

The assault upon the citadel

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Advocates of open courts are battering the 'citadel' of court secrecy, but it's still standing. Secret settlements deprive Americans of an effective tort system and jeopardize public health and safety. Trial lawyers must join the fight.

The assault upon the citadel,” Dean William Prosser wrote in a famous law review article in 1960, “‘is proceeding in these days apace.’ . . . With the passage of nearly thirty years, a goodly part of the citadel still holds out; but the assault goes on with unabated vigor.”¹

Prosser was writing about the long struggle for enhanced consumer protection; his “citadel” was the old, oppressive, contractual doctrine of privity, which eventually gave way to strict products liability. But his words would be as appropriate today to describe the struggle against the secrecy that has pervaded the American civil court system, particularly in settlement agreements, since the 1970s.²

Prosser did not exaggerate when he called the efforts to achieve better consumer protection a “battle.” American industry fought fiercely against the pro-consumer efforts of which he was the intellectual leader. Similarly, the movement to achieve greater openness in our courts is strongly resisted—and by essentially the same entities who opposed Prosser’s enlightened ideas. There is much left to do, but the past five years have seen four major developments.

Restrictions on secrecy. In the late 1980s, the public became more aware of what practicing lawyers had long known—that corporate defendants were keeping the citizenry ignorant of many details of significant lawsuits by

insisting on secrecy as a condition of settlement. Major exposés in the news media brought to light both secrecy in litigation and the increasing efforts by the consumer bar to counter it.³

Unsurprisingly, the business community reacted strongly to this new attention. In 1991, Professor Arthur Miller of Harvard Law School wrote a defense-bar-funded article that has become a favorite of secrecy advocates.⁴ Miller observed that, at that time, just four states (Florida, New York, Texas, and Virginia) had adopted court rules or statutes to restrict secrecy.⁵ He also noted that 22 other jurisdictions (plus the federal courts) that had considered antisecrecy proposals had not adopted them.

Since then, many states and federal district courts have adopted restrictions on court secrecy, including a number of the jurisdictions Miller cited as having rejected them. Today, secrecy is regulated to at least some extent through statutes and court rules in 41 state court systems and in 50 of the 94 federal districts—a vast increase in the regulation of secrecy in less than 20 years.⁶

It is still true, as Miller observed, that legislatures and court rulemaking bodies do not adopt all of the antisecrecy measures that are proposed to them. But that means only that the business community lobbies hard against every pro-

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posal to make the courts more open.

Academic interest in secrecy. There has been a parallel increase in academic interest in court secrecy. The number of law journal articles on the subject has grown enormously, and two law reviews (the *University of South Carolina Law Review* and the *Chicago-Kent Law Review*) have held conferences and published special issues devoted to secrecy.⁷

More important than the number of law review articles, however, is the growing conclusion of most scholars that the routine use of court secrecy disserves the public. This criticism extends to blunt assertions that some uses of secrecy mechanisms violate criminal statutes.⁸

Federal Judicial Center study. In 2004, the Federal Judicial Center (FJC) published a major study of sealed settlements in federal courts, conducted at the request of the federal courts' Advisory Committee on Civil Rules.⁹ The FJC researchers examined records of 288,846 cases that terminated in calendar years 2001 and 2002 in 52 of the 94 federal district courts—and identified 1,270 sealed settlement agreements that had been filed in those courts (0.44 percent of the sample of cases).¹⁰ In 97 percent of the cases with sealed settlements, the complaints remained unsealed, allowing access to at least some information.¹¹

The FJC researchers' most basic quantitative finding immediately became a mantra for secrecy advocates: "Sealed settlements are filed in less than one-half of 1 percent of civil cases!" But there is actually much more secrecy in federal personal injury litigation—the cases in which defendants are often particularly anxious to suppress information—than the mantra admits.¹²

Personal injury suits accounted for 30 percent of the cases in which the FJC researchers found sealed settlements,¹³ compared with only 18 percent of total case filings in the district courts in a comparable period.¹⁴ The sealing rate for personal injury cases was nearly twice what it was in the sample overall: 0.82 percent as opposed to 0.44 percent.¹⁵

A rough extrapolation from the 1,270 sealed settlement agreements found suggests that throughout all 94 federal districts (assuming that cases are about

as likely to be sealed in one district as another) there might have been as many as 400 more sealed settlements, with a rough total perhaps close to 1,700. With personal injury cases representing 30 percent of the FJC's sealed settlements, there might have been as many as 500 personal injury cases among the 1,700 total. Thus, in 2001 and 2002 alone, federal courts may have allowed the sealing of settlement documents in as many as 500 personal injury cases—and their significance for public health and safety will, for the most part, never be known.

Even the 500-case estimate is the small

education organization in Arizona that is active in scholarship, continuing legal education, and the development of legal policy in a number of substantive areas.¹⁶ In 2004, the organization established a Working Group on Protective Orders, Confidentiality, and Public Access, which includes tort lawyers from both sides of the courtroom, media lawyers, representatives of public interest and consumer organizations, academics, judges, and state government officials.¹⁷

The working group developed generic guidelines on secrecy that can be used by lawyers, courts, and legislatures for re-

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tip of a large secrecy iceberg. It refers only to the subset of personal injury settlements that were both sealed *and* filed in *federal* courts, leaving untouched all the cases that were concluded secretly without filing a settlement agreement—likely a far higher number.

It also leaves out all the secret settlements in state courts. According to conventional wisdom, state courts handle 95 percent of U.S. litigation, so the number of secret settlements in state courts (whether filed or unfiled) should be proportionately higher than the number in federal courts.

But the problem is not the raw number of secret settlements—it never has been. The real problem is the abuse of the practices that allow such secrecy, and the fact that even one sealed settlement can keep a product on the market for years after it is discovered to be dangerous—exposing consumers to continued risk and thwarting government regulators' efforts to protect the public.

The Sedona Guidelines. Arguably the most important development of the last five years in the struggle to establish an appropriate approach to confidentiality in litigation is the publication of *The Sedona Guidelines* by the Sedona Conference, a nonpartisan legal research and

search and guidance. *The Sedona Guidelines* address discovery, pleadings, court orders, substantive motions, dockets, proceedings in open court, settlements, and "privacy and public access to the courts in an electronic world."¹⁸ They hold out the promise of broader and more consistent development of legislation, court policies, and standards that will improve the present patchwork of state and federal secrecy regulation.

Thus, in the past five years, advocates of openness in America's courts have gained new weapons in the battle against secrecy. State and federal restrictions can be invoked to defeat some demands for secret settlements. Academic work can be cited to support policy arguments. The figures from the FJC study suggest the real extent of secrecy. And *The Sedona Guidelines* can serve as a model for new or expanded regulation of secrecy.

But for all this good news, secrecy in America's public courts is still a major public problem—and only trial lawyers are likely to solve it.

'Outrageous' arguments

When Prosser reported with satisfaction that "the storming of the inner citadel is already in full cry," he added the caveat that "over this stricken field

the slings and arrows of outrageous argument continue to fly.”¹⁹ Similarly, today two particularly pernicious arguments advanced by the secrecy advocates stand out.

“Cases won’t settle, or they will settle for less.” Defendants sometimes argue that cases won’t reach settlement if they cannot secure secrecy agreements. The argument is meant to frighten judges, to convince them that restricting secrecy would result in fewer settlements, more crowded dockets, more trials, and generally more work for an already-over-

worked judiciary.²⁰ that if cases had to be settled without secrecy, the amounts paid might be lower—an argument obviously intended to frighten plaintiffs and their lawyers, and a tacit admission that “defendants pay, and plaintiffs accept, more money than a case is worth simply to ensure secrecy—or, put more bluntly, that secrecy is indeed bought and sold.”²⁵

“Protecting public access to information about litigation is beyond the purpose of the courts.” The other “outrageous” argument, which initially appears benign but is by far the more dangerous

secrecy mechanisms are available to defendants, and much of the harm done by secrecy is unrelated to discovery. Second, court efficiency is not the only important issue for the courts. It has long been recognized that the need for efficiency is trumped by the judiciary’s duty to protect the public interest, if the two are in conflict.²⁹

Third, and most important, many jurists (including several U.S. Supreme Court justices) have acknowledged that their functions are not limited to the resolution of private disputes. The purposes of courts are seldom if ever the subject of litigation, so most of these statements appear in dicta or in concurring or dissenting opinions—but, wherever they appear, they evidence a legal culture that recognizes that courts carry out many functions over and above the quotidian deciding of disputes.

Among the other functions judges have acknowledged are resolving doubts; ascertaining the truth; educating the public; guarding, interpreting, forming, and modifying the social conscience; protecting the public interest; promoting safety; and recognizing the occasional need for change in the law, with the creation of new law to answer that need.³⁰

Some of the purposes served by the courts vary with the subject matter of the cases before them. With a domestic relations case comes the policy of keeping families together; with a juvenile crime case comes the policy of rehabilitation. This is even truer of tort law, which is the area in which most of the conflict over court secrecy arises.

In his 1984 report on the deliberations of the American Bar Association’s Special Committee on the Tort Liability System, Professor Marshall Shapo, a leading authority on tort law, identified 10 functions served by the tort liability system. Foremost among them is the deterrence of future harm, which he called “reduction of the occurrence, and severity, of injury-causing events.”³¹

The deterrent function of tort law is also recognized in nine sections of the American Law Institute’s *Restatement of Torts*, as well as in its Reporters’ Study on *Enterprise Responsibility for Personal Injury*.³² Court decisions also routinely ac-

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worked judiciary.²⁰

The argument has largely fallen out of favor, in part because judges have recognized its speciousness. Chief Judge Joseph Anderson of the U.S. District Court for the District of South Carolina wrote in a law review article that the argument “was based upon the somewhat illogical concept that if litigants could no longer attempt to cajole a judge into ordering a secret settlement, then the parties would necessarily opt for the most public of all resolutions—a trial before a jury in an open courtroom.”²¹

Judicial skepticism of the dire predictions has been borne out by the experience of several state and federal courts following the adoption of antisecrecy measures. In the first decade after secrecy restrictions were implemented in Florida and Texas, there was no apparent decrease in the number of case dispositions²²—and Anderson reported that, after his court adopted a local rule prohibiting filing of sealed settlements, the number of trials *decreased*, even though case filings *increased*.²³ One prominent South Carolina defense attorney who had lobbied against the adoption of the rule later told a reporter, “I don’t think it has caused more cases going to trial.”²⁴

The defense bar, however, promptly moved to a fallback position, arguing

of the two arguments, is that protecting the people’s access to information about the litigation that takes place in their courts somehow goes beyond the purpose of the courts. In his 1991 law review article, Miller labeled the opposition to secrecy as an attempt to add “an information clearinghouse function (in effect, a court-administered Freedom of Information Act)” to the role of the courts.²⁶ He argued that this was improper, because “the function of the judicial system is to resolve private disputes, not to generate information for the public.”²⁷

No antisecrecy advocate has suggested turning courts into information conduits; however, many have argued, *contra* Miller, that it is not proper for courts to help to *conceal* information from the public. In another article, Professor Richard Marcus of Hastings College of the Law stated flatly that “courts exist to resolve disputes that are brought to them by litigants, a bedrock principle that finds expression in the case or controversy requirement of Article III of the Constitution.”²⁸

Miller’s and Marcus’s articles both emphasized the discovery aspects of court secrecy and expressed concern for court efficiency. However, their arguments miss (or avoid) several important points.

First, the secrecy problem goes well beyond discovery. Numerous court se-

knowledge the importance of the deterrence policy of tort law. When courts address tort cases, the deterrence policy comes neither at the urging of the parties nor at the discretion of the judge. It comes with the territory, and it stays.

The deterrence policy may be the last remaining “brooding omnipresence”³³ in the law—a presence of both reason and humanity. Supporting it is not an improper function for the court—and it is a far cry from operating an “information clearinghouse.”

Strategic sabotage

Opponents of the civil justice system have had considerable success in neutralizing several tort system functions by lobbying for legislation that alters substantive law and radically restricts damages. But tort “reformers” cannot limit the deterrence policy of tort law by means of legislation. There is nothing to legislate.

What the tort revisionists *can* do is sabotage the deterrence function by using secrecy mechanisms to constrict the supply of information on which justice in tort litigation depends—information that extends beyond what appears in court filings, is produced in discovery, and is revealed in open court.

The paradigm example is information on settlements. The settlement process is one of the most critical elements of the tort system. Settlements are negotiated “in the shadow of the law” and of economics³⁴ and—along with jury and bench verdicts and the results of appellate review of compensation awards—information on the amount of money actually paid in settlements is critical to the work of judges and lawyers engaged in tort litigation.

The estimation of likely verdicts, and the likely cost of out-of-court settlements, is the basis of decisions by both plaintiff and defense lawyers on whether to settle cases or to take them to trial, and by judges reviewing proposed settlements for fairness. Outside of courthouses and law offices, settlement information is the basis of business decisions on whether to alter or eliminate practices and products that have caused injuries and deaths.

If repeat-player defendants can conceal settlement information, they can reduce the amount and quality of data used by consumer attorneys to make litigation decisions; facilitate public relations campaigns claiming that their products or operations are safe; characterize suits against them as “frivolous”; trivialize amounts paid to settle, leaving an impression that they are paying nuisance value; conceal the number of lawsuits against them;³⁵ conceal the fact that litigation ever occurred; and, sometimes, stave off litigation entirely.

When secrecy limits the public’s awareness of threats to health and safety, repeat-player defendants can continue their injury-producing activities.

If secrecy mechanisms can be used to limit the public’s awareness of threats to health and safety, repeat-player defendants can continue their injury-producing activities regardless of the public interest. Thus, court secrecy can neutralize all or a significant part of the deterrent function of tort law, which would otherwise force earlier changes in activities that cause injury.

The result—and, one suspects, the ultimate goal—of the liberal use of secrecy can be to deprive Americans of an effective tort system, allow defendants to conduct “business as usual,” and reduce all matters of injury-prevention and compensation to mere business calculations. If that can be done, the only remaining step will be to buy the insurance that will cover the costs.

In 1599, William Shakespeare wrote for Mark Antony the prophetic lines that “the evil that men do lives after them / the good is oft interred with their bones.”³⁶ Defense counsel are not usually evil, but it is too much to expect even honorable, decent defense lawyers not to try to obtain secret settlements and use other secrecy mechanisms.

Yet the stakes for the public are high, and consumer lawyers must resist this pernicious practice. Trial lawyers who sign secret settlement agreements may secure immediate relief for their clients,

but they may also prolong the life of “the evil that men do”—and bury with their own bones the good they themselves have done. ■

Notes

1. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099 (1960) (quoting *Ultrameres Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931)).
2. See Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case against Government-Enforced Secrecy*, 55 *S.C. L. Rev.* 711, 713-14 (2004).
3. See e.g. Assn. Trial Law. of Am., Board of Governors, Resolution on Protective Orders

(May 6, 1989) (reproduced in James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 *S.C. L. Rev.* 859, 876-77 (2004)).

4. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 *Harv. L. Rev.* 427 (1991) (with a biographical footnote disclosing that preparation of the article “was assisted by a research grant from the Product Liability Advisory Council Foundation”).

5. *Id.* at 429 n. 7 (citing Fla. Stat. §69.081 (1990) (Sunshine in Litigation Act); Uniform R. N.Y. Trial Cts. R. 216.1; Tex. R. Civ. P. 76a; Va. Code Ann. §8.01-420.01 (Michie 1991)).

6. AAJ members may access a compilation of statutes and court rules for both state and federal courts, current as of April 2007, on the AAJ Web site at www.justice.org/pressroom/FACTS/secrecy/antisecrecyprovisions2007.doc. The advisability of establishing court rules for what can and cannot be sealed is borne out by the researchers’ experience in a major study of sealed settlements in federal district courts. See Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 *Chi.-Kent L. Rev.* 439, 446 (2006) (“One recently hired clerk told us that in one of her offices the prior practice had been for the clerk’s office to simply file under seal anything a person filing a document asked to be filed under seal.”).

7. Symposium, *Court-Enforced Secrecy*, 55 *S.C. L. Rev.* 711 (2004); Symposium, *Secrecy in Litigation*, 81 *Chi.-Kent L. Rev.* 301 (2006).

8. See e.g. Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 *Hofstra L. Rev.* 1 (2002); John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 *S.C. L. Rev.* 829 (2004).

9. Robert Timothy Reagan et al., *Sealed Settlement Agreements in Federal District Court* (Fed. Jud. Ctr. 2004), www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf [hereinafter *FJC Study*].

10. *Id.* at 3, app. A-2.
11. *Id.* at 1.
12. Reagan, *supra* n. 6, at 453.
13. *FJC Study*, *supra* n. 9, at 5 tbl. 1. The district courts broke the “personal injury” category down further into 12 subcategories, such as “airplane,” “airplane product liability,” “federal employers’ liability,” and “product liability.” See also Reagan, *supra* n. 6, at 452 n. 72.
14. The FJC sample was apparently based on the calendar years 2001 and 2002. The federal courts’ statistical records are based on fiscal years ending September 30 of each year. In the statistical year 2001, in all district courts, there were 250,907 civil filings, 33,663 of them tort cases, or 13.4 percent. Admin. Off. U.S. Cts., *Federal Court Management Statistics, 2001, District Courts*, www.uscourts.gov/cgi-bin/cmsd2001.pl. In the statistical year 2002, there were 274,841 civil filings, 62,919 of them tort cases, or 22.9 percent. Admin. Off. U.S. Cts., *Federal Court Management Statistics, 2002, District Courts*, www.uscourts.gov/cgi-bin/cmsd2002.pl.
15. *FJC Study*, *supra* n. 9, at 5 tbl. 1.
16. *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 Sedona Conf. J. 141 (Mar. 2007), accessible on Westlaw (database identifier SEDCJ); see also www.thsedonaconference.org.
17. The author is a member of the working group.
18. *The Sedona Guidelines*, *supra* n. 16, ch. 5.
19. Prosser, *supra* n. 1, at 1113-14.
20. Every commentator who represented the insurance industry and four of the six defense attorneys who submitted letters opposing the proposed ban on filing sealed settlements in federal court in South Carolina made this argument. See Rooks, *supra* n. 3, at 866-69.
21. Anderson, *supra* n. 2, at 726.
22. See Rooks, *supra* n. 3, at 871, 874 n. 57 (analyzing Florida case filings and dispositions and inviting attorneys to report cases in which secrecy was rejected and which thereafter could not be settled; no one has yet reported such a case); David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. Ill. L. Rev. 1217, 1225 (“To our knowledge, there is no evidence that these differences among jurisdictions [in how much they regulate secret settlements] have translated into differences in settlement timing and/or settlement rates.”).
23. Anderson, *supra* n. 2, at 726. See Dist. S.C. Loc. Civ. R. 5.03.
24. John Monk, *Ford Settlement Open to All in S.C., The State* (Columbia, S.C.), www.motleyrice.com/news/cuttings/2005/Ford_settlement_open_to_all_in_SC.pdf (June 19, 2005).
25. Richard Zitrin, *The Judicial Function: Justice between the Parties, or a Broader Public Interest?*, 32 Hofstra L. Rev. 1565, 1578 (2004). Significantly, the U.S. Tax Court has ruled that the portion of a personal injury settlement attributable to secrecy is taxable. See *Amos v. Commr.*, 2003 WL 22839795 at *7 (U.S. Tax Dec. 1, 2003) (holding that \$80,000 of a \$200,000 confidential settlement was not excludable from the taxpayer’s gross income).
26. Miller, *supra* n. 4, at 487.
27. *Id.* at 441.
28. Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457, 468 (1991).
29. See e.g. *Ins. Group Comm. v. Denver & Rio Grande W.R.R.*, 329 U.S. 607, 631 (1947) (Frankfurter, J., dissenting). When federal judges take office, their oath says nothing about efficiency—it does, however, oblige them to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. §453 (2001).
30. See e.g. *Rios v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (“[T]he underlying aim of judicial inquiry is ascertainable truth.”); William O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea* 443 (Doubleday 1956) (“[T]he judiciary plays an important role in educating the people as well as in deciding cases.”); Benjamin Nathan Cardozo, *The Wisdom of the Supreme Court* 88 (Percival E. Jackson ed., U. Okla. Press 1962) (“The judge interprets the social conscience, and gives effect to it in law, but in so doing

he helps to form and modify the conscience he interprets. Discovery and creation react upon each other.”); *Denver & Rio Grande W.R.R.*, 329 U.S. at 631 (Frankfurter, J., dissenting) (“[T]he protection of the public interest in the special keeping of the Court is more imperative than the despatch of judicial business.”); *Hay v. Med. Ctr. Hosp. of Vt.*, 496 A.2d 939, 945 (Vt. 1985) (“When the conditions and needs of a society have changed, judges must adapt the common law to those new conditions.”).

31. Marshall S. Shapo, ABA, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law, Report of the ABA Special Comm. on the Tort Liab. Sys.* ch. 4 at 3 (1984).

32. See e.g. *Restatement (Second) of Torts* §§901, 908 (1979); *Restatement (Third) of Torts: Physical Harm* §§1, 3, 19 cmt. c, 26 (rptrs. n. to cmt. b), 27 (rptrs. n. to cmt. d), 28 cmt. o (proposed final dft. no. 1, 2005); *Restatement (Third) of Torts: Apportionment of Liability* §E18 cmt. d (2000); Am. L. Inst., Reporters’ Study, *Enterprise Responsibility for Personal Injury*, vol. II, 211-12 (1991).

33. *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 102 (1945) (“Law [in the mid-19th century] was conceived as a ‘brooding omnipresence’ of Reason, of which decisions were merely evidence and not themselves the controlling formulations.”) (referring to Justice Holmes’s dissent that “the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified” in *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917), *superseded by statute as stated in Dir., Office of Workers’ Compensation Programs, U.S. Dept. of Labor v. Perini N. River Assocs.*, 459 U.S. 297 (1983)).

34. Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1341-42 (1994).

35. See Monk, *supra* n. 24 (“Ford spokeswoman . . . said the company doesn’t know how many lawsuits are pending alleging defective door latches. ‘We face so many frivolous lawsuits in a year that if we kept statistics, they just would be meaningless,’ she said.”).

36. William Shakespeare, *The Tragedy of Julius Caesar*, Act 3, Scene 2.