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## Let in a Little Sunshine: Limiting Confidential Settlements in Missouri

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## Comment

# Let in a Little Sunshine: Limiting Confidential Settlements in Missouri

### I. INTRODUCTION

In 1982, priest Robert M. Burns was treated for pedophilia.<sup>1</sup> After discussing his history with the director of clergy personnel, he was assigned to St. Thomas Aquinas Church in Jamaica Plain and reassigned to St. Mary's Church in Charlestown in 1985.<sup>2</sup> Allegations of sexual abuse at both parishes surfaced in 1991.<sup>3</sup> The victims sued, but in 1993, judges in Suffolk County sealed all the records related to the lawsuits against Burns.<sup>4</sup> In support of sealing the documents, the Archdiocese argued that Burns was no longer a threat to children.<sup>5</sup> Additionally, the Church removed Burns from all priestly functions.<sup>6</sup> However in 1995 Burns was found guilty of luring two children to an apartment in New Hampshire and sexually molesting them.<sup>7</sup> After the numerous stories of sexual abuse by priests broke, one Cardinal sent a letter to his parishoners stating, "Ultimately, there is nothing to be gained by secrecy except avoidance of scandal . . . which too often, has allowed it to continue—we must address it with humble contrition, righteous anger and public outrage. Telling the truth cannot be wrong."<sup>8</sup>

Stories like this one have generated controversy over sealing court records, especially when the public has an interest in the information surrounding the lawsuit.<sup>9</sup> The controversy has created a dichotomous split among legal

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1. Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue out of Public Eye*, THE BOSTON GLOBE, Jan. 31, 2002, at A1.

2. *Id.*

3. *Id.*

4. Walter V. Robinson & Sacha Pfeiffer, *Priest Abuse Cases Sealed by Judges*, THE BOSTON GLOBE, Feb. 16, 2002, at A1.

5. *Id.*

6. Robinson, *supra* note 1, at A1.

7. Robinson & Pfeiffer, *supra* note 4, at A1.

8. Lucy Dalglish et al., *Comments of the Reporters Committee for Freedom of the Press, National Press Club, The Radio-Television News Directors Association, and Society of Professional Journalists* (Sept. 27, 2002), in PUBLIC COMMENTS ON PROPOSED REVISIONS TO UNITED STATES DISTRICT COURT DISTRICT OF SOUTH CAROLINA LOCAL CIVIL RULE 5.03, at 39, 43, at <http://www.scd.uscourts.gov/Notices/COMLR503.pdf> (quoting statement of Roman Catholic Cardinal William Keeler of Baltimore).

9. See generally Martha Neil, *Confidential Settlements Scrutinized, Recent Events Bolster Proponents of Limiting Secret Case Resolutions*, A.B.A. J., July 2002, at 20.

One court philosophized that "[t]o close a court to public scrutiny of the

scholars.<sup>10</sup> At one extreme, Professor Dore asserts that courts have become a conduit for agreements resembling blackmail.<sup>11</sup> On the other end of the spectrum, pro-secrecy advocates argue that confidentiality agreements, protective orders and sealing documents are the only way to protect litigants from being required to divulge sensitive, private information.<sup>12</sup> Almost without exception, members of the defense bar and members of conservative organizations form the coalition in favor of secrecy.<sup>13</sup> The anti-secrecy alliance consists of plaintiff's

proceedings is to shut off the light of the law." *State v. Cottman Transmission Sys. Inc.*, 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988). "Sunshine laws," which to varying degrees allow access to public documents, are a result of this sentiment. One author argues about the Firestone cases:

[T]he fact that the current legal regime in most jurisdictions operates to allow defendants, plaintiffs, and the courts to hide information unearthed in lawsuits that might save lives does not make it right. Indeed, any legal regime that facilitates the keeping of secrets as lethal as the secrets Firestone was allowed to keep may be a legal regime in need of serious repair. Certainly, the public is likely to feel that way, and we insiders (by insiders I mean lawyers and judges), must recognize the possibility that the system we have lived with for years, the system we are comfortable with, may be just as perverse as our fellow citizens seem to think it is.

Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?*, 30 HOFSTRA L. REV. 783, 787 (2002).

10. See generally PUBLIC COMMENTS, *supra* note 8. One legal scholar points out:

Of course, the dramatis personae of this debate are not the black and white warring factions . . . nor can the disagreements between them fairly be described as entirely pro-secrecy or antisecrecy platforms. In actuality, the debate consists of more subtle arguments that reflect broader systemic tensions in the civil justice system.

Laurie Kratky Dore, *The Confidentiality Debate*, TRIAL MAG., Oct. 1, 2000, at 18.

11. Koniak, *supra* note 9, at 797-800. Another author likened secrecy agreements to the crime of compounding. He reasoned that compounding agreements, which are agreements not to inform authorities of a crime that has been committed against yourself in return for some consideration, are illegal. Letter from John P. Freeman, Professor of Law, University of South Carolina, to The Honorable Joseph F. Anderson, Jr. (July 11, 2002), in PUBLIC COMMENTS, *supra* note 8, at 132, 133-37. Public policy dictates that secrecy agreements should likewise be void and illegal. *Id.* at 137.

12. See generally Paul S. Doherty III, *Public Policy Favors the Liberal Use of Protective Orders in Products Liability Litigation*, 4 PRODUCTS LIABILITY L.J. 143 (1993).

13. See generally PUBLIC COMMENTS, *supra* note 8. For example, in a statement in opposition to a federal sunshine in litigation bill, one attorney from Lawyers for Civil Justice spoke. He discussed the make-up of the organization as "corporations, defense bar organizations, and corporate defense practitioners." *The Sunshine in Litigation Act of 1993: Hearings on S. 1404 Before the Subcommittee on Courts and Administrative Practice*, 104th Cong. (1994) (statement of Alfred W. Cortese on behalf of Lawyers for Civil Justice).

lawyers, members of liberal organizations and the media.<sup>14</sup> Law professors and other legal scholars are split between the two camps but very few occupy the middle ground between the two divergent views.<sup>15</sup>

This Comment will first address the different ways that parties are able to keep secret information obtained during discovery and litigation. Next, it will address how different jurisdictions control public access, focusing specifically on the current laws and rules in Missouri. Finally, the Comment will suggest components of an ideal “sunshine in litigation” statute and how the law in Missouri currently compares to that ideal.

## II. KEEPING RECORDS SECRET

There are several different ways of keeping secret information obtained in litigation. First, litigants can privately settle claims between themselves without court involvement.<sup>16</sup> Usually this type of agreement is a contract with a confidentiality clause.<sup>17</sup> Generally, the contract will provide for remedies if a party discloses the terms of the settlement.<sup>18</sup> Second, courts can approve settlements that are agreed upon by parties that contain confidentiality clauses.<sup>19</sup> One benefit of a court-approved settlement is that the parties can enforce the contract without filing a separate lawsuit,<sup>20</sup> however, only cases involving minors

14. *Id.* The President of the American Trial Lawyers Association, an organization composed primarily of plaintiffs’ attorneys, “attacked the ‘morally corrupt use of secrecy’ in the ‘dirty little world of confidentiality agreements’ that resulted in ‘Orwellian suppression of the truth.’” Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 463-64 (quoting Bill Wagner, *Secrecy Betrays Justice*, NAT’L L.J., July 24, 1989, at 17, 22).

15. Marcus, *supra* note 14, at 463-64. Marcus takes the middle ground. *Id.*

16. Letter from Stephen Gillers, Vice Dean & Professor of Law, New York University, to The Honorable Joseph F. Anderson, Jr. (Sept. 27, 2002), in PUBLIC COMMENTS, *supra* note 8, at 34, 36.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994). If a court uses a settlement agreement in its decision to dismiss a case, “a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. . . . Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.” *Id.*

It has been noted that “for large insurers and corporations dealing with potentially large products liability cases, secrecy—and a judge’s order enforcing it—literally can be worth millions.” Eric Frazier, *Judges Veto Sealed Deals: U.S. Bench in S.C. Won’t OK Them*, NAT’L L.J., Aug. 12, 2002, at A1.

and class actions must be filed with the court.<sup>21</sup> The court that originally approved the settlement can find a party in contempt of its order if the party discloses information contained in the agreement.<sup>22</sup> Third, a court can issue a protective order.<sup>23</sup> The protective order can take three forms; it can be a specific order, a blanket order, or an umbrella order.<sup>24</sup> A specific order requires that a particular piece of information or document remain confidential.<sup>25</sup> A blanket order gives the holder the power to designate, with a duty of good faith, which materials are confidential and should receive protection.<sup>26</sup> An umbrella order designates all discovery as confidential without requiring a duty of good faith.<sup>27</sup> A party may seek protective orders prior to discovery, during discovery, or after discovery.<sup>28</sup> If a party violates a protective order, she will be found in contempt by the court issuing the order.<sup>29</sup> Finally, a court can seal, or impound, all or part of the records related to a lawsuit.<sup>30</sup> When this happens, the restricted information is usually separated from the nonconfidential information held by the

21. Letter from Amanda Frost, Representative of the Public Citizen Litigation Group, to The Honorable Joseph F. Anderson, Jr. (July 11, 2002), in PUBLIC COMMENTS, *supra* note 8, at 5, 6.

22. Letter from Stephen Gillers, *supra* note 16, at 36.

23. Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 76-77 (2000). "If the protective order is sought after the material has been presented to the court, it may take the form of a request to seal the records." *Id.* at 77.

24. Steven R. Kramer, *Protecting Dissemination of Business Secrets During Discovery*, N.Y. ST. B.J., Jan. 1997, at 24, 26.

25. *Id.*

26. *Id.* This type of order is judicially favored. One judge characterized blanket orders as "essential to the function of civil discovery." Bayer AG & Miles, Inc. v. Barr Labs., Inc., 162 F.R.D. 456, 465 (S.D.N.Y. 1995).

27. Kramer, *supra* note 24, at 26. "Through the use of umbrella protective orders, manufacturers commonly attempt to shift the burden to the plaintiff to show why the documents should not be protected." Ross T. Turner, Note, *Rule 26(c)(7) Protective Orders: Just What Are You Hiding Under There, Anyway?*, 87 KY. L.J. 1299, 1315 (1999).

28. Friedenthal, *supra* note 23, at 76-77.

29. See FED. R. CIV. P. 37(b)(2)(D). In *Kehm v. Procter & Gamble Manufacturing Co.*, a protective order was issued during pre-trial discovery to protect the defendant's trade secrets. *Kehm v. Procter & Gamble Mfg. Co.*, 580 F. Supp. 913, 915 (N.D. Iowa 1983), *aff'd*, 724 F.2d 630 (8th Cir. 1984). After the close of the trial, the plaintiff's attorney sold "litigation kits" to similarly situated plaintiffs and their attorneys. *Id.* Although the court believed the attorney's actions were not willful, the court found the plaintiff's attorney in violation of the protective order. *Id.* at 915-16. Consequently, he was held in contempt of court and ordered to pay damages and the defendant's attorney's fees. *Id.* at 917.

30. Letter from Stephen Gillers, *supra* note 16, at 36-37.

court clerk.<sup>31</sup> The nonconfidential records are often kept in a completely different room and are open to public access.<sup>32</sup>

Even with all the controversy surrounding secrecy in litigation, when there is no rule or legislation prohibiting secrecy both plaintiffs and defendants have incentives to keep quiet. Plaintiffs often do not want intimate details about their lives disclosed to the public.<sup>33</sup> Often, they just want their money as soon as possible so they can move on with their lives.<sup>34</sup> Agreeing to keep information confidential speeds up discovery and sometimes even aids in settling the case.<sup>35</sup>

Defendants, who are often corporations, have other motives. Generally, they wish to protect confidential business information from dissemination to competitors.<sup>36</sup> Furthermore, bad publicity harms a company's reputation and ultimately its bottom line; a company will be willing to pay a premium for silence to keep negative information from the public.<sup>37</sup>

In addition to the litigants, judges have an incentive to acquiesce to confidential settlements when both parties agree.<sup>38</sup> If the judge signs off on the settlement, that is one less lawsuit clogging the already overburdened docket. Without some sort of rule or legislation prohibiting secrecy, confidentiality will remain the norm.<sup>39</sup>

31. See S. 686, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002).

32. *Id.*

33. Friedenthal, *supra* note 23, at 86.

34. Neil, *supra* note 9, at 20.

35. Doherty, *supra* note 12, at 149. One author also claims:

The discussions of confidentiality with plaintiffs' lawyers often follow a familiar choreography, with plaintiffs agreeing to secrecy first, then later protesting . . . . "Often, it feels to me as though it comes at a time when they're trying to put pressure on the defendant to settle: 'Oh, we're going to give this to the press if you don't talk settlement with us and give us lots of money and lots of big attorney's fees.'"

Bob Van Voris & Matt Fleischer, *Critics: Sealed Tire Deals Can Kill but Clients' Needs Often Require Them*, *Trail* [sic] *Lawyers Say*, NAT'L L.J., Sept. 25, 2000, at A1 (quoting statement of Lorna Schofield, co-chair of the discovery rules task force for the ABA).

36. Michael K. Brown & Lisa M. Baird, *Businesses' Privacy and Property Rights Threatened in California*, ANDREWS TIRE DEFECT LITIG. REP., Apr. 2001, at 11.

37. Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 16, 2002, at A13.

38. Letter from Jane Kirtley, Representative of the Silha Center for the Study of Media Ethics and Law, to The Honorable Joseph F. Anderson, Jr. (Sept. 24, 2002), in PUBLIC COMMENTS, *supra* note 8, at 79, 85. "[I]n an understandable desire to compensate plaintiffs, a judge may be reluctant to undermine an agreement struck between parties in the name of promoting abstract notions of openness and accountability." *Id.*

39. *Id.* "Although not all settlements are secret, the practice is ingrained in . . . legal culture, lawyers said." John Monk, *Secret Court Deals in S.C. Face Scrutiny*, THE

### III. SECRECY IN MISSOURI

Chapter 610 of the Missouri Revised Statutes gives very little direction to courts considering sealing documents. The Chapter creates a presumption of open access to public records;<sup>40</sup> however, the definition of “public records” is quite limited in judicial contexts.<sup>41</sup> The statute specifically excludes any documents that consist of opinions or recommendations of a decision-making body.<sup>42</sup> Chapter 109 directly addresses judicial records<sup>43</sup> and creates a presumption of openness.<sup>44</sup> Other statutes proscribe confidentiality in certain judicial proceedings.<sup>45</sup>

STATE, July 14, 2002, at A12.

40. MO. REV. STAT. § 610.022.5 (2000). The statute provides that “[p]ublic records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter.” *Id.*

41. MO. REV. STAT. § 610.010(6) (2000). Public record is defined as:  
 [A]ny record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds; provided, however, that personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years. The term “public record” shall not include any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting  
 . . . .

42. *Id.*

43. *Id.* § 109.180. The statute provides:

Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement.

44. *Id.*

45. *E.g.*, MO. REV. STAT. § 210.846 (2000) (hearings held under the Uniform Parentage Act); MO. REV. STAT. § 211.321 (2000) (juvenile court records); MO. REV. STAT. § 453.120 (2000) (records from adoption proceedings); MO. REV. STAT. § 630.140

Missouri courts have also made it clear that there is a common law presumption that court records will remain open absent specific reasons for closure.<sup>46</sup> Even with this common law presumption, the Missouri Supreme Court enacted a court operating rule that expressly gives the public the right to inspect all Missouri state court records.<sup>47</sup>

On January 9, 2002, Senator Steelman introduced Senate Bill Number 686 to the Missouri State Senate.<sup>48</sup> The bill was sent to the Senate Judiciary Committee on February 26, 2002, and remained there until the end of the legislative session.<sup>49</sup> A similar bill was not introduced during the 92nd session.

The bill, had it been enacted, would have amended Chapter 610 of the Missouri Revised Statutes.<sup>50</sup> Also, it would have added a Section regarding access to court records.<sup>51</sup> The bill provided that all records would be open to the public unless sealed by a court.<sup>52</sup> Other than in cases of juvenile records, a court would only be able to seal a record upon a successful motion by a party.<sup>53</sup> The party would have to show that (1) good cause exists to seal the record,<sup>54</sup> (2) the

(2000) (court records received from mental health facilities).

46. *Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Employees*, 43 S.W.3d 293, 300 (Mo. 2001). The court reasoned:

It is undisputed . . . that there is a common law right of public access to court and other public records. . . . [A]buse of discretion is present when trial court orders inexplicably seal court records, do not articulate specific reasons for closure, or do not otherwise demonstrate a recognition of the presumptive right of access.

*Id.*

47. MO. SUP. CT. OP. R. 2.02. The Rule “does not apply to records that are confidential pursuant to statute, court rules or court order; judicial or judicial staff work product; memoranda or drafts; or appellate judicial case assignments.” *Id.*

48. Summary of S. 686, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002), *available at* <http://www.house.state.mo.us/bills02/bills02/sb686.htm>.

49. *Id.*

50. S. 686, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002). Chapter 610 of the Missouri Revised Statutes governs access to public documents.

51. The Section defines records as:

[A]ll documents, instruments and things which constitute or are related to a civil action, including but not limited to all documents produced in response to discovery, pleadings, claims, applications, answers, replies, court dockets, motions, memoranda, forms, notices, rulings, orders, judgments, depositions, transcripts, interrogatories, requests for production, admissions, exhibits, consents, settlements, waivers, dismissals and withdrawals; except documents determined by the court to be work product.

*Id.*

52. *Id.*

53. *Id.*

54. *Id.*



request is narrow and the least restrictive means of protecting the party from the disclosure,<sup>55</sup> (3) the record to be sealed contains a trade secret or other confidential business information,<sup>56</sup> (4) public access would harm the reputation of the party,<sup>57</sup> and (5) the interest in keeping the information confidential outweighs the public interest in the material.<sup>58</sup> Only then could the court order that the record be sealed.<sup>59</sup> Additionally, under the bill, if the record were ordered to be sealed parties in other proceedings could access the information during discovery if the records were relevant.<sup>60</sup>

#### IV. OTHER STATE AND FEDERAL LEGISLATION

Proposed legislation like Missouri's Senate Bill 686 has been introduced in several states,<sup>61</sup> but few states have passed "sunshine in litigation" laws.<sup>62</sup> Some courts have also taken the initiative by creating court rules regarding sealing documents and secret settlements when the state legislature has not provided guidance through legislation.<sup>63</sup> The rules and statutes are each quite different in scope, definiteness and requirements for keeping information secret.<sup>64</sup>

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. The use of the word "and" indicates that all circumstances must be present before a record could be sealed.

60. *Id.*

61. S. 1254, 1999-2000 Reg. Sess. (Cal. 1999); H.R. 3239, 91st Gen. Assem., Reg. Sess. (Ill. 1999); S. 2707, 2002 Gen. Assem., Jan. Sess. (R.I. 2002). There have also been several federal bills introduced but not passed by Congress. *E.g.*, Sunshine in Litigation Act of 2003, S. 817, 108th Cong. (2003); S. 957, 106th Cong., 1st Sess. (1999); Sunshine in Litigation Act of 1995, S. 374, 104th Cong. (1995); 140 CONG. REC. 7719 (103d Cong. Amend. 1930 to S. 687) (1994); S. 1408, 103d Cong., 1st Sess. (1993); H.R. 3803, 102d Cong., 1st Sess. (1991).

62. See ARK. CODE ANN. §§ 16-55-122, 25-18-401 (Michie Supp. 2001); FLA. STAT. ch. 69.081 (2002); N.C. GEN. STAT. § 132-1.3 (2002); OR. REV. STAT. § 30.402 (2001); WASH. REV. CODE §§ 4.24.601, 4.24.611 (Supp. 2000).

63. FED. R. CIV. P. 26; D.S.C. CIV. R. 5.03; GA. UNIF. SUP. CT. R. 21.2; TEX. R. CIV. P. 76a.

64. "Many jurisdictions confine their statutes to the sealing of judicial records. Others speak only to confidential settlements involving a government agency or to particular public hazards. Still others narrowly address the sharing of information in specified, related litigation or merely express a hortatory open-records policy." Dore, *supra* note 10, at 18.

*A. Federal Rule of Civil Procedure 26*

Federal Rule of Civil Procedure 26 allows courts to issue protective orders upon a motion by a party from whom discovery is sought.<sup>65</sup> Additionally, although the Rule specifically deals with protective orders sought during discovery, many courts have used the Rule's requirements for protective orders sought at other times in the litigation process.<sup>66</sup> The drafters of the Rule purposely made the provision vague, anticipating that the courts would interpret the clause and its applicable exceptions.<sup>67</sup> In order for the court to issue a protective order, the movant has the burden of showing "good cause."<sup>68</sup> Courts

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65. FED. R. CIV. P. 26(b)(5)(c). Rule 26 provides in part:

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including 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 person 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 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.

66. *See* *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096 (9th Cir. 1999) (requiring good cause criterion in motion to intervene); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994) (confidentiality by party agreement still requires showing of good cause); *Glickstein v. Neshaminy Sch. Dist.*, No. 96-6236, 1998 U.S. Dist. LEXIS 2021, at \*5 (E.D. Pa. Feb. 25, 1998) (good cause showing is not just a formality).

67. Notes of Advisory Committee, FED. R. CIV. P. 26.

68. FED. R. CIV. P. 26(b)(5)(c). Some courts have broken down the inquiry into a three-step analysis:

First, is the matter sought to be protected "a trade secret or other confidential

have interpreted “good cause” to mean that the party seeking the protective order must show that the discovery request seeks information that is a trade secret,<sup>69</sup> and if disclosed, the information may harm the party.<sup>70</sup> Harm is proven by asking the court to take judicial notice of the damage caused or, preferably, by an affidavit by a person with specific knowledge of the potential harm caused by disclosure.<sup>71</sup>

### B. South Carolina’s Rule

In November 2002, the United States District Court for the District of South Carolina enacted Local Civil Rule 5.03.<sup>72</sup> After the Rule was proposed in July 2002, the court accepted feedback about the Rule and allowed suggestions for amending it.<sup>73</sup> There were numerous comments ranging from those who encouraged the court to enact the Rule as written or even broaden the coverage

research, development, or commercial information” which should be protected? Second, would disclosure of such information cause a cognizable harm sufficient to warrant a protective order? Third, has the party seeking protection shown “good cause” for invoking the court’s protection?

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

69. See *infra* notes 111-12 and accompanying text. “This provision does not specifically refer to the public interest. Rather, it applies primarily to commercially sensitive information that might cause the defendant some competitive harm.” Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL’Y 53, 57 (2000).

However, not all trade secrets are protected. See *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981); *Garcia v. Peeples*, 734 S.W.2d 343, 346 (Tex. 1987).

70. *Snowden ex rel. Victor v. Connaught Labs., Inc.*, 136 F.R.D. 694 (D. Kan. 1991). Damage to reputation and goodwill is thought by most courts as insufficient to constitute good cause. See *Smith v. BIC Corp.*, 121 F.R.D. 235, 242-43 (E.D. Pa. 1988), *aff’d*, 869 F.2d 194 (3d Cir. 1989); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982).

The potential that one party may share information learned through discovery is also thought to be insufficient to constitute good cause by most courts. See *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992); *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295 (7th Cir. 1981); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153-54 (W.D. Tex. 1980); *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987). *But see Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993).

71. See *Kramer*, *supra* note 24, at 25-26. The suggested harm must be specific and particular. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *United States v. Garrett*, 571 F.2d 1323, 1326 (5th Cir. 1978).

72. D.S.C. Civ. R. 5.03.

73. *Id.*

of the Rule, to those who thought the Rule would inhibit settlements and further burden the court's docket.<sup>74</sup>

The Rule, as adopted, created a mandatory process for parties seeking to seal documents.<sup>75</sup> First, the party seeking to seal documents must file a motion with an accompanying memorandum that (1) specifically identifies which documents are to be sealed, (2) explains why sealing the documents is necessary, (3) explains why there are no less drastic alternatives to sealing and (4) addresses the factors considered in governing case law.<sup>76</sup> Additionally, the party must attach a non-confidential index listing the documents to be sealed along with the actual documents.<sup>77</sup> The judge is then required to review the documents *in camera*.<sup>78</sup> After the motion is filed with the court, the clerk of the court is required to post a public notice of the motion.<sup>79</sup> The most controversial part of the Rule addresses settlement agreements. The Rule provides that “[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule.”<sup>80</sup>

### *C. Florida's Sunshine in Litigation Act*

Florida's statute, known as the “Sunshine in Litigation Act,”<sup>81</sup> is comprised of two components. The first part of the statute prohibits courts from entering an “order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting

74. See generally PUBLIC COMMENTS, *supra* note 8.

75. D.S.C. CIV. R. 5.03. The Rule expressly does not apply to agreements and documents not filed with the court. *Id.*

76. *Id.* The factors referred to are illustrated in *Nixon v. Warner Communications, Inc.* They are: (1) whether the records are being sought for proper purposes, (2) whether disclosure would enhance the public's understanding of the occurrence, and (3) whether the information has already been made public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-608 (1978).

77. D.S.C. CIV. R. 5.03.

78. *Id.*

79. *Id.* R. 5.03(B). “The Clerk shall provide public notice of the Motion to Seal in the manner directed by the Court. Absent direction to the contrary, this may be accomplished by docketing the motion in a manner that discloses its nature as a motion to seal.” *Id.*

80. *Id.* R. 5.03(C). This is quite a deviation from normal judicial discretion. Many critics of secret settlement agreements claim that many judges seal records as a matter of course. See, e.g., Weinstein, *supra* note 69, at 58. But see *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, No. AC23014, 2002 WL 1837910, at \*6 (Conn. Super. Ct. June 12, 2002), *rev'd*, 825 A.2d 153 (Conn. App. Ct. 2003), *cert. granted*, 832 A.2d 71 (Conn. 2003) (court chastises lower court for sealing court records relating to pedophilia by priests).

81. FLA. STAT. ch. 69.081 (2002).

themselves from injury which may result from the public hazard.”<sup>82</sup> It is striking that the statute also makes private contracts and agreements unenforceable if they conceal public hazards.<sup>83</sup> The statute protects trade secrets that “are not pertinent to public hazards.”<sup>84</sup> It allows “substantially affected person[s]” standing to contest any protective order issued by a court in violation of the statute.<sup>85</sup>

The second portion of the statute makes agreements and contracts settling a claim against the government unenforceable.<sup>86</sup> The statute gives standing to any person to contest “an order, judgment, agreement, or contract that violates” the statute.<sup>87</sup>

#### D. Texas Rule of Civil Procedure 76a

The Texas Supreme Court showed its steadfast support for public access to court records when it adopted Texas Rule of Civil Procedure 76a.<sup>88</sup> The Rule creates a presumption of openness for court records<sup>89</sup> and specifically sets out

82. *Id.* ch. 69.081(3). So far, there are not many cases interpreting the statute. In *AcandS, Inc. v. Askew*, the court narrowed the application of the statute by claiming the statute was inapplicable in an asbestos case because the public was aware of the dangers related to the product. *AcandS, Inc. v. Askew*, 597 So. 2d 895, 898-99 (Fla. Dist. Ct. App. 1992). For other cases interpreting the statute see *Ronque v. Ford Motor Co.*, 23 Fed. R. Serv. 3d (West) 1299 (M.D. Fla. 1992), and *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226 (Fla. Dist. Ct. App. 1995).

83. FLA. STAT. ch. 69.081(4) (2002). The statute states 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.” *Id.*

84. *Id.* ch. 69.081(5).

85. *Id.* ch. 69.081(6). Specifically, “Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement, or contract that violates this section.” *Id.*

86. *Id.* ch. 69.081(8)(a). The statute reads:

Any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced.

*Id.*

87. *Id.*

88. TEX. R. CIV. P. 76a.

89. The Rule defines court records as:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

when a court may seal records upon the motion of a party.<sup>90</sup> Upon the motion by a party seeking to seal court records, the court will hold a public hearing concerning the potential sealing order.<sup>91</sup> All interested parties are able to intervene in the proceeding.<sup>92</sup> If the court decides to seal the records, it must make a written finding explaining the reasoning behind the decision.<sup>93</sup>

## V. COMPONENTS OF AN IDEAL STATUTE OR RULE

In state and federal courts that do not limit secrecy by statute or court rule, lawyers face an ethical dilemma. Often, it is in the best interest of their clients to either propose secrecy or succumb to the demand of opposing counsel seeking secrecy.<sup>94</sup> Only when the legislature or court takes away the choice of secrecy does this dilemma cease to exist. For this reason, this Comment takes the

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

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

Some attorneys believe that the Rule is unconstitutional because of the breadth of documents covered in the definition of “court records.” Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 653 (1991). Specifically, “unfiled discovery should not be subject to the same demands of openness and access.” *Id.*

90. TEX. R. CIV. P. 76a(1). The party seeking to seal the court must show:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

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

*Id.*

91. *Id.* R. 76a(3), (4).

92. *Id.* R. 76a(4).

93. *Id.* R. 76a(6).

94. Alan B. Morrison, *The Secrecy Scandal*, THE BOSTON GLOBE, Apr. 14, 2002, at E7. The author claims that “[e]ven the lawyers who had grave misgivings about suppressing the facts could do nothing. Breaking the secrecy pledge would place at risk their license and their fee, and jeopardize their client’s settlement.” *Id.*

position that state legislatures, or Congress preferably,<sup>95</sup> should enact a statute delineating when secrecy in litigation is not appropriate.<sup>96</sup>

### A. General Presumption of Access

Historically, there has been a presumption of access to the courts.<sup>97</sup> “Courts are public institutions, paid for by tax dollars for the purpose of producing public goods such as court precedents, legal rules and factual accounts of contested events.”<sup>98</sup> Specifically, when all records related to a suit are sealed, judges in future cases are unable to use the sealed records as precedent. Courts have held that once a suit is before a court, the dispute loses its private nature and becomes the “public’s case.”<sup>99</sup> The presumption of openness provides a check on the integrity of the court system.<sup>100</sup>

The court should balance many interests when deciding whether to keep information learned during litigation secret.<sup>101</sup> Judges should consider the privacy interest of the parties involved in the suit. If the party is seeking disclosure for improper purposes, such as to embarrass the litigant, the court should take this into account when making its decision.<sup>102</sup>

95. See *infra* notes 125-27 and accompanying text.

96. Letter from Jane Kirtley, *supra* note 38, at 80. But see Richard A. Zitrin, Open Courts with Sealed Files: Secrecy’s Impact on American Justice, What Judges Can and Should Do About Secrecy in the Courts, Presentation at 2000 Roscoe Pound Institute Forum for State Court Judges (July 29, 2000), available at <http://www.roscoepound.org/new/00zitrin.pdf> (suggesting a change in the Rules of Professional Conduct would solve the dilemma).

97. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984).

98. Letter from Amanda Frost, *supra* note 21, at 5-9.

99. E.g., *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1014 (11th Cir. 1992).

100. *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571. “[T]he rights of the public in maintaining open records . . . [is a] check . . . on the integrity of the system, insured by that public access.” *Id.*

Justice Holmes wrote long ago:

The chief advantage to the country which we can discern . . . is the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

*Cowley v. Pulsifer*, 137 Mass. 392, 394 (Mass. 1884) (citations omitted).

101. See generally Weinstein, *supra* note 69, at 58 (discussing different interests to be weighed).

102. In *Nixon v. Warner Communications, Inc.*, the Supreme Court held:

The judge should consider the interests of similarly situated litigants seeking information for litigation and future litigants who may bring a similar suit. Discovery sharing should be encouraged. Making each plaintiff duplicate the discovery process that has already been endured by another plaintiff is inefficient and wastes both the time of the court and the time of the litigants.<sup>103</sup>

The judge should also weigh the interest of regulatory agencies in knowing the information. Although there are laws that require agencies to report defective products that may cause serious injuries to consumers,<sup>104</sup> manufacturers are not zealous in reporting information that can later be used against them in court. Judges should not allow manufacturers of dangerous products to bury the problems under protective orders and sealing orders. Agencies need to be able to access information in order to protect the public.<sup>105</sup> Finally, judges should

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. For example, the common-law right of inspection [of court records] has bowed before the power of a court to insure that its records are not “used to gratify private spite or promote public scandal” through the publication of “the painful and sometimes disgusting details of a divorce case.” . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant’s competitive standing . . .

Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) (quoting *In re Caswell’s Request*, 29 A. 259, 259 (R.I. 1893)) (citations omitted).

103. See Turner, *supra* note 27, at 1308-09. The author argues: Less apparent [than lawyers obstructing access to evidence], though perhaps much more threatening, is the notion that in attempting to force each individual plaintiff to try her case in a vacuum, a manufacturer’s request for a protective order drags the entire judicial system into the vacuum with her. In a never-ending parroting of the idea that the protective order will simplify discovery in this case, the effect on later litigants is brushed aside. Nonetheless, the court will undoubtedly see the same manufacturer, in similar cases, making this argument again and again. The “[j]udicious division of labor between a large number of defense counsel can tax the limits of plaintiff’s counsel[] . . .” In doing so, it also taxes the limits of an already overburdened court system.

*Id.* (quoting Albert H. Parnell, *The Coordinated Group Defense*, FOR THE DEFENSE, Nov. 1980, at 19) (citations omitted).

104. E.g., The Consumer Product Safety Act, 15 U.S.C. §§ 2051-73 (2000).

105. One author cites the argument of James Rooks, Associate General Counsel for the American Trial Lawyers Association, writing:

[W]hen crucial information about defective products is hidden in secret settlements, it’s impossible for regulatory agencies to do their jobs. From the lawsuits over exploding Ford Pinto gas tanks of the 1970s to the Firestone tire suits of the 1990s, settlements cloaked in secrecy kept regulatory agencies as well as consumers in the dark for years . . .



weigh the public's interest in the information. Consumers, as well as regulatory agencies, should be aware of dangerous products and dangerous people as soon as practicable.

Many secrecy proponents argue that sunshine statutes will inhibit settlements and could result in more trials. Practically speaking, even with a "sunshine in litigation" statute in place, both plaintiffs' attorneys and defense attorneys will still have incentives to settle claims. A public trial will draw more attention than even a public settlement would.<sup>106</sup> The costs associated with litigating a claim and the risk associated with potentially large jury verdicts will remain. In states like Florida and Texas where statutes and rules are in effect, there has been no increase in litigation.<sup>107</sup> In fact, legal scholars have pointed to a decrease in litigation since the "Sunshine in Litigation Act" was enacted in Florida.<sup>108</sup>

Secrecy proponents also argue that if secrecy was liberally extended, discovery would be delayed as requests met more resistance.<sup>109</sup> It is unclear if that would be the case. Lawyers already insist that discovery requests are met with resistance and delay.<sup>110</sup>

Diana Digges, *Confidential Settlements Under Fire in 13 States*, 2 ANN. ATLA-CLE 2769 (2001).

106. Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A13.

107. Digges, *supra* note 105.

108. *Id.*

109. *See, e.g.*, Friedenthal, *supra* note 23, at 76-77. Friedenthal argues: [E]ven without court interference, discovery might well be limited because parties will be reluctant to come forward voluntarily with anything that might be damaging if it were to become public. The value of cooperation with regard to discovery should not be underestimated. The cost to the parties and the legal system of continuous fights over what discovery is or is not appropriate can be high and disheartening.

*Id.*

110. One lawyer claims "[t]he game is, number one, to stall and, number two, to try to protect as broad a set of materials as they can." Van Voris & Fleischer, *supra* note 35. In the public comments to the proposed court Rule in South Carolina, one attorney wrote of his experience with the tobacco industry when he was suing for Medicaid cost recovery. He spoke of the defense counsel gloating about using the tobacco industry's resources to wear down plaintiffs during discovery. In an internal memorandum that was later disclosed, the opposing counsel wrote, "To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his." Letter from Edward J. Westbrook, to The Honorable Joseph F. Anderson, Jr. (Aug. 30, 2002), in PUBLIC COMMENTS, *supra* note 8, at 105, 105.

*B. Presumption Against Access to Trade Secrets and Confidential Business Information*

The court should make every attempt to protect litigants from the disclosure of confidential business information that does not relate to concealment of a public harm or hazard. Judges routinely use the factors set forth in the Restatement of Torts<sup>111</sup> to determine if a trade secret exists.<sup>112</sup> If the trade secret relates to a public harm or hazard it should be disclosed regardless of whether it would cause a competitors to gain knowledge of a business' trade secrets. Most likely a disclosure of this type would not cause a competitive disadvantage for the business because competitors would not want to adopt practices that could potentially lead to liability. The protection by secrecy of nonhazardous trade secrets would protect a company from competitors gaining knowledge about the company's inner workings.<sup>113</sup>

*C. Confidentiality Should be Liberally Extended to Parties During Pre-Trial Discovery*

Confidentiality, enforced through temporary protective orders, should be liberally extended during discovery. In the justice system today, discovery is

111. Comment b of § 757 of the Restatement of Torts sets forth factors to determine whether information should be treated as a trade secret:

- (1) [T]he extent to which the information is known outside [the holder's] business;
- (2) the extent to which it is known by employees and others involved in the holder's business;
- (3) the extent of measures taken by [the holder] to guard the secrecy of the information;
- (4) the value of the information to [the holder and his competitors];
- (5) the amount of effort or money expended by [the holder] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1981).

112. *Id.* The definition provides, in part, that a trade secret is:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business.

113. It would also protect the court from potential Fifth Amendment suits. Failure to protect confidential business information may be considered a taking. Gregory Gelfand, *'Taking' Informational Property Through Discovery*, 66 WASH. U. L.Q. 703, 718-19 (1988).

largely a “private affair.”<sup>114</sup> Unless there is some sort of dispute, documents are generally not even filed with the court.<sup>115</sup> The purpose of discovery is for litigants to prepare for trial;<sup>116</sup> much of the information learned through discovery is not even relevant to the trial.<sup>117</sup> The standard for seeking information through discovery is much lower than the relevancy that must be shown in order to introduce evidence during a trial.<sup>118</sup> Once information gained through discovery has been introduced into evidence, it should only then become

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114. See Doherty, *supra* note 12, at 143.

115. *Id.* at 154. “[P]re-trial discovery—including document inspections, depositions and the answering of interrogatories—usually takes place in the lawyer’s office or on the business premises of the producing party. Furthermore, many district courts have adopted local rules that eliminate the need to file some or all of the discovered material.” *Id.*

116. *Id.* “[I]n the daily practice of law, it is the underlying assumption of both the courts and the litigants that discovery compels the disclosure of information solely to assist preparation for trial.” *Id.* (quotation marks omitted).

117. See FED. R. CIV. P. 26(b)(1); MO. R. CIV. P. 56.01(b)(1). Under the liberal discovery regime set up by the Federal Rules of Civil Procedure:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Relevant information need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

118. Evidence must be relevant to be admissible at trial. See FED. R. EVID. 402. Under the Federal Rules of Evidence, “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* R. 401.

part of the public record.<sup>119</sup> Courts should protect parties' privacy interests from potential abuses of the liberal discovery regime.<sup>120</sup>

#### *D. Presumption Against Access to Settlement Terms and Amounts*

Settlement terms and amounts should not be disclosed without good cause. There are several factors that influence the settlement amount that have little, if anything, to do with the merits of the case.<sup>121</sup> Whether the jurisdiction is pro-plaintiff or pro-defense may affect the settlement. Whether the parties have assets to litigate may influence the settlement amount. A party may settle a meritless claim in order to avoid costly litigation. There really is no public interest, other than of idle curiosity, in the amount and terms of settlement.<sup>122</sup>

#### *E. Judges Required to Make Written Findings When Records Sealed or Confidentiality Ordered*

If a judge should decide to issue a protective order or seal records of a suit, he should then be required to make written findings of law and fact as to why confidentiality was ordered. If it is not as easy for the judge to issue an order, it will be less likely that secrecy can be rubber stamped. The judge will be required to think through the interests to be weighed in each individual case; just the process of writing down the findings will also require a more thoughtful analysis of the interests at stake.

119. Even the Supreme Court has held that the public right of access is of subordinate standing when the information was learned through discovery. In *Seattle Times Co. v. Rhinehart*, the court held that facts learned through discovery:

[A]re 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. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

120. "It is clear from experience that pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties." *Id.* at 34-35.

121. *See generally* Weinstein, *supra* note 69, at 61-62 (describing factors that may influence settlements).

122. Letter from Howard B. Stravitz, University of South Carolina, to The Honorable Jean Hofer Toal (Aug. 21, 2002), in PUBLIC COMMENTS, *supra* note 8, at 27, 28-29 (citing Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 484-85 (1991)).

### F. Discretion of Judges Must be Retained

Most importantly, the discretion of the judge must be retained. Hard and fast rules may be easier to apply, but they will not fit well with every case. The judge should maintain the autonomy to balance the relevant interests in each case. Judges are in the best position to determine whether secrecy is the best choice since they have the experience and the specific facts relevant to the controversy.

## VI. THE FUTURE IN MISSOURI

The fact that Missouri still primarily relies on common law<sup>123</sup> when deciding whether to administer secrecy puts all litigants on shaky ground. Because the common law boundaries are not well developed, parties will remain uncertain about whether secrecy is an option. The 2002 Bill proposed in the legislature<sup>124</sup> was a step in the right direction, but until Congress enacts a statute, the laws will be dramatically different depending on what is the law in the jurisdiction where the suit is brought.

Congress needs to clear up the murkiness in this area of the law.<sup>125</sup> Until then, litigants will be motivated to forum shop for the jurisdiction with the laws that benefit their position the most.<sup>126</sup> A federal law will also take the uncertainty out of which state's law to apply in consolidated cases, which are increasingly popular.<sup>127</sup> It is clear that the public is ready for a law that will protect citizens from pedophiles like Robert Burns. State statutes and court rules are a step in the right direction, but until Congress steps into this political quagmire, uncertainty will be the only rule.

RHIANA SHARP

123. See *supra* note 46 and accompanying text.

124. See *supra* note 60.

125. Although a federal statute amending Chapter 111 of Title 28 of the United States Code will not bind states, most states turn to the Federal Rules of Civil Procedure for guidance on drafting state rules. For example, Federal Rule of Civil Procedure 26(b)(5)(C) governing protective orders is virtually identical to Missouri Rule of Civil Procedure 56.01(b)(6)(c) governing protective orders in Missouri's state courts.

126. Friedenthal, *supra* note 23, at 98. "Hopefully, both federal and state courts can be united in support of such principles. Differences in treatment [of dispensing secrecy] are not sound. Neither the possibility of protection nor a threat of disclosure should become a motivation for forum shopping." *Id.*

127. Weinstein, *supra* note 69, at 61. "Whatever the method chosen, it should be a national approach whenever cases are consolidated on a national basis. It is not possible to control the litigation effectively if each state's privileges and secrecy laws are applied." *Id.*