

Secrecy in the Courts: Protective Orders, the Sealing of Information, and Confidential Settlement Agreements

Presented by the ISBA
Individual Rights & Responsibilities
Section Council

Friday, June 26, 1992
9:00 am - 12:00 pm

Planning Chairs:

Kurtis B. Reeg, Gallop, Johnson & Neuman, St. Louis; William A. McNutt, Lowe, Moore, Susler, McNutt & Wrigley, Decatur; Linda L. Zazove, Land of Lincoln Legal Services, East St. Louis

Program Moderator:

Kurtis B. Reeg, Gallop Johnson & Neuman, St. Louis

This seminar will explore multiple facets on the current hot topic of the use of protective orders to seal documents, pleadings and testimony, and the ever-increasing use of confidential settlement agreements and releases. Outstanding representatives of the plaintiff and defense bar, the media, and the judiciary, will focus on the pros and cons, uses and abuses, underlying issues and concerns, and the impact of the use of these devices on all the interested parties and the public. A panel discussion permitting input from the audience will round out this lively discussion on a very compelling topic.

9:00 - 9:15 am

Introduction

Kurtis B. Reeg, Gallop Johnson & Neuman, St. Louis

Leonard M. Ring, Leonard M. Ring and Associates, P.C., Chicago

9:15 - 9:45 am

The Use of Protective Orders and Confidentiality: The Plaintiff Perspective

This presentation will explore current issues involving the use of protective orders and the sealing of pleadings, testimony, and documents in personal injury, products liability, toxic tort, and other cases from the perspective of a plaintiff's attorney. The use and implementation of confidential settlement agreements will also be discussed. Issues involving the litigants, courts, and the public will be considered.

9:45 - 10:15 am

The Use of Protective Orders and Confidentiality: The Defense Perspective

This segment of the program will examine the use of protective orders and the sealing of pleadings, testimony, and documents from the perspective a defense attorney, as well as explore the implications of confidential settlement agreements and their effect on the litigants, public, and the judicial system.

C. Barry Montgomery, Williams & Montgomery, Ltd., Chicago

10:15 - 10:30 am

Break

10:30 - 11:00 am

**Secrecy in the Courts:
The Media Perspective**

This presentation will address First Amendment and other constitutional considerations, as well as other trade and business issues involving the use of protective orders and confidential settlement agreements. The impressions of and implications for the public and issues important to the media will be considered.

Jack C. Doppelt, Attorney/Associate Professor,
Medill School of Journalism, Northwestern
University, Evanston

11:00 - 11:30 am

**Protection and the Province
of the Courts:
The Judicial Perspective**

A judge experienced in large litigation matters will offer his views regarding issues involved in - and the pros and cons of - the use of protective orders and confidential agreements.

Honorable Paul E. Riley, Chief Judge, Madison
County Circuit Court, Third Judicial District,
Edwardsville

11:30 - 12:00 pm

Panel Discussion

This final segment of the program will allow for a free exchange between members of the panel as well as the audience to consider issues raised during the morning.

PRIVACY VS. PUBLICITY: SOME TACTICS AND TURMOIL SURROUNDING
ACCESS TO LITIGATION INFORMATION

By
Kurtis B. Reeg*
Gallop Johnson & Neuman
St. Louis, Missouri

There are varied and often conflicting viewpoints regarding the extent to which the public should have access to litigation related documents. Constitutional principles, the common law, rules of civil procedure, and the inherent power of the courts have all been employed by both the proponents and opponents of public access to such information and materials. If any common ground appears to exist among the various viewpoints, it is that public access should not be absolute. Most seem to agree that certain information should be protected from dissemination to the general public. The debate centers on the degree of access and the procedures to be used to limit access in any particular case.

While the term "secrecy" implies the hiding of the truth from the public, this debate is better understood in terms of striking a balance between the public's right to know and a civil litigant's right to privacy. Public access to criminal proceedings has been authoritatively decided by the U.S. Supreme Court. The public has a right to attend a criminal trial (Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)), preliminary hearings (Press-

* The author gratefully acknowledges the research assistance of his associate, Tod J. O'Donoghue, Esq.

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Enterprise Co. v. Superior Court, 478 U.S. 1 (1986)), and voir dire (Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)). The public's right of access to civil litigation is less clear.

In civil litigation and, particularly, large tort lawsuits and business disputes, numerous people and groups have an interest in the litigation. The plaintiff has an interest in discovering all relevant information which will either be admissible or otherwise lead to admissible evidence at trial. The defendant, brought into the litigation by the plaintiff, and the trade or industry group of which it is a member, wants a fair and quick resolution of the dispute often with the least amount of public involvement possible. For instance, if the lawsuit alleges that the defendant placed a defective product into the market, many other potential plaintiffs and their attorneys may assert an interest in viewing all discovery materials made available by the defendant. The public and/or media may contend that they have a right to know of any potential hazard to the public at large. Finally, the judiciary, the neutral party, has a right to inspect any and all available information in order to make its rulings.

Thus, the various parties have conflicting interests. What becomes apparent is that not all of these interests can be satisfied with any decision a particular court makes regarding access. A defendant will be reluctant to produce discovery material without assurances that use of the information will be restricted to the litigation and, perhaps, to only particular parties. While the individual plaintiff may be amenable to this,

an attorney representing the plaintiff may object because the information may be useful for another lawsuit or may be of interest to other attorneys, and, therefore, is marketable.

The tension between the attorney and the client also raises ethical considerations. For example, a plaintiff's attorney who had signed a non-disclosure agreement promising to keep trade secret information confidential, later sold certain documents to over thirty (30) different attorneys, for which he was charged with contempt. In re Iowa Freedom of Information Council, 724 F.2d 658, 660 (8th Cir. 1984). In the recent case of Kraszewski v. State Farm General Ins. Co., 139 F.R.D. 156 (N.D. Cal. 1991), the Plaintiffs' attorney obtained documents from the Defendant pursuant to a protective order which limited the use of the material to the litigation, a class action sex discrimination lawsuit. Later, the Plaintiffs' attorney sought a modification of the protective order which would permit use of the discovery in a class action age discrimination lawsuit filed by that same attorney against the same Defendant. When the Defendant contended that Plaintiffs' counsel had misused the discovery, the Court noted that, in the Ninth Circuit, discovery is conducted in public. While the Court reiterated that the sex discrimination suit should not be used to gather information wholly irrelevant to the case, it nonetheless ruled that the protective order would be modified so as to allow Plaintiffs' counsel to utilize records in the separate age discrimination case. Id.

The affects of cases like Kraszewski on the discovery process should give pause to all sides in the public access debate because such rulings will likely make future disclosure more difficult and adversarial. If defendants cannot disclose information secure in the knowledge that its use will be confined to the instant litigation, information which is not squarely related to the very issues in the case may be withheld. At least, the temptation to withhold information exists. In addition, given the costly nature of litigation and its far-reaching consequences, both the defendants and their attorneys are under increasing pressure to minimize pretrial disclosures, assert form over substance, and resist harmful disclosure in ways which test the limits of legitimate advocacy. The result has been the proliferation of discovery abuses on both sides. Such a reaction, while perhaps understandable, runs counter to the very essence of discovery -- the full disclosure of all information. It has been suggested that the move toward more public access will eventually have dramatic and unfortunate consequences for civil litigation in federal court. See, Arthur R. Miller, "Privacy, Secrecy, and the Public Interest," Sept. 1990 For The Defense, p. 7, 11 ("Miller"). (With permission of the publisher, a copy of this article is attached as Attachment A).

Rather than advocate a particular position, the remainder of these comments summarize and are designed to raise questions concerning: (1) discovery pursuant to protective orders; (2) the sealing of court documents; and (3) confidentiality of settlement

agreements. An attempt has been made to include references to rules and cases relevant to both state and federal court.

1. PROTECTIVE ORDERS REGARDING DISCOVERY

No First Amendment right to access exists which would allow a litigant to disseminate information gained only by virtue of the trial court's discovery mechanisms. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984). Discovery and its trappings are matters of legislative grace. Id. Pretrial depositions and interrogatories are not public components of a civil trial and were not open to the public at common law. Id. at 33. Generally, in modern practice, these are both conducted in private. Thus, federal courts, in determining whether to enter a protective order under Rule 26 of the Federal Rules of Civil Procedure, are not required to apply any constitutional balancing test. Public Citizen v. Liggett Group, 858 F.2d 775, 788 (1st Cir. 1988).

Although the U.S. Supreme Court has held that public access does not extend to civil cases to the extent to which it applies to criminal cases, some courts have noted that the policy considerations and history in the criminal context apply to civil proceedings. In re Coord. Pretrial Proc. In Petroleum Prod. Antitrust Litigation, 101 F.R.D. 34, 41 n. 8 (C.D. Cal. 1984). In In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983), the Court stated that the presence of the public and press at civil proceedings would enhance and safeguard the quality of the fact-finding process, just as it does at criminal trials. However, given the multiple agendas at work for courtroom

spectators of whatever persuasion, and the supposed objectivity of the judicial fact-finding process, such a conclusion seems open to serious debate.

While in both the civil and criminal arenas the defendant did not choose to be in court, any constitutional safeguards which protect the criminal defendant may well be detrimental to the civil defendant. Civil cases, by definition, involve disputes between purely private parties. It is doubtful, at least in theory, that a civil defendant, in a dispute with an alleged "equal", needs the same protection as a criminal defendant, who is faced with the overwhelming power of the state. Can and should a civil defendant be allowed to forego some of the "protection" of public scrutiny in exchange for the retention of its privacy rights? Does a civil defendant lose her, his or its privacy rights merely as a result of being a party to a lawsuit, or by providing information to the plaintiff under court-ordered discovery?

Under both the Federal Rules of Civil Procedure and the Illinois Supreme Court Rules, a party may obtain by discovery any relevant document which is admissible as evidence or is reasonably calculated to lead to the discovery of admissible evidence at trial. See Fed. R. Civ. P. 26; Ill. S. Ct. R. 201; United Nuclear Corp. v. Energy Conversion, 110 Ill. App.3d 88, 441 N.E.2d 1163, 1174 (1st Dist. 1982). Under Rule 201(c)(1), a court may issue a protective order regarding discovery and under Rule 201(m) the local court rules may regulate or prohibit the filing of discovery materials. See also, Fed. R. Civ. P. 5(d).

The privacy rights of civil defendants and the necessity of protective orders become especially evident when one considers the overwhelmingly broad sweep of discovery under both the federal and Illinois rules. Perhaps it is helpful to distinguish between two non-attorney groups which may seek to obtain pretrial discovery material. In one group are potential plaintiffs who may bring a similar cause of action against the same or similar defendant, while in the other is the public/media which wants to disseminate the pretrial discovery information in order to "protect the public good." It is arguable that the interests of the former group appear to be easier to reconcile with broad discovery because these potential plaintiffs can obtain information subject to protective orders. The public/media will doubtfully agree to any type of protective order because they specifically seek the information in order to make it available to the general public. Such dissemination would not be limited to information which a trial court has determined to be both relevant to the issues and not unduly prejudicial to the parties, criteria typically considered by a court in determining whether to issue a protective order.

Permitting public access to material admitted into evidence is consistent with the general provision that courtroom proceedings be open to the public. However, as we all know, not all discovery material is admitted into evidence because of its irrelevancy or for some other reason. Public disclosure of such information raises the specter of lawsuits being filed solely to obtain information about a defendant, industry, product, or subject of a

possible suit. Cf., Glaser v. A. H. Robins Co., Inc., 950 F.2d 147 (4th Cir. 1991), cert. denied (May 26, 1992) (court appointed expert who gained access to confidential information pursuant to a protective order, agreed to be bound thereby, and was paid over \$300,000 for his services, would not be relieved from the protective order so he could market his services to individual Dalkon Shield claimants.)

Another question regarding access to discovery material is whether the public has any right of access where the parties have agreed to use alternative dispute resolution mechanisms ("ADR"). When parties agree to use ADR, they choose to forego employing the "public" court as a mediator, and, therefore, appear to be even less interested in the topic in dispute becoming a source of public debate. However, one can easily imagine advocates of public access making the same arguments regarding disclosure of material which becomes available through ADR. Such a demand may have chilling effect on parties choosing ADR and result in more cases being placed on already crowded trial dockets.

From the perspective of an attorney, perhaps the greatest issue to be resolved is the extent to which granting public access to court documents and pretrial material will result, at least with respect to certain kinds of cases (such as product liability and trade secret), in the end of, or at least significant alterations to, discovery as we now know it. Because both the federal and the Illinois rules permit liberal discovery, civil defendants, faced with the prospect of potentially damaging material being

disseminated to the public, may be faced with the challenge and temptation to disclose only that information which is absolutely relevant and clearly admissible, drawing fine lines, splitting hairs, and perpetuating discovery wars which have recently become the rage in litigation, whether the case is simple or complex. Without the use of protective orders insuring that discovery material will not be used outside the context of the litigation, the real effect of too much public access may be to secret documents or deny discovery altogether.

Alternatively, defendants will seek judicial review on a document-by-document basis requesting that particular documents not be disseminated to the public. Courts today, using "umbrella" protective orders, conserve judicial resources permitting the producing party to designate as "confidential" any document it wishes. Samples of such orders from cases in which the author has been involved are attached as Attachments B and C. Under such orders, the court need only address whether particular documents should be subject to the protective order when either a party to the lawsuit or an interested third party seeks judicial review. If unlimited access is permitted, discovery will no longer be "self-executing through the cooperation of counsel" and will necessitate tremendous amounts of court time in determining the relevance and admissibility of all discovery documents. See, Wauchop v. Domino's Pizza, 138 F.R.D. 539, 552 (N.D. Ind. 1991).

The consequences of changing protective order practices under Rules 26(c) and 201(c) (1) would probably work more of a hardship on

plaintiffs as a group than defendants, because plaintiffs would have greater difficulty gaining access to data and there would be much greater resistance to settlement. See, Miller at 11. Additionally, there could be an adverse affect on the very objectives of Federal Rule of Civil Procedure 1 and §1-106 of the Illinois Code of Civil Procedure (Ill. Rev. Stats. ch. 110, §1-106) which provide for a just, speedy, and inexpensive determination of every action. The hue and cry surrounding more disclosure in court proceedings should be considered in light of the implications for the parties in discovery and trial proceedings.

2. THE SEALING OF COURT DOCUMENTS

Proponents of public access also argue that courts should not seal court records, at least not without adequate notice to the public. Again, as with protective orders, one of the main issues raised is how to strike a balance between the public's right to know and the privacy interests of the litigants. This issue is relevant for all litigants, for defendants are not the only parties which request that court documents be sealed; at times a plaintiff also seeks to protect his or its privacy rights. See Doe v. Shady Grove Hosp., 89 Md.App. 351, 598 A.2d 507 (1991) (plaintiff with AIDS sued a hospital for wrongful disclosure using a pseudonym).

A presumptive right of access applies to trial exhibits admitted into evidence. Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3rd Cir. 1988). Whether such a right attaches to documents filed in conjunction with summary judgment motions is disputed. Compare Rushford v. New Yorker Magazine, 846 F.2d 249, 252 (4th Cir. 1988)

(presumptive right attaches whether or not motion is granted) with In re Reporters' Committee for Freedom of the Press, 773 F.2d 1325, 1339 (D.C. Cir. 1985) (no right of access until after judgment is entered) and Grundberg v. Upjohn Co., 140 F.R.D. 459, 465 (D. Utah 1991) (no right of access attaches if the documents were submitted under seal.) See also, Republic of Philippines v. Westinghouse Elec., 139 F.R.D. 50, 59 (D. N.J. 1991) (citing cases). Any presumption, however, is not absolute and a court deciding whether to continue protection for confidential business information must balance the interest in disclosure against that of the owner of the information. Rushford, 846 F.2d at 253 (indicating that countervailing interests must heavily outweigh the public interest in access).

The sealing of court records is a matter of the court's inherent power to control its own records. Cummings v. Beaton & Associates, 192 Ill. App.3d 792, 549 N.E.2d 634, 638, 139 Ill. Dec. 908, 912 (1st Dist. 1989). This inherent power of control has been held to be superior to a statutory public right of access. Deere & Co. v. Finley, 103 Ill. App.3d 774, 431 N.E.2d 1201, 1203, 59 Ill. Dec. 444, 446 (1st Dist. 1981). Yet, the Seventh Circuit has held that the district court must be sensitive to the public's right of access when permitting documents to be filed under seal. U.S. v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989).

Many states have recently enacted provisions dealing with the sealing of court records. In general, these provisions call for a formal order and require that notice be given to interested third

parties. See, Article VIII, Mass. Trial Ct. Rules; Rule 15, Wash. Gen. Ct. Rules; Part 216 of N.Y. Uniform Rules for Trial Ct.; and Rule 76a, Tex. R. Civ. P. These provisions do not preclude the court from sealing documents, but require that a hearing be held and the court issue formal findings. The author understands that a subcommittee of the Illinois Supreme Court Committee on Jury Instructions in Civil Cases is currently considering a similar scheme for submission to the Supreme Court. As such, these provisions merely follow the general trend that there be a balancing between the needs of the public and the privacy interests of the parties involved in the litigation.

3. SETTLEMENT AGREEMENTS

While some commentators argue that by keeping the terms and conditions of settlement agreements confidential, members of the public may be exposed to potentially hazardous conditions (See, Bob Gibbons: "Secrecy v. Safety, Restoring the Balance," December 1991 ABA Journal 74 (discussing settlements involving silicone breast implants, Halcion, and artificial heart valves)), plaintiff and defense attorneys alike have suggested and executed confidential settlement agreements. One form of such an agreement utilized by the author, which specifies the amount of the consideration paid for the release as the agreed-to amount of special damages recoverable for breach of the confidentiality provision, is attached as Attachment D. Public policy favors voluntary settlements which obviate the need for expensive and time-consuming litigation. Bass v. Phoenix Seadrill/78, Ltd., 749

F.2d 1154, 1164 (5th Cir. 1985). Settlement before trial also conserves scarce judicial resources. In re Smith, 926 F.2d 1027, 1029 (11th Cir. 1991).

Illinois courts apparently agree that settlement agreements may be kept confidential. When properly sought, the defendant may seek a confidentiality order either through petitioning the court or through agreement of the parties. Northern Trust Co. v. Brentwood N. Nursing and Rehabilitation Ctr., Inc., 588 N.E.2d 467, 471, 167 Ill. Dec. 826, 830 (2d Dist. 1992). The trial court possesses inherent authority to protect the privacy of the parties, restrict the dissemination of discovery materials, and order that private information or trade secrets not be disclosed. Id. at 470-71.

Recent events surrounding silicone breast implants suggest that, at least in some instances, the concern regarding confidential settlement agreements may be unwarranted. In demanding that settlement agreements remain confidential, it is arguable that a manufacturer merely prolongs the inevitable. The public will probably learn of hazardous products through means other than litigation and settlement agreements. If a manufacturer continues to market a potentially hazardous product, that manufacturer does so at the risk of dramatically increasing its financial liability. Market forces, and not the disclosure of settlement terms, should eventually force a manufacturer to reveal or at least address problems with its products. On the other hand, while confidentiality agreements may keep the public from learning

details of the settlement and other facts within the knowledge of the litigants, the public already has knowledge of the existence of the underlying suit, its allegations, and the fact that the suit was concluded by settlement.

Some commentators assert that requiring confidentiality in settlement agreements puts the plaintiff's attorney in the untenable position of being forced to choose between the client and serving the public. Kierman and Huttler, "More Public Access to Discovery Documents?" Fall 1991 Litigation 19. This concern itself raises troubling ethical issues. Does not the attorney have a duty to zealously represent his client? By refusing to agree to confidentiality as a condition of settlement, thereby precluding settlement, has the attorney harmed the client? How can an attorney ever fully serve the public when the person she or he is duty-bound to represent is the client? Perhaps the attorney's desire to represent other parties or profit from the knowledge gained in the lawsuit are the bases for resisting confidentiality and the protestations of the public good are but a smoke screen for a different agenda. Yet, can it be truly said that attorneys and the courts do not have broader obligations beyond the four corners of a lawsuit to improve the judicial system and society as a whole? These are difficult legal, ethical and moral questions, the ramifications of which need to be viewed on a scale wider in scope than our own personal and professional predispositions.

4. CONCLUSION

As no easy solution to this debate is imminent, it is incumbent upon both the bar and the judiciary to find ways to strike a balance between the public's right to know and a civil litigant's privacy rights. On the one hand, it is difficult to argue that the public should not receive information which would protect it from harm. At the same time, care must be taken lest in the desire for more openness the rights of the litigants and the ease of discovering information will be lost. Open discovery under the federal rules ushered in a new era in litigation whereby the issues are decided on the merits following full disclosure of all relevant information. All sides in this debate must work together to ensure that any move toward public disclosure will not cause a reversion to the days when discovery was even more secret and time consuming for both the litigants and the judiciary.

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