happen. In cases I have been involved with, the confidentiality orders ultimately have hurt the public health, I believe. You can look at various car rollover cases, breast implant cases, all kinds of products liability cases, where evidence is buried sometimes for decades. Those kinds of orders, I say, impacted public health. They need extra judicial scrutiny.

**You can look at various car rollover cases, breast implant cases, all kinds of products liability cases, where evidence is buried sometimes for decades. Those kinds of orders, I say, impacted public health. They need extra judicial scrutiny.**

In circumstances dealing with real trade secrets, business information, product formulas, I totally agree that that needs to be protected and deserves to be protected. But the

expectation as soon as you get in a case is "Let's agree to a confidentiality order." That is like the first thing that comes up, even before you talk about the merits of the case, or talk about whether a confidentiality order is even appropriate in a particular kind of products case, where we know that tens of thousands of people could have been harmed.

## Safety Risks

**Question:** Justice Few, could you detail how the public can be protected from agreements keeping major safety risks secret if the court's own interest favors settlement including such terms? How do you resolve that tension?

**Justice Few:** I allow the parties to resolve that tension. If the court adheres to the law and refuses to seal information that is relevant to public health, then the case goes forward. It is up to the parties as to whether or not

they want to settle the case in any particular way, or to settle the case on different terms. And if the case goes to trial, I think that is a good result. We have had a dramatic downturn in the number of civil jury trials around the country. That is not a good thing.

You often hear lawyers in their closing arguments—I used to do it myself—argue to the jury that “You are the conscience of the community,” and that is true. If we take away, as we have (not intentionally, but incidentally to the mediation movement), the opportunity for juries to serve the role as the conscience of the community, then we have inhibited one of the major functions of democracy. If we keep cases from settling because parties want to conceal important information from the public, and we force those cases to go to trial, and force trial judges and jurors to work, that is a good thing.

**If the court adheres to the law and refuses to seal information that is relevant to public health, then the case goes forward. It is up to the parties as to whether or not they want to settle the case in any particular way, or to settle the case on different terms.**

## Certification of Just Cause

**Question:** Professor Campos, should a certification by the court that just cause exists be required when entering a confidentiality order?

**Professor Campos:** I wrote in my paper that, even though I find a lot of these confidentiality agreements probably should not be enforceable to the extent that it prevents the use of that information in subsequent litigation, I am still trying to figure out my own personal views on the extent to which they should be enforced. I am sensitive to the workload of judges, although I take Justice Few’s point to heart that he does not think it would actually be that much. I am intrigued by it. If something like this happens in class action practice, obviously you need a fairness hearing before an order can be entered. Whether that should be extended to all settlement agreements is something I have to think about a little bit more.

**Question:** Professor Kotkin, if judges are to review and approve (or not) the agreed-upon documents in a confidential protective order, are we potentially disrupting a resolution?

**Professor Kotkin:** That is an interesting question. There was a comment about judges not being involving in so many jury trials anymore. Judges are seeing very little of the merits of cases these days, even apart from jury trials. I think the more judges know about real cases and the underlying facts, the better it is. Judges today see cases settle one after another. They have no idea whether these are nuisance settlements or substantial settlements. And up until now, with regard to sexual harassment cases and discrimination cases particularly, I think much of the judiciary, because they just saw one settlement after another, thought that there really was not a problem, because the settlement terms were confidential. I think the more information judges have about cases, including what is considered confidential and what is not, and the terms of settlements, the better off we are.

**Judges are seeing very little of the merits of cases these days, even apart from jury trials. I think the more judges know about real cases and the underlying facts, the better it is.**

**Question:** Justice Few, if NDAs are used outside of litigation (for instance in employment agreements and any number of rudimentary contracts), should there be some public policy against those, too?

**Justice Few:** The short answer is no. Nondisclosure agreements are critical to the way business operates, the way business negotiates, the way business does deals to bring employment to various areas. It is only when there is some information that is improperly suppressed through a nondisclosure agreement that affects public health. There may be other categories, but it is only when there is some legally protected information that is being suppressed that there should be a policy against a nondisclosure agreement.

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## Notes

<sup>1</sup> Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

<sup>2</sup> Fla. Stat. § 69.081.

<sup>3</sup> Tex. Rules Civ. Proc. 76(a).

<sup>4</sup> Sergio J. Campos & Cheng Li, *Discovery Disclosure and Deterrence*, 71 Vand. L. Rev. 1993 (2018).

<sup>5</sup> Minna J. Kotkin, *Reconsidering Confidential Settlements in the #MeToo Era*, 54 U. San Francisco L. Rev. 517 (2020). See also Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. Rev. 927 (2006), available at <http://scholarship.law.unc.edu/nclr/vol84/iss3/4>.

<sup>6</sup> The Charter or Fundamental Laws of West New Jersey, Agreed Upon 1676, Chapter XXIII: “That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner nor in any covert manner*; being intended and resolved, by the help of the Lord, and by these our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery.” (Emphasis added.) Numerous other “open court” references in U.S. fundamental documents may be found in AMERICAN BAR FOUNDATION, *SOURCES OF OUR LIBERTIES* (Perry ed., 1978).



## CLOSING GENERAL SESSION

**Jennie Anderson, President, Pound Civil Justice Institute:** At this time, I would like to ask our paper presenters, Professor Dustin Benham and Professor Sergio Campos, to make any final remarks they would like to make.

**Professor Benham:** Since I am in front of a group of appellate judges, I want to begin by backing up and filing a supplemental brief in response to one of the questions that was posed this morning. Someone asked if my proposed reforms would reach appellate courts. In other words, will this generate appellate litigation? Who would be the appellant? I was answering flatfooted this morning on this very important point—if a confidentiality request is denied in the trial court because of one of the reforms that I have proposed, then obviously you have a very willing appellant, particularly if there is a legitimate fight about the confidential status of particular materials.

Moving to close and give you a few final thoughts, the biggest thing I think I took away from this project—which has been a multi-year project for me—is the belief that we need to reframe the traditional debate. The traditional debate has been primarily among corporate and commercial interests seeking confidentiality for those defendants’ materials, and courts seeking efficiency, against the public and some plaintiff lawyers or plaintiff lawyer interest groups who would seek to reveal information that is being uncovered in litigation. I think that debate framework has changed.

**The biggest thing I think I took away from this project—which has been a multi-year project for me—is the belief that we need to reframe the traditional debate.**

We heard from Dan Levine today, and we learned a couple of things. At least a piece of the public’s interest and the courts’ interest are aligned. The courts have an interest in their own legitimacy. The courts are simply not faring well in these exposés. And the public has an interest in its own health and safety. I think with that frame in mind, we ought to look at reform.

That brings me to my second point. Even if you think the reforms I proposed would go too far, or if you have some other issue in your particular court system or jurisdiction, please consider that reform is still appropriate. Think about what we can agree on from my proposals:

- Traditional reform, “sunshine” reform, has failed, because it fails to account for player incentives. Sunshine legislation is not self-executing, and therefore players who are incentivized toward secrecy have no reason to invoke it. The court is the same way.
- The First Amendment should and does play a role when court orders are gagging speakers. Who would be the speakers? Perhaps litigants, perhaps interveners.
- Finally, whether or not you believe we should reject umbrella designations entirely, wholesale delegation of the confidentiality process to the parties is problematic, as has been shown in the media exposés.

Thank you.

**Professor Campos:** I want to close by saying that I learned in the discussion groups, from great judges from many great state courts from all over the country, that many of you are surprised about the role that confidentiality mechanisms are playing in litigation, because a lot of these issues do not make it up to appellate courts.

**There are interests at stake apart from the privacy interests of the parties that are before the court. As appellate judges, you are probably all too aware that the decisions that you make, and the rules that you choose for your state courts, are going to have an impact not only on the case immediately before you, but on many other cases, and on the behavior of many people who are subject to your courts' jurisdiction.**

I am really thankful to the organizers for informing you about what is happening in the trial court. Hopefully, maybe through the supervisory powers that you have, either as a justice on the state supreme court or on appeals court, maybe you can play a larger role in trying to bring more attention to these particular issues, and try to help fashion rules that take into account all of the interests that are at stake.

The only other thing I would say is that the goal of my presentation and my paper was simply to bring to light the fact that there are interests at stake apart from the privacy interests of the parties that are before the court. As appellate judges, you are probably all too aware that the decisions that you make, and the rules that you choose for your state courts, are going to have an impact not only on the case immediately before you, but on many other cases, and on the behavior of many people who are subject to your courts' jurisdiction. All I

ask is that you please be mindful of these impacts, and in particular the enforcement or legal compliance aspects of some of the rules that you choose in thinking about these issues.

Thank you again to all of the participants for coming together to talk about these important issues.

## **Is Civil Litigation Broken?**

**Jennie Anderson:** Now we are going to address some questions that have been sent through the portal throughout the course of the day. The first question is, "Is there something broken about civil litigation at the present time, and if so, are confidentiality practices part of the problem or part of the solution?" Justice Nowell, do you want to address that question first?

**Justice Nowell:** I do not know that I would say there is something "broken" about civil litigation. I think that is infinitely too broad. I know that a number of us are huge fans of the civil justice system. I am certain that all of us would also say we want to make sure that the right to trial by jury is absolutely safeguarded.

I also do not think that confidentiality practices are part of the problem of the system being "broken," but we talked about how confidentiality practices can sometimes keep people from getting to the jury. I think that, really, confidentiality practices that are preventing civil litigation from moving forward in the way that was intended are the problem, rather than the civil litigation system itself being broken.

**I also do not think that confidentiality practices are part of the problem of the system being "broken," but we talked about how confidentiality practices can sometimes keep people from getting to the jury.**

**Professor Benham:** I tend to agree with Justice Nowell. I do not think the system as a whole is broken, but I do think parts of it are broken. I think the confidentiality area is one of them. We have essentially left it to the parties

**When the drafters of the civil rules envisioned the pre-trial discovery practices, they knew that what they were doing was revolutionary.**

to decide what information gets out and what information does not. We have a long tradition of transparency in the courts. I think there are a lot of reasons for the confidentiality status quo, some of that having to do with the volume of discovery and some of that having to do with the explosion in technology and communication practices. But this is nothing that we cannot handle. Technology creates information that we have to review, but technology also helps us to review, cull, and minimize information.

When the drafters of the civil rules envisioned the pre-trial discovery practices, they knew that what they were doing was revolutionary. They knew that discovery was going to be a process that was liberal and a process that allows you to delve into the information of other parties, and that civil litigation was going to be a challenge to manage. But I do not think that means we cannot manage it, and I do not think that means the system is broken.

### Can We Get Back to the “Old Normal”?

**Question:** We are getting used to “new normal,” and not just in public health. Some believe that the historic levels of court funding, employment of trial by jury, and litigation transparency will never come back. Justice Few, do you agree, and are there ways to bring them back?

**Justice Few:** Thank you. Just quickly hearkening back to the question of whether the civil justice system is broken, it is not broken, of course, but there are always going to be ways that we need to work to improve civil justice. As we move forward, away from the more commonplace jury trial, as we move forward away from the things that you just mentioned as a part of your question about the future, we need to think very carefully about what the civil justice system is. There are many ways that we can think about that.

One way that I like to think about it is that it is a dispute-resolution system. But it is a dispute resolution system that operates by standards, and those standards are generally reflected in our law, but they also are reflected in the rights that our citizens have. And somebody mentioned—I think it was Professor Benham—in a question earlier trying to correlate the Fourth Amendment warrant litigation to confidentiality. It’s a good correlation, because every time a judge takes up the question of whether probable cause exists for a search warrant, that judge to a large extent is protecting our rights under the Fourth Amendment. And every time a judge considers a minor settlement, it is not simply the relationship between the two parties that are at stake.

There are many other issues that we all have dealt with, as in criminal justice, for example, and sentencing. When a judge sits on the bench to sentence a defendant, the state has a position. The defendant has a position. But the community has a position, too. And the judge constantly thinks about what that position is. I think that this is very much the case with secrecy and confidentiality. As a judiciary, we should much more enthusiastically accept our responsibility

**As a judiciary, we should much more enthusiastically accept our responsibility to stand up for the public interests that have been so well articulated here today.**

to stand up for the public interests that have been so well articulated here today, and not let these issues get by us without properly addressing their substance as it should be addressed under the law.

**Jennie Anderson:** Professor Endo, would you like to weigh in on that, either on Justice Few's comments or going back to the question? Are we losing ground on trial by jury and litigation transparency, and if so, how can we regain some of that ground?

**Professor Endo:** Sure. One of my colleagues when I was at NYU focused on the civil jury system. It certainly does seem to be going away. I think the question, though, brings out a couple of normative elements. In terms of whether it could it come back, there is no real structural impediment to that. There is no calcification of rights. It is really just a public policy call. Do we want to fund this system? Do we want to have rules of procedure that encourage jury trial? To date, we have not, and one might imagine that that is in part because of the "repeat players" identified by Marc Galanter in a famous article.<sup>1</sup> You have repeat players in litigation. If you think about their incentives, there is a very concentrated benefit, particularly for defendants, in how these things been going by the wayside. And the benefit tends to be much more diffuse. I think of it as much more of a political economy problem than one that is deeply embedded in hard-to-fix structures.

How do we encourage jury trials and litigation transparency? I think that actually things like this program really get the word out to the legal community—and hopefully it will spread further out—to be thinking about these issues. It's a great start. I am keeping my fingers crossed.

## Standards for Different Types of Cases

**Question for Ellen Reisman:** Should there be a different standard for MDL or mass tort cases, keeping in mind the number of potential claimants harmed, and that the public interest may be greater?

**Ellen Reisman:** Sure. I do think that MDL judges are aware that it is not the typical situation of one party against another. I think there are ways that MDLs do address this, for instance with document depositories, making information widely available to plaintiffs' lawyers. Plaintiff counsel work together. The question of MDLs, though, is always how it is going to end, because when you have a situation where there are tens of thousands of plaintiffs (or in some cases even hundreds of thousands), not every one of those cases is going to be tried. And I do not think we, as a society, want that to happen. I think those are situations where you really do have to balance the dispute-resolution function of the courts with the transparency function. There is a need for efficiency and resolution in MDL mass tort cases. I think both the plaintiff and defense side see that. I do not think that necessarily means that you have to ignore, nor should you ignore, the public interest in these matters, because typically they do involve situations where there are allegations of injuries to individuals. There is obviously a public interest in them.

**Jennie Anderson:** Jennifer Bennett, would you like to respond?

**I do think that MDL judges are aware that it is not the typical situation of one party against another. I think there are ways that MDLs do address this, for instance with document depositories, making information widely available to plaintiffs' lawyers. Plaintiff counsel work together.**



**Jennifer Bennett:** Sure. I do not think they have a different standard, which is to say that the standard always considers the public interest. But I think in those cases, it is likely that the public interest will be greater. Under the same standard, which incorporates the public interest, it would be more likely that documents would be made public in those kinds of cases. The Sixth Circuit actually has several good decisions that I think are very useful in thinking through the public interest in both class actions and MDLs, where essentially a large percentage of the public is directly interested in the litigation because they themselves have been harmed and may be unnamed class members. That means that it is more important that the court records be made public. But, again, that is all part of the same standard, which already considers the public interest.

## Ethical Duties of Lawyers

**Jennie Anderson:** Chris Placitella, does the plaintiff or the plaintiff's lawyer have a responsibility not to settle if a defendant requires the return of documents or depositions as a condition of settlement?

**Chris Placitella:** As I said earlier, part of the problem is that, when you get to the end of the line and a settlement is put on the table, and there are documents and issues that impact the public health, the plaintiff's lawyer should not be put in a position of having to juggle the obligation to the client versus the obligation to the public health. That is where the rules need to be adjusted, I think.

**For information that pertains to the public health, I believe the courts need some help on that. They need to be cognizant of the circumstances that the litigants have been put in. The court needs to play a more active role in protecting the public health and making sure the right thing is done.**

Even in the mass tort context, confidentiality orders used to be the exception. You would litigate a case, and there would be circumstances that would arise that would require a confidentiality order to be put in place. Now, it seems like the cart is before the horse a lot of times. And the notion of having to give back documents, that is hard to come to grips with—unless you are talking about business secrets, trade secrets, product formulas, things that will hurt the company, that have nothing to do with the conduct issue.

But for information that pertains to the public health, I believe the courts need some help on that. They need to be cognizant of the circumstances that the litigants have been put in. The court needs to play a more active role in protecting the public health and making sure the right thing is done.

**Jennie Anderson:** Professor Campos, would you like to address Chris's comments or otherwise address the issue of what responsibility the litigants, and specifically the plaintiffs, have in this respect?

**Professor Campos:** This came up in one of the discussion groups that I was in. I wanted to repeat Jennifer Bennett's answer when she pointed out that attorneys actually do have ethical obligations that require them to consider not simply the interest of the client, but other, more public, interests with respect to these

**Attorneys actually do have ethical obligations that require them to consider not simply the interest of the client, but other, more public, interests with respect to these materials.**



materials. She also mentioned that, in practice, insisting on these ethical duties can often induce the defendant to *not* insist upon the return of some material. It can actually play a good role in encouraging attorneys to resist returning some of these materials, which I think can be a very good thing. It is one of these situations where the law is helpful in bringing about the right outcome.

**Jennie Anderson:** One more question: “Should a court ever approve a settlement that requires the removal of court files from a courthouse to defense counsel’s office?”<sup>2</sup> Professor Kotkin, would you like to address that?

**Professor Kotkin:** I cannot imagine a court approving such an order. It is one thing to seal a document, which I think goes over the line in many cases, but to have public documents housed in defense counsel’s office seems to me way over the line.

I just want to comment on one issue that has not come up, which is the question of arbitration. Not only do we have a crisis, I think, in the issues of confidentiality, but we have the removal of a whole slew of cases out of the court system entirely, which is only contributing to the lack of transparency in our civil litigation system. I just wanted to raise that and suggest that that is a place where legislation is, I think, critical, at least for public interest litigation and civil rights cases.

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## Notes

<sup>1</sup> Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

<sup>2</sup> See News Release of Trial Lawyers for Public Justice, Dec. 21, 1999, on the litigation in *Foltz v. State Farm Mut. Auto. Ins. Co.* <https://www.tlpj.org/pressreleases/folt2pr.htm>.

# THE JUDGES' RESPONSES

In the discussion groups, judges considered the issues raised by the paper presenters and the panels. Judges made individual comments, and the moderators were asked to note areas in which the judges' thinking appeared to converge.

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## Decisions on enforcement of non-disclosure agreements, stipulated protective orders, or confidential settlements where danger to the public from confidentiality is clear

### Points of Convergence

- Generally, courts should refuse to enforce non-disclosure agreements, stipulated protective orders, or confidential settlements if they are against public policy, but there will always be exceptions. A consideration of the facts of each individual case is essential.
- Ideally, the court would consider this, but the determination of whether the public need exists is usually not clear.
- Where confidentiality would harm public interest, courts should not enforce NDAs/protective orders. For instance, there is universal disclosure of sexual predators.
- Because courts are public, information regarding litigation should be assumed to be public.
- There's a bigger danger in confidential settlement agreements than with confidential discovery.
- The mere fact that there could be harm to the public is not enough to justify protection. Balancing is needed. Courts need to ask if there is some policy reason for protecting the information?
- Courts should not have to micromanage discovery disputes.

### Comments by Individual Judges

*"This calls for a serious balancing of interests, with heavy weight given to the public interest."*

*"Where health and safety are involved, the courts are less likely to permit sealing or otherwise prevent access to the records."*

*"Most states have sex offender registration acts that allow different levels of publication and reporting requirements depending on the level of the sex offender."*

*“Non-enforcement might move more cases to private judges and private arbitrations.”*

*“How can the court make a determination about public danger without the information?”*

*“It is important to determine whether the information sought to be kept confidential was based upon proven evidence or mere allegations that may have been brought in bad faith.”*

*“Unless someone is advocating for the public’s right to know, it’s difficult for courts to know when an agreement should not be enforced.”*

*“Trial judges should not rubber-stamp a nondisclosure agreement without considering the public interests.”*

*“Perhaps an ‘escape clause’ should be included in all agreements, allowing for future changes.”*

*“Can a court address a confidentiality issue after the parties voluntarily dismiss a case? At that point it would just be advisory.”*

*“It seems that confidentiality practices are the new arbitration/mediation attacks on the civil justice system.”*

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## **The likely effect on discovery of making protective orders harder to obtain**

### **Points of Convergence**

- “Discovery is discovery.” The presence or absence of protective orders should not serve to restrict scope of discovery; at most it would bear upon whether courts would impose conditions on discovery (e.g., “for attorney eyes only”).
- If the parties propose that the court enter a protective order, they would need to show good cause. But if it’s early in the case, the court is not in a position to know the details.
- Judges know that raw data can mean different things. It needs to have context, as in a deposition. Giving carte blanche to access could lead to less discovery.
- Attaching a document to a pleading makes it more fair game for discovery.
- There should be no relationship between protective orders and the availability of discovery.

### **Comments by Individual Judges**

*“Our state supreme court has made it harder to obtain protective orders, and there has been no noticeable change in the scope of discovery.”*

*“Trial courts would absolutely constrict the available discovery, since there is a great deal of trial court discretion in evaluating confidentiality issues. As such, trial court decisions should be reviewed de novo rather than on an abuse of discretion standard.”*

*“Our decision-making might be influenced by issues outside of the cases, including the likelihood that the information will be released to the public absent a protective order. We have an obligation to the public that elected us to the court.”*

*“In our state it has not resulted in less discovery, but it has significantly reduced the number of judges signing these requests. “*

*“I do not believe that there is any restriction on discovery, whether or not there is a protective order in place.”*

*“Essentially, the defense argument is that, without a protective order, a plaintiff will not get the documents, which of course means ‘we will hide the documents.’”*

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## How courts would assess requests for confidentiality if “umbrella” protective orders were not available

### Points of Convergence

- Confidentiality agreements should be subject to judicial review, even when they are consensual between the parties.
- Current funding and staffing issues for the courts would prevent judges from engaging in substantive review of confidentiality issues, especially when there is an agreement between the parties.
- The use of protective orders has inappropriately been expanded by the parties to include concealing information about public harms.
- If a state has a presumption of access, then what may be public is decided by rule.
- Litigants are expending tax dollars when they come into court, and the public has a right to know how that money is being spent. The courts are not private mediation services.
- Parties need to show good cause for a protective order from the outset.

### Comments by Individual Judges

*“‘Umbrella’ protective orders are not appropriate, and are very harmful to the public. Their only purpose is to keep vital information from disclosure.”*

*“The court can insist that the parties confer and present an agreed list of which documents may be released, which should not be released, and which one side believes can be released but which the other side wishes to remain confidential. As to the latter two categories, the court should review these materials on its own and determine whether they should be released notwithstanding the parties’ request for confidentiality.”*

*“Reviewing representative documents has worked well.”*

*“Courts could appoint more special masters, who could also be tasked with presenting the public interest arguments to the court in order to keep the judge out of the advocacy role.”*

*“At the outset, the good cause factors should be explained. The parties should negotiate a sample of the types of documents so that the court can make a determination as to whether a protective order should be granted for those types of documents.”*

*“There was a case where a judge required the parties to review each document produced in the litigation and advise as to whether it was subject to public release or not. The judge then focused on only those documents where there was a dispute between the parties, with the threat that there would be blanket disclosure if the parties were not acting in good faith. This allowed the judge to consider confidentiality issues in a manner that did not waste judicial resources.”*

*“There should be a burden on plaintiffs, too. If plaintiffs became aware of a public danger, they should have some duty not to agree to confidentiality.”*

*“It would be difficult to use technology in this area.”*

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## State “sunshine” measures

### Points of Convergence

- Some states make it difficult to submit documents under seal, but many do not apply the open courts provisions to protective orders or sealing orders.
- Sunshine measures have had no real impact upon public disclosure.
- When records are sealed, it is typically because there’s a statute that allows secrecy for a certain category of documents.
- In states where judges are elected, there is always a concern regarding how decisions on releasing or not releasing confidential documents might impact the judge in the future. Their constituents may want to know if the judges have acted in their best interests.
- Generally, where the rulemaking process has made it clear as to what kind of information is to be made public, there is less litigation over confidentiality.

### Comments by Individual Judges

*“My state law is a very forceful tool for the public. It has made a meaningful difference, especially in cases involving state entities.”*

*“They have changed the playing field with respect to litigation involving governmental bodies. In my state, the legislature amended the FOI law to specifically provide that a governmental body could not withhold disclosure of a settlement agreement which it or an officer thereof had approved.”*



*“I wonder whether breach-of-confidentiality challenges might be more difficult in the future due to the ability to disseminate information widely through social networks, such as reposting by non-parties to the litigation, and the refusal of entities like Facebook to take responsibility for the posted content.”*

*“I would include economic harm as justifying nondisclosure, not just physical injury.”*

*“Freedom of information laws in my jurisdiction allow for disclosure of confidential information involving public entities, such as police misconduct cases, but often it’s long after the litigation has been resolved.”*

*“I would think that they would stifle settlements.”*

*“Courts rely on confidentiality to maintain integrity and independence.”*

*“We need to be careful not to prevent private parties from being able to resolve disputes.”*

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## Role of the news media in court confidentiality issues

### Comments by Individual Judges

*“Sunshine laws were a victory for the media and have been good for the public.”*

*“The issue of whether a document should be sealed will only arise in an appellate court if a third party, such as a media outlet, intervenes in the case, is denied access, and then appeals the denial order. In my state, such orders are immediately appealable.”*

*“It usually requires national media involvement to push these issues. Oftentimes, the local media lack the resources to litigate these issues.”*

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## The argument for a public right of access to raw discovery material under the common law right of public access to court proceedings

### Points of Convergence

- There was a time when discovery and depositions were filed with the court; all discovery was part of the record.
- Public access to raw discovery depends on the public interest (e.g. safety or health). Generally, the public has a right to know what dangers are out there, but not to know individuals’ health histories.
- One of the purposes behind public access is so the public can see the basis for a court decision (whether by judge or jury), and this is important for public confidence in the judicial system. This may not apply to raw discovery that was not offered as evidence in court proceedings.

- Not every issue involves public health or an emergency. If someone is really a stakeholder, they can intervene, but there is no automatic right. Applying the common law right to discovery would aggravate backlogs.
- Procedures exist for public access through public news sources. The courts make that determination.

## Comments by Individual Judges

*“In my state, discovery materials are not generally filed with the court unless they are presented in support of a motion, or for a similar purpose. Requiring parties to file these would create a significant burden on court clerks.”*

*“A right to see the discovery? No. A right to try to persuade a court that in a particular case they should get to see the discovery? Yes.”*

*“What is the standard for the ‘public interest?’”*

*“If discovery is filed with the court without a protective order or under seal, then the public should have a right of access to it. If it’s not filed with the court, then there should be a right of access only if it affects public health or safety.”*

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## Justification for, and enforcement of, nondisclosure agreements (NDAs)

### Points of Convergence

- NDAs are justified when they protect truly private interests (e.g. trade secrets and matters in disputes between businesses).
- NDAs may be appropriate when children are involved.
- While there are private matters that may rightly be kept confidential, clearly public health and safety concerns should not be kept secret.
- If NDAs prohibit disclosure to regulatory agencies, they should generally not be enforced.
- NDAs that bar litigants from sharing information with other similarly situated litigants would at least “raise a yellow flag.”
- In smaller tort claims with minor damages, where the parties want to move on with their lives, NDAs should be enforced. Often NDAs can be used to help the dispute resolve.
- NDAs should not be enforced when criminal conduct is involved.
- As a contract, an NDA should generally be treated like other contracts, and enforceability should turn on state law concepts like unconscionability and adhesion.
- If there is a question of enforceability of an order from another state, the issues may be decided under the Full Faith and Credit doctrine.

## Comments by Individual Judges

*“NDAs are justified when the liability does not stem from an act or condition that is capable of repetition—i.e. not a matter of public interest—and when disclosure would cause additional harm to the victim or collateral damage.”*

*“Agreements should be enforceable when they relate to trade secrets, minors, or disputes between two corporations. They should not be enforced when the information involves public health or public safety.”*

*“There’s a need for a procedural rule articulating a list of factors for the court to consider, and requiring the court to explain its ruling.”*

*“We judges are constrained somewhat by the fact that these are consensual agreements that are construed according to contract law.”*

*“How should a court handle a settlement with one of several defendants, when one defendant wants to keep the amount confidential from the other defendants?”*

*“Sometimes I have called another court to discuss an NDA it approved, to discuss its application to the current case.”*

*“The question is not ‘Are you fair?’, but ‘Are you just?’ Judges have a responsibility to their office as well as to the public.”*

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## Regulation of nondisclosure agreements by legislatures or courts

### Points of Convergence

- Some good laws have been enacted, and sunshine laws can be helpful, though finding the balance can create some issues.
- Perhaps in sexual assault or misconduct cases the legislature might be able to help; but, generally speaking, the less the legislature gets involved, the better.
- Legislative attempts to dictate judicial discretion are not well received. However, judges would appreciate some guidance as to the categories of information that must be reported to regulatory agencies so that courts have clear guidance as to when an NDA or protective order goes too far.
- There needs to be a proper balance between the branches of government. Legislation may need to acknowledge the need for judicial discretion.
- Yes, legislatures should get involved in prohibiting certain types of NDAs, especially when public health is involved, and maybe even when sex predators are involved. It would be good generally for the legislature to create laws around these.
- Partisan issues make passage of legislative restrictions impossible. Court determination would be better. A legislature could set a floor to guide the court.

## Comments by Individual Judges

*“Legislative action demonstrates what the public policy is.”*

*“There is a proper role for state legislatures to forbid non-disclosure agreements in cases involving the public interest such as sexual workplace misconduct or toxic torts.”*

*“Some things can be political footballs in the legislature, and rights can be shredded. But court rulemaking and court decisions can prompt legislative action.”*

*“Judges should not legislate or make law from the bench.”*

*“State legislatures should be more proactive, as this is a policy issue better suited for legislatures.”*

*“Rather than have judges individually free-wheeling and improvising in this area, it would be appropriate for the legislature to enact a standard escape route from such agreements. The thrust of such legislation might be that, while such agreements are presumed to be valid and enforceable, the state court of general jurisdiction may, upon application, and for good cause appearing, set the nondisclosure obligation aside when there is a compelling showing of imminent harm to the public if information is not disclosed.”*

*“It would help if state legislatures would provide guidance in this area.”*

*“They should defer to the courts. It’s difficult to write broad-enough legislation that will cover all the specific circumstances.”*

*“Sharing that responsibility is not a bad thing.”*

*“These issues are not exclusively for the courts, but judges need to play a greater role than they have.”*

*“We need clear criteria, available to the both the trial courts and to the parties.”*

*“Whenever you ask judges if they want to hear more from the legislature, they’ll say, ‘No thanks.’”*

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## Confidentiality matters in appellate courts

### Points of Convergence

- There should be more appellate involvement on these matters. Trial courts need to have appellate guidance on this, but there is not a lot out there in state jurisprudence.
- Trial judges should have discretion to make good-cause determinations, and appellate review should decide whether the law was applied correctly. Appellate courts might provide factors for trial courts to consider in exercising their discretion.
- These issues do not often reach the appellate courts, because stipulated agreements are rubber-stamped by the trial judges, there are no intervenors pressing these issues, and/or there is no one to pursue an interlocutory appeal.

- These issues might start percolating up to the appellate courts, particularly as parties begin to intervene to open up records. Overall, the more awareness there is by appellate judges, the better chance there is that appellate courts will issue appellate opinions on the subject.

## Comments by Individual Judges

*“There should be more appellate supervision. In order to foster public confidence in judicial decisions, open proceedings and open records should be the default. How can one have confidence in the decision unless one can view the bases for that decision?”*

*“When we deal with cases that are central to the public’s interests (such as sexual abuse claims), we appellate judges are always concerned about the future impact of our rulings on the public. We have to balance this with our obligation to follow the rules, legal precedent, and legislation.”*

*“Someone would have to appeal a ruling. I am confident that appellate courts would do the job if given the opportunity.”*





# APPENDICES

## FACULTY BIOGRAPHIES

### Paper Writers and Speakers

(In order of appearance)

**Jennie Lee Anderson** is President of the Pound Civil Justice Institute, and a founding partner of the San Francisco law firm of Andrus Anderson LLP. Ms. Anderson exclusively represents plaintiffs in a variety of class and complex cases in both state and federal court, including consumer, antitrust, employment and product liability matters. She has served as lead counsel, liaison counsel, and as a member of the plaintiffs' steering committees in multiple state and nationwide class or mass actions. She lectures frequently across the country on a variety of issues relating to class and complex litigation. Ms. Anderson also serves on the American Association for Justice Board of Governors, and is the past Chair of the AAJ Class Action Litigation Group, its Antitrust Litigation Group, and its Business Torts Section. She is active in the American Bar Association, the Consumer Attorneys of California, Public Justice, and the San Francisco Trial Lawyers Association. She also serves on the Board of Directors of Legal Aid at Work.

**The Honorable John R. Fisher** was Appointed to the District of Columbia Court of Appeals in 2005 by President George W. Bush. He received his A.B. degree from Harvard College, then served as an enlisted man in the U.S. Army, spending one year in South Vietnam. He received his J.D. degree from Harvard Law School. Following law school, he served in the United States Attorney's Offices in Washington, D.C. and the Southern District of Ohio, then entered private practice, specializing in complex civil litigation. He served as Chief of the Appellate Division of the United States Attorney's Office in Washington, D.C. for over sixteen years, supervising criminal appeals and managing the work of a forty-five person division. Judge Fisher has served on numerous bar committees dealing with legal ethics. Among other recognitions, he received the Harold Sullivan Award from the Assistant United States Attorneys Association, a Director's Award for Executive Achievement from the Director of the Executive Office for U.S. Attorneys, and the John Marshall Award for Outstanding Legal Achievement for Handling of Appeals from the Attorney General of the United States.

**Professor Dustin B. Benham** teaches and studies civil procedure and evidence at Texas Tech University School of Law. He devotes his time to improving the civil-litigation system. He has written numerous articles regarding the importance of transparency in civil courts. This work appears in prominent law journals and has been cited by scholars, lawyers, and courts across the country. Professor Benham is also an award-winning law teacher and serves as Chair-Elect of the Teaching Methods Section of the Association of American Law Schools. He is regularly invited to speak on court transparency and other litigation topics at national conferences and legal-education events.

**Professor Sergio J. Campos** teaches at the University of Miami School of Law faculty. Prior to joining the faculty in 2009, he was Charles Hamilton Houston Fellow at Harvard Law School and was in private practice. He clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit and the Honorable

Patti B. Saris of the United States District Court for the District of Massachusetts. His teaching and research interests include civil procedure, federal courts, and remedies.

**Bruce H. Stern** practices law in Lawrenceville, New Jersey, concentrating his practice in the area of trucking and construction litigation, brain and spinal cord injuries, and wrongful death. He is certified as a Certified Civil Trial Attorney by both the New Jersey Supreme Court and the National Board of Trial Advocacy. He graduated cum laude from Duke University in 1977, and from Rutgers School of Law-Camden in 1981. Mr. Stern presently serves as President of the American Association for Justice. He is a past president of the New Jersey Association for Justice and a recipient of its highest award, the Gold Medal for Distinguished Service. He also received the Trial Bar Award for distinguished service in the cause of justice from the Trial Attorneys of New Jersey. He is a member of the International Society of Barristers and the International Academy of Trial Lawyers.

**Dan Levine** has covered the U.S. judicial system for 15 years, the last ten of them at Reuters. He is one of the primary reporters behind *Hidden Injustice*, the 2019 Reuters series about court secrecy, which has received several top journalism honors including the ABA's Silver Gavel award. Other investigations involved Coronavirus testing, the death penalty, and a story which led to a new California law to help immigrant crime victims who cooperate with law enforcement. His beat reporting has included President Trump's travel ban, tech privacy, and intellectual property. He is based in San Francisco.

## Panelists

### (In order of appearance)

**Professor Seth Katsuya Endo** is an Assistant Professor at the University of Florida Levin College of Law. His scholarship and teaching focus on civil procedure and professional responsibility. His recent articles on discovery have appeared in the UC DAVIS LAW REVIEW and the BOSTON COLLEGE LAW REVIEW. Professor Endo's practice experience includes time at Cleary Gottlieb and Demos, a public policy research and advocacy organization. He also clerked for several judges, including the Honorable Rosemary Barkett, then-Circuit Judge of the United States Court of Appeals for the Eleventh Circuit. He received his B.A. from the University of Chicago and his J.D. from NYU School of Law.

**The Honorable Erin A. Nowell** has been a Justice of the Fifth District Court of Appeals in Dallas, Texas, since 2019. She earned her B.A. from Wake Forest University and her J.D. from the University of Texas School of Law in Austin. She spent time in private practice as a litigator. Justice Nowell has held numerous leadership positions in the Dallas Bar Association, has received its Presidential Citation, and is a Fellow of the Dallas Bar Foundation. She is a Past President of the J.L. Turner Legal Association (the African-American bar association of Dallas), and has been a leader of the Dallas Branch of the NAACP. Justice Nowell has also been a leader of the Minority Caucus of the American Association for Justice (AAJ), and is a Barrister of the Patrick E. Higginbotham Inn of Court. She has made numerous presentations at conferences of local and national bar associations.

**Emily G. Coughlin** is the founding partner of the Boston firm of Coughlin Betke LLP, and is President-Elect of DRI—The Voice of the Defense Bar. She has held numerous other positions in DRI, and is also a Past President of the Massachusetts Defense Lawyers Association. She tries cases and handles appeals in all State and Federal Courts in the Commonwealth of Massachusetts. Emily's practice concentration includes over 25 years of broad-

ranging civil litigation experience, representing businesses and insurers in construction, premises liability, products liability, and professional liability litigation. She has given numerous seminars to the insurance industry on handling construction-related accidents, the allocation and avoidance of risk in construction litigation, and the intricacies of additional insureds and contractual indemnity as they relate to the construction industry. Emily is an active member of the American and Massachusetts Bar Associations and the International Association of Defense Counsel.

**Jennifer Bennett** is a principal at Gupta Wessler PLLC, where she heads the firm's new San Francisco office and focuses on cutting-edge public interest and plaintiffs-side appellate litigation. Her practice covers a wide range of issues including civil rights, consumer protection, constitutional law, workers rights, and government transparency. Jennifer has been lead counsel or co-counsel in several significant plaintiff-side cases before the U.S. Supreme Court, including recently arguing and winning a landmark victory on behalf of transportation workers challenging forced arbitration in *New Prime Inc. v. Oliveira* in 2019—the first case in over a decade in which the Supreme Court ruled in favor of a party challenging arbitration. In addition to her U.S. Supreme Court litigation, Jennifer regularly handles appeals in both state and federal court on behalf of workers and consumers fighting against forced arbitration and other barriers to access to justice. She frequently represents journalists, media organizations, and nonprofits challenging government secrecy, recently winning a groundbreaking case in the Ninth Circuit vindicating the public's right to access court records. And she regularly represents plaintiffs in civil rights cases involving difficult or novel legal issues. Ms. Bennett clerked for the Honorable Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit, the Honorable Jesse Furman of the U.S. District Court for the Southern District of New York, and the Honorable Vince Chhabria of the U.S. District Court for the Northern District of California. She earned her J.D. from Yale Law School.

**Professor Minna J. Kotkin** teaches employment discrimination law and sexual harassment issues at Brooklyn Law School, and directs its Employment Law Clinic. She has also taught civil procedure, administrative law, civil rights law, and interviewing and counseling. Professor Kotkin has written and lectured extensively on issues of employment discrimination, with a particular emphasis on sexual harassment and confidentiality, and on clinical legal education. She has been a visiting scholar at New York University School of Law, the University of East London, and the University of Cape Town. Among many other positions, she has served as the chair of the Association of American Law Schools' Section on Litigation and on its Section on Clinical Legal Education. Before joining the Brooklyn faculty, Professor Kotkin was the litigation director of New York Lawyers for the Public Interest and a litigation associate at Proskauer Rose. She graduated from Barnard College and from Rutgers University Law School, where she was Editor-in-Chief of the law review.

**The Honorable John Cannon Few** is a Justice on the Supreme Court of South Carolina. He attended college at Duke University, where he served as Duke's athletic mascot—the Blue Devil—during his junior year. He received his A.B. degree from Duke, and then attended the University of South Carolina School of Law, where he was a member of The Order of Wig and Robe and The Order of the Coif. He also served as Student Works Editor of the *SOUTH CAROLINA LAW REVIEW*. Justice Few began his career as a law clerk to a federal district judge, and then became a trial lawyer, a trial judge, and the Chief Judge of the South Carolina Court of Appeals. Justice Few has been active in teaching law. He served on the faculty at the National Judicial College in Reno from 2005 to 2009. He has been an Adjunct Professor of Law since 2008, and now teaches Advanced Evidence as an Adjunct Professor at the University of South Carolina School of Law.

**Ellen K. Reisman** has devoted her career to representing major pharmaceutical, medical device, and biotech companies in product liability litigation, settling product liability litigation, and taking proactive measures to prevent such litigation. She joined in founding Reisman Karron Greene LLP after nearly 30 years at a major multinational firm. She also served as Associate General Counsel of American Home Products Corporation and Vice President of Wyeth Pharmaceuticals from 1999-2001. She has litigated some of the largest mass tort matters in history, supervising hundreds of lawyers throughout the country. In 2016, Ms. Reisman was appointed Special Master by several federal and state courts to assist in coordinating settlement discussions among the parties to multiple lawsuits arising from the sale by Syngenta within the United States of corn seed containing genetically modified traits approved in the United States, but not approved by certain foreign countries. Ms. Reisman has mediated individual cases and served as Special Master to facilitate settlement of ongoing pelvic mesh litigation. She has also worked with pharmaceutical and medical device clients to address U.S. and international regulatory issues that frequently arise in parallel with product liability litigation.

**Christopher Placitella** practices law in Red Bank, New Jersey. He is one of the country's leading legal authorities on mass torts, class actions, and asbestos-related diseases. He represents individuals injured by defective products and drugs, toxic substances, and environmental damage. Mr. Placitella helped to establish a national asbestos litigation group dedicated to representing individuals suffering from asbestos-related diseases and their families. He volunteers with numerous consumer advocacy groups, including Consumers for Civil Justice, the Veterans Transition Initiative, and Holidays for the Homeless and Underprivileged, Inc.

## Discussion Group Moderators

**Janet Gilligan Abaray** practices in Cincinnati. She received her B.A. degree from the University of Cincinnati, and her J.D. degree from the University of Cincinnati School of Law, where she was Business Manager of the Law Review. She has litigated extensively in the area of pharmaceutical products liability, beginning her career as defense counsel for Merrell Dow Pharmaceuticals, Inc. Since 1987 she has represented plaintiffs in numerous over-the-counter and prescription drug cases, and also represents plaintiffs in insurance and contract disputes. In 2012-2018 she served as a member of the Ohio Constitutional Modernization Commission, established by the Ohio legislature to review and recommend changes to the Ohio Constitution, and chaired the committee on the Judicial Branch and Administration of Justice. She is an active member of the American Association of Justice, and is a member of its Legal Affairs Committee. Ms. Abaray has served as a faculty member of the National Institute of Trial Advocacy. She lectures frequently in the areas of products liability litigation, trial techniques, and epidemiology, and has published articles in numerous legal journals. The University of Cincinnati College of Arts and Sciences recognized Ms. Abaray as its Distinguished Alumni for the 2018-2019 academic year.

**David M. Arbogast** practices law in Los Angeles, concentrating in complex and class action litigation. He has been involved with complex litigation matters involving a number of disciplines, including consumer lending, tobacco, antitrust, defective products, and technology-related matters. He received his B.A. degree from Western State College, and his J.D. degree from Thomas Jefferson School of Law. He has been an active member of the American Association for Justice and a governor of Consumer Attorneys of California ("CAOC").

**Linda Miller Atkinson** is of counsel to the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Michigan and Emeritus member of Wisconsin and Georgia bars. A 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in



Detroit, Michigan, she is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, and of *LAWYERS DESK REFERENCE* (8<sup>th</sup> edition, Thomson-West), and is author of the “Depositions” chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She is a past president of the Michigan Association for Justice, a member of the American Association for Justice President’s Club and a Fellow and former Trustee of the Pound Civil Justice Institute. In her life outside the courtroom she teaches firearm and hunter safety for the Michigan Department of Natural Resources and is in her 25th year with the National Ski Patrol.

**Leslie A. Brueckner** is a Senior Attorney at Public Justice, a national public interest law firm, where she specializes in appellate litigation in the state and federal courts. A 1987 magna cum laude graduate of Harvard Law School, Brueckner’s current areas of practice include class actions, constitutional law, federal preemption, consumer rights, personal jurisdiction, food safety, and combating court secrecy. She just celebrated her 25th anniversary with Public Justice. Among other victories, in 2018 Ms. Brueckner won a landmark ruling from the California Supreme Court in *T.H. v. Novartis*, holding that brand-name prescription drug manufacturers can be sued for failing to warn of the dangers of mislabeled, generic versions of their drugs. She and her co-counsel, Ben Siminou, were awarded the Pound Institute’s 2018 Appellate Advocacy Award for their work on the case. In addition to her litigation work, Ms. Brueckner has taught appellate advocacy at American University Law School and Georgetown University School of Law.

**Kathryn H. Clarke** is a sole practitioner in Portland, Oregon, who specializes in appellate practice and consultation on legal issues in complex tort litigation. She served as President of the Pound Civil Justice Institute from 2011 to 2013. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for over 25 years, served as President from 1995 to 1996, and received that organization’s Distinguished Trial Lawyer award in 2006. She is also a member of the Board of Governors of the American Association for Justice. She was a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. In 2008 she served as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission, which resulted in a bill passed by the 2009 legislature. She has served as member and Chair of Oregon’s Council on Court Procedures, and has been a member of the Oregon State Bar’s Uniform Civil Jury Instructions Committee. In 2016, she was honored by the Pound Institute for her lifetime achievement as an appellate advocate.

**Brenda S. Fulmer** practices law in Florida, where, for the past 25 years, she has specialized in mass tort litigation involving pharmaceuticals and medical devices. She serves on the Board of Governors of the American Association for Justice, and on its Executive Committee and numerous other committees. She is also active in the American Bar Association, the Florida Association for Justice, and in Florida’s state and local bar and trial lawyer organizations, and participates in the Duke and Emory Conferences on mass tort litigation. Ms. Fulmer is a frequent lecturer on law office management, drug and medical device litigation, and consumer drug safety issues, and has published numerous articles in legal publications. She received her B.S. degree from the University of South Florida, and her J.D. degree from Stetson University College of Law, where she was an editor of the *STETSON LAW REVIEW*. Ms. Fulmer is also an active volunteer with a number of Florida charitable organizations, including Take Stock in Children, the Special Olympics, and the Girl Scouts. She was one of several thousand attorneys who worked with Trial Lawyers Care to provide free legal services to 9/11 victims and others impacted by disasters. She has also volunteered as a foster parent and as an exchange-student host parent.

**Eric Gibbs** is a founding partner of the Gibbs Law Group in Oakland, California. He prosecutes consumer protection, antitrust, whistleblower, financial fraud, and mass tort matters. He has been appointed to leadership positions in dozens of contested, high-profile class actions and coordinated proceedings, and currently serves in leadership positions in *In re Equifax, Inc. Customer Data Security Breach Litigation*, *In re Wells Fargo Auto Insurance Marketing and Sales Practices Litigation*, *In re Risperdal and Invega Product Liability Litigation*, *In re Vizio, Inc., Consumer Privacy Litigation*, and *In re Banner Health Data Breach Litigation*.

**Raymond R. Jones** is in private practice in Washington, D.C. focusing on criminal defense, personal injury, and employment law matters. He has extensive experience litigating matters in state and federal courts. He also represents individuals against some of the largest defense law firms in the country. Mr. Jones serves on the Metropolitan Washington Employment Lawyers (MWELA) Board of Governors and the American Association of Justice Board of Governors. He received his Bachelor's degree in Criminal Justice from Temple University, his J.D. from The American University-Washington College of Law and an LL.M in Trial Advocacy from Temple University's Beasley School of Law.

**Mark Kitrick** practices in Columbus, Ohio, and is the founder and senior partner of his law firm. He specializes in serious injury and wrongful death cases. He is the author of numerous articles on litigation, legal history, and safety, and has lectured on such diverse topics as intentional torts, jury selection subrogation, emergency room errors, neuroscience and human biases, resort torts, and distracted driving. He is an active member of the Ohio Association for Justice, and has served as its president. He is also an active member of the American Association for Justice (AAJ), and has served on its Board of Governors and on numerous committees. He is an active member of the Ohio State Bar Association and the Columbus Bar Association, is president of Ohio's ABOTA chapter, and is the current president of the Ohio State Bar Foundation, the largest nonprofit, legal foundation in the world. Mark has avocations as a rock climber, a musician with two albums to his credit, a martial arts instructor, and enjoys cross fit training and parkour (free running). He received his B.A. from the University of Cincinnati and his J.D. from the University of Dayton, Dayton.

**Florence J. Murray** is a partner with the firm of Murray and Murray in Sandusky, Ohio. Her practice centers on civil rights, traumatic brain injury, trucking collisions, maritime law, and railroad law. She holds a B.A. degree from Saint Ignatius of Loyola University, Baltimore, Maryland, an M.Ed. degree from Ashland University, Ashland, Ohio, an M.B.A. from Case Western Reserve University, and a J.D. degree from The Ohio State University. She is a member of the Ohio Association for Justice, the Leadership Academy of the American Association for Justice (AAJ), and a Fellow of the Pound Civil Justice Institute. In her non-legal life she assists with Habitat for Humanity projects and is a board member of the Erie County Court Appointed Special Advocates (CASA) for children.

**Christopher T. Nace** is an attorney with Paulson & Nace, PLLC where his practice includes medical malpractice, wrongful death, legal malpractice, and other serious personal injury matters. Chris is a past president of the Trial Lawyers Association of Metropolitan Washington, D.C. He is a member of the American Association for Justice Executive Committee, and sits on the boards of the Public Justice Foundation and Living Classrooms Foundation of the National Capital Region. He is the current Secretary of the Pound Civil Justice Institute and the Secretary of the National College of Advocacy. Mr. Nace was the 2019 Recipient of the American Association for Justice Joe Tonahill Award, which is given in recognition of outstanding and dedicated service to and support of consumers and the trial bar. While in law school, Christopher served as Editor-in-Chief of the EMORY LAW JOURNAL.

**Gale Pearson** is Senior Counsel with the law firm of Fears Nachawati in Minneapolis. Her practice concentrates on complex litigation, ranging from environmental law to pharmaceutical and medical device litigation to Qui Tam prosecution. She received her bachelor's degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry, and her law degree from Loyola Law School in Los Angeles. She is a nationally recognized clinical laboratory scientist. She has played pivotal roles in MDL litigations, serving on science committees, or, in the case of a class action against a tobacco company, as lead counsel. In 2003, U.S. Supreme Court Justice Stephen Breyer presented her the Outstanding Pro Bono Service Award for her work with Trial Lawyers Care, which provided free legal assistance for applicants to the September 11th Victim Compensation Fund. Gale is a member of the Minnesota and American Associations for Justice and the American Bar Association, and is a board member for Public Justice. She has served as a speaker for Minnesota's "We the Jury" project, and is a frequent lecturer on topics in science and law.

**Ben Siminou** is the founder and principal of Siminou Appeals in San Diego, specializing in appeals of civil cases. Prior to establishing Siminou Appeals, Ben worked nearly a decade as a trial lawyer, handling all aspects of civil litigation. Ben has handled numerous civil and criminal appeals in the California Supreme Court, the California Court of Appeal, and the Ninth Circuit. In 2018, Ben and his co-counsel Leslie Brueckner won a landmark ruling from the California Supreme Court in *T.H. v. Novartis*, holding that brand-name prescription drug manufacturers can be sued for failing to warn of the dangers of mislabeled, generic versions of their drugs. Ben and Leslie were awarded the Pound Institute's 2018 Appellate Advocacy Award for their work on the case.

**Gerson Smoger** practices with Smoger & Associates, specializing in toxic tort, personal injury, and consumer class action litigation. In 2012, Dr. Smoger was named national "Trial Lawyer of the Year" for his lead trial role in representing 17 children exposed to lead in Herculaneum, Missouri, after being a finalist for the award for his role in the Illinois class action *Price v. Philip Morris* involving the fraud of "light" cigarettes. Before the U.S. Supreme Court, he argued the rights of absent class members (*Dow v. Stevenson*). He serves on the following boards/committees: Pound Civil Justice Institute, Physicians for Human Rights, Public Citizen, Public Justice, Legal Affairs Committee of American Association for Justice, Civil Justice Research Initiative, Human Rights Center at U.C. Berkeley, and for many years the Advisory Committee of the American College of Medical Quality.

**Peggy Wedgworth** is a partner with Milberg Phillips Grossman, LLP, in New York City. She is a managing partner and Chair of the Antitrust Practice Group. She has handled numerous securities, commodities, antitrust and whistleblower matters, representing defrauded investors and consumers. She currently represents consumers in contact lens, car dealership, and computer software litigation. Ms. Wedgworth has also litigated antitrust and commodities class actions on many subjects. She is a member of the New York State Bar Association's Antitrust Committee, the American Bar Association, and the American Association for Justice. She holds a B.A. degree from Auburn University and a J.D. degree from the University of Alabama Law School.

## 2020 Judicial Participants

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Hon. William B. Sellers, Supreme Court  
Hon. Mary Windom, Court of Criminal Appeals

### ARKANSAS

Hon. Mark Klappenbach, Court of Appeals

### CALIFORNIA

Hon. Malcom Mackey, Los Angeles County  
Superior Court  
Hon. Eileen C. Moore, Fourth District Court  
of Appeals

### DISTRICT OF COLUMBIA

Hon. Herbert B. Dixon, Jr., Superior Court  
Hon. John Fisher, Superior Court  
Hon. Zinora Mona Mitchell, Superior Court

### FLORIDA

Hon. Edward C. LaRose, Second District Court  
of Appeal  
Hon. Sandra Perlman, Seventeenth Judicial Circuit

### GEORGIA

Hon. Anne Elizabeth Barnes, Court of Appeals  
Hon. Kenneth Bryant Hodges, III, Court of Appeals  
Hon. Christopher J. McFadden, Court of Appeals

### ILLINOIS

Hon. Robert L. Carter, Appellate Court  
Hon. Mathias W. Delort, Appellate Court  
Hon. Shelvin Louise Marie Hall, Appellate Court  
Hon. Thomas E. Hoffman, Appellate Court  
Hon. Sharon Oden Johnson, Cook County  
Circuit Court

### INDIANA

Hon. Geoffrey G. Slaughter, Supreme Court

### IOWA

Hon. Julie A. Schumacher, Court of Appeals  
Hon. Mary Ellen Tabor, Court of Appeals

### KENTUCKY

Hon. Jacqueline M. Caldwell, Court of Appeals  
Hon. Irv G. Maze, Court of Appeals

### LOUISIANA

Hon. Paula A. Brown, Fourth Circuit Court of Appeal  
Hon. Nakisha Ervin-Knott, Civil District Court for  
the Parish of Orleans  
Hon. John M. Guidry, First Circuit Court of Appeal  
Hon. Marc Errol Johnson, Fifth Circuit Court of  
Appeal  
Hon. Ulysses Gene Thibodeaux, Third Circuit Court  
of Appeal

### MARYLAND

Hon. Andrea M. Leahy, Court of Special Appeals  
Hon. Michael Wilson Reed, Court of Special Appeals

### MICHIGAN

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Hon. Angela T. Quigless, Court of Appeals

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## NEW YORK

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Hon. Mary Eileen Kilbane, Eighth District Court  
of Appeals  
Hon. Mary Jane Trapp, Eleventh District Court  
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## OKLAHOMA

Hon. David B. Lewis, Court of Criminal Appeals  
Hon. Jane P. Wiseman, Court of Civil Appeals

## OREGON

Hon. Henry Kantor, Circuit Court  
Hon. Jerome LaBarre (ret.), Circuit Court

## SOUTH CAROLINA

Hon. John Cannon Few, Supreme Court  
Hon. Rosalyn Frierson-Smith, Family Court  
Hon. Clifton Newman, Circuit Court

## TEXAS

Hon. Gina Benavides, Thirteenth District Court  
of Appeals  
Hon. Dori Contreras, Thirteenth Court of Appeals  
Hon. Sarah Beth Landau, First District Court of  
Appeals  
Hon. Rebeca Martinez, Fourth District Court of  
Appeals  
Hon. Audrey Moorehead, Dallas County  
Criminal Court  
Hon. Lana Myers, Fifth District Court of Appeals  
Hon. Erin A. Nowell, Fifth District Court of Appeals  
Hon. Margaret Margaret Poissant, Fourteenth  
District Court of Appeals  
Hon. Jaime Tijerina, Thirteenth District Court  
of Appeals  
Hon. Jerry Zimmerer, Fourteenth District Court  
of Appeals

## UTAH

Hon. Gregory K. Orme, Court of Appeals  
Hon. John A. Pearce, Supreme Court

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## WASHINGTON

Hon. Sheryl Gordon McCloud, Supreme Court  
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## About the Pound Civil Justice Institute

The Pound Institute is a legal think tank, supported by member Fellows, dedicated to the cause of promoting access to the civil justice system through its programs and publications. Since 1956, the Institute has promoted open, ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. To bring positive changes to American jurisprudence, Pound promotes and organizes:

**Annual Forum for State Appellate Court Judges**—Since 1992, Pound’s annual Judges Forum has brought together state appellate judges, legal scholars, attorneys, and policymakers to discuss major issues affecting the U.S. civil justice system. Lauded by attending judges as “one of the best seminars available to jurists in the country,” the Forum is unique in its mission to educate state judiciaries on the role of the U.S. civil justice system in protecting citizens’ rights. Our 2020 Forum, “Dangerous Secrets: Confronting Confidentiality in Our Public Courts,” took place via webcast on July 11th, 2020.

**Academic Symposia**—The Institute holds periodic Academic Symposia in conjunction with law schools in an effort to produce new empirical research supportive of the civil justice system. The academic papers prepared for the symposia are published in the co-sponsoring law schools’ Law Reviews. Recent symposia include The “War” on the Civil Justice System (Emory Law 2015); The Demise of the Grand Bargain (Rutgers and Northeastern 2016); The Jury Trial and Remedy Guarantees (OREGON LAW REVIEW, Oregon Jury Project 2017); Class Actions, Mass Torts and MDLs: The Next 50 Years (Lewis & Clark 2019).

**Appellate Advocacy Award**—This award recognizes excellence in appellate advocacy in America, and is given to legal practitioners who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, and access to civil justice.

**Civil Justice Scholarship Award**—This award for legal academics recognizes current scholarly research and writing focused on the U.S. civil justice system, including access to and the benefits of the civil justice system, and the right to trial by jury in civil cases.

**Howard Twiggs Memorial Lecture on Legal Professionalism**—Founded in 2010 to honor former Pound President Howard Twiggs, this annual lecture series, held during the AAJ Annual Convention, educates attorneys on ethics and professionalism. These lectures are delivered by prominent attorneys, law professors and jurists, and qualify for ethics and professionalism CLE credit.

**Papers of the Pound Institute**—Pound has an expansive library of research resulting from its Judges Forums, research grants, Academic Symposia, Warren Conferences, Roundtable discussions, and other sources. This research, Papers of the Pound Civil Justice Institute, is available via Pound’s website. Pound Fellows receive complimentary copies of Pound’s publications.

**Alliance with Academics**—The Institute has developed strong relationships within the legal academic community. Currently, 78 Academic Fellows keep Pound abreast of emerging legal trends.

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# Papers of the Pound Civil Justice Institute

## Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for download at [www.poundinstitute.org](http://www.poundinstitute.org).)

### 2020 • DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS

Dustin B. Benham, Texas Tech University School of Law, *Foundational and Contemporary Court Secrecy Issues*  
Sergio J. Campos, University of Miami School of Law, *Confidentiality in the Courts: Privacy Protection or Prior Restraint?*

### 2019 • AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

D. Theodore Rave, University of Houston Law Center, *Federal Trends Affecting Aggregate Litigation in the State Courts*  
Myriam Gilles, Cardozo Law School, Yeshiva University, *Rethinking Multijurisdictional Coordination of Complex Mass Torts*

### 2018 • STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS

Robert F. Williams, Rutgers Law School, *State Constitutional Protection of Civil Litigation*  
Justin L. Long, Wayne State University School of Law, *State Constitutional Structures Affect Access to Civil Justice*

### 2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*  
Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

### 2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*  
Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

### 2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*  
Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*

### 2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*  
Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

### 2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*  
Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

### 2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*  
J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

### 2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*  
Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*  
Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

### 2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*  
Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

### 2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*  
Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

#### **2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?**

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*  
Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

#### **2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS**

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*  
Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

#### **2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY**

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*  
Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

#### **2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS**

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

#### **2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS**

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

#### **2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS**

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

#### **2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?**

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

#### **2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE**

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

#### **2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE**

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

#### **1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS**

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

#### **1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"**

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

#### **1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES**

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

#### **1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY**

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.



### **1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS**

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

### **1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY**

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

### **1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM**

Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

## **Law Reviews from Academic Symposia**

### **2019 • CLASS ACTIONS, MASS TORTS, AND MDLS: THE NEXT 50 YEARS**

Lewis & Clark Law Review, Vol. 24, No. 2

### **2017 • THE JURY TRIAL AND REMEDY GUARANTEES: FUNDAMENTAL RIGHTS OR PAPER TIGERS?**

Oregon Law Review, Vol. 96, No. 2

### **2016 • THE DEMISE OF THE GRAND BARGAIN: COMPENSATION FOR INJURED WORKERS IN THE 21ST CENTURY**

Rutgers University Law Review, Vol. 69, No. 3

### **2015 • THE “WAR” ON THE U.S. CIVIL JUSTICE SYSTEM**

Emory Law Journal, Vol. 65, No. 6

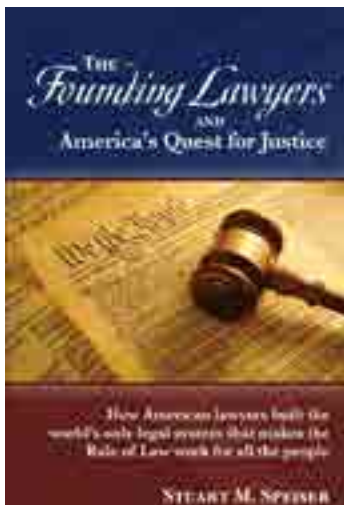
### **2005 • MEDICAL MALPRACTICE**

Vanderbilt Law Review, Vol. 59, No. 4

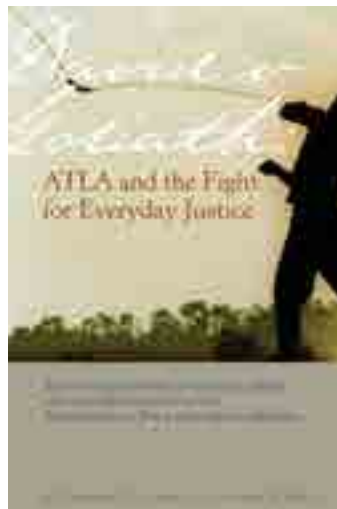
### **2002 • MANDATORY ARBITRATION**

Law and Contemporary Problems, Vol. 67, No. 1 & 2, Duke University School of Law

## **Books distributed by the Pound Civil Justice Institute**



*The Founding Lawyers and America's Quest for Justice*  
by Stuart M. Speiser (2010)



*David v. Goliath: ATLA and the Fight for Everyday Justice*  
by Richard S. Jacobson & Jeffrey R. White (2004)  
(Free viewing and downloading at [www.poundinstitute.org](http://www.poundinstitute.org).)



*The Jury In America*  
by John Guinther (1988)

## Reports of the Chief Justice Earl Warren Conferences on Advocacy

1989 • MEDICAL QUALITY AND THE LAW

1986 • THE AMERICAN CIVIL JURY

1985 • DISPUTE RESOLUTION DEVICES IN A  
DEMOCRATIC SOCIETY

1984 • PRODUCT SAFETY IN AMERICA

1983 • THE COURTS: SEPARATION OF POWERS

1982 • ETHICS AND GOVERNMENT

1981 • CHURCH, STATE, AND POLITICS

1980 • THE PENALTY OF DEATH

1979 • THE COURTS: THE PENDULUM OF FEDERALISM

1978 • ETHICS AND ADVOCACY

1977 • THE AMERICAN JURY SYSTEM

1976 • TRIAL ADVOCACY AS A SPECIALTY

1975 • THE POWERS OF THE PRESIDENCY

1974 • PRIVACY IN A FREE SOCIETY

1973 • THE FIRST AMENDMENT AND THE NEWS MEDIA

1972 • A PROGRAM FOR PRISON REFORM

## Reports of Roundtable Discussions

### 1993 • JUSTICE DENIED: UNDERFUNDING OF THE COURTS

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

### 1991 • SAFETY OF THE BLOOD SUPPLY

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C. attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

### 1990 • INJURY PREVENTION IN AMERICA

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

### 1988-89 • HEALTH CARE AND THE LAW III

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

### 1988 • HEALTH CARE AND THE LAW

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

### 1988 • HEALTH CARE AND THE LAW II—POUND FELLOWS FORUM

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

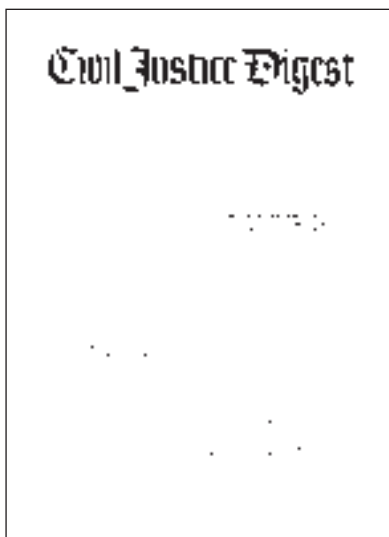
## Research Monographs

**Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts.** This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

**The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D.** Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

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