

## 2014 CONSUMER RIGHTS LITIGATION CONFERENCE

Session 7A: Ethical and Legal Restrictions on

Confidentiality Agreements and Sealed Documents

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### **Confronting Court Secrecy Issues From Discovery Through Settlement** *Measures to Protect Both Your Client and the Public Interest*<sup>1</sup>

Secrecy is one of the most powerful weapons used to prevent consumers, employees, and injury victims from having their day in court because it hinders our ability to identify threats to public health and safety and hold wrongdoers accountable. As Justice Brandeis noted, “[s]unlight is the best of disinfectants,”<sup>2</sup> yet we’re finding that the prevalence of over-broad protective orders and secret settlements has increased dramatically in the past few years.

Public Justice has a litigation project that is dedicated solely to exposing and preventing unwarranted court secrecy. The Court Secrecy Project is aimed at unsealing evidence of corporate wrongdoing that is unearthed in litigation, opposing overbroad protective orders and the sealing of court records, and educating the public about the dangers of litigation conducted behind closed doors. For example, we recently represented the Center for Auto Safety in defeating Cooper Tire Company’s efforts to seal the transcript of a public trial in which an Iowa jury concluded, based on evidence that Cooper was aware of dangerous defects in its tires, that Cooper was 100 percent at fault for a fatal rollover crash.<sup>3</sup> We also represented the medical journal *PLoS Medicine* in obtaining public access to volumes of discovery material involving drug giant Wyeth Pharmaceutical’s routine failure to disclose its role in preparing medical studies and articles touting its hormone replacement therapy drug as safe when—in fact— independent studies proved that the drug was deadly.<sup>4</sup>

What we’ve learned from litigating these types of cases is that, not only is the law extremely favorable to opponents of court secrecy, but also that courts understand and value the importance of a transparent judicial system. However, all too often, plaintiffs’ attorneys simply agree to overbroad protective orders, sealing orders, and secret settlements in order to “get on with” the litigation, minimize motion practice, or extract some perceived short-term strategic advantage. It doesn’t have to be this way.

This article offers five “DOs” and “DON’Ts” at each stage of litigation—from discovery through settlement—that plaintiffs’ counsel can use to push back against defendants who insist

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<sup>2</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People’s Money* 62, NATIONAL HOME LIBRARY FOUNDATION (ed.1933)).

<sup>3</sup> *Toe v. Cooper Tire and Rubber Co.*, 2010 WL 1652378 (Iowa Dist. Ct. Jan. 28, 2010).

<sup>4</sup> *In re: Prempro Products Liability Litig.*, No. 4:03-cv-01507-WRW (E.D. Ark. July 24, 2009).

on secrecy when it's not warranted. As you will see, the law is on your side. Courts have been very responsive to challenges that seek to curtail unwarranted secrecy, but the onus is on the plaintiffs' bar to help ensure that secrecy orders once again become the exception and not the norm.

### **Five Dos & Don'ts During Discovery**

Undoubtedly the defendants will be all too happy to send you their standard boilerplate protective order. But you can resist such a stipulation on the ground that it is an end-run around the Rule 26 "good cause" requirement for protective orders. Alternatively, you can seize control of the situation and propose your *own* protective order rather than trying to improve on the defendant's version, and the end document will be more likely to include the terms that are important to you. While there are several kinds of terms that merit discussion, we've identified what we believe are the most universally important terms to insist on—or avoid.

#### **1. DO make the proponent of secrecy demonstrate "good cause" under Rule 26.**

Under Rule 26 of the Federal Rules of Civil Procedure (and many state court counterparts), a party may publicly disseminate materials produced during discovery so long as there is no protective order directing otherwise.<sup>5</sup> Many defendants, however, will insist on a blanket protective order during discovery in an attempt to keep all information exchanged confidential. You can avoid stipulating to such an order because Rule 26 requires the defendant to show "good cause" to keep discovery material confidential.<sup>6</sup> Indeed, even if the parties have stipulated to the protective order, Rule 26 does not permit a court to enter the order unless it finds "good cause" to do so.<sup>7</sup> In order to allow appellate review of its discretion, the court must

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<sup>5</sup> See, e.g., *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) ("As a general rule, the public is permitted 'access to litigation documents and information produced during discovery.'" (quoting *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 857 (7th Cir. 1994) ("Absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit."); *Public Citizen v. Liggett Group*, 858 F.2d 775, 790 (1st Cir. 1988) ("It is implicit in Rule 26(c)'s 'good cause' requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public."), *cert. denied*, 488 U.S. 130 (1989); *Oklahoma Hosp. Ass'n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984) ("[P]arties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order"); *National Polymer Products, Inc. v. Bog-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981) ("The discovery rules themselves place no limits on what a party may do with materials obtained in discovery.").

<sup>6</sup> FED. R. CIV. PROC. 26(c).

<sup>7</sup> See, e.g., *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (noting that district court order denying motion to intervene was improper where district court failed to apply good cause requirement to individual documents under a blanket stipulated protective order); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996)

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lay out the factors it relied upon in the good cause determination,<sup>8</sup> and in some jurisdictions must cite to specific factual findings.<sup>9</sup>

Mere convenience alone does not satisfy the “good cause” standard.<sup>10</sup> Rather, proponents of secrecy are required to make fact-based demonstrations of the precise harms that would result if a particular discovery document or set of documents were made publicly available.<sup>11</sup> This harm “must be significant, not a mere trifle.”<sup>12</sup> In short, a proponent of secrecy can and should be put to its proof that there is “good cause” for secrecy in any given case.

## 2. DON’T agree to no-sharing or “return or destroy” provisions.

Defense counsel push protective orders in large part to quell collaboration and cooperative discovery efforts amongst plaintiffs’ counsel litigating similar cases. However, the law favors sharing. Indeed, many courts to address the issue have explicitly authorized (and even encouraged) the sharing of discovery between litigants in different cases.<sup>13</sup> As one court

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(“The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.”); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) (“It would be improper and unfair to afford an order presumptive correctness if it is apparent that the court did not engage in the proper balancing to initially determine whether the order should have been granted.”); *Jepson*, 30 F.3d at 858 (“Even if the parties agree that a protective order should be entered, they still have the burden of showing that good cause exists for issuance of that order.”).

<sup>8</sup> See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

<sup>9</sup> See, e.g., *Campbell v. U.S. Dept. of Justice*, 231 F. Supp. 2d 1, 7 (D.D.C. 2002).

<sup>10</sup> *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 343 (3d Cir.), cert. denied, 484 U.S. 976 (1987) (“The magistrate’s rationale that entry of the protective order would facilitate and streamline this litigation is not sufficient ‘good cause’ under Rule 26(c).”).

<sup>11</sup> See, e.g., *Foltz*, 331 F.3d at 1130 (“A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted.”); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (“‘Good cause’ is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.”); *Pansy*, 23 F.3d at 787–91 (same; also setting forth various factors that may be considered in weighing good cause balance); *Anderson v. Cryovac*, 805 F.2d 1, 7 (1st Cir. 1986) (“A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements.”) (citing 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2035, at 264–65 (1970)).

<sup>12</sup> *Cipollone*, 785 F.2d at 1121 (citing *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982)).

<sup>13</sup> See, e.g., *United Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1428 (10th Cir. 1990) (agreeing with other appellate courts that information sharing should be permitted).

aply noted, “there is no merit to the all-encompassing contention that the fruits of discovery in one case are to be used in that case only.”<sup>14</sup>

Likewise, if you’re suing a company that is involved in many lawsuits, the defendant will almost certainly try to include a term in the protective order requiring you to return or destroy all discovery materials subject to the order at the end of the litigation. However, in the event government authorities or other private litigants may be interested in “confidential” information produced in the case, that information should *not* be destroyed. To that end, an ABA resolution states: “No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order.”<sup>15</sup> In addition, some attorneys have successfully insisted on retaining complete client files, at least through the statute of limitations for malpractice actions, which in some jurisdictions is required by the rules of professional conduct.<sup>16</sup>

### **3. DO define “confidential materials” as narrowly as possible and insist on a mechanism for challenging confidentiality designations.**

Defendants frequently insist on blanket protective orders that allow them unilaterally to designate any document as “confidential,” but you should resist any language that gives complete carte blanche to the producing party to make this designation at its own unbridled discretion. At the very least, the protective order should state that a party may only designate a document as “confidential” where the party believes in good faith that “good cause” exists under Rule 26 for protecting the information from public disclosure.

In addition, the protective order must have a clear procedure for challenging any confidentiality designation – and, crucially, that the proponent of secrecy has the burden of demonstrating to the court the need for secrecy. In the words of the *Cipollone* Court, any other approach “would turn Rule 26(c) on its head.”<sup>17</sup> Thus, in the event of a disagreement over a

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<sup>14</sup> *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 32 (S.D.N.Y. 1970) (quoting FED. R. CIV. P. 1); see also *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981) (noting that cooperation amongst similarly situated litigants “promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources”) (citing *Williams*, 50 F.R.D. at 32); see generally *Duling v. Gristede’s Operating Corp.*, 266 F.R.D. 66, 76 (S.D.N.Y. 2010); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004).

<sup>15</sup> ABA Blueprint for Improving the Civil Justice System; Report to the American Bar Association Working Group on Civil Justice System Proposal, 74 (American Bar Ass’n 1992).

<sup>16</sup> See, e.g., Rule 4-1.15(j) of Missouri Rules of Professional Conduct (*available at* [http://www.law.cornell.edu/ethics/mo/code/MO\\_CODE.HTM](http://www.law.cornell.edu/ethics/mo/code/MO_CODE.HTM)) (providing that a lawyer shall not destroy a client’s file if s/he knows or reasonably should know “a criminal or other governmental investigation is pending related to the representation,” if “other litigation” is pending related to the representation, or if the file has “intrinsic value”).

<sup>17</sup> *Cipollone*, 785 F.2d at 1122; see also *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (“Under the provisions of umbrella orders, the burden of proof justifying the

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confidentiality designation, the document in question loses its confidential status unless the producing party obtains a court ruling that the information is entitled to protection.<sup>18</sup> Under such an approach, a plaintiff who opposes a confidentiality designation need only voice an objection, and then the defendant will have the burden of moving for court-ordered protection over a specific document or set of documents.

#### **4. DON'T accept that everything designated a “trade secret” really is a trade secret.**

Perhaps the most common ground used by defendants as a basis for designating a discovery document “confidential” is that the document contains trade secrets. Prior to making this designation, a defendant is supposed to “make ‘specific demonstrations of fact, supported where possible by affidavits and concrete examples,’ demonstrating that disclosure will result in clearly defined and very serious injury to its competitive and financial position.”<sup>19</sup> Defendants often skirt this required showing, and plaintiffs’ attorneys too often defer to unsupported “trade secret” designations when—in fact—the information produced either affects the public health, or involves matters of general knowledge within a particular industry—neither of which are considered to be “trade secrets” under the law.<sup>20</sup>

Moreover, even where trade secrets *are* contained in a discovery document, courts “have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed the[] claim to privacy against the need for disclosure.”<sup>21</sup> In short, just because the producing party alleges that a discovery document should be designated “confidential” on the basis that it contains a trade secret does not mean that you should accept this as so.

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need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party.”).

<sup>18</sup> See, e.g., *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 90 (11th Cir. 1989) (approving protective order that “allows the producing party to designate a document confidential unless the other party objects,” and in the event of an objection, allows the producing party to move the court for a ruling or concede the objection); *In re Alexander Grant*, 820 F.2d at 354 (approving protective order that provides that once a notice of objection to a confidentiality designation was received, the producing party had ten days to apply to the district court for a ruling to keep the material confidential).

<sup>19</sup> *Minter v. Wells Fargo Bank*, 2010 WL 5418910, at \*9 (D. Md. Dec. 23, 2010) (citation omitted); see generally *Foltz*, 331 F.3d at 1131-1132; *Arvco Container Corp. v. Weyerhaeuser Co.*, 2009 WL 311125 (W.D. Mich. Feb. 9, 2009).

<sup>20</sup> See, e.g., *Garcia v. Peebles*, 734 S.W.2d 343, 348 n.4 (Tex. 1987) (information on matters affecting the public health are not “trade secrets”); see also *Smith v. BIC Corp.*, 869 F.2d 194, 199-200 (3d Cir. 1989) (information involving matters of generally knowledge within a particular industry not considered “trade secrets”).

<sup>21</sup> *Smith*, 869 F.2d at 199.

## 5. DO use the public interest to your advantage.

Even if the party requesting a protective order establishes that the material it seeks to protect rises to the level of a trade secret or other legitimate basis for confidentiality, this does not end the inquiry. In fact, some courts will *still* deny confidentiality designations after finding that the public's interest in access outweighs the need for secrecy.<sup>22</sup> As Judge Posner once noted, "[t]he judge is the primary representative of the public interest . . . . He may not rubber stamp a stipulation to seal the record."<sup>23</sup> If your case involves issues affecting public health or safety, or could expose other types of corporate wrongdoing that the public has a strong interest in knowing, you should urge the court to consider the public's interest in accessing the discovery materials produced before allowing the defendant to shield the material from public inspection.

### **Five Dos & Don'ts to Avoid the Sealing of Court Records**

An even *higher* burden applies for sealing court records, which includes pleadings filed with the court, court orders, minute entries, hearing transcripts, trial exhibits, and even discovery materials filed with the court as attachments to dispositive motions.<sup>24</sup> With respect to this category of documents, the proponent of secrecy must demonstrate that sealing is warranted under both the federal common law *and* the First Amendment to the U.S. Constitution, which serve as independent grounds for challenging secrecy orders.

This means that, in some circumstances, even if a defendant is able to demonstrate "good cause" to keep a document confidential during the discovery phase of litigation, once that discovery document is either filed with the court as an attachment to a dispositive motion or used as a trial exhibit, it is treated as a "court record" and is subject to the more exacting standards of

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<sup>22</sup> *In re Roman Catholic Archbishop*, 661 F.3d at 424; *see also Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) ("[A] court always must consider the public interest when deciding whether to impose a protective order."); *Glenmede Trust*, 56 F.3d at 483 ("[T]he analysis [of good cause] should always reflect a balancing of private versus public interests."); *see, e.g., Ayyad v. Sprint Spectrum, L.P.*, 2009 WL 2197276, at \*6 (Cal. Ct. App. July 24, 2009) (concluding that the "ultimate issue before the trial court" was not whether documents should be sealed because they contained trade secrets, but rather "whether [the producing party's] interest in protecting its trade secret information outweighed the public's constitutionally-protected interest in access to civil trial proceedings and overcame the presumption of public access"); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 298 (Cal. Ct. App. 2002) ("The mere presence of a claimed trade secret does not carry a mandatory confidentiality requirement.").

<sup>23</sup> *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).

<sup>24</sup> Although the Rule 26 "good cause" standard applies to *unfiled* discovery materials and discovery materials filed with the court as attachments to *non*-dispositive motions, when discovery material is attached to a dispositive motion (most often a motion for summary judgment), that material is treated as a court record for the purposes of determining the public's right of access. *Foltz*, 331 F.3d at 1135.

the federal common law and First Amendment.<sup>25</sup> It is therefore important to recognize that the answer to the question of whether confidentiality is warranted with respect to any particular document depends on the stage of litigation and how that document will be used.

**1. DO require defendants to meet the more stringent standards under the federal common law and First Amendment to seal court records.**

We often challenge sealing orders under both the federal common law and First Amendment even though the analyses are similar and courts that reach one of the challenges often decline to address the other. Both types of challenges taken together, however, demonstrate an extremely compelling case for public access, and we urge you to consider this approach when faced with a motion to seal court records.

Under the federal common law standard for sealing court records, courts begin with a “strong presumption in favor of [public] access” when determining whether a particular court record should be shielded from public view.<sup>26</sup> This presumption of access can be overcome only if the proponent of secrecy demonstrates “compelling reasons” for secrecy that are supported by “specific factual findings.”<sup>27</sup> The standard is a stringent one: “compelling reasons” justifying secrecy have been found where disclosure of court records would result in “improper use of the material for scandalous or libelous purposes” or “infringement upon trade secrets,” but not much beyond that.<sup>28</sup>

The First Amendment places similar restraints on secrecy. The public’s right of access to court records under the First Amendment can be overcome only by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>29</sup> As is the case with the federal common law standard, this is a high threshold that is not easily met, as proponents of secrecy must identify specific reasons why secrecy is warranted, and must also demonstrate that any available alternatives to public access would not adequately protect their interests.<sup>30</sup> However, only the Second, Third, Fourth, Sixth, and

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<sup>25</sup> Because of these different standards, a discovery protective order should not address sealing of exhibits at trial. Any such determination should be expressly reserved for trial.

<sup>26</sup> *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194-95 (9th Cir. 2011) (citations omitted).

<sup>27</sup> *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006); *see also In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005) (“[O]nly the most compelling reasons can justify the non-disclosure of judicial records.”); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 11 (1st Cir. 2002) (applying compelling reasons standard to request to seal court records); *see generally Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (“Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.”).

<sup>28</sup> *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

<sup>29</sup> *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

<sup>30</sup> *Oregonian Pub. Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citation omitted).

Seventh Circuits have conclusively recognized a First Amendment right of access to court records in civil proceedings,<sup>31</sup> and the issue remains open in other jurisdictions.<sup>32</sup>

## **2. DO utilize the standards promulgated by the Office of U.S. Courts.**

In addition to the federal common law and First Amendment, the Office of U.S. Courts recently promulgated another tool for fighting unwarranted court secrecy in its Judicial Conference Policy on Sealed Cases.<sup>33</sup> The Policy is useful in situations where an entire case file has been sealed, which the Office of U.S. Courts describes as an act of “last resort.”<sup>34</sup> More specifically, the Policy states that sealing an entire case file should only occur when “required by statute or rule,” or when “justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information).”<sup>35</sup> The Policy further provides that “[a]ny order sealing a civil case [must contain] findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule.”<sup>36</sup> Finally, the policy dictates that in the event an entire case file is sealed, that seal should be “lifted when the reason for sealing has ended.”<sup>37</sup>

Although not binding on courts, the Policy is “at the very least entitled to respectful consideration,”<sup>38</sup> and should be brought to the court’s attention whenever you are faced with a request from an opposing party to seal the entire court file or when you need to access court records in a sealed case.

## **3. DON’T agree to seal court records merely because a defendant will be embarrassed.**

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<sup>31</sup> See, e.g., *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Publicker*, 733 F.2d at 1070; *Brown & Williamson Tobacco Corp.*, 710 F.2d 1165, 1177 (6th Cir. 1983).

<sup>32</sup> See, e.g., *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1374 (8th Cir. 1990) (“We find it unnecessary to our decision in this case to decide whether there is a First Amendment right of access applicable to civil proceedings.”); *San Jose Mercury News*, 187 F.3d at 1102 (“We leave for another day the question of whether the First Amendment also bestows on the public a prejudgment right of access to civil court records.”).

<sup>33</sup> Administrative Office of the U.S. Courts, *Judicial Conference Policy on Sealed Cases* (Sept. 13, 2011), available at <http://www.uscourts.gov/uscourts/News/2011/docs/JudicialConferencePolicyOnSealedCivilCases2011.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Hollingsworth v. Perry*, 130 S. Ct. 705, 712 (2010) (citation and quotation omitted).



A desire to avoid public scrutiny of alleged wrongdoing or embarrassment is not a sufficient legal basis for sealing court records. As the Ninth Circuit has explained, “[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.”<sup>39</sup> Often times, defendants will claim that a particular document should be protected on grounds that it will “embarrass” them. However, because *any* unintended release of information may tend to embarrass, “embarrassment” should justify sealing court records only when the embarrassment is “particularly serious,” and the defendant can otherwise satisfy the standards set forth by the federal common law and First Amendment.<sup>40</sup> Further, because embarrassment is ordinarily associated with non-economic harm—*i.e.*, bad feelings—it is “especially difficult” for a business enterprise or other corporate defendant to show embarrassment sufficient to merit a protective order.<sup>41</sup> A broad, general claim of injury to reputation cannot suffice to show embarrassment; rather, the business must make a specific showing of the significant economic harm it would suffer from disclosure.<sup>42</sup>

**4. DO demand that court records be unsealed immediately once the court rules that secrecy is not warranted.**

Court records are public by default. As soon as the court determines that there is no longer any valid basis for continued secrecy, the “default posture of public access prevails” and the court should immediately release improperly-sealed court records back into the public domain.<sup>43</sup> In one case, after a district court had ordered all documents to be sealed without requiring the proponents of secrecy to demonstrate that sealing was warranted under the law, the Ninth Circuit vacated the order and noted that “ordinarily, documents sealed under an unconstitutional order would be released immediately.”<sup>44</sup> However, noting that the parties may have filed certain documents in reliance on a protective order that had been entered in the case, the court gave the parties a mere *three days* to provide such “sufficiently specific . . . document-

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<sup>39</sup> *Foltz*, 331 F.3d at 1136; *see also Phase II Chin, LLC v. Forum Shops, LLC*, 2010 WL 2695659, at \*2 (D. Nev. July 2, 2010) (“The mere suggestion that embarrassing allegations . . . might harm a company commercially if disclosed in publicly available pleadings does not meet the burden of showing specific harm will result.”).

<sup>40</sup> *Cipollone*, 785 F.2d at 1121.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Kamakana*, 447 F.3d at 1181-82; *see also Lugosch*, 435 F.3d 110, 126 (2d Cir. 2006) (noting that the circuit courts “emphasize the importance of immediate access where a right to access is found”); *Grove Fresh*, 24 F.3d at 897 (“[O]nce found to be appropriate, access should be immediate and contemporaneous.”).

<sup>44</sup> *Associated Press v. U.S. District Court for Central District of California*, 705 F.2d 1143, 1147 (9th Cir. 1983).

by-document” justification for continued secrecy.<sup>45</sup> The amount of time—if any—that should pass before court records are released to the public will vary based on the particular circumstances of your case, but should be measured in days—not weeks or months—unless the proponent of secrecy can obtain an order staying the case pending an appeal of the unsealing order.

## **5. DO identify any public health or safety issues implicated by the sealed records.**

Courts uniformly hold that the public’s interest in access to court records is strongest when those records concern issues of public health or safety. In one case, a district court had sealed court records involving the content of tar and nicotine in various brands of cigarettes. The Sixth Circuit vacated the sealing orders, emphasizing that the public had a particularly strong interest in the court records at issue because the “litigation potentially involves the health of citizens who have an interest in knowing the accurate ‘tar’ and nicotine content of the various brands of cigarettes on the market.”<sup>46</sup> Another court noted, in granting a motion to unseal court records in an unrelated case, that “the ‘greater the public’s interest in the case the less acceptable are restraints on the public’s access to the proceedings.’”<sup>47</sup> Because courts are especially loathe to enter sealing orders in cases involving public health and safety, it is important that you identify for the court any such issues implicated by your case and how secrecy might exacerbate the problem by keeping the public in the dark.

## **Five Dos & Don’ts at Settlement**

Secret settlements can take many forms. A defendant may be most concerned that discovery materials revealing evidence of wrongdoing are returned to the company; another defendant may be focused on preventing publicity about the amount of money it was willing to pay to settle a case where it denied any wrongdoing. For many reasons, including a defendant’s desire to keep its wrongdoing a secret to avoid future liability, your client’s silence may be worth a great deal.

Given attorneys’ duty to abide by our client’s settlement decisions, it may seem difficult to counsel a client to turn down a financially advantageous offer in exchange for silence. But there are some things you can do to help ensure that by settling a case, you won’t be helping a repeat wrongdoer avoid liability in future cases.

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<sup>45</sup> *Id.*

<sup>46</sup> *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180-81.

<sup>47</sup> *United States v. General Motors*, 99 F.R.D. 610, 612 (D.D.C. 1983); *see also In re Air Crash at Lexington, Ky., August 27, 2006*, No. 5:06-CV-316-KSF, 2009 WL 1683629, at \*8 (E.D. Ky. June 16, 2009) (denying a motion for a protective order; noting that the “public has an interest in ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its] decisions,” and that “the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety”).

**1. DO talk to your client in advance about secrecy.**

Chances are, at the beginning of the case, your client was primarily interested in holding the company accountable and even making sure the same thing doesn't happen to anyone else—at least as much as winning damages against the defendant. Many attorneys have adopted the practice of discussing secrecy with clients early on in the attorney-client relationship. The conversation could begin with a discussion of whether the harm to your client could have been avoided if only your client had access to information about the harm and could have made different decisions or could have taken extra precautions. Perhaps it was because the defendant bought silence in a past case that your client was injured.

While it is likely unethical to ask a client to prospectively waive her right to enter into a confidential settlement,<sup>48</sup> some law firms do include a term in their retainer agreements specifying that neither lawyer nor client *presently* intends to enter into a secret settlement, if only as a basis for later discussion during settlement negotiations.

**2. DON'T forget that a settlement agreement filed with the court is a public record.**

While some settlement agreements have the same status as a private contract, a settlement agreement filed with the court is presumptively a public record just like any other court document.<sup>49</sup> A settlement agreement may be filed with the court for any number of reasons. The obvious example is where the court retains jurisdiction to enforce legal rights or duties embodied in the agreement, such as injunctive relief. But whatever the reason, the public has a presumptive right of access to court records, and thus the same arguments discussed above with respect to sealing of court records applies equally to settlement agreements filed with the court.<sup>50</sup>

Critically, the mere fact that a case is settling is *not* sufficient grounds for sealing a court record. As numerous courts have held, “the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public’s common law right of access.”<sup>51</sup> More importantly, “[t]he right of access to court documents belongs to the

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<sup>48</sup> See D.C. Bar Ethics Adv. Op. 289 (Jan. 19, 1999), *available at* [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion289.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion289.cfm)

<sup>49</sup> *Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343–44 (3d Cir. 1986) (“[A] motion or a settlement agreement filed with the court is a public component of a civil trial.”).

<sup>50</sup> See *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (“Whatever the rationale for the judge’s participation in the making of the settlement in this case, the fact and consequences of his participation are public acts. He was not just a kibitzer. But even if he had been, judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.”)

<sup>51</sup> *Hotel Rittenhouse*, 800 F.2d at 346 (“Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the

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public, and the [parties] [a]re in no position to bargain that away” as a condition of settling a case.<sup>52</sup>

Some plaintiffs’ lawyers have succeeded in using the public interest to essentially shame a defendant into backing down on its insistence on a secret settlement. These advocates argue that by staying silent about their clients’ experiences, they would become accomplices, helping the defendant continue to perpetrate fraud or sell a product it knows is hazardous. Examples of this abound: Firestone Tires was aware of a defect in its product that was responsible for at least 80 deaths and 250 injuries, but concealed the evidence from the public for years through confidential settlement agreements.<sup>53</sup> The Boston Archdiocese concealed child sex abuse cases from the public for over a decade through the use of confidential settlement agreements.<sup>54</sup> And BIC concealed the dangers of its lighters through secret settlements and millions of dollars in payouts so no one would know that the lighters were linked to ten deaths and were so unsafe they didn’t meet the industry’s own safety standards.<sup>55</sup> It also can’t hurt to remind the defendant that the only way to truly protect its reputation is *not* to swear everyone to silence, but to change its own behavior and stop engaging in the conduct that gave rise to this lawsuit in the first place.

### **3. DO insist that the settlement comply with your state’s statutes, court rules, and ethics rules.**

Several states have adopted “Sunshine in Litigation” laws that impose limitations on courts’ ability to approve secret settlements or declare settlements that hide information critical

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public’s common law right of access.”); *see also* *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849-50 (5th Cir. 1993) (district court abused its discretion in sealing transcript of settlement proceedings without considering the public’s right of access); *Daines v. Harrison*, 838 F. Supp. 1406, 1408-09 (D. Colo. 1993) (“interest in promoting settlement” insufficient to rebut the presumption of public access to court filings).

<sup>52</sup> *San Jose Mercury News*, 187 F.3d at 1098.

<sup>53</sup> *See* American Association for Justice, *Eight Deadly Secrets—How Court Secrecy Harms Families and Children*, at <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/3469.htm>.

<sup>54</sup> *Id.*; Walter V. Robinson and Stephen Kurkjian, *Records Show a Trail of Secrecy, Deception*, BOSTON GLOBE, Dec. 4, 2002, available at [http://www.boston.com/globe/spotlight/abuse/stories3/120402\\_burns.htm](http://www.boston.com/globe/spotlight/abuse/stories3/120402_burns.htm).

<sup>55</sup> Tamar Lewin, *Lawsuits, and Worry, Mount Over BIC Lighter*, N.Y. TIMES, Apr. 10, 1987, available at <http://www.nytimes.com/1987/04/10/business/lawsuits-and-worry-mount-over-bic-lighter.html?pagewanted=all&src=pm>; *see also* Public Citizen, *The Hazards of Secrecy: 10 Cases Where Protective Orders or Confidential Settlements Jeopardized Public Health and Safety*, at [http://www.citizen.org/congress/article\\_redirect.cfm?ID=571](http://www.citizen.org/congress/article_redirect.cfm?ID=571).

to public health or safety unenforceable for public policy reasons.<sup>56</sup> The defendant should not be able to require you to agree to a secrecy term that would be unenforceable under state law.

Your jurisdiction's rules of civil procedure and/or your local court rules may also have helpful provisions on secret settlements. For example, the District of South Carolina's Local Civil Rule 5.03(E) provides that "No settlement agreement filed with the Court shall be sealed."<sup>57</sup> The state's Rule of Civil Procedure 41.1 likewise provides that any proposed settlement agreement submitted for the court's approval "shall not be conditioned upon its being filed under seal."<sup>58</sup> The rule requires the court to consider whether there are alternatives other than sealing that would protect the parties' interests, and whether sealing would best serve the public interest.<sup>59</sup> In one case, where plaintiff's counsel objected to the inclusion of a confidentiality clause in a release, the district court removed the secrecy term and enforced the settlement without it, citing these rules.<sup>60</sup>

Even if you are entering into a private settlement and will not seek court approval, attorneys' actions are always subject to scrutiny under the rules of professional conduct.<sup>61</sup> These rules can be helpful to plaintiffs' attorneys seeking leverage for resisting secrecy terms. For example, ABA Model Rule 5.6(b) requires that a lawyer "shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." That "right to practice" includes an attorney's right to advertise and solicit clients. The U.S. Supreme Court has held that "lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection."<sup>62</sup> As comment 2 to that Model Rule explains, the Rule "prohibits a lawyer from agreeing not to

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<sup>56</sup> See Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OREGON L.REV. 480, 493 (2008), available at <http://law.uoregon.edu/org/olrold/archives/87/bauer.pdf> (listing states).

<sup>57</sup> D.S.C. Local R. 5.03(E); see generally *Symposium, Court-Enforced Secrecy*, 55 S.C. L.REV. 711 (2004); Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811 (2008) (analysis by Chief Judge of the District of South Carolina of the debate over "court-ordered" secrecy and his court's landmark adoption of an anti-secrecy rule).

<sup>58</sup> S.C. R. Civ. P. 41.1(c); see also B. Keith Poston, *Confidential settlement agreement prohibiting plaintiff attorney's use of defendant's name in advertising considered unethical*, 7 ABI Ethics Committee Newsletter 9, at <http://www.abiworld.org/newsletter/ethics/vol7num9/unethical.html> (last visited May 3, 2012) (describing South Carolina Bar Ethics Adv. Op. #10-04 ).

<sup>59</sup> *Id.*

<sup>60</sup> *Wright v. Liberty Med. Supply, Inc.*, No2011 WL 3235762 (D.S.C. July 25, 2011).

<sup>61</sup> For a thorough argument that agreeing to certain settlement terms—such as noncooperation terms or terms that require the facts of a case to be kept secret with no exception for voluntary disclosures of information relevant to other litigants' claims—is unethical under the model rules, see Bauer, *supra*.

<sup>62</sup> *Fla. Bar v. Went For It Inc.*, 515 U.S. 618, 622 (1995).

represent other persons in connection with settling a claim on behalf of a client.” Thus, a defendant cannot require that plaintiff’s counsel refrain from publicizing that she has obtained a settlement against that company as a means of attracting other clients with similar potential claims.

In a recent advisory opinion, the Legal Ethics Committee of the District of Columbia Bar Association concluded that “[a] settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled.”<sup>63</sup> The committee explained that the purpose behind D.C. Rule 5.6(b) (which mirrors the model rule) is to “preserve the public’s access to lawyers who, because of their background and experience, might be the best available talent to represent future litigants in similar cases, perhaps against the same opponent.”<sup>64</sup> The committee emphasized that when “settlement terms are taken off the table because they are prohibited, clients are not harmed,” because “[i]f all parties are prohibited from agreeing to such provisions, they have no value.” This is worth keeping in mind when entering into settlement negotiations—whenever secrecy can be taken off the table completely, it no longer merits discussion.

#### **4. DO be prepared to call the defendant’s bluff.**

One successful tactic reported by some attorneys is to agree to secrecy, but only in exchange for such a high monetary amount that the defendant is just not willing to pay the price. Often a defendant will wait until settlement negotiations are almost complete before bringing up confidentiality. In this circumstance, one strategy is to file a motion with the court to enforce the settlement agreement *without the confidentiality term*—making the agreement part of the public record.

In negotiating a settlement, remember that if the defendant is worried about your client talking after the case settles, imagine how concerned they are about you airing their dirty laundry at trial. If the case goes to trial, much more information about the defendant’s conduct will become a matter of public record than would be risked by a settlement with no confidentiality provision.<sup>65</sup> Thus, when negotiating about secrecy, it is essential to be prepared to go forward to try the case—and to convincingly argue that if the case cannot settle except with a confidentiality clause, you will do just that.

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<sup>63</sup> D.C. Bar Ethics Adv. Op. 335 (May 16, 2006), *available at* [http://www.dcb.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion335.cfm](http://www.dcb.org/for_lawyers/ethics/legal_ethics/opinions/opinion335.cfm).

<sup>64</sup> *Id.*

<sup>65</sup> *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (“The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial materials.”) (citation omitted).

## **5. DON'T give in to unconditional secrecy.**

Lastly, if your client truly wants to settle the case, and the *only* term preventing agreement is secrecy, you should try to limit the scope and effect of the confidentiality term by inserting terms that protect your client and the public interest. First, make sure the agreement includes a term allowing your client to disclose information about the settlement to government agencies, in connection with the prosecution or defense of any action to which they may be a party, in response to a subpoena, or as otherwise required by law, court order, rule, or regulation.

Second, there is no reason the confidentiality need be permanent. You could agree to confidentiality on condition that it expires (for example) one year after execution of the settlement agreement. Similarly, it would be advantageous to limit damages for breach of the confidentiality agreement to a smaller amount than the damages for breach of other terms.

One compromise that may well be acceptable to all involved, including your client, is an agreement to keep the dollar amount and terms of the settlement confidential, but not the alleged wrongdoing or any documents containing information to which the public should have access. Sometimes a client may prefer not to have word get out that she accepted a large amount of money, particularly if the claim was for the wrongful death of a loved one. In addition, a defendant may be satisfied by an agreement that you and your client will refrain from affirmatively reaching out to the media, but retain the right to talk to the press if contacted.

## **Conclusion**

Consumer lawyers have many ways to push back against excessive demands for secrecy. The more we all stand up against confidentiality, the less defendants will take it for granted. Best of all, the law is on our side. At each step of the way—from discovery to settlement—it pays to approach the issue of secrecy carefully and to keep in mind not only the interests of the client in the present case, but future clients, the public interest, and the integrity of the practice of law. Public Justice has fought unnecessary secrecy in the courts for over two decades, and we have developed a resource bank of briefs, testimony, and model protective orders. If you are facing a difficult situation involving court secrecy, don't hesitate to call on us for help.