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# Public Access to Information in Civil Litigation vs. Litigant's Demand for Privacy: Is the "Vanishing Trial" an Avoidable Consequence?

Dennis J. Drasco\*

Recently, the legal and academic communities have been studying the phenomenon of the "vanishing trial."<sup>1</sup> The phenomenon is an observation of the fact that the American court system is experiencing a trend of shrinking trial dockets. At least one scholar has partially attributed the decline in trials to the value placed upon settlement rather than adjudication within our justice system.<sup>2</sup> Those competing values have spawned a debate regarding the secrecy and confidentiality characteristic of settlements versus public access to information in civil litigation.<sup>3</sup> Jurisdictions that have addressed the issue have noted the complexities involved in regard to the factors to be considered.<sup>4</sup> This article outlines those factors, addresses the impact electronic filing may have on them, and theorizes that the impact may further contribute to the phenomenon of the vanishing trial, and what can be done to avoid those circumstances.

## I. THE "VANISHING TRIAL" PHENOMENON

Marc Galanter is credited with coining the phrase "vanishing trial" and with significantly contributing to the understanding of the phenomenon by being a pioneer in the collection of data pertaining to trials. For purposes of this article, it is important to note that Galanter's data reveals that as of 2002 dispositions by trial had declined to 1.8 percent, compared to 11.5 percent in 1962.<sup>5</sup> Scholars

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1. For a discussion on recent studies see Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35

2. Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 288-92 (1999).

3. *Id.* at 289-300.

4. See *Seattle Times Co. v. Rinehart*, 467 U.S. 20 (1984); *U.S. v. Ky. Utils. Co.*, 927 F.2d 252 (6th Cir. 1991); *Pansy v. Borough of Strousburg*, 23 F.3d 772 (3d Cir. 1994); *SEC v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001); see also Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 775-85 (1990) (examining the federal court's development of a balancing test).

5. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

have suggested that the phenomenon may be the result of procedural reform and the acknowledgment that the trial process is expensive and time consuming.<sup>6</sup> Those scholars have noted that many commentators view trials as a failure resulting in a victor “at great cost to both sides and the public.”<sup>7</sup>

The idea of trials being “wasteful” may have resulted in a preference for settlement, which procedural rules tend to foster.<sup>8</sup> As noted by Professor Laurie Kratky Dore, Federal Rule of Civil Procedure 16 acknowledges that settlement is an objective of pretrial conferences and that trial courts are permitted to convene settlement conferences as early as possible within the litigation process.<sup>9</sup> Liberal procedural rules pertaining to discovery, however, also help to explain the decline of trials.<sup>10</sup> Indeed, discovery accelerates the disclosure of information which in turn permits counsel to regularly reevaluate their positions. In reevaluating their positions, counsel and their clients are forced to address the cost of litigation compared to the advantages of settlement.<sup>11</sup> This cost-effect analysis is consistent with our market economy and the primary objective of our civil justice system: “the just, speedy, and inexpensive determination of every action.”<sup>12</sup>

Another consequence contributing to the “vanishing trial” phenomenon, is the migration of cases to other venues, such as alternative dispute resolution (ADR), which methods include arbitration and mediation. Galanter has suggested that ADR is “one of the most prominent explanations” for the decline of trials.<sup>13</sup> Galanter admits that it is still unknown how much an effect ADR has on trials, but notes that research reveals that in 2001 approximately one-seventh of all federal cases were referred to some form of ADR.<sup>14</sup> That number does not account for those cases that were not filed with the courts. Moreover, mandatory ADR is becoming more common in areas such as employment, financial services, and health care.<sup>15</sup> Although it is unknown how many cases are diverted by mandatory ADR, the annual reports of the American Arbitration Association suggest that the number has reached the hundreds of thousands.<sup>16</sup>

To the extent that the procedural rules, economic factors, and/or a combination of the two have contributed to the “vanishing trial” phenomenon and the preference for ADR and settlement, the existence of those factors, the phenomenon, and such a preference clearly threatens the benefits associated with trials. The

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6. Dore, *supra* note 2, at 290-92; *see generally*, Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943 (2004).

7. Yeazell, *supra* note 6, at 947.

8. Dore, *supra* note 2, at 290-92.

9. *Id.*

10. Yeazell, *supra* note 6, at 950-54.

11. *Id.*; *see Seattle Times*, 467 U.S. at 34 (“Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”)(emphasis added).

12. FED. R. CIV. P. 1.

13. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* 76 (2004), available at [www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf](http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf) (last visited Mar. 15, 2006).

14. *Id.* at 77.

15. Richard C. Reuben, *The Closing Courthouse Door: When Arbitration Subverts Democracy by Blocking Access to the Courts, Mandatory Arbitration and Separability Undermine the Rule of Law*, TRIAL, Jan. 2006, at 34-35.

16. *Id.* at 35 (citing AM. ARB. ASS’N, 2001 ANNUAL REPORT 2 (2001); AM. ARB. ASS’N, 2000 ANNUAL REPORT 2-3 (2000)).

trial is the mechanism by which our justice system employs the political institution, the jury.<sup>17</sup> Without trials, the jury is excluded from the adjudication process and the function that the jury serves—the impartial administration of justice by a representative body of society—is eliminated.<sup>18</sup> Further, trials provide a venue for parties to represent their competing interest to impartial decisionmakers, the result of which may be thoroughly reviewed.<sup>19</sup> In other words, there is a strong public interest in trials because that process ensures the proper resolution of issues that may affect the public at large.<sup>20</sup> Trials are also a source of information for interested parties, and are the mechanism by which legal doctrine is developed.<sup>21</sup> Public adjudication of socially important controversies results in benchmarks which assist in the settlement of future cases.

The factors recognized as contributing to the “vanishing trial” phenomenon and the preference for mediation and settlement are clearly in direct contradiction to the factors supporting the preference for adjudication. As will be discussed below, those same competing interests have directly affected the outcome of cases addressing the right of the public to access information pertaining to litigation and the right of parties to have information deemed confidential.

## II. CONFIDENTIALITY VERSUS RIGHT TO ACCESS

Courts have generally acknowledged a common law right of access to judicial proceedings and judicial records.<sup>22</sup> The presumption of public access has been applied “to a wide variety of civil records and documents, including papers filed in connection with a motion for summary judgment,” transcripts of trial and exhibits admitted during trial, settlement documents and post-settlement motions seeking to interpret and enforce agreements filed with the court, and transcripts of hearings for preliminary injunctions.<sup>23</sup> Courts have explained that the presumption of a right to access serves several functions:

The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system. . . . As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness. In addition, [a]ccess to civil proceedings and records promotes public respect for the judicial

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17. Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974 (2004).

18. *Id.* at 974-76.

19. *Id.* at 976-78.

20. *Id.*

21. *Id.* at 978-79.

22. *Pansy*, 23 F.3d at 780-81 (citing *Littlejohn v. Bic Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988)).

23. *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (citing *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660-62 (3d Cir. 1991); *Littlejohn*, 851 F.2d at 678-80; *Bank of Am. Nat'l Trust & Savs. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-67 (3d Cir. 1984)).

process and helps to assure that judges perform their duties in an honest and informed manner.<sup>24</sup>

To overcome the presumption of the right to access the moving party must demonstrate that the interest in secrecy outweighs the presumption.<sup>25</sup> Because of the liberality of pretrial discovery, federal courts have the inherent authority to issue protective orders pursuant to Federal Rule of Civil Procedure 26.<sup>26</sup> Such authority is necessary because of the “significant potential for abuse,” which is not limited solely to matters of delay and expense, but also to the potential to implicate the privacy interest of litigants and third parties.<sup>27</sup> To obtain an order of protection over discovery materials, the moving party must demonstrate that “good cause” exists for such an order.<sup>28</sup> Good cause is established upon a “showing that disclosure will work a clearly defined and serious injury to the party seeking [dis]closure.”<sup>29</sup> Even in the context of trade secrets, confidential research, development, and other commercial information, courts have not automatically given complete immunity against disclosure.<sup>30</sup> Instead, the moving party’s claim of privacy must be weighed against the need for disclosure.<sup>31</sup> The confidentiality of each document sought to be protected must be established.<sup>32</sup>

In balancing the factors, the court must weigh the moving party’s “need for information against the injury that might result if uncontrolled disclosure is compelled.”<sup>33</sup> If the court determines that disclosure is required, then it must next determine whether the materials should be disclosed in a designated way or whether disclosure should be limited.<sup>34</sup> Courts must take into account the interest of privacy, but such interests are diminished when the person seeking protection is a public person or the information sought concerns the health or safety of the public.<sup>35</sup> Conversely, if the moving party is a private litigant and the material involved is of little legitimate public interest, then the interest of privacy weighs in favor of granting a protective order.<sup>36</sup> Moreover, the general interest of furthering settlement cannot serve as the sole factor for granting a protective order and should not be provided any weight unless there is a particularized showing for the need of confidentiality in reaching a settlement.<sup>37</sup>

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24. *Id.* (internal citations and quotations omitted).

25. *Id.* at 165

26. *Seattle Times*, 467 U.S. at 34-35.

27. *Id.*

28. *Pansy*, 23 F.3d at 786 (citing FED. R. CIV. P. 26(c) and *Smith v. Bic Corp.*, 869 F.2d 194, 199 (3d Cir. 1989)).

29. *Id.* at 786.

30. *See Leucadia*, 998 F.2d at 166.

31. *Id.*

32. *Id.*

33. *Pansy*, 23 F.3d at 787 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 433 (1991)).

34. *Id.* at 787 (citing Miller, *supra* note 33, at 433-35).

35. *Id.* at 787.

36. *Id.* at 787-88.

37. *Id.* at 788.

These factors apply to motions for protective orders considered at all stages of litigation, including settlements.<sup>38</sup> Thus, litigants must be aware of these factors because courts are no longer likely to permit blanket protective orders.

### III. FEDERAL RULE OF CIVIL PROCEDURE 26

Federal Rule of Civil Procedure 26(c) permits federal district courts to issue protective orders “for good cause shown . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”<sup>39</sup> The rule sets forth that the court may enter an order to include one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.<sup>40</sup>

As discussed, *supra*, there is no absolute privilege of confidentiality and the rule requires the party seeking such an order to establish “good cause.”<sup>41</sup> As observed by the United States Court of Appeals for the First Circuit, it is apparent that the opposite is true; therefore, discovery materials may be open for public

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38. *Id.* at 786

39. FED. R. CIV. P. 26(C).

40. *Id.*

41. Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 362 (1979); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986).

inspection when judicial protection is unwarranted because of a failure to establish good cause.<sup>42</sup>

A party relying upon a protective order must be aware that the order can be subject to modification. Federal courts have varied on how to address modification. For instance, in determining whether to modify an existing protective order, courts in the Third Circuit apply the balancing test outlined above in addition to considering the original parties' reliance on the protective order.<sup>43</sup> The reliance factor is not a determinative factor because the parties are on notice that protective orders may be modified.<sup>44</sup> The extent to which a party can rely on a protective order depends on the extent to which the protective order induced the party to allow discovery or to settle the case.<sup>45</sup> The Second Circuit, on the other hand, requires a showing of improvidence in granting the protective order or of a compelling need before modification can be justified.<sup>46</sup> Thus, the Second Circuit provides greater weight to the litigants' reliance upon the existing protective order.

In any event, third parties clearly have standing to challenge protective orders and/or confidentiality agreements.<sup>47</sup> There can be no guarantee that a protective order will not be challenged, modified, or vacated during the course of litigation or even years after.<sup>48</sup> A moving party can challenge a protective order by merely establishing an "injury in fact."<sup>49</sup> The injury asserted is usually interference with the right to access doctrine or a right provided by the Constitution, i.e., the First Amendment,<sup>50</sup> or statute.<sup>51</sup> The moving party need not demonstrate the likeliness that he or she will prevail on the merits.<sup>52</sup> Accordingly, parties' seeking to keep certain material out of the public's eye may have an incentive to choose a venue other than the courtroom.

Recently, the Second Circuit clarified that in addition to the common law right to access, the public and the press have a First Amendment right to attend judicial proceedings and access certain judicial documents.<sup>53</sup> The court noted that relevant documents that are submitted to a court in the course of adjudicatory proceedings are subject to the presumption of public access.<sup>54</sup> Once presented to the court the documents are considered "judicial documents" regardless of which party filed them or of the outcome of the proceeding.<sup>55</sup> Judicial documents are entitled to the highest presumption of public access.<sup>56</sup> Accordingly, documents

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42. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988).

43. *Pansy*, 23 F.3d at 790.

44. *Id.*

45. *Id.*

46. See *TheStreet.com*, 273 F.3d at 229.

47. *Pansy*, 23 F.3d at 777.

48. See generally Anita Hotchkiss & Diane M. Fleming, *Protecting and Enforcing Protective Orders: Easier Said Than Done*, 71 DEF. COUNS. J. 161 (2004).

49. *Pansy*, 23 F.3d at 777.

50. See *Nixon v. Warner Communications*, 435 U.S. 589 (1978) (holding that First Amendment considerations and the common law right of access to judicial records apply to all judicial proceedings and materials filed with the Court).

51. *Pansy*, 23 F.3d at 777.

52. *Id.*

53. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 120 (2d Cir. 2006).

54. *Id.* at 121.

55. *Id.*

56. *Id.* at 123.

used by parties moving for, or opposing, a substantive motion, such as one for summary judgment, should not remain under seal “*absent the most compelling reasons.*”<sup>57</sup> The Court explained: “If the rationale behind access is to allow the public an opportunity to assess the correctness of the judge’s decision . . . documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge’s decision.”<sup>58</sup> This rationale applies regardless of the party’s intent in seeking access to the previously sealed documents.<sup>59</sup>

The Second Circuit’s holding, which is consistent with previous rulings by other District and Circuit Courts,<sup>60</sup> is an example of the increased burden litigants may have in attempting to protect private interests. Indeed, the defendants in *Lugosch* risked having their private information revealed when they filed a motion for summary judgment attaching twenty-five sealed documents totaling approximately 4000 pages. In opposition, the plaintiff filed fifteen volumes of sealed appendices, as well as a sealed memorandum of law, and a sealed response to defendants’ statement of material facts.<sup>61</sup> Newspaper companies filed motions to intervene to obtain access to the filed documents, which the district court held in abeyance pending the outcome of the motion for summary judgment.<sup>62</sup> The Second Circuit concluded that the motion could not be held in abeyance because the “contested documents are judicial documents to which a presumption of immediate access applies under both the common law and the First Amendment.”<sup>63</sup> The Second Circuit remanded the matter for a determination of whether the presumption is overcome by countervailing factors,<sup>64</sup> but the opinion reveals the risk to defendants in filing sealed documents in support of their motion.

Technology has compounded the risk as electronic filing becomes mandatory by courts that have yet to discover an efficient method to protect private interests. The protection of those interests may require the court to reconsider the weight provided to certain factors in balancing the right to access versus confidentiality.

#### IV. ELECTRONIC FILING

Prior to electronic filing, routine review of court records was uncommon. Generally, the litigants, interested persons, and the press were the only individuals or entities that would rummage through copies of documents that were on file

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57. *Id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)).

58. *Id.* (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43 (C.D. Cal. 1984)).

59. *Id.*

60. See *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404 (1st Cir. 1987); *Joy*, 692 F.2d at 880; *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991); *Publicker*, 733 F.2d at 1059; *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985).

61. *Lugosch*, 435 F.3d at 113-14.

62. *Id.* at 114.

63. *Id.* at 113.

64. *Id.*



with the court clerk.<sup>65</sup> Today, with the advent of electronic filing, the public at large can collect a vast amount of personal and private information regarding a case with the click of a mouse.<sup>66</sup> Access to such information can have a substantial impact on the privacy concerns of litigants and those individuals named in a court document. Personal and sometimes embarrassing information will now be readily accessible and businesses now have to worry about their commercial and private documents.

A concern with a process called “data mining” was discussed at the recent Sedona Conference regarding protective orders, confidentiality, and public access held last September 8, 2005 at Seton Hall School of Law. Mary Sue Henifin and Robert J. Levin argued that electronic filing may now permit businesses to “data mine” court dockets and search for cases involving their competitors.<sup>67</sup> The potential for abuse is unlimited as electronic filing may “turn court records into a massive data bank” that can be accessible to the world instantaneously upon filing.<sup>68</sup> This potential for abuse, clearly impacts the balance of factors concerning the right to access and confidentiality.<sup>69</sup> The idea of grueling searches through archives will become extinct and new measures will have to be developed to protect privacy interests.<sup>70</sup> Until the courts are able to find an effective balance and/or method to protect privacy interests, litigants will be more reluctant than ever to file information that they know will become readily accessible.<sup>71</sup> Courts must acknowledge that the development of the common law right and First Amendment right to access did not take into account the technological advances that have occurred; thus, the balancing of this new technological factor must be addressed in order to address what will likely contribute to the “vanishing trial.”

## V. NEW JERSEY LOCAL FEDERAL CIVIL RULE 5.3

As an example of the judiciary’s failure to address the side effects of electronic filing, consider the consequences with New Jersey’s new Local Federal Rule 5.3. The rule was recently adopted on February 24, 2005, and addresses the sealing of discovery materials, materials associated with judicial proceedings, and provides public notice of all requests to seal. The rule permits parties to enter into written agreements to keep materials produced through discovery confidential. In addition, the rule addresses the treatment of settlement agreements. However, subsection (c)(1) of the rule requires that any request to “seal, or otherwise restrict public access to, any materials or judicial proceedings shall be made by formal

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65. George F. Carpinello, *Public Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule’s Future in a World of Electronic Filing*, 66 ALB. L. REV. 1089, 1089 (2003).

66. See generally Tal Z. Zarsky, “Mind Your Own Business!”: Making the Case For the Implications of the Data Mining of Personal Information in the Forum of Public Opinion, 5 YALE J.L. & TECH. 4 (2003).

67. Mary Sue Henifin & Robert J. Levin, *A Business Perspective on Local Rule 5.3 & the Sedona Guidelines on Best Practices for Protective Orders, Confidentiality & Public Access*, Sedona Conference (2005).

68. Carpinello, *supra* note 65, at 1121.

69. David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, at \*II.N.6.

70. *Id.*

71. *Id.*

motion . . . [and] shall be filed electronically under the designation ‘motion to seal materials’ or ‘motion to seal judicial proceedings.’” Subsection (c)(2) lists specific factors that the motion papers must address in regard to confidentiality. Those factors are consistent with the factors outlined in *Pansy*.<sup>72</sup>

A literal reading of the rule suggests that “at the moment a motion to seal is denied, confidential documents submitted in connection with that motion automatically and immediately be converted to public status.”<sup>73</sup> The rule appropriately abides by the presumption of the right of access, but makes no concessions for the fact that materials deemed private by the litigant will be readily accessible by the public at large if ruled not to overcome the presumption. The failure to make such a concession or to address the reality of the litigants’ concerns may add to a litigant’s reluctance to proceed through the courts. The efficiency of electronic filing should not be permitted to contribute to the “vanishing trial.” Other methods should certainly be utilized to address litigants’ concerns, including permission to file hard copies when such concerns exist. Such an option takes into consideration the accessibility of the information sought to be protected while permitting interested parties to gain access.

Courts need to consider limiting access to such documents by permitting the burden to shift when the party protecting such information establishes that the seeking party has no legitimate interest in the information. Such a burden shift would prevent competitors from accessing confidential information for the sole purpose of gaining an upper hand. By preventing access to those parties that have an interest that is inconsistent with the public policy reasons set forth in favor of the right to access, the policy remains effective. Requiring the seeking party to explain the purpose of its inquiry, when the purpose has been questioned, is not inconsistent with promoting the court’s perception of fairness. The court’s decision to deny access should be reviewable and open to the public scrutiny. In addition, such a requirement promotes fairness to the litigants utilizing the courts, takes into consideration the change in time, and in the long run will help to address the “vanishing trial” phenomenon.

## VI. CONCLUSION

With the advent of electronic filing, our court system is able to utilize technology to make the system more efficient; but, as with most substantial changes, new concerns need to be addressed. Scholars have identified the “vanishing trial” phenomenon, its potential causes, and the affect it may have or is having on our judicial system. The concerns associated with electronic filing may add to the causes of the “vanishing trial,” if they are not addressed. Litigants with an interest in keeping certain discoverable material confidential are less likely to participate in a judicial process if there is a potential risk that the court may make the confidential information easily accessible to the public. Courts need to consider the policy reasons associated with the right to access and consider as a new factor to the balancing test the concerns of the litigant in regard to electronic filing. The failure to do so may further reduce the utilization of the court system. While utili-

72. *C.f.* N.J. Rule X with *Pansy*, 23 F.3d at 786-91.

73. ALLYN Z. LITE, NEW JERSEY FEDERAL PRACTICE RULES, (2006) (cm.4 on R. 5.3).

zation of alternate dispute resolution is not evil, it should not be chosen because the court system cannot accommodate legitimate privacy concerns of litigants.