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ESSAY

PROTECTIVE ORDERS, PLAINTIFFS, DEFENDANTS AND THE PUBLIC INTEREST IN DISCLOSURE; WHERE DOES THE BALANCE LIE?

*Alan B. Morrison**

I. INTRODUCTION

It is a basic principle of the American system of jurisprudence that the courts of the United States are open. That includes not only the opportunity for the public to attend courtroom proceedings, but also the right to examine the documents that are filed in court. However, this principle of openness can sometimes come into conflict with other principles in our justice system. Everyone recognizes that there are some situations in which information should not be made public, at least not immediately. The problem is how to identify and limit those situations in which information is not made public so that we do not have too much information kept secret. The problem is complicated because a litigant's trial strategy may not be consistent with the public's interest in greater disclosure. Perhaps the easiest way to describe the problem is to work through a law school hypothetical.

II. INTERESTS AFFECTED

A. *The Interests of Litigants*

Suppose that in 1978 a young unmarried woman, age eighteen, began taking a new birth control pill approved by the federal Food and Drug Administration ("FDA") as being safe and effective. Un-

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fortunately, at age twenty-six, this woman developed cancer of the uterus, had to have a hysterectomy, and was no longer able to have children. She had been married for two years at that time, and after she recovered from the operation, she learned that there was significant evidence of danger from the pill and that it may have been the cause of her cancer. After much consideration, she decides to bring a lawsuit against the manufacturer and files the case in federal court. In her complaint, she seeks both actual damages and punitive damages because she has reason to believe that the company in fact knew about the dangers and did not disclose them in order to keep its profits up.

After she files her complaint, her lawyer serves on the defendant a set of interrogatories and a request for the production of documents seeking, in particular, the results of all tests that were done on animals and on human beings, all the adverse drug reaction reports, internal investigations, complaints and everything else which was supposed to have been submitted to the FDA. The defendant, of course, would prefer not to give the plaintiff anything, but it realizes that there is no real chance of success in taking that position. After all, the plaintiff has a genuine need for the material, which is obviously relevant to her charges, and her suit could not go forward without it.

The defendant is concerned, however, that much of the information sought is what the defendant refers to as "trade secrets" or "proprietary information." The defendant does not want to have this information disclosed to the public, but again there is no real chance that the information is going to be kept entirely private throughout the litigation, particularly if there is a trial. The defendant's best hope is to keep the data secret for the time being, and to do this the magic words are "protective order."

Before one castigates the defendant's side too thoroughly, we should ask whether the defendant has *any* legitimate interest in keeping this information secret. At this point, we do not know what kind of information the defense actually has, let alone what it shows. The harm from disclosure may depend upon the patent status of the drug because some of the information may already have been made public. The legitimacy of the secrecy claim may also depend on whether the information shows how the drug might be manufactured or whether it contains data about sales or other business information. There may also be attorney-client information as a result of the investigation by its lawyers or other people for

the company. Whether the information qualifies as a trade secret or proprietary information, it seems clear that this is not the kind of information that any company would ordinarily make available to anyone on the outside. At the very least, I would concede that we cannot be sure that *all* of the information is *not possibly* within the category that may be protected by the trade secret rule.¹

If the defendant has its way, the plaintiff will have to obtain all this information under a protective order, under which the plaintiff (or, more precisely, the plaintiff's attorney) promises not to divulge the information to anyone without permission of the defendant or the court. The defendant is particularly concerned about certain groups of people gaining access to this information. For instance, information may come out that may be highly prejudicial to the defendant, and the defendant has a legitimate interest in seeing that jurors do not consider such information, especially if it is not admissible at trial. The defendant also has an interest in seeing that competitors do not obtain such information, particularly if internal records suggest the product may not be what the business has represented to the public. The defendant is also interested in seeing that the FDA and relevant congressional committees do not get too involved and the defendant is surely interested in keeping its name out of the press over the misleading results of the drug. Last and probably not least, the defendant is very interested in seeing that attorneys for other potential plaintiffs do not obtain the information and get ideas about bringing their own lawsuits against the company. Some of these concerns may be legitimate, and the problem is that once the information is in the public domain, it is there for everybody. What can the defendant legitimately ask the plaintiff to do in these circumstances?

The defendant will probably seek a protective order, which prohibits the dissemination of this kind of information, except to a few narrow categories of people. These categories might include other lawyers in the plaintiff's attorney's office, the plaintiff herself, expert witnesses, and perhaps a few others provided they sign a confidentiality agreement under which they would not divulge any of the information without permission from the court or the defendant.

The plaintiff will want to use this information in discovery, by asking questions based upon it in depositions or in further inter-

1. FED. R. CIV. P. 26(c)(7).

rogatories, and to submit it to the court if the defendant tries to have the case dismissed on a motion for summary judgment. The plaintiff also wants to be able, at some point, to ask the court to make the information public so the plaintiff can conduct the trial in the way that her lawyers believe is best for her.

What exactly is it that the defendant wants to keep secret? Obviously, the defendant would like nothing to be public. For the defendant, nothing is going to improve if more information is made public. Among other things, the defendant believes that everything about its business is proprietary; it is all trade secrets, and none of this should be made public. The natural reaction of corporations is to close everything up and keep it that way.

However, the question is whether the parties and the court should go through these records and try to separate that which is truly confidential from that which is not confidential. If the answer is "yes," the defendant is going to say something such as: "If we have to go through item by item, document by document, it's going to take a lot more time, and you, the plaintiff, are not going to get this case close to trial any time soon." That result would impose an enormous financial burden on the plaintiff and cause an enormous delay as well. Thus, the plaintiff has to weigh whether it is worthwhile to fight the defendant over the protective order, under which the defendant basically says that anything said is confidential, at least for the time being. The plaintiff must consider the burden of keeping this information confidential, how to get the information and use it in court, and possible mistakes if documents are not filed under seal as required.

Another matter for plaintiff and her lawyer to consider is that the defendant is almost certain to demand the return of all information when the case is over. "After all," defense counsel will say, "you've either won, or you've lost, and anything that is not public in the courtroom, you ought to have to turn back over to me. You don't need it any more, and if you need it, you can just come and ask me for it. If you ever have another lawsuit, I'll be glad to give it to you."

Such a proposal puts the plaintiff's attorney in another difficult position. It is true that, when the case is over, the lawyer will not need that information for that case. On the other hand, given the breadth of this protective order, the files of the plaintiff's lawyer must be decimated if everything that refers to confidential infor-

mation (and that is the way these protective orders are always written), as well as the confidential documents themselves, must be returned to the defendant. Therefore, the plaintiff's lawyer must find a way to keep the files intact. As I will mention a bit later, there are other similar problems that need to be addressed.

At this point, the defendant may say: "Take it or leave it. If you don't like the protective order that was drafted, then we'll go to the judge and see what happens." Is that a proper or improper position? In fact, the plaintiff's lawyer does not have much choice. The defendant has an arguable trade secret claim, and judges worry that once the information gets out, one can never put the genie back in the bottle. Moreover, most judges are busy and do not want to have lawyers fight in front of them on a document-by-document basis, particularly when there are thousands of pieces of paper at issue. The judge is likely to tell the plaintiff's attorney to sign the protective order, proceed with the litigation, and worry about the problems later. In that regard, the plaintiff's lawyer needs to think about his obligation to his client. The client's principal interest is in getting money as soon as possible. Most clients are not interested in helping the FDA or other lawyers. For these reasons, the plaintiff's lawyer will almost certainly consent to an order like this, as long as there is a little flexibility, and he and his client are not locked into secrecy forever. If the plaintiff fails to consent, most judges will sign the order anyway, and the plaintiff's lawyer will have just made the judge unnecessarily angry (unlike the times when it is clearly necessary to incur a judge's wrath).

B. *The Interests of Other Groups*

1. The Press

The plaintiff is now reasonably happy, the defendant is happy, the trial judge is happy, and that ought to take care of everybody. Or does it? Are there some people that have a legitimate interest in disclosure who are not taken into account under this scheme? Is the press taken into account? The press will believe there is a wonderful story and that they have a first amendment right to report the news. Unfortunately for the press, the Supreme Court of the United States said in *Seattle Times Co. v. Rhinehart*² that there is

2. 467 U.S. 20 (1984).

no first amendment right to disseminate information under a protective order at the pre-trial stage.

2. Regulatory Agencies

Another interest is that of the FDA and other regulatory bodies responsible for determining whether this pill should be taken off the market if it is still being sold, or whether there should be a recall or notification if it is no longer on the market. Why doesn't the FDA simply ask the company itself for these documents? It has the power to ask and probably the ability to subpoena the documents if the request is not honored.

But government agencies are not always on top of the situation. They may know generally about the problems with the pill, but they may not know about this lawsuit. They may not know what records the plaintiff has obtained, and if they ask the company for what the plaintiff has received, the company may give the agency what it gave yesterday, but not today, tomorrow, or the next day. In addition, the FDA has a lot of projects under way, and the pill may not be at the top of its list, especially if it does not know what it will get if it makes the request. Therefore, it is not enough to say that if the FDA wants the information, it can get it without the plaintiff's help. Moreover, since the plaintiff's attorney will have reviewed the documents, he or she has the best idea of what is really there and what ought to go to the FDA.

There is, however, something the plaintiff's attorney might do—notify the FDA that the agency should ask for what the plaintiff received. But is that in the interest of the plaintiff? Or is the plaintiff better off by having her lawyer say to the defendant, "Suppose I told the FDA about these documents, or suppose I did not—could we then settle the case?" How could any settlement be at a higher price than the price that the plaintiff would get if her lawyer had threatened to, but not gone to the FDA? But what if that conversation took place? Would it be blackmail or at least unethical? Nonetheless, is it not likely that the plaintiff will be in a better position if her lawyer just keeps quiet and does not rock the boat, rather than bringing in the FDA?

Whatever way the client feels, we have to ask whether her decision should dictate what information goes to the government agency designated by law to protect all of us from similar injuries. Seen in that light, I believe it is inappropriate to leave that decision to a plaintiff and her lawyer.

Defendants and their lawyers are becoming increasingly sophisticated about these issues. Thus, if they do not want to disclose information to a government agency, they ask the judge to enter a two-way protective order which forbids everyone, both the plaintiff and the defendant, from talking to anybody about it. When the FDA asks for the information, the defendant can refuse, citing the court order. That sounds fine in theory, but it happens to be weighted quite heavily one way, rather like the famous aphorism of Anatole France that "The law in all its majesty forbids the rich and poor alike from sleeping under the bridges of Paris." So here, the "equality" really runs entirely in one direction—favoring the defendant.

3. Legislative Bodies

There are also legislative bodies legitimately interested in the information. Some committees in Congress are very aggressive, yet many are not. None of them has a regular reporting system like the FDA, but they need to be informed, even though they have even less time to investigate than the FDA. While in theory they have subpoena power, they do not use it very often. They are supposed to protect the public, yet it is unlikely that agencies or legislative bodies are going to get this information, unless the case goes to trial or unless we change some of the rules on protective orders.

4. Other Potential Plaintiffs

There is another group that has been left out—other plaintiffs, that is, other victims. This group includes those who have already filed suit, those who have a claim or who may have written the company but not filed suit, and those who do not even know they have a legitimate claim. Can the plaintiff do anything about them? Surely, the defendant will abhor the idea of this information going to other lawyers, because it will cause more litigation, and it will surely cost more money. However, if we do not allow the sharing of information among plaintiffs' attorneys, we perpetuate a system which maximizes inefficiency. It requires each lawyer to re-invent all of the discovery—to figure out the right interrogatories and document requests to make and to determine whom to depose and what questions to ask. That leads to delay and unnecessary expenditures, and in the end is not beneficial to the other clients.

There are other harms to subsequent plaintiffs beyond the harm of having a second lawyer redo the discovery in the case. Most trial lawyers know that the first time a witness is under oath, the testimony is fresher, and things come out which, upon reflection, are not always said on the second and third deposition. Thus, when the theory of the defendant's case is not entirely clear, there are some explanations given early in the testimony that are not entirely consistent. When the defendant's witnesses have an opportunity to look at documents, suddenly their views about what happened change a little bit. Therefore, while the later discovery may prove beneficial for other reasons, the first time a witness is deposed, there are things which come out that the defendants in most cases would prefer not to have on the record. All of this advantage, of course, is lost if the original plaintiff's attorney cannot pass the results of her discovery on to the other plaintiffs. This inefficiency is another cost of the present system. This cost is borne entirely by the plaintiffs because the defendant knows what happened the first time, but the plaintiffs in the second and third cases will not.

5. Business Competitors

The final group of people we need to think about is the defendant's business competitors. As between the defendant and its competitors, does it matter to our system whether one rather than the other makes the sale? It seems to me that it does to some extent. If we are talking about one product being potentially dangerous and another one not, or if we are talking about consumer freedom of choice, both of which are values we ought to protect in our system, then the question becomes how highly do we value each of them and at what cost? However that balance may be struck, it is clear that our present system does not factor these values into the disclosure equation at all.

III. DEFENDANTS' RATIONALE FOR LIMITING DISCLOSURE

The answer given by those who defend the present system to those like me who want much more of the fruits of discovery made public, is that litigation is for the litigants and not for anyone else. But that is true only if one accepts the defendant's premise that court records are only for the litigants, and it overlooks the fact that the courts are funded by the public and serve a public func-

tion. As I will assert in a moment, that view is too simplistic. Nevertheless, under the present law, these other interests take a back seat to the lawsuit. The parties can operate in virtual secrecy because under the Federal Rules of Civil Procedure, keeping the case moving would be good cause for issuing broad protective orders, rather than engaging in lengthy discovery disputes, and yet that rationale would allow everything to be kept under seal.³

A. *Preventing Bias of Future Juries*

In any event, assume that the case is eventually settled or disposed of prior to trial, as are over ninety percent of the civil cases that are brought in federal district courts and elsewhere. Of course, if the case goes to trial, then much of the information would come out. However, some of it might still not be made public either because it was not relevant, because the plaintiff chose for tactical reasons not to introduce it as evidence, or because the lawyer did not appreciate its value.

Suppose that once the case is closed, the press, the FDA and everyone else decide to try again to gain access to this information. Is there a difference in how the competing interests are weighed now, such that the balance should come out differently? To the extent that the defendant's justification for secrecy was that pre-trial disclosure would interfere with the trial in this case, the fact that there is not going to be any trial makes it hard to understand what interest in secrecy remains. What the defendant will say in these situations is: "What about the next case? The jurors in the next case may be affected. The court should consider whether there are cases pending in that courthouse or in other jurisdictions and consider the effect of disclosures on our right to a fair trial in those cases." There is no clear answer on this issue because it depends on the facts of each case. My own view is to be quite skeptical of such claims, especially since courts deal regularly with much more serious problems in criminal cases, such as the effort of Lieutenant Colonel Oliver North to get an impartial jury.

3. See FED. R. CIV. P. 1 (rules "shall be construed to secure the just, speedy, and inexpensive determination of every action.").

B. *Conserving Business Secrets and Litigation Resources*

A second reason given by defendants when they seek a protective order early in a case is that the litigation process will be slowed down without such an order. There will be inordinate delays if documents have to be reviewed individually and if counsel will have to litigate over which documents must be disclosed to opposing counsel. Again, that argument is moot after a case is closed. The defense, of course, responds that these documents contain legitimate trade secrets which the company is entitled to keep secret. Indeed, the defense claims that the reason it settled the case is to maintain its secrets. I agree that the defendant has a legitimate interest in keeping from the public those documents which are in fact trade secrets, which are explicitly protected under Rule 26(c)(7) of the Federal Rules of Civil Procedure. But that is a very narrow category of records compared to the enormous number of documents which the courts have allowed defendants to keep secret in the discovery process.

The defendant may nevertheless insist that "litigation is litigation is litigation," and that information used in litigation is not intended for public use. With respect, I suggest that is simply a conclusion and not a reason. Litigation is not just for the litigants, at least not in our system. In our system, we are concerned with overall justice. We are concerned about the next case. We are concerned about public controversies that arise in public forums and are decided there. After all, that is one of the reasons that we have the court system.

Next, the defendant will insist that if it knew the court might make this information public, even at the end of the case, it would never have turned anything over to the plaintiff, and it surely will be smart enough not to do so in the next case. Again, that is the kind of threat that probably cannot be carried out since, if the information is relevant, the defendant has to turn it over. In theory, the defendant could threaten to litigate discovery on an item-by-item basis and suggest that the plaintiff will receive nothing until the judge orders materials produced, which will slow the case down, and burden the plaintiff and the judge. But this will also burden the defendant, who will have to pay lawyers to go through the documents item-by-item and formulate an objection to each, increasing the cost to the defendant. Despite these threats, defendants are probably not going to be that obstinate in the future, and

if they tried, it probably would not work.

Nonetheless, the courts have continued to be reluctant to make discovery public, even at the conclusion of the case, even when the defendant is no longer making the product, and even when the information is years old. There is one important matter not to overlook. If the defendant can convince the court, even after the case is over, that any documents contain legitimate trade secrets or other proprietary information, they will not be disclosed.

IV. THE JUDICIARY'S TREATMENT OF DISCLOSURE ISSUES

A. *Common Law Principles*

Rather than deal with the substance of the defendants' particular arguments, the courts have set up some rather artificial boundaries or ground rules that define the categories of documents that can and cannot be disclosed. First, the courts have asked whether this document was used by the court or was at least filed in court with a request for a ruling by the judge. These cases, which involve access to court records under common law principles,⁴ focus on whether a document became part of the judicial decision making process. Courts ask whether the defendant submitted it to the court as part of its motion for summary judgment or for some other purpose, or whether the plaintiff used it to defend part of her claim. They also ask whether it was introduced as a pre-trial exhibit or listed in the pre-trial order for use at trial.⁵ In those cases, the courts presume that those documents should be public. However, this approach does not encompass that many documents. In addition, it gives the defendant an incentive to settle the case very early so that the least amount of information will be made public.

4. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Following the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which held that the public has a first amendment right to attend criminal trials, the lower federal courts have recognized a first amendment right of access to the records actually used in litigation, including both civil and criminal cases. *E.g.*, *In re Continental Ill. Sec. Lit.*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

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

B. Access to Filed Documents

In many cases, the public may have an interest in examining records which are produced in discovery even if they are not actually presented to a judge. Because these documents have not been filed for use in the judicial decision making process, courts have not recognized any common law right of access to them. Nonetheless, for many years, there was a right of access under the Federal Rules of Civil Procedure,⁶ which required that discovery materials be filed with the clerk and made available to the public unless there was "good cause" for issuing a protective order under Rule 26 of the Federal Rules of Civil Procedure.

The difficulty is that in 1980, the draftsmen of the federal rules changed Rule 5(d) to allow district courts to adopt orders specifying that many documents received in discovery need not be filed. Many courts have exercised that option, and thus many types of documents that used to be filed are no longer filed in the courthouse. However, as the courts in the *Agent Orange* litigation observed, Rule 5(d) was amended not for the purpose of maintaining secrecy, but because the federal courthouses were being overwhelmed with paper.⁷ Judge Mansfield, chairman of the Civil Rules Committee which prepared the amendment to Rule 5(d), wrote a letter at the time assuring Congress that the purpose of the change was not to have secret documents and that the committee intended the courts to have the power to require the filing and unsealing of documents which became a matter of public interest, even if the documents were not originally filed and hence were not public then.⁸ In the *Agent Orange* litigation, the courts did just that in the course of approving settlement.

In any case, one federal appeals court has held that district courts have no power to issue Rule 5(d) filing orders after final judgment, based on the theory that once the case is over, the case is over, and the court does not have any power to order filing.⁹ In

6. FED. R. CIV. P. 5(d).

7. *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 567-68 (E.D.N.Y. 1985), *aff'd* 821 F.2d 139, 146 (2d Cir.), *cert. denied sub nom. Dow Chemical Co. v. Ryan*, 108 S. Ct. 344 (1987).

8. 104 F.R.D. at 565 n.4, *aff'd*, 821 F.2d at 146; *see also* FED. R. CIV. P. 5(d) Advisory Committee note (Preliminary Draft of Proposed Amendments), 77 F.R.D. 613, 622-23 (1978).

9. *See Public Citizen v. Liggett Group Inc.*, 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989). In reaching this conclusion, the court failed to analyze the history and

one case where this happened, however, the “no filing” decision did not leave the requester in the lurch. The court also chose to modify the protective order, which continued in effect after the case was over, to allow the plaintiff’s lawyers to give the documents to anyone.¹⁰ In most cases, the plaintiff’s lawyer is more than willing to turn over the documents, particularly at the end of the case. In most cases, that solution is acceptable, but it is not acceptable in all cases. Moreover, if the plaintiff is recalcitrant or just plain ornery, this approach encourages third party intervention, which in turn may delay the case-in-chief and generate unnecessary ancillary litigation. However, it is still an improvement over no disclosure at all.

V. PRINCIPLED REFORM OF THE PROTECTIVE ORDER SYSTEM

Is this a satisfactory solution? Should we say that disclosure of this kind of information is too important in cases like this and that the defendant should be required to justify the need for secrecy with respect to each document because the public interest is at stake? Or should we accept the notion that litigation is only for litigants and not for anyone else?

In general, the particular lawsuit ought to be the primary focus of our litigation rules. Thus, if the parties are willing, for whatever reasons, to keep most information secret, we ought to be willing to allow them to do that. I say that not only because I believe that the parties should be able to control their own lawsuits, but also because, if we had a rule which said that the judge must rule on claims of secrecy on a document-by-document basis, who would be there to police the judge? Would we have an official looking over

evolution of the current Rule 5(d) which the *Agent Orange* opinions discussed at length. Nor did it explain why the court had power to order filing and disclosure in that case, but not in this one, or why it presumably makes more sense to require third parties to make filing and unsealing motions while the case is still an active one, when there may be countervailing reasons for maintaining the status quo with respect to secrecy issues. Nor did the court explain how third parties who are interested in the public filing of records may assert this interest in a timely fashion when cases are quietly settled with no advance notice to any third party.

10. *Id.* at 782-83, 792. In *Public Citizen*, as in *Agent Orange*, the third parties seeking access to the records indicated their willingness to let the defendant retain under seal any specific documents which were claimed to be “confidential” proprietary records at the time they were provided to plaintiffs and which still qualified for such treatment. Unlike *Agent Orange*, however, the defendant never made any claim of confidentiality with respect to particular documents, so the effect of the order modifying the protective order was to make all discovery records public. 858 F.2d at 780 n.4.

his or her shoulder, or would we give the press or interested citizens the automatic right to appeal in every case, and to appeal each time a document was kept secret? Either nothing would change, or we would have utter chaos in the system. Therefore, as a general proposition, I do not endorse a significant change in our current protective order system.

There are certain types of disclosures that ought to be made during the course of litigation, regardless of the general rule. For these situations the arguments of those supporting a change in the protective order system are quite compelling largely because we cannot rely on the litigants and their lawyers to protect the broad public interest. The public interest should be protected through disclosures to other plaintiffs' attorneys and regulatory bodies.

A. *Sharing Information with Other Plaintiffs*

As to the first group, there are no justifications for the defendant to refuse to allow one plaintiff's lawyer to turn over documents produced by the defendant to the lawyer for another plaintiff provided that the second plaintiff's lawyer is willing to abide by the same protective order as the first one. The sole reason that defendants do not consent is to take advantage of the situation and to make life more difficult and more inefficient for the second group of lawyers.

In response, this year the Virginia legislature passed an information-sharing bill. The bill went to the Governor, and after objections were raised by the defense bar about the effective date, the Governor sent it back, and a proposed modification was approved.¹¹ In Virginia, therefore, plaintiff's attorneys can share the information that they receive under protective orders entered after July 1, 1989.

However, the new law is unclear. It does not state whether the other plaintiff's lawyer must have filed a lawsuit already. It is not clear whether the law applies to other lawyers who are either not members of the Virginia Bar or who have cases outside of Virginia. It fails to make clear which court will enforce the protective order against the second lawyer—the one issuing the protective order, or the one where the second case is pending.

Despite these weaknesses, the new law is a major step in the

11. 1989 Va. Acts 702 (codified at VA. CODE ANN. § 8.01-420.01 (Cum. Supp. 1989)).

right direction. The Virginia General Assembly, stepped in and decided that certain kinds of disclosures are too important to be left to the lawyers and the adversary process. The legislature decided that, as long as the second lawyer is bound, the defendant gets all the protection to which it is entitled. The law also saves valuable judicial resources.

B. *Sharing Information with Regulatory and Legislative Bodies*

The second group which deserves freer access to information includes regulatory bodies, such as the FDA, as well as the legislatures, both federal and state, which have jurisdiction over the subject of the lawsuit. These groups should be able to get the information while the lawsuit is pending, without waiting until the case is concluded or goes to trial. These are the people who are supposed to protect the public, and we should not deny them this potentially vital information. One of the difficulties is that in situations such as the prior hypothetical, there is no routine way in which a legislature or regulatory agency can be forbidden from disseminating the information to the public, as a lawyer can. Indeed, regulatory agencies may be required by law to make public any information concerning a public health hazard. I believe that, even with governmental bodies, a defendant ought to be entitled to a little protection. For instance, a defendant should be notified that a plaintiff's lawyer is going to tell or has told the FDA about a particular problem. It would not be unreasonable for a court rule or statute to require that type of notice, even if there was not much that the defendant could do if it knew the plan to give the alleged trade secrets to the agency. But at least it could try to persuade the agency or lawmakers not to make this information public. It could also bring a lawsuit to try to prevent disclosure, although it might succeed against an agency only in a very narrow category of cases.¹² Therefore, while a defendant has a legitimate interest in seeing that its truly confidential information is not made public, the public interest in seeing that our regulatory bodies work in an effective manner is far more important.

Unfortunately, under our adversary system, we cannot count on the plaintiffs' attorneys to see that the government and other plaintiffs' attorneys will get this information. There is real conflict between the duty of plaintiffs' lawyers to their clients and the duty

12. See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

which many lawyers would feel to assure that an unsafe product does not continue on the market. That kind of conflict must be resolved in favor of the client unless there is a supervening rule of law that not only allows, but encourages, lawyers to do what most of us believe is their public duty.

VI. CONCLUSION

If these proposals are adopted, what will this do to litigation? Will plaintiffs receive less information than in the past? Perhaps, although I rather doubt it. Will they be able to settle sooner because the defendants would rather not give them any information at all? Yes, and they may get somewhat larger settlements. I say that based on our experience with recent cases involving the Shiley heart valve, in which the company has been paying everybody enormous sums of money before discovery starts. The company paid very large settlements, avoiding the discovery which might have revealed to the public and the FDA when the company first knew the device was unsafe.

Finally, I do not believe that defendants will refuse to produce incriminating documents in the fear that they may become available to other lawyers or the government. I have learned that, all too often, defendants assert that their business will collapse if any documents are made public. Those claims are often vastly overstated, rather like those of the Department of Defense in the *Pentagon Papers* case, where claims of grave harms to national defense were rejected, at no apparent cost to the republic.¹³ These documents often contain insignificant information, and little that can legitimately be kept secret. The defendants simply do not want to make them public, and they want to make life as difficult as possible for plaintiffs, press groups, and others who are trying to get hold of them. While I am not a big supporter of the use of sanctions under the Federal Rules of Civil Procedure,¹⁴ the courts should start considering whether Rule 11 might not be appropriately applied to de-

13. *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y.), *rev'd per curiam*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971). The government claimed that publication of the documents — certain volumes of a pentagon study relating to Vietnam and a Defense Department study relating to the Tonkin Gulf incident — would “involve a serious breach of the security of the United States” and would “cause irreparable injury to the national defense.” *Id.* at 326. The district court refused to grant a preliminary injunction against the publication because the government was unable to establish that there would be irreparable injury or a breach of national security. *Id.* at 330.

14. FED. R. CIV. P. 11.

defendants who unnecessarily multiply litigation by asking for secrecy when secrecy is not warranted. There need to be, I suggest, different incentives for defendants so that they do not claim secrecy at every opportunity.

In conclusion, I suppose that the system is not inefficient at present, because much of the vital information eventually is made public. But it could work a lot better, if we did not put all of the responsibility for its operation on the litigants and the trial judges. Therefore, we should ask our courts and our legislatures to impose rules which control the discretion of litigants and protect the legitimate interest of defendants, but which also recognize that the public interest lies elsewhere than in secrecy when public safety is at stake.

