

# CONFIDENTIALITY AGREEMENTS – WHAT’S SO SECRET?

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## I. Introduction

A basic principle of our judicial system is the exchange of documents during discovery and their unfettered use during trial under the constant glare of public inspection. Unfortunately, the pervasive use of confidentiality agreements and protective orders from the initial stages of discovery through settlement prevents the public from serving its ‘watchdog’ function, so vital to our liberty, health and general welfare.

Reports of the past decade have documented that protective orders and other means of keeping information confidential have moved beyond the confines of the traditionally expected areas of confidentiality.<sup>2</sup> This area of the law has migrated from a rather mundane topic to one that is fueled with public policy issues. Fortunately, the past decade has seen a national movement to thwart protective orders encompassing documents exchanged during discovery, through trial, and beyond.<sup>3</sup> Typically, consumer lawyers are presented with the prospect of entering, by stipulation, umbrella protective orders which permit the company to limit the use of documents to the pending case simply upon its unilateral designation “confidential”. Such bargaining candy has been unfairly offered to attorneys who feel compelled to agree to such limitations in order to get their hands on documents for the pending case. Only too soon they learn that the offer is merely a saccharine substitute to what they should have fought for from the beginning—unfettered access to the documents, and sharing of the material with other similarly situated litigants and counsel. Many lawyers who have entered such orders learn, reviewing the documents, they would have been much better off had they been able to share the material with other lawyers litigating the same issues, to determine their value and relevancy.

Fortunately, consumer lawyers are not alone in their battle to unleash the full public access to documents they obtain during litigation for many states have joined the movement to keep public access by enacting legislation to limit judicial discretion.<sup>4</sup>

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<sup>2</sup> Trade secrets are among those areas that have been traditionally protected.

<sup>3</sup> Richard A. Rosen and Karen Steinberg Kennedy, *New Developments in State Protective Order Legislation and Procedural Rules*, C915 ALI-ABA 315, 317 (1994).

<sup>4</sup> *Id.* States have enacted these statutes out of concern for the concealment of evidence that have proven hazardous to the public’s health. *Id.* at n.1 (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 441-45 (Dec. 1991)). These states have cited to defective product cases such as Dow Corning’s silicone implants, Upjohn’s Halicon sleeping pill that have kept hazardous information from the public for support of their enactment of their public access statutes. *Id.* These same states reason that due to the

Those in support of public access have no trouble articulating the need for limiting the entry of protective orders. They cite to a confidentiality crisis as more and more attorneys are faced with an ‘umbrella protective order’ the first time any company documents are exchanged. They want assistance from the court, reminding the judiciary of the abuses that toxic tort and product industry have inflicted on the public by the use of confidential agreements which have resulted in senseless deaths and injuries.<sup>5</sup> They argue that judges should be exercising great discretion, balancing needs of public access against trade secrets and entering protective orders only on the basis of good cause.<sup>6</sup> Proponents of confidentiality usually assert that all company documents qualify for protection, even claim files, underwriting files, engineering files and manuals. They claim public health and safety issues paraded by litigant’s counsel as a basis for public access affect only a miniscule sector of the population.<sup>7</sup>

In the initial stages of discovery, proponents of company secrets often propose that the attorney-client and work product privilege casts a veil of secrecy over all such material. If that fails, they typically Then try to seal documents from public view, reasoning that as long as local counsel has access, no harm, no foul. In this way, they sequester one counsel from another and prohibit the plaintiff’s bar from assessing the company’s liability by sharing information, ideas, documents and their pattern and practice behavior. Be wary, this ‘sealed lips’ approach is attractive to the judiciary because it saves them from having to devote precious judicial time to scrutinize whether documents merit protection on an in camera inspection.<sup>8</sup> Consumer lawyers should be quick to point out that this approach will ultimately backfire, as it would force each litigant to repave his way to entitlement to the documents, involving substantial judicial time and energy.

Why all the secrets?<sup>9</sup> What can consumer lawyers do to contribute to the wealth of accessible information so as to become better informed, and thus better represent their clients? Attorneys who fly solo often do so because they take the myopic view that if they fight the big

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protective orders issued in these cases, the public was denied access to discovery material that could have stopped unnecessary claims and harm. Rosen, *supra note 3*, at 317.

<sup>5</sup> See Larry E. Cohen, *Protective Orders*, ATLA TRIAL MAGAZINE, August 1986. “A defendant’s request for a protective order is tantamount to binding and gagging plaintiffs and their counsel for improper reasons. Most often, a defendant seeks protection from the disclosure of information that is already known to its competitors and that can only harm the defendant if some other person should use the information to prove their case, which would, after all, cost the defendant money. *Id.*”

<sup>6</sup> Rosen, *supra note 3*, at 319.

<sup>7</sup> Miller, *supra note 4*.

<sup>8</sup> In *Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356(1995), the Court held that each document will be inspected by the Court to determine whether the proponent of protection has demonstrated with specificity and articulated reasoning good cause for protection. Nonetheless, our overburdened judiciary rarely has the time nor the stomach for such lengthy, exhaustive in camera inspections.

<sup>9</sup> Protective orders are not given as liberally as the “confidentiality proponents” attempt to promote, only about “60 percent of all requests for protective orders were partially or completely denied.” Laurie Kratky Dore, *The Confidentiality Debate*, 18 TRIAL MAGAZINE, October 2000.

fight for disclosure, they may risk losing the ability to obtain the material for their own case. This paper will discuss the evolution of protective and other secretive orders, present an overview of the national perspective on this problem, and will suggest how to approach an issue that challenges each of us everyday.

## II. How Did We Get Here? The Development of Judicial Secrecy

Our American system has held steadfast to the ideals of free speech and expression, and from this freedom, the American public has enjoyed access to our courts and judicial systems.<sup>10</sup> The reason for this open door policy is to ensure the judiciary is held accountable for its actions. This allows the public to gain trust in the system, and perhaps even encourage spectators to become a part of the system.<sup>11</sup>

Historically, a protective order was viewed as *unconstitutional* because it would have the effect of blocking both the party's First Amendment's right to exchange information and the public's right to such information.<sup>12</sup> Additionally, a protective order was characterized as a prior restraint on a litigant's speech and therefore any order granted would be reviewed under strict scrutiny.<sup>13</sup>

The United States Supreme Court radically changed the traditional view towards protective orders in *Seattle Times v. Rinehart*.<sup>14</sup> The Court focused solely on the litigant's rights as opposed to the right of the public to access the court documents.<sup>15</sup> The majority framed its decision by analyzing the case narrowly through a "good cause" lens instead of through the constitutional lens the Court had used prior to *Seattle Times*.<sup>16</sup> The Court ultimately held that there was *no constitutional bar* to the issuance of protective orders.

With the door opened for confidentiality and protective orders, parties served with discovery requests vehemently refused to disclose what they conveniently perceived to fall within the category of documents worthy of protection. This was a catalyst for companies to assert bogus reasons for protection, such as a company wide policy to mark every document in a claim file "confidential;" sending every sensitive document to in house counsel so it could be couched in attorney-client privilege; or claiming all documents created after a loss are protected

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<sup>10</sup> Miller, *supra note 4*, at 428.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> In Re Hanklin, 598 F.2d 176, 184-86 (D.C. Cir. 1979). Strict scrutiny is a harder bar to reach than the "good cause" standard set forth in Federal Rule of Civil Procedure 26 (c), and public access advocates claimed there should be no less restrictive means of speech than strict scrutiny.

<sup>14</sup> 467 U.S. 20 (1984).

<sup>15</sup> Brian Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 JOURNAL OF LAW AND POLITICS 381, 390 (1990).

<sup>16</sup> *Id.*

as “work product.” Thus, the first task is to prove the documents do not qualify for any protection under a privilege assertion and should be produced. Next, to secure production without the boomerang of a restrictive order so it may be shared with others and made available to the public.

Since *Seattle Times*, public access groups have been on a quest to protect the public’s traditional right to access through state legislation aimed at combating the “concealment of public hazards”<sup>17</sup> and remove the cloak of secrecy now covering the courtroom. Many state and circuit courts have followed the lead of such groups as ATLA by promoting a presumption of public access in the courtroom.

### **III. The Cloak of Confidentiality Is Most Often Worn During Discovery**

The landscape of litigation has dramatically changed from a judicial system that is trying cases on the merits to a system that is settling cases.<sup>18</sup> This shift has put a tremendous amount of pressure on the need for liberal and efficient discovery rules. The area of litigation that is most currently affected by secrecy is discovery and subsequent Rule 26(c) motions.<sup>19</sup> Under the Federal Rules of Civil Procedure, Rule 26(c) provides the means of obtaining a protective order, but only after an attorney has shown a good faith effort to confer with an adversary, “and for good cause shown.” The court in its discretion can choose from a list of protective measures or can fashion its own remedy.<sup>20</sup> This rule places the burden on the party seeking the protection to show that the document sought is either a trade secret or some other form of confidential information and has demonstrated “good cause” prior to the court’s issuance of such an order.<sup>21</sup>

Since most protective orders are now being instituted at the discovery level, a debate arose when confidentiality proponents reacted to the liberality of Rule 26 and the rule’s “information gathering purpose” by demanding the court protect potentially confidential documents.<sup>22</sup> However, public access advocates are quick to point out that “any type of judicial order which limits public access to the judicial record is similar to a prior restraint on speech.”<sup>23</sup> It should be noted that the federal courts have not required varying standards for the different

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<sup>17</sup> Miller, *supra note 4*, at 439.

<sup>18</sup> Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 288 (1999). Currently only four percent of cases go to trial on the federal level. *Id.* (citing Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1).

<sup>19</sup> Henry J. Reske, *Secrecy Orders at Issue*, A.B.A. JOURNAL, AUG. 1994, at 32, 33 (quoting Abner Mikva).

<sup>20</sup> FED. R. CIV. P. 26(c).

<sup>21</sup> *Id.*

<sup>22</sup> Fitzgerald, *supra note 16*, at 385.

<sup>23</sup> *Id.* at 387.

types of protective orders, and generally just look to “the context of information disseminat[ed] during the discovery process.”<sup>24</sup>

Common-law has evolved in certain states to ensure that the judiciary does not abuse this discretionary right of issuing protective orders when faced with Rule 26(c) motions to protect discovery material. In the Third Circuit, the court addressed the fear of judicial secrecy and the court ultimately chastized the lower court’s willingness to issue such orders.<sup>25</sup> The court went on record to criticize stipulated confidentiality orders whether these orders are procured “at the discovery stage or any other stage of litigation, including settlement, ‘as potential abdications of judicial discretion to private judgments.’”<sup>26</sup>

The *Pansy* court was disturbed by the prevalence of secrecy orders that were seemingly based on the judiciary’s concern for quickly settling cases instead of the concern of the public interest that is “sacrificed” with the granting of the order.<sup>27</sup> The *Pansy* court articulated certain factors for consideration when determining “good cause;”

- (1) whether disclosure would violate the privacy interests of the party seeking protection;
- (2) whether the information is being sought for a legitimate 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>28</sup>

In the balancing of needs approach, many courts require the party seeking the protective order to persuade the court of good cause, and look favorably at the entry of agreements allowing plaintiffs to share material with similarly situated litigants.<sup>29</sup> For example, in *Nestle Foods Corporation v. Aetna Casualty and Surety Corp.*,<sup>30</sup> Aetna asserted the claim, underwriting

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<sup>24</sup> *Id.*

<sup>25</sup> *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994).

<sup>26</sup> Dore, *supra note 19*, at 315 (citing *Pansy*, 23 F.3d at 789).

<sup>27</sup> Dore, *supra note 19*, at 315 (citing *Pansy*, 23 F.3d at 785-86).

<sup>28</sup> *Pansy*, 23 F.3d at 787-91. Several jurisdictions have followed the *Pansy* court’s recommendations for good cause. See *Wiggins v. Burge*, 173 F.R.D. 226 (N.D. Ill. 1997); *Doe v. White*, 2001 WL 649536 (N.D. Ill. 2001); *Holland v. Summit Autonomous, Inc.*, 2001 WL 930879 (E.D. La. 2001); *Holland v. Summit Technology, Inc.*, 2001 WL 1132030 (E.D. La. Sep. 21, 2001); and *Adams v. Metallica, Inc.*, 758 N.E.2d 286 (Ohio App. 2001).

<sup>29</sup> *Nestle Foods Corporation v. Aetna Casualty and Surety Corporation*, 129 F.R.D. 483 (D.N.J. 1990); *Cipollone v. Liggett Group, Inc.* 785 F.2d 1108 (3d Cir. 1986), cert. denied, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed. 2d 485 (1987)

<sup>30</sup> 129 F.R.D. 483 (D.N.J. 1990).

and engineering files reflect the “procedures they use in evaluating risks and handling of claims, while the claim and underwriting manuals reveal their internal business practices.”<sup>31</sup> The New Jersey court, citing *Cipollone*, denied the request and reasoned that broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26 (c) test,<sup>32</sup> and noted:

“as a matter of common sense, if one were truly fearful of competitive disadvantages, one would make every effort to properly safeguard information to prevent disclosure to competitors.. In the instant case, defendants have been quite open in sharing the allegedly confidential information with their competitors.”<sup>33</sup>

Courts in Massachusetts have also been liberal in their view of the dissemination of discovery information. In *Baker v. Liggett Group, Inc.*,<sup>34</sup> it stated “[i]t is implicit in Rule 26 (c)’s ‘good cause’ requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public.”<sup>35</sup> Restrictions on the right to disseminate information obtained in discovery are appropriate if it is shown that such restrictions are necessary to protect a producing party from “annoyance, embarrassment or oppression,” including, but not limited to, true trade secrets and confidential research, development and commercial information.<sup>36</sup> The court ultimately did not find the particularized showings of good cause necessary for the protective order and was not convinced a protective order was necessary to avoid pre-trial publicity and embarrassment.<sup>37</sup>

Similarly, other courts faced with claims that a party’s discovery information is “confidential” or is a “trade secret” have created a higher bar than just “good cause” by requiring the moving party to show the information, if not protected, would lead to a “clearly defined and very serious injury to his business.”<sup>38</sup> Some courts have also required that “good cause” for discovery materials can be found only when an injury has been specifically shown, and any statements couched in conclusory statements do not meet this standard.<sup>39</sup> Additionally, the Fifth Circuit has held that without a particular pleading of fact evidencing a harm, any “stereotype conclusory statements”<sup>40</sup> will not carry a protective order argument. In Ohio, the courts held

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

<sup>32</sup> *Id.* at 484

<sup>33</sup> *Id.*

<sup>34</sup> 132 F.R.D. 123 (D. Mass, 1990).

<sup>35</sup> *Id.* (citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775,790 (1<sup>st</sup> Cir. 1988)).

<sup>36</sup> *Id.* (citing FED. R. CIV. P. 26 (C).)

<sup>37</sup> *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986)).

<sup>38</sup> John D. Liber, *Secrecy in the Courts*, TRIAL LAWYER JULY 1991, at page 57 (citing *Yurko v. Nissan Motor Corp.* (1984) C.P., Lackawanna Cy., Pa. No. 756 (unreported); *U.S. v. International Business Machines Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975)[citations omitted].

<sup>39</sup> *U.S. v. Hooker Chemical and Plastic Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981).

that in order to show "good cause," the party requesting the protective order must demonstrate that disclosure of the confidential information will clearly create a defined injury to the moving party's business.<sup>41</sup>

As discussed in more depth in the the next portion this paper, Texas and Florida have made bold advancements for public access through Texas' Rule of Civil Procedure, Rule 76 (a), which creates a presumption of court records, and Florida's Sunshine Act, which limits protective orders to situations where "public hazards" are concerned.<sup>42</sup>

Furthermore, ATLA has drafted recommendations for "good cause," such as:

Party that requests secrecy has a cognizable legal interest that is entitled to the protection of the secrecy; the information to be sealed meets 'rigorous legal criteria applicable to the trade secrets or privileged information or otherwise justif[ies] the court in exercising its judicial power to restrict the openness of discovery or public access; and the disclosure of the information would likely result in clearly defined serious harm.<sup>43</sup>

Attorneys involved in the discovery stages of litigation find that defendants will propose an all encompassing, stipulated protective order. You should consult with your client and gain his authorization to proceed onto this battle ground because such orders should NOT be agreed to, unless the limiting agreement clearly outweighs the benefits of sharing information and building on it in future cases.

If you refuse to sign such an order, the defendant will be hard pressed to sustain its burden of proving a significant threat to its competitive position in the marketplace or of having disclosed some genuine trade secret to competitors. It is difficult for businesses to reach this standard unless they are truly making a bona fide attempt to protect a trade secret or some truly confidential information. This point cannot be overstressed because often a large commercial industry, such as insurance, will move to try and protect operating manuals or personnel procedures, claiming these types of materials are confidential. These documents cannot be classified as confidential unless the movant can show a real harm would result from disclosure. Remember, public access includes all of us, no matter if our practice is far from sophisticated firms in large cities. All litigants have equal right to access documents being squirreled away by the corporation. Sharing documents makes the legal system more accessible to people who could not otherwise afford to fight the expensive battles waged by corporations with endless defense funds. You should not be willing to put up with their bond of secrecy without a fight.

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<sup>40</sup> U.S. v. Garrett, 571 F.2d 1323, 1326 (5<sup>th</sup> Cir. 1978).

<sup>41</sup> Koval v. General Motors Corp., 610 N.E.2d 1199 (Ohio Com. Pl. 1990).

<sup>42</sup> Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 464.

<sup>43</sup> TRIAL MAGAZINE, October 2000, page 22.

#### IV. Who Should Have Access To The Documents Filed In Court Either During Litigation Or Used At Trial?

On a federal legislative level, Senators Feinstein and Kohl proposed legislation fashioned after Florida's "Sunshine" statutes – "Sunshine in Litigation Act of 2000,"<sup>44</sup> to reinforce the right of public access to court documents. This act was unfortunately not enacted. The revolutionary bill would have required trial judges to make specific findings twice before the trial judges could issue a protective order.<sup>45</sup> Under this act, a protective order would only be granted if the order would not keep information relating to the public health and safety from the public. Perhaps with enough support from the Senators' constituents and concerned public access groups, legislation mirrored after the Sunshine Act can be introduced again.

Turning to the circuit courts, they have experienced mixed reaction to the right of public access. The Third Circuit has taken a bold step by creating a presumption of public access to all material filed in connection with nondiscovery pretrial motions.<sup>46</sup> It has held that the public is presumed to have a right to inspect and copy judicial records, reasoning that the public's right to access predates the Constitution.<sup>47</sup> When faced with whether a document can be classified as a "judicial document," thereby being open to the public, the courts throughout the nation have applied varying standards. The Third Circuit has "focused on the technical question of whether a document is physically on file with the court."<sup>48</sup> The Third Circuit has accordingly held that, "[i]f [the document] is not [filed], it is not a 'judicial record.'"<sup>49</sup>

The First Circuit has taken a somewhat similar approach. In *Anderson v. Cyovac, Inc.*,<sup>50</sup> the court determined that only documents utilized in the adjudication process are accessible, but those used solely in discovery cannot be reached.<sup>51</sup> The Second Circuit, in *United States v. Amodeo*,<sup>52</sup> narrowed public access only to filed items that are "relevant to the performance of the

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<sup>44</sup> This bill was introduced under S. 3070, 106<sup>th</sup> Congress § 3 (Sept. 19, 2000).

<sup>45</sup> Joseph D. Steinfeld, Robert A. Bertsche, Stuart Svonkin, *Recent Developments in the Law of Access*, 690 PRACTISING LAW INSTITUTE 7, 30 (2001).

<sup>46</sup> *Leucadia v. Applied Extrusion Tech. Inc.*, 988 F.2d 157 (3d Cir. 1993).

<sup>47</sup> *Id.* at 161.

<sup>48</sup> *Pansy*, 23 F.3d at 782.

<sup>49</sup> *Id.* (citing *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344-45 (3<sup>rd</sup> Cir. 1986) (once a settlement has been filed, it is open to public access); *Leucadia*, 988 F.2d at 161-62 (citing cases where "other courts have also recognized the principle that the filing of a document gives rise to a presumptive right of public access.")).

<sup>50</sup> 805 F.2d 1, 13 (1<sup>st</sup> Cir. 1986).

<sup>51</sup> *Id.*

<sup>52</sup> 44 F.3d 141, 46 (2d Cir. 1991).



judicial function and useful in the judicial process.” If the document meets this criteria, it is deemed a judicial document and therefore accessible.<sup>53</sup>

On the state level, Florida is the most protective of the public’s right to access litigation information. The “Sunshine in Litigation Act”, enacted in 1990 prohibits the judiciary from granting protective orders if the purpose of the order is to “conceal[] a ‘public hazard’ or to ‘conceal any information which may be useful to the members of the public in protecting themselves from injury which may result from the public hazard.’”<sup>54</sup> The most promising aspect of the act is that it removed any “interest balancing” from the trial judge because the act is very clear in its purpose: if the information sought to be protected can cause injury to the public, the information needs to remain public even if the information is a trade secret.<sup>55</sup> The act is currently under attack as unconstitutional.<sup>56</sup>

Texas followed Florida’s lead by enacting a very contested rule of procedure, Rule 76 (a) of the Texas Rule of Civil Procedure. The controversial aspect of the rule stems from the presumption that records used in litigation should be kept public, and “only upon a showing of a ‘specific, serious, and substantial interest’ that clearly outweighs both the presumption and any probable adverse effect that sealing will have upon the general public health and safety,” may the court sustain a request for a protective order.<sup>57</sup>

Virginia has enacted statutes with a more constricted scope than the Texas and Florida statutes. The Virginia statutes allow attorneys to share discovery materials relating to similar personal injury and wrongful death actions, even if there has been a protective order entered.<sup>58</sup> In Virginia, as long as the attorneys have been given permission by the court that entered the order, and have provided notice and an opportunity to be heard, the information can be shared. Therefore, under the statute, a rebuttable presumption of public access applies in civil proceedings to “judicial records,” and to overcome it, the moving party must bear the burden of establishing a compelling reason that it cannot be protected by any other means than a protective order.<sup>59</sup>

In Arkansas, the state court has held that the public has the right of access to settlement agreements.<sup>60</sup> In fact, the court held other than cases described in the statute or rules, courts

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<sup>53</sup> *Id.*

<sup>54</sup> Rosen, *supra* note 3, at 321. The act has defined a public hazard as anything that is likely to cause injury. *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing National Association of Manufacturers v. Florida, Fl. Cir. Ct. No. 92-4868, (Fla. Leon Co. 2d Jud. Cir. Ct., filed Nov. 19, 1992)).

<sup>57</sup> *Id.* (citing TEX. R. CIV. P. ANN. R. 76a (West. Supp. 1991)). The cases that have followed this rule have had varying results and there has been dissention between the lower and appellate courts on how to best use the rule.

<sup>58</sup> VA. CODE ANN. § 8.01 – 420.01 (MICHIE SUPP. 1991).

<sup>59</sup> Code 1950, § 17-43; Sup.Ct.Rules, Rule 5:10.

<sup>60</sup> Arkansas Best Corp. v. General Electric Cap. Corp., 878 S.W.2d 708 (Ark. 1994).

authority to protect records must be kept extremely limited in light of the powerful common-law right of access.<sup>61</sup>

In Washington, the courts have found a common law right to public access as evidenced in the court's decision in *Nast v. Michels*.<sup>62</sup> It held the public does have a right of access to court case files as established by the common-law.<sup>63</sup> The courts have held the common-law right to inspect and copy judicial records, however, is not absolute. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."<sup>64</sup> The courts have held case files are usually accessible absent a specific reason, such as adoption files or juvenile files.<sup>65</sup> "Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court."<sup>66</sup>

In California, the court in *Wilson v. Science Applications Int. Corp.*,<sup>67</sup> held it was weary of secrecy in judicial proceedings and instead favored public access to courtroom records. Following the Supreme Court decision in *Shepard v. Maxwell*<sup>68</sup>, which said it is a vital function of the press to subject the judicial process to "extensive public scrutiny and criticism,"<sup>69</sup> the California Supreme Court concluded, 'it is first a principle that the people have the right to know what is done in their courts.' [Citation.]<sup>70</sup>

In Colorado, the courts have held that there can be settlement agreements that can be kept confidential, but these private agreements cannot be used as a method of blocking another party from discovering information that a court may later determine to be discoverable.<sup>71</sup> Likewise, in

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<sup>61</sup> *Id.*

<sup>62</sup> 730 P.2d 54 (Wash. 1986).

<sup>63</sup> *See* *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1311, 55 L.Ed.2d 570 (1978); *In re Nat'l Broadcasting Co.*, 653 F.2d 609, 612 (D.C.Cir.1981); *Cowles Pub. Co. v. Murphy*, 96 Wash.2d 584, 588, 637 P.2d 966 (1981). This right has been described as "fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C.Cir.1976), reversed on other grounds sub nom.

<sup>64</sup> *Nixon*, 435 U.S. at 598.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.*

<sup>67</sup> 52 Cal. App. 4<sup>th</sup> 1025 (1997).

<sup>68</sup> 384 U.S. 333 (1967).

<sup>69</sup> *Id.*

<sup>70</sup> *See* *Estate of Hearst*, 67 Cal.App.3d 777, 782-784 (1967); accord *Mary R. v. B. & R. Corp.*, 149 Cal.App.3d 308, 317 (1983); *Champion v. Superior Court*, 201 Cal.App.3d 777, 786-787 (1988); *Church of Scientology v. Armstrong*, 232 Cal.App.3d 1060 (1991).

<sup>71</sup> *Anderson v. Home Ins. Co.*, 924 P.2d 1123, (Colo. 1996).

Georgia, the influence of the *Pansy* decision from Pennsylvania caused a court to agree with the press that the parties' self imposed confidentiality settlement agreement should be lifted.<sup>72</sup>

Certain states have demanded that a party needs to show "good cause" before a court can order a protective order sealing records or granting confidentiality. Recently, in *Adams v. Metallica, Inc.*,<sup>73</sup> the Ohio Supreme Court determined that discovery documents filed with the court are open to the public, short of a showing of good cause.<sup>74</sup> It also held that requests for protective or confidentiality orders should be considered with tremendous skepticism and granted "begrudgingly."<sup>75</sup>

North Carolina courts have held that if a court is faced with a decision regarding the closure of selected documents, the court needs to issue such an order only if the order is exceedingly narrow in scope.<sup>76</sup> In Pennsylvania, to rebut the well-established presumption of public access to judicial proceedings and records a party is required to demonstrate good cause.<sup>77</sup>

New York "requires a written finding of good cause before materials filed with the court can be sealed."<sup>78</sup> The court reinforced the rule's requirement of finding good cause in *Estate of R.R., Jr.*,<sup>79</sup> wherein the court held that in determining whether there is good cause for sealing of court records, the court is to weigh parties' desires for privacy against lack of legitimate public interest in the proceedings.<sup>80</sup>

Finally Delaware, declared that "pleading and other papers filed with the court [are] public records, subject to sealing only for good cause and subject to unsealing by court determination on petition of 'any person.'"<sup>81</sup>

## V. Where To Go From Here?

Companies who make unsafe products that injure, or corporations who do not honor their agreements, should be forced to release in litigation documents germane to their actions without the comfort of the confidentiality blanket. They fight like gladiators to keep the documents

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<sup>72</sup> Mullins v. Griffin, 886 F. Supp. 21, 23 (N.D.Ga. 1995).

<sup>73</sup> 143 Ohio App.3d 482 (2001).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (citing Rule of Civil Procedure, Rule 26(c)).

<sup>76</sup> Virmani v. Presbyterian Health Serv. Corp., 493 S.E.2d 310 (N.C. Ct. App. 1997).

<sup>77</sup> R.W. v. Hampe, 626 A.2d 1218 (Pa. Super. Ct. 1993).

<sup>78</sup> Rosen, *supra* note 3, at 326 (citing N.Y. Comp. Codes R. & Regs. Tit. 22, § 216.1 (1991)).

<sup>79</sup> 582 N.Y.S.2d 644 (Sur. Ct. 1992).

<sup>80</sup> *Id.*

<sup>81</sup> Superior Court Civil Rule 5 (g), 17 Del. Code Ann. Rule 5(g) (1991).

under wraps. After all, the defendant corporation knows how damaging the information could be if freely exchanged between consumer counsel via the internet. It must be frightening for these companies to know that we are after them to make safer products and fulfill promises they have made. We will challenge them from a position of strength, aided by the sharing of information from coast to coast until the truth be told. Bottom line, sharing is good and beneficial to all, except, that is, if you have something to hide.

Fundamentally, the public is our best audience, for if we gain public access to documents, we are doing the judicial system a service. Public access has been said to be “fundamental to a democratic state, and public court records are rich with democracy’s indispensable raw material: information.”<sup>82</sup> Therefore, attorneys as well as public access groups need to remain faithful to the fundamentals of our legal tradition and remove the cloak of secrecy that is being worn in too many courtrooms.

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<sup>82</sup> *Id.* at 653.