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Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement

Laurie Kratky Dore

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SECRECY BY CONSENT: THE USE AND LIMITS OF CONFIDENTIALITY IN THE PURSUIT OF SETTLEMENT

*Laurie Kratky Doré**

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* Associate Professor of Law, Drake University Law School (laurie.dore@drake.edu). I wish to thank my colleagues at Drake Law School, Thomas Baker and Gregory Sisk, for reviewing and commenting upon earlier drafts of this Article. I also gratefully acknowledge the excellent research and editorial assistance provided by Jennifer Clark and Renee Kossiak, as well as the generous research stipends provided by the Drake University Law School Endowment Trust. Finally, and especially, I thank my husband and colleague, Matthew Doré, for his invaluable input and support.

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INTRODUCTION

Consensual secrecy pervades virtually every phase of modern civil litigation. At the inception of many civil lawsuits, parties stipulate to "umbrella" protective orders that restrict the dissemination of confidential discovery and require its return or destruction upon resolution of the controversy.¹ Litigants sometimes further agree that documents, exhibits, pleadings, and even court transcripts be filed under seal with the court.² Settlements are often conditioned upon confidentiality agreements and orders that prohibit disclosure of the terms and amount of the compromise or the facts upon which they are premised.³ Even court decisions and jury verdicts have been erased from the public record by stipulation of parties who belatedly resolve their dispute after trial, often during the pendency of an appeal.⁴

1 See MANUAL FOR COMPLEX LITIGATION §§ 21.431-432 (3d ed. 1995) (discussing benefits and standard terms of early umbrella protective orders in cases involving voluminous discovery).

2 See *Nault's Auto. Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25, 43 (D.N.H. 1993) (noting the "growing tendency" of parties to stipulate to the sealing of "documents produced during the discovery process as well as pleadings and exhibits filed with the court").

3 Professor David Luban has criticized the secrecy of many settlements, noting: The sticking point with settlements is not truth but openness. Parties consummate settlements out of public view. The facts on which they are based remain unknown, their responsiveness to third parties who they may affect is at best dubious, and the goods they created are privatized and not public. Settlements are opaque.

David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648-50 (1995).

4 While the United States Supreme Court recently restricted the use of stipulated vacatur by federal appellate courts, the practice still subsists in some state courts, most notably California. Compare *United States Bancorp Mortgage Co. v. Bonner Mall*

Courts sanction these confidentiality agreements in order to promote the private settlement of disputes—a long-established public policy aimed at preserving the autonomy of litigants to resolve their own disputes as they wish and at conserving both public and private resources by avoiding trial.⁵ Shifts in the American procedural landscape and in our overall vision of civil litigation, however, have called these rationales into question and have suggested that, at least in some cases, party autonomy and the preference for settlement should yield to some greater interest supporting public access.

In this Article, I explore these issues by examining the appropriate uses and limits of confidentiality in the pursuit of the settlement in civil litigation.⁶ I reject the “one size fits all” approach to litigation confidentiality that has been adopted by many courts and commentators and analyze instead the distinct issues of public access that surround stipulated protective orders governing discovery, the sealing of judicial records, and confidential settlements. To address these issues, I suggest a balancing approach that uses as its measure the principal objectives of the right of public access to judicial proceedings. Under this approach, the importance of party autonomy and the strong preference for settlement both vary according to the role that the confidential materials play in the principal adjudicative function of the courts.

Partnership, 513 U.S. 18, 25 (1994) (criticizing stipulated vacatur) *with* Neary v. Regents of Univ. of Calif., 834 P.2d 119, 121 (Cal. 1992) (creating “strong presumption” in favor of vacatur on consent). For an extensive discussion of stipulated vacatur in state and federal courts, see generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

5 See generally Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9 (1996) (extolling the institutional benefits of private settlement).

6 While litigation confidentiality is as (if not more) pressing an issue in state courts today, see *infra* Part II.C.2 (describing federal and state sunshine laws), this Article focuses primarily upon secrecy orders in the federal courts. Given that a majority of states have adopted the Federal Rules of Civil Procedure, however, this federal focus can nevertheless instruct the broader confidentiality debate. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1 (noting that over 35 states have adopted the Federal Rules of Civil Procedure for their trial courts).

Further, although precedent concerning public access to pretrial criminal proceedings informs the access debate in the civil context, this Article focuses exclusively on access issues as they arise in the settlement of civil litigation. See *infra* note 155 and accompanying text (distinguishing between access issues in criminal and civil proceedings).

Part I of the Article surveys the shift in our procedural landscape and examines the conflicting visions of civil litigation that have resulted from that movement. Trial on the merits no longer holds center stage for lawyers who currently spend the great majority of their time engaging in pretrial activities such as discovery and motion practice. The norm of a public trial is giving way to the norm of private settlement, with almost two-thirds of all filed federal civil cases terminating by pretrial agreement of the parties.⁷ These changes in orientation—from trial to litigation; from adjudication to settlement—have heightened the existing tension between the traditional party-centered view of civil litigation as a public service for private dispute resolution and the often conflicting perception of courts as “institutions expressive of and accountable to the public.”⁸

Part II then assesses how this broad systemic tension contributes to the more particular controversy over secrecy agreements and agreed confidentiality orders. In that section, I examine the increasingly heated debate over whether there is an “excess of court secrecy in civil litigation” that undercuts the tradition of public access to judicial proceedings or jeopardizes public health and safety.⁹ In that connection, I canvass various judicial and legislative proposals aimed at limiting the discretion of judges and parties alike to enter into or approve secrecy agreements at virtually every phase of the litigation process.

The Article then studies the public access issues that particularly arise at the various stages of litigation where agreed confidentiality is frequently utilized. Part III sets the stage by inspecting the rationales that traditionally support public access to judicial proceedings and

7 See *infra* Part I.A (reviewing moves from trial to litigation and from adjudication to settlement).

8 Resnik, *supra* note 4, at 1527 (describing one vision of the courts as “instruments” and “guardians” of the public with an interest in adjudication beyond dispute resolution). For a discussion of the systemic debates concerning the appropriate role of the civil justice system, the traditional primacy of party autonomy, and the institutional value of settlement, see *infra* Part I.B.

9 Henry J. Reske, *Secrecy Orders at Issue*, A.B.A. J., Aug. 1994, at 32, 33 (quoting Abner Mikva and contending that court secrecy poses a “serious problem for the health and safety of our population”). See also James L. Gilbert et al., *The Price of Silence*, TRIAL, June 1994, at 17 (maintaining that “[d]eadly secrets lie sealed on the shelves of courtrooms across America”); Sen. Herbert Kohl, Testimony before Senate Judiciary Committee on Courts and Administrative Practice, F.D.C.H., 1994 WL 230123, at *1 (April 20, 1994) [hereinafter *Kohl Testimony*] (proposing federal sunshine legislation that would remedy the perceived “cover-up” involving the prevalent “use of secrecy agreements in litigation to shield critical information about health and safety from the public”).

records. Part IV critiques the applicability of these rationales to unfiled confidential discovery and analyzes the private and public considerations relevant to the entry and modification of stipulated protective orders. Part V examines how public access analysis might vary with the filing of confidential discovery and suggests a functional approach to the sealing of judicial records. Finally, Part VI explores judicial oversight of confidential settlements—an arena in which stipulated protective orders and sealing orders frequently converge.

I. A SHIFTING PROCEDURAL LANDSCAPE AND CONFLICTING VISIONS OF CIVIL LITIGATION

A. *From Trial to Litigation; From Adjudication to Settlement*

Although popular perception views the public trial as the centerpiece of our justice system, trial-on-the-merits increasingly represents a rare and atypical resolution of the majority of civil lawsuits filed in this country.¹⁰ In federal court alone, the proportion of filed to tried cases has declined by four-fifths over the last fifty years, with only approximately four percent of all filed civil cases now resulting in a trial.¹¹ Indeed, a civil litigator today devotes less than ten percent of her time to trials, hearings, appeals, and judgment enforcement.¹² As recently noted by Professor Stephen Yeazell, lawyers and courts alike now focus on “events that occur instead of trial and which typically head off trial,”¹³ including discovery, pretrial motions, and settlement negotiations. The last half century, Professor Yeazell concludes, has witnessed “the displacement of trial as the culmination of civil litiga-

10 See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 63 (1996) (arguing that the very few “extreme and unrepresentative cases” that do go to jury trial “distort public perception of the administration of civil justice”).

11 See Yeazell, *supra* note 6, at 631, 633 (“Only 4.3% of the filed civil cases [in 1990] resulted in trials, a proportional decline of almost four-fifths from the pre-Rules world.”); see also Marc Galanter & Mia Cahill, *“Most Cases Settle”: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994) (“[I]n the federal courts, the portion of cases that terminated in trials dropped from 11 percent in 1961 to 4 percent in 1991.”). Recent studies suggest that the national trial rate is significantly lower, with a mere two percent of civil filings in both state and federal courts actually proceeding to trial. See Gross & Syverud, *supra* note 10, at 2, 63 & n.2 (citing a study by Professor Theodore Eisenberg for the National Center for State Courts).

12 See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 tbl. 3 (1983).

13 Yeazell, *supra* note 6, at 639.

tion" and the investiture of pretrial activities as "a fundamental characteristic of modern process."¹⁴

This shift from trial to pretrial litigation has brought about a corresponding decline in adjudications on the merits and a dramatic rise in settlement.¹⁵ Only one-third of all federal civil cases end after some form of merits determination—eleven percent by trial and the remainder by pretrial adjudication such as motions to dismiss or motions for summary judgment.¹⁶ The remaining two-thirds of all filed cases settle without any "definitive judicial ruling."¹⁷ These figures represent more than a doubling of the settlement rate over the last half decade.¹⁸ In short, civil process in this country is increasingly diverting time and resources away from trial and adjudication toward pretrial activities and settlement.

B. *Conflicting Visions*

This evolution in modern process has created some wrenching tensions in our vision of the civil justice system, tensions which contribute to and inform the current debate over litigation confidentiality. For instance, the value one places upon settlement as opposed to adjudication directly correlates with one's willingness to sanction secrecy as a method of achieving compromise. How one views the primary role of the courts further fuels the secrecy debate, for if the primary function of the judiciary is dispute resolution, then courts should readily accede to the parties' mutual desire for confidentiality if it serves that purpose. On the other hand, one would expect a certain amount of suspicion toward stipulated secrecy if one conceives of courts as accountable to and guardians of a broader public interest. Finally, the question of who owns a lawsuit and its resolution—the parties or the public—significantly influences one's stance toward

14 *Id.* at 633, 674. See also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 45 (1983) (concluding that "the trial is no longer the center of gravity of common law litigation").

15 See Yeazell, *supra* note 6, at 674 (attributing decline in adjudication to emphasis on pretrial process).

16 See *id.* at 636 (stating that in 1990, trial constituted only 11% of adjudicated dispositions).

17 Galanter & Cahill, *supra* note 11, at 1340. See also Gross & Syverud, *supra* note 10, at 2 (noting that "[o]f the hundreds of thousands of civil lawsuits that are filed each year in America, the great majority are settled").

18 See Yeazell, *supra* note 6, at 638 (noting that "pretrial activity that does not result in dispositive adjudication is producing fewer abandoned cases and twice as many settlements as was the case fifty years ago").

stipulated secrecy. In order to fully understand (and potentially resolve) the confidentiality controversy, then, one must have a broader understanding of these competing systemic visions.

1. Settlement Versus Adjudication

a. Public Policy Favoring and Judicial Promotion of Settlement

The expense, risk, and delay that frequently attend formal adjudication in the American legal system explain, at least in part, the party preference for and rising incidence of settlement.¹⁹ A strong and well-established public policy favoring the private settlement of disputes, however, also contributes to the decline of trial and the ascendancy of settlement.²⁰ This public policy appears deeply embedded in, and actively encouraged by, our civil justice system, which has, as its primary objective, "the just, speedy, and inexpensive determination of every action."²¹ Our procedural rules thus promote private settlement from the outset of a civil lawsuit through its appeal.

Federal Rule of Civil Procedure 16, for example, recognizes facilitation of settlement as an objective of the pretrial conference,²² and expressly authorizes a trial court to convene a settlement conference at any appropriate time and "at as early a stage of the litigation as possible."²³ Federal Rule of Civil Procedure 26(f) further directs the parties to meet "as soon as practicable" to discuss, among other

19 See Gross & Syverud, *supra* note 10, at 3–5 (explaining the American legal system's preference for settlement with structural reasons such as "scarcity of judges and abundance of lawyers, adversarial fact-finding, [and] trial by jury").

20 See Resnik, *supra* note 4, at 1477 (discussing the "myriad of contemporary developments that promote, as a matter of public policy, the settlement of disputes and the diminution of the role of formal adjudication").

21 FED. R. CIV. P. 1. See also Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1995) (giving the "just, speedy, and inexpensive resolution of civil disputes" as one purpose of civil justice expense and delay plans).

22 FED. R. CIV. P. 16(a)(5).

23 FED. R. CIV. P. 16 advisory committee's note to 1983 amendment (reasoning that settlement "obviously eases crowded dockets and results in savings to the litigants and the judicial system").

Rule 16 was recently amended to reinforce the court's authority, even over party objection, "to make appropriate orders designed . . . to facilitate [pretrial] settlement." FED. R. CIV. P. 16(c) advisory committee's note to 1993 amendment. The 1993 amendments now authorize trial courts to direct party representatives with settlement authority to appear or to be available by telephone during the pretrial conference to discuss possible settlement of the case. In addition, if authorized by statute or local rule, courts can now utilize alternative dispute resolution procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbit-

things, "the possibilities for a prompt settlement or resolution of the case."²⁴ Up until ten days before trial, a defending party can make an offer of judgment under Federal Rule of Civil Procedure 68, the "plain purpose" of which "is to encourage settlement and avoid litigation."²⁵ Our procedural rules even facilitate post-trial settlement by now authorizing appellate courts to order the parties to address the "possibility of settlement" at appeal conferences and to enter any order necessary for "implementing any settlement agreement."²⁶ The push for settlement similarly manifests itself in our evidentiary rules,²⁷ in federal legislation like the Civil Justice Reform Act,²⁸ and in

tration. See FED. R. CIV. P. 16(c), 16(c)(9), and FED. R. CIV. P. 16(c) advisory committee's note to 1993 amendment.

24 FED. R. CIV. P. 26(f).

25 *Marek v. Chesny*, 473 U.S. 1, 5 (1985). The public policy favoring the compromise of disputes explains why Federal Rule of Civil Procedure 68 renders unaccepted offers of judgment inadmissible except in a proceeding to determine costs. See FED. R. EVID. 408 advisory committee's notes.

26 FED. R. APP. P. 33. This Rule was completely revised in 1994 to, among other things, acknowledge settlement as a potential tool to "aid in the disposition of the proceedings." *Id.* See also FED. R. APP. P. 33 advisory committee's note to 1994 amendment. To that end, Rule 33 now requires that attorneys come to the appellate settlement conference only after consulting with their clients and obtaining "as much authority as feasible to settle the case." *Id.*

27 To promote "the public policy favoring the compromise and settlement of disputes," Federal Rule of Evidence 408 renders evidence of a settlement or an offer to settle inadmissible to prove either the validity or the amount of a disputed claim. FED. R. EVID. 408 advisory committee's note. See also Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 957, 999 (1988) (cautioning that while Rule 408 "clearly reflects a significant federal policy in favor of promoting settlement by encouraging freedom of communication," it does not create a privilege and thus does not necessarily protect against the discovery or admissibility of settlement materials in all cases).

28 Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-82 (1995). Although it does not explicitly direct federal courts to actively promote private settlement, the Act accomplishes that objective implicitly by directing federal district courts to implement plans for reducing expense and delay in civil lawsuits. *Id.* § 471. In formulating such plans, district courts should consider and may include provisions that explore "the parties' receptivity to, and the propriety of, settlement," *id.* § 473(a)(3)(A), that authorize referral to alternative dispute resolution or neutral evaluation programs, *id.* §§ 473(a)(6), 473(b)(6), and that require that representatives "with authority to bind [the parties] in settlement discussions" be present or available at settlement conferences. *Id.* § 473(b)(5).

Congress continues to favor settlement. The Alternative Dispute Resolution Act of 1988, H.R. 3528, 105th Cong. (1988), recently approved by the House Judiciary Committee, would require federal district courts to authorize the use of alternative dispute resolution in all civil cases and to implement their own alternative dispute resolution programs. See *Bill Would Require Federal Courts To Devise Procedures for ADR Use*, 66 U.S.L.W. 2584 (1998).

Supreme Court decisions.²⁹ These procedural rules and innovations, together with a court's inherent authority to manage its own affairs,³⁰ have intensified judicial efforts to actively promote the private settlement of disputes.³¹

b. The Current Debate and the Push to Regulate Settlement

Over the last decade, legal scholars have vigorously debated the value of settlement in lieu of adjudication³² and the propriety of judicial promotion of settlement.³³ Defenders of settlement argue that it

29 In *Evans v. Jeff D.*, 475 U.S. 717, 732-38 (1986), for example, the United States Supreme Court relied upon the public policy favoring settlement when it construed the Civil Rights Attorney's Fees Awards Act of 1976 to permit settlement of civil rights claims conditioned upon the waiver of attorney fees. To hold otherwise, according to the Court, might impede the settlement of civil rights claims, "thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants." *Id.* at 736-37. See also *Marek*, 473 U.S. at 10 (construing Federal Rule of Civil Procedure 68 to promote both settlement and civil rights). Professor Cordray, however, criticizes a recent trilogy of Supreme Court cases for giving insufficient, if any, consideration to the important federal policy favoring settlement. See Cordray, *supra* note 5.

30 See Daisy Hurst Floyd, *Can the Judge Do That?—The Need for A Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 57 (1994) (noting that courts may issue orders designed to encourage or facilitate settlement, even if not specifically authorized by Rule 16, pursuant to their "inherent authority to control litigation before them").

31 See Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3-4 (1992) (tying expanded judicial promotion of settlement to Civil Justice Reform Act and Rule 16); Cordray, *supra* note 5, at 40-41 (asserting that "procedural rules and reforms . . . have encouraged judges to become increasingly active in trying to broker settlements between parties"); Floyd, *supra* note 30, at 51 (attributing increasingly active role of judges in settlement to "growing concern over litigation delay and expense"); Galanter & Cahill, *supra* note 11, at 1340-41 (noting that the Civil Justice Reform Act "encourages district courts to include active judicial promotion of settlement in their arsenal of techniques for expediting litigation"). But see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1122-23 (1996) (attributing "[c]ourts' strong disposition toward settlements" to judicial self-interest in avoiding uninteresting cases and in clearing crowded dockets).

32 Compare Luban, *supra* note 3, and Galanter & Cahill, *supra* note 11 (both questioning the current understanding of the value of settlement), with Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995), and Cordray, *supra* note 5 (both extolling the systemic value of settlement in certain cases).

33 See generally Floyd, *supra* note 30, at 50 (proposing judicial education and the revision of Rule 16 and the Code of Judicial Conduct "to prevent misuse of case management techniques with regard to settlement and to give judges clearer guidance regarding their role in settlement"); Galanter & Cahill, *supra* note 11, at 1364-70 (questioning whether judicial intervention increases the incidence or quality of settlement or judicial productivity); Carrie Menkel-Meadow, *For and Against Settlement: Uses*

produces significant institutional benefits in addition to benefiting the immediate parties.³⁴ Settlement, it is contended, conserves scarce judicial resources and relieves a court's crowded dockets—weighty objectives in a world characterized by too few judges, too many lawyers, and an overflow of disputes.³⁵ Settlement arguably spares the litigants the time, expense, and, perhaps most importantly, the risk of an unpredictable adjudication.³⁶ Moreover, many view settlement as qualitatively better than adjudication because settlement permits a more satisfying and lasting resolution of a controversy.³⁷

Others strongly criticize the current celebration of settlement and the resulting decline in adjudication.³⁸ In his seminal article *Against Settlement*, for example, Professor Owen Fiss rails against settlement as an inadequate substitute for adjudication and “a capitulation to the conditions of mass society [that] . . . should be neither encouraged nor praised.”³⁹ More recent critics of the settlement movement question the supposed benefits of settlement over adjudication,

and Abuses of the Mandatory Settlement Conference, 33 UCLA L. REV. 485 (1985) (discussing pros and cons of mandatory settlement conferences); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743 (1989) (examining the costs and benefits of active judicial involvement in pretrial settlement).

34 See, e.g., Menkel-Meadow, *supra* note 32, at 2669 (making “a case for settlement by arguing that there are philosophical, as well as instrumental, democratic, ethical, and human justifications for settlements (at least in some cases)”).

35 See Gross & Syverud, *supra* note 10, at 4.

36 See *id.* at 3–4 (noting that “[a]dversary fact-finding is . . . expensive, unpredictable . . . and, given the scarcity of judges, slow”); Cordray, *supra* note 5, at 36–37 (contending that settlement can obviate “the debilitating effects of uncertainty and exposure to risk that exist while a dispute remains unresolved, and the toll taken by the aggravation and distress that so often plague a party as a lawsuit grinds its way through the court system”).

37 As explained by Professor Menkel-Meadow: “[U]ntil litigation is permitted to recognize the ambiguities and contradictions in modern life by developing a broader ‘remedial imagination,’ settlement offers the opportunity to craft solutions that do not compromise, but offer greater expression of the variety of remedial possibilities in a postmodern world.” Menkel-Meadow, *supra* note 32, at 2674–75. See also Cordray, *supra* note 5, at 37 (arguing that settlements allow the parties greater flexibility to consider non-legally cognizable facts and to craft more creative and responsive solutions); Menkel-Meadow, *supra* note 33, at 504–05 (suggesting that settlement offers “substantive justice that may be more responsive to the parties’ needs than adjudication”).

38 Galanter & Cahill, *supra* note 11, at 1339.

39 Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Because consent is often coerced and dependent upon party resources, Fiss finds settlement a “highly problematic technique for streamlining dockets” that is “at odds with a conception of justice.” *Id.* at 1075–76.

pointing to the lack of empirical evidence demonstrating either that settlement reduces the cost, time, and aggravation of litigation or that settlement produces any superior outcome.⁴⁰ Of particular relevance to the confidentiality controversy is the more fundamental criticism that settlement fails to produce the "public goods" created by adjudication.⁴¹ According to Professor David Luban, these public goods include the development of precedent that binds nonparties and guides future conduct,⁴² the honing of advocacy and case assessment skills,⁴³ the discovery and dissemination of facts,⁴⁴ and the enhancement of a court's adjudicative authority.⁴⁵ At the same time, he insists that adjudication avoids the "public bads" of settlement by making it impossible or very difficult to pass on the burdens of a compromise to unrepresented third parties.⁴⁶

Even the staunchest defenders of adjudication, however, today grudgingly acknowledge that settlement will remain a permanent fixture of the litigation landscape.⁴⁷ Instead of advocating the abandonment or curtailment of settlement, then, they seek to police or regulate the settlement process to promote settlements that achieve at least some of the public goods created by adjudication and to avoid settlements that defeat those public values.⁴⁸ In short, the argument has shifted away from one either "for" or "against" settlement to one

40 See Galanter & Cahill, *supra* note 11, at 1350–87. Professor Galanter also faults the "hidden costs" of settlement, such as the depletion of precedent. *Id.* at 1364.

41 See *id.* at 1379–80 (examining the impact of settlement upon nonparties and doubting that settlement can produce comparable public goods to those produced by adjudication); Luban, *supra* note 3, at 2621–42 (making an "instrumentalist" argument premised upon the "public goods" created by adjudication). Professor Menkel-Meadow characterizes such criticisms as "litigation romanticism." Menkel-Meadow, *supra* note 32, at 2669.

42 See Luban, *supra* note 3, at 2622–23.

43 See *id.* at 2623–24, 2641. According to Luban, adjudication enhances the advocacy skills of trial judges, as well as lawyers. See *id.*

44 See *id.* at 2625.

45 See *id.* By this, Luban refers to "the courts' claim as an authoritative resolver of controversies" which is weakened when litigants "turn elsewhere" and resolve their dispute through private bargaining or other extra-judicial processes. *Id.*

46 *Id.* at 2626. Adjudication avoids this pitfall, according to Luban, because of its judicial oversight and the public nature of a trial. See *id.*

47 See *id.* at 2647 (predicting that "settlement [will] inevitably . . . become more salient in the universe of litigation"). Luban further admits that too much adjudication can create its own "public bads." See *id.* at 2642–47.

48 See Galanter & Cahill, *supra* note 11, at 1388 (stating that the "task for policy is not promoting settlements or discouraging them, but regulating them" to ensure their quality); Luban, *supra* note 3, at 2647 (reframing the issue as "how can matters be arranged to preserve the values promoted by adjudication as best they can be preserved?").

focused upon the appropriate regulation, if any, of settlements—"when, how, and under what circumstances should cases be settled?"⁴⁹ As discussed below, the controversy over litigation confidentiality figures prominently in this developing "jurisprudence of settlement."⁵⁰

2. The Judicial Function

Whether one values settlement over adjudication or vice versa ultimately reflects how one imagines the role of the courts and our legal system. Professor Luban characterizes the current competition as one between a "problem solving" and a "public life" conception of the judicial role.⁵¹ The first regards dispute resolution as the primary mission of the courts, which exist in order to resolve the particular dispute before them according to the substantive law.⁵² Under that traditional viewpoint, courts function as neutral and authoritative arbiters to assist litigants in resolving their private disputes.⁵³

49 Menkel-Meadow, *supra* note 32, at 2664–65. As iterated by Professor Luban: "We cannot really be against settlements; nor can we really be against settlements that vastly outnumber adjudications. But we can be against the wrong settlements." Luban, *supra* note 3, at 2662.

50 Luban, *supra* note 3, at 2620 (asking whether there is "a jurisprudence of settlements waiting to be developed"); Menkel-Meadow, *supra* note 32, at 2696 (acknowledging need to develop and debate this new "jurisprudence of settlement").

51 Luban, *supra* note 3, at 2626–42. Professor Luban distinguishes the two as follows:

Proponents of the problem-solving conception desire the minimum amount of adjudication necessary to create bargaining-shadows and adjudicatory authority. Proponents of the public-life conception, on the other hand, desire the maximum amount of adjudication consistent with respect for the parties, who may be reluctant to go to trial.

Id. at 2642.

52 See Cordray, *supra* note 5, at 47 n.161 (describing the core purpose and "primary function" of the judicial system as helping parties to resolve their dispute); Richard L. Marcus, *The Discovery Confidentiality Controversy*, U. ILL. L. REV. 457, 469–70 (1991) [hereinafter Marcus, *Discovery Confidentiality*] (arguing that the primary role of a court, unlike other "organs of government," is to resolve disputes and "decide cases according to the substantive law," rather than to "give expression to 'public values'"); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 16 (1983) [hereinafter Marcus, *Myth and Reality*] (criticizing assumption that courts play a role in resolving "major social issues"); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 431–32 (1991) (contending that the court's "primary mission" of resolving disputes among litigants should not be diverted by the collateral effect of information dissemination).

53 See Koniak & Cohen, *supra* note 31, at 1127–28 (suggesting that "traditional paradigm of judging is that of a neutral arbiter, rather than partisan or protector"); Luban, *supra* note 3, at 2638 (describing problem-solving conception as one that re-

In contrast, proponents of a public life conception regard courts as playing a role beyond the resolution of the immediate dispute and independent of the particular litigants before them. Adjudication, the traditional charge of the courts, functions as a vehicle for public discourse, for the explication of public values, and for the refinement or improvement of the law.⁵⁴ Moreover, as publicly funded institutions, courts are accountable to and guardians of a broader public interest.⁵⁵ As described by Professor Judith Resnik, this alternative vision thus regards courts

as instruments of the public, of judges as guardians of the public, and of the public as having an interest in adjudication beyond its function of concluding disputes of the parties or across a series of disputes over time. Courts are not "servants" of the parties; courts have an independence from the parties, not only as the voices of other parties' interests, but as institutions expressive of and accountable to the public.⁵⁶

This tension concerning the appropriate judicial role informs the controversy concerning public access and litigation secrecy. As discussed further below, proponents of a problem-solving conception of litigation, like Professors Arthur Miller and Richard Marcus, oppose any attempt to supplant the primary dispute-resolving role of the courts with what traditionally have been mere "collateral effects" of litigation such as information generation and dissemination.⁵⁷ In

gards "adjudication as a social service that the state provides disputing parties to keep the peace"); Menkel-Meadow, *supra* note 32, at 2680 (characterizing one vision of courts as "public service for private dispute resolution").

54 In arguing against settlement, Professor Owen Fiss laments the decline of adjudication, whose purpose is not "to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes to interpret those values and to bring reality into accord with them." Fiss, *supra* note 39, at 1085. Fiss contrasts adjudication with settlement, which "trivializ[es] the remedial dimensions of a lawsuit, and . . . reduc[es] the social function of the lawsuit to one of resolving private disputes." *Id.* See also Luban, *supra* note 3, at 2638 (arguing that "there is nothing wrong with using [litigants'] resort to the courts as an occasion for improving [or refining] the law").

55 See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 513 (1994) (asserting that the "public, which created and funds our judicial institutions, depends upon those institutions to protect it").

56 Resnik, *supra* note 4, at 1527 (suggesting that stipulated vacatur runs counter to this perception of the law).

57 Marcus, *Discovery Confidentiality*, *supra* note 52, at 478-79 (stating that affording access to materials based upon the public's interest diverges from basic dispute resolution role of courts); Miller, *supra*, note 52, at 432 (suggesting that the presumption of public access promotes goals unrelated to litigation before the court).

contrast, and as Professor Marcus has acknowledged, a public life conception of our judicial process inevitably points to an "expansive attitude toward the publicness of all aspects of litigation."⁵⁸

3. Party Autonomy, Court Control, and the Public Interest—Whose Settlement Is It?

Both the controversy concerning the value of settlement and the friction concerning the judicial function create the almost schizophrenic "public versus private" character of civil litigation today. Indeed, many of the current conflicts in modern process, including litigation confidentiality, turn on a sense of ultimate ownership of a civil dispute and all its accouterments—its pleadings, its discovery, its precedent, and, of importance to this Article, its settlement.⁵⁹ This inquiry pits the value our system traditionally places upon party autonomy against the trend toward active judicial management and the recognition that some disputes reach beyond the particular litigants.

The importance our procedural system traditionally places upon party autonomy explains, in large part, the preference for settlement over adjudication.⁶⁰ As designed, the civil justice system purports to resolve disputes with the minimum possible amount of judicial involvement or interference.⁶¹ To the extent possible, the parties themselves are responsible for the investigation, initiation, conduct, and resolution of their lawsuit, a significant portion of which now takes place outside the purview of judicial review.⁶² The parties are the per-

58 Marcus, *Discovery Confidentiality*, *supra* note 52, at 469.

59 This underlying friction is reflected in the titles to several recent law review articles. See Menkel-Meadow, *supra* note 32, at 2680 (asking "[t]o whom does a dispute belong when it enters the legal system? Whose 'property' is a particular dispute, and who should decide how it should be treated?"); Resnik, *supra* note 4, at 1472 (identifying ownership query as one of the "central problems of *fin-de-siecle* procedure").

60 See Gross & Syverud, *supra* note 10, at 4 (contending that the "special importance of settlement" manifests a "single cultural value: the preference for private ordering over public control").

61 See Luban, *supra* note 3, at 2626 (exploring "contemporary American antipathy to government" and to "constraints on private conduct").

62 Professor Stephen Yeazell notes that after the enactment and subsequent amendments of the Federal Rules of Civil Procedure, "lawyers operated further from any judicial scrutiny than they had a century earlier, and when judicial scrutiny came, it was likely to be by a trial judge, most of whose decisions would effectively escape appellate review." Yeazell, *supra* note 6, at 647–48. See also Gross & Syverud, *supra* note 10, at 48 (describing an American legal system where "[p]retrial negotiation and much of pretrial litigation go on in private with no judicial oversight at all"). For a discussion of the importance of party autonomy in the current discovery regime, see *infra* Part IV.C.2.

sons who will bear the risk and expense of adjudication and who will most keenly feel the effect of any judgment if compromise cannot be reached. Such a party-initiated, party-centered, and party-controlled⁶³ system regards litigant autonomy as a value in itself and "installs preferences of the parties as the best measure of fairness available."⁶⁴ Under this viewpoint, the parties "own" their dispute and should be permitted to dispose of it in any mutually agreeable manner.⁶⁵

Several procedural innovations, however, have begun to erode our traditional commitment to party autonomy and the proprietary nature of a lawsuit. As Professor Resnik points out, the increase in "managerial judging" and the trend toward case aggregation subordinate individual interests in and control over a lawsuit in favor of some broader public interest.⁶⁶ Thus, while some recent amendments of the Federal Rules reinforce litigant autonomy, others encourage judges to assume tighter control over their dockets at a much earlier stage in the process.⁶⁷ Burgeoning multidistrict litigation and consolidation of related cases further reflect a desire to consistently and efficiently address related problems in one lawsuit, often at the expense of litigant autonomy.⁶⁸

63 See Cordray, *supra* note 5, at 43 (rejecting "party-centered" view of settlement as "simplistic"); Menkel-Meadow, *supra* note 32, at 2696 (recognizing the need to reassess the traditional "party-initiated and party-controlled legal system" in light of potential nonparty interests).

64 Resnik, *supra* note 4, at 1539. See also *id.* at 1491 (contending that stipulated vacatur enhances party autonomy).

65 Professor Carrie Menkel-Meadow suggests that party consent may supply a "democratic justification for settlement":

For those who regard our legal system as a public service for private dispute resolution, or as a "democratic and participatory" party initiated system, the dispute and its resolution remain the property of the parties and can be removed from the system in any way, as long as the parties consent.

Menkel-Meadow, *supra* note 32, at 2696, 2680. But see Galanter & Cahill, *supra* note 11, at 1359 (hesitating to equate party choice of settlement "with an informed affirmation of the quality of the selected process").

66 Resnik, *supra* note 4, at 1472-74, 1486, 1528.

67 In addition to prodding the judicial promotion of settlement (see *supra* notes 22-23 and accompanying text), Rule 16 also encourages judges to establish "early and continuing control so that the case will not be protracted because of lack of management." FED. R. CIV. P. 16(a)(2). See also FED. R. CIV. P. 16(b) (requiring entry of scheduling order). A similar motive underlies the Congressional mandate to establish expense and delay reduction plans. See Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1990) (intending that plans "improve litigation management"); *id.* § 472(a)(2) (aiming plans at establishing "early and ongoing control of the pretrial process through the involvement of a judicial officer").

68 See Resnik, *supra* note 4, at 1486; see also Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, U. ILL. L. REV. 69, 74 (1989) (arguing that aggregation

This erosion of party autonomy contributes to a contrasting vision of civil litigation as a public good. From this perspective, all adjudication has public significance and a dispute will lose its private character once a litigant resorts to the publicly subsidized court system for its resolution.⁶⁹ The focus in settlement accordingly shifts away from the individual litigants to "actors who are not parties to the dispute at hand."⁷⁰ Because a case or controversy may have profound ramifications beyond the immediate parties or a particular court, the quality of its resolution should be gauged according to its effect upon others.⁷¹

Thus, third parties and even the general public might have "ownership" interests in a particular lawsuit, as well as its resolution. The lingering dilemma is determining when these nonparty interests exist, how they can be raised, and how, if at all, they can be balanced against our traditional preference for litigant autonomy.⁷² Nowhere is the

techniques in "substantial tort cases" derogate the "right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor").

69 Professor Luban thus finds:

There is nothing wrong with using [the parties'] resort to the courts as an occasion for improving the law. Parties still get their dispute adjudicated, as at least one of them requested. At the same time, however, the litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law. Using litigants as stimuli for refining the law is a legitimate public interest in the literal sense of the term: the public is interested in learning the practical implications of past political choices and the values they embody. The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait.

Luban, *supra* note 3, at 2635, 2638. *But see* Menkel-Meadow, *supra* note 32, at 2680, 2683 (noting and criticizing the view that "a case, once filed, becomes the property of the polity," and that parties waive their "right . . . to privatize their disputes" by their resort to the courts).

70 Galanter & Cahill, *supra* note 11, at 1351. *See also id.* at 1380 (discussing "public goods" produced by adjudication).

71 As expressed by Professor Marc Galanter:

In assessing the quality of different instances or rival modes of dispute processing, we should shift our focus from the results among the parties (and the forum) to consider the effects a given process has on others—for example, parties in other cases, individuals in similar situations who have not brought suit or been sued, parties who will be affected by the patterns of activity of those in the plaintiff and defendant classes, and parties who have a professional interest as potential participants in such disputes (such as other lawyers, psychologists, social workers, and police officers).

Id. at 1379.

72 *See* Menkel-Meadow, *supra* note 32, at 2696 (acknowledging that nonparty interests should be raised and accounted for if parties do not exclusively own the dis-

need to accommodate these competing interests more pressing than in the current debate concerning litigation confidentiality.

II. THE CONFIDENTIALITY DEBATE

The conflicting visions of our civil justice system described in Part I fuel the current controversy concerning the appropriate use and limits of confidentiality in conducting and settling civil lawsuits. That often heated debate,⁷³ while previously focused upon protective orders governing discovery, now extends to the sealing of judicial records and proceedings, as well as to the entry into and judicial approval of confidential settlements.⁷⁴ The current controversy germinates with a dispute over the very existence of any improper excess of court secrecy, grows into a disagreement regarding the propriety of confidentiality and the need for public access to civil litigation, and eventually blooms into a quarrel over the most effective method of curbing perceived confidentiality abuses.

A. *Is There An Excess of Secrecy in Our Courts?*

Many judges, legislators, and lawyers decry what they perceive as a worrisome excess of confidentiality orders and secrecy agreements in civil litigation.⁷⁵ Often citing high profile product liability or toxic tort cases, these proponents of increased public access argue that protective, sealing, and confidentiality orders prevent dissemination of vital information relevant to public health and safety. Stipulated protective orders and settlement gag orders in cases involving silicone

pute); Resnik, *supra* note 4, at 1525 (exploring tension between the litigants' right to buy and sell the risk of their lawsuit and the "social investments in the production of adjudication and often unspecified third party interests in the decisions thus produced").

73 While the broad systemic debates appear largely confined to the legal academy, the issue of litigation secrecy is of great pragmatic concern to the many practicing lawyers and judges who routinely confront confidentiality issues. Not surprisingly, then, practitioners are often the most vocal participants in the confidentiality debate. See, e.g., Gilbert et al., *supra* note 9; Michael McCauley, *Proposed Rule Changes Threaten to Increase Court Secrecy*, NAT'L B. ASS'N MAG., Feb. 1996, at 31; William E. Shull, *Opposing Counsel—Protective Orders*, 18 A.B.A. SEC. LITIG. NEWS 3, 11 (1993); Sharon Sobczak, *To Seal or Not to Seal? In Search of Standards*, 60 DEF. COUNS. J. 406 (1993); Chilton Davis Varner & M. Graham Loomis, *Surviving Settlement: Ethical Problems and Strategic Risks Associated with Settlement of Litigation*, 20 A.B.A. SEC. LITIG. NEWS 3 (1995).

74 Although I ultimately propose an approach that varies with each of these differing uses of confidentiality, many who enter the confidentiality fray fail to distinguish between these various functions—often lumping all under the generic rubric of "secrecy" or "confidentiality" orders. See *infra* Part III.A.

75 See *supra* note 9.

breast implants, the Shiley heart valve, the antidepressant drug Prozac, toxic shock syndrome, and the fungicide Benlate, to name just a few, have spurred attempts to restrict such orders and facilitate public access to the often voluminous discovery and pleadings underlying the confidential settlement of these cases.⁷⁶

These efforts to increase public access to virtually all phases of civil litigation (at least in some cases) have been met with strident opposition. Defenders of the status quo accuse "reformers" of making empirically unsubstantiated and exaggerated claims concerning the incidence and dangers of secrecy orders. Professor Arthur Miller, for example, dismisses the claim that sealing orders endanger the public as based upon anecdotal evidence of "questionable content" and "nonexistent" research and statistical data.⁷⁷ Professor Miller and others further criticize as myopic the reform movement's focus upon product liability cases, which arguably overlooks the number of non-personal injury suits in which secrecy orders are legitimately entered to protect confidential trade secrets or individual privacy.⁷⁸

The paucity of empirical evidence in this area makes it difficult to assess the existence or extent of any secrecy crisis that may be plaguing our courts. The Federal Judicial Center (FJC), however, recently conducted a study concerning the extent of protective order activity

76 One can taste the flavor of these arguments by reviewing the Senate testimony concerning the failed Sunshine in Litigation Act of 1994. See *Court Secrecy, Its Impact on Public Health and Safety, and the Sunshine in Litigation Act: Hearings on S. 1404 Before the Senate Judiciary Subcommittee on Courts and Administrative Practice*, 103d Cong. (1994) [hereinafter *Hearing Testimony*]; see also Edward Felsenthal, *Secret Accords in Civil Cases Are Under Fire*, WALL ST. J., June 26, 1996, at B1-2 (reporting on secret side arrangements in settlements involving the Exxon Valdez oil spill, the drug Prozac, and the Ford Bronco II); see, e.g., *Kohl Testimony*, *supra* note 9; 1994 WL 230112 (Abner Mikva) [hereinafter *Mikva Testimony*]; 1994 WL 230087 (Prof. Charles Clausen); 1994 WL 230346 (Sybil Niden).

77 Miller, *supra* note 52, at 480. Professor Miller further argues that these reformers exaggerate the extent of the problems, which he contends can be adequately dealt with through conscientious use of existing procedural rules. See *id.* at 428; see also Marcus, *Discovery Confidentiality*, *supra* note 52, at 464 (finding "hard data . . . generally lacking" to support broad assertions regarding "supposed cover-ups of hazards"); Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 BAYLOR L. REV. 163, 175-76 (1996) (asserting that empirical data does not support the claim that secrecy orders suppress information vital to public health and safety).

78 See Arthur R. Miller, *Effective Rulemaking Damaged By Politics*, N.L.J., May 1, 1995, at A21-22 (reporting that protective orders are "predominately" requested in civil rights and contracts actions); see also *infra* note 82.

during a three year period in three judicial districts.⁷⁹ That study does not support claims that federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders or that such orders create significant hazards to public health and safety. Instead, stipulated protective orders accounted for only twenty-six percent of the protective orders entered in the districts studied, and approximately one-half of all motions for protective orders were contested.⁸⁰ Moreover, protective orders were sought in only about five to ten percent of all civil cases,⁸¹ most of which were civil rights and contract cases,⁸² and approximately sixty percent of the orders were partially or wholly denied.⁸³

The limited scope of the FJC study should make one cautious in drawing any firm conclusions from its data, however.⁸⁴ One could fur-

79 See Elizabeth C. Wiggins & Melissa J. Percherski, *Federal Judicial Center, Protective Order Activity in Three Federal Judicial Districts—Interim Report to the Advisory Committee on Civil Rules* (Oct. 14, 1994) [hereinafter *FJC Study*]. The *FJC Study* examined protective order activity in 300 cases from the District of Columbia federal district court for the three-year period from 1990–1992; 293 cases from the Eastern District of Michigan for the two-year period from 1991–1992; and 310 cases from the Eastern District of Pennsylvania from 1991–1992. *Id.* at 1–4.

80 See *id.* at 4.

81 Protective order activity varied from five percent in the Eastern Districts of Michigan and Pennsylvania to between eight and ten percent in the District of Columbia. See *id.* at 3.

82 See *id.* at 9. The *FJC Study* classified cases as either contract, property, civil rights, labor, or personal injury. According to the Study, products liability cases accounted for only a small minority of protective orders issued. Instead, a large percentage of protective orders were entered in civil rights cases to protect personal information concerning both parties and nonparties. See Letter from Judge Patrick E. Higginbotham, Chair of Advisory Committee on Civil Rules to (Standing) Committee on Rules of Practice and Procedure (June 2, 1995) [hereinafter *Higginbotham Letter*] (criticizing “broad gauged hostility toward protective orders” and its focus upon product liability claims); Civil Rules Advisory Committee Draft Minutes, at 9–10 (Apr. 20, 1995) [hereinafter *Apr. 20, 1995 Advisory Comm. Minutes*] (“Civil rights cases are the single most common category of cases involving protective orders, protecting against general access to highly personal information that may relate to nonparties as well as parties.”).

83 The *FJC Study* reports that approximately 40% of all resolved motions for protective orders were granted in whole or in part. See *FJC Study*, *supra* note 79, at 6.

84 The *FJC Study* covered a limited three-year time period and an extremely small sample of judicial districts. See *FJC Study* *supra* note 79. One might further question the choice of the Eastern District of Pennsylvania as representative of protective order activity in the 93 other federal judicial districts. As discussed below, the Third Circuit Court of Appeals, of which the Eastern District of Pennsylvania is a part, leads a movement to circumscribe judicial discretion to enter all types of secrecy orders. See *infra* Part II.C.3. Finally, trend lines may have improved or worsened in the years following the periods studied and completion of the study.

ther question whether an empirical study of federal protective order activity presents a complete portrait of the extent of such activity in state courts.⁸⁵ Moreover, the FJC study carefully limited its parameters to protective orders governing the use or dissemination of materials generated through discovery. It thus did not encompass the filing of such discovery with the court, the sealing of judicial records, or confidentiality orders regarding settlements.⁸⁶

In short, the few and limited empirical studies in this area make it difficult to confirm or deny the existence of any excess of secrecy in civil litigation today. As judicial attention increasingly focuses upon pretrial activity and settlement, however, and as the public trial gives way to private compromise, the debate concerning litigation confidentiality will likely continue and intensify.⁸⁷

B. *Conflicting Visions: Confidentiality Debate*

At the risk of over-generalizing the various positions involved in this multifaceted discussion, the debate over litigation confidentiality can generally be divided into two camps. On one side are those who oppose any attempt to increase public access to litigation-generated information or to further restrict trial court discretion in this area. These "confidentiality proponents," as I will call them, highly value the use of confidentiality in the settlement of civil litigation and believe that trial court discretion, as it currently exists, can adequately accommodate the competing interests that arise when secrecy issues emerge during the course of a lawsuit.⁸⁸ On the other side of the debate are those who advocate increased public access to materials generated by the litigation process. These "public access advocates" seek to restrict trial courts' discretion to enter secrecy orders, and some even argue for restricting the ability of the parties themselves to

85 One might expect federal courts to more frequently issue protective orders in civil rights cases, which fall within their federal question jurisdiction, than in product liability or other personal injury cases, which might not qualify for federal diversity jurisdiction.

86 See *FJC Study*, *supra* note 79, at 1-2 (noting possible future empirical study on sealed court records and sealed settlement agreements). But see Judicial Conference of the United States, Minutes of the Advisory Committee on Federal Rules of Civil Procedure, at 22-23 (Apr. 28, 1994) (1994 WL 809916) [hereinafter *Apr. 28, 1994 Advisory Comm. Minutes*] (tabling possible procedural rule concerning sealing orders because time had not yet come for further study).

87 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 476 (acknowledging that "epochal shifts in litigation" may "at some point" justify increased public access to historically closed pretrial proceedings).

88 See generally *id.*; Marcus, *Myth and Reality*, *supra* note 52; Miller, *supra* note 52.

privately negotiate confidentiality agreements.⁸⁹ As discussed below, the various arguments made by both confidentiality proponents and public access advocates reflect the broader systemic debates concerning the value of settlement, the proper judicial function, and the importance of party autonomy.

1. The Value of Settlement

Confidentiality proponents generally choose settlement over adjudication in the “settlement versus adjudication” debate. Confidentiality, they argue, conserves scarce party and judicial resources by fostering the cooperative exchange of discovery and by minimizing judicial involvement.⁹⁰ Confidentiality likewise facilitates, and indeed makes possible, the final compromise of many disputes.⁹¹ Any reduction in the availability or reliability of secrecy orders, it is argued, will jeopardize these savings by making litigants reluctant to voluntarily disclose confidential or private information through discovery, to settle high profile cases where the chances of liability are slim or non-existent, or to establish any sort of benchmark for the settlement of future related claims.⁹² In sum, confidentiality proponents believe that restrictions on litigation secrecy will significantly impede the settlement process and unduly burden an already oversubscribed judicial system.

Public access advocates, in contrast, question how critical confidentiality really is to the compromise of most cases when trial repre-

89 See also *infra* Parts II.C.2–3 (discussing legislative and judicial sunshine reform). See generally Gilbert et al., *supra* note 9; Luban, *supra* note 3.

90 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 487 (arguing that discovery protective orders serve the purposes of Rule 1); see also *infra* Part IV.B.1.b.iii (discussing benefits of stipulated protective orders).

91 Confidentiality proponents virtually all assume that confidentiality is critical to the settlement of many lawsuits. See Marcus, *Discovery Confidentiality*, *supra* note 52, at 484–85 (arguing that presumption of public access would impede settlement); Miller, *supra* note 52, at 429 (contending that confidentiality is “not only acceptable, but essential” to discovery and settlement of lawsuits); see also Luban, *supra* note 3, at 2656 (admitting that some settlements will collapse without confidentiality); Weinstein, *supra* note 55, at 510–11 (noting that many mass tort cases would not settle without secrecy agreement).

92 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 484 (asserting that restrictions on protective orders will “foment . . . opposition to broad discovery”); Shull, *supra* note 73, at 11 (contending that confidentiality encourages settlement in “high visibility cases, particularly where liability is slim or nonexistent”); Varner & Loomis, *supra* note 73, at 3 (arguing that both plaintiffs and defendants may be reluctant to establish settlement benchmark).

sents a lengthy, expensive, and risky alternative.⁹³ They dismiss cost and delay arguments as mere “housekeeping” or efficiency concerns that should not overshadow the public benefits that flow from open judicial proceedings. Increased public access to settlements and their underlying information, it is said, fosters the public debate previously associated with adjudication and that is altogether lacking when cases are secretly settled.⁹⁴ Moreover, restricting secrecy orders promotes the efficient resolution of related litigation by permitting collaboration among litigants and the sharing of discovery—fostering systemic efficiency.⁹⁵ Arguments for increased public access, then, rest on a vision of the judicial system that is broader than the individual lawsuit and that seeks to import the values of adjudication into settlement.

2. The Judicial Function

Confidentiality proponents tend to regard dispute resolution as the principal function of the civil courts, with the judge acting as neutral arbiter or adjudicator who decides cases according to the substantive law. Unlike the executive or legislative branches of government, civil courts should not primarily aim to represent the general public interest, to formulate major social policy, or to protect public health

93 Many public access advocates doubt whether restricting confidentiality would have any effect upon the frequency or amount of settlement. See Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 7 GEO. J. LEGAL ETHICS 111, 119 (1992) (contending that settlements will occur without confidentiality because they mutually benefit parties); Barry C. Schneider, *Sealing of Records and Other Secrecy Problems*, C949 ALL-ABA 95, 111 (Aug. 1994) (predicting “that the prospect of the settlement being made public is less significant to the parties than the cost of trial and exposure of all that will be revealed in a public trial”); see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (positing that settlements will occur regardless of whether confidentiality can be promised).

94 Professor Luban, for example, strongly criticizes the secrecy that currently surrounds many settlements. He advocates legislative or judicial sunshine regimes as “an important step toward allowing settlements to fulfill at least some of the public values of adjudication.” Luban, *supra* note 3, at 2659; see also *infra* Parts II.C.2–3 (discussing sunshine reforms). According to Luban, public debate constitutes one benefit of adjudication that would be furthered by increased public access to settlements. See Luban, *supra* note 3, at 2653; see also *supra* notes 41–45 and accompanying text (discussing the other “public goods” that Luban believes adjudication creates).

95 See Luban, *supra* note 3, at 2653 (discussing the “other-litigants argument” which supports making discovery “available for other litigants to avoid unnecessary multiplication of expense”); Shull, *supra* note 73, at 3, 9 (noting that restricting secrecy orders fosters consistency in discovery responses and avoids the waste of time and resources associated with relitigation of issues); see also *infra* Part IV.D.2 (examining discovery sharing as reason for modifying stipulated protective orders).

and safety.⁹⁶ Instead, confidentiality proponents like Professors Marcus and Miller deem these “collateral” or “side” effects of litigation that should not override the fundamental problem-solving role of the courts.⁹⁷

Confidentiality proponents thus criticize efforts to enhance public access to pretrial discovery and civil settlements as improper attempts to transform the court into an advocate (either of the general public interest or of existing or future plaintiffs) or an information clearinghouse.⁹⁸ Such a transformation arguably motivates litigants to utilize the court system for purposes other than resolution of the case at hand—whether to exploit discovery for use in other cases, to force a settlement, to circumvent the regulatory process, or to drum up publicity and foment future litigation.⁹⁹ In so doing, confidentiality

96 In addition to questioning whether secrecy orders actually jeopardize public health and safety, *see* Miller, *supra* note 52, at 477 (contending that only a “minuscule” number of protective orders impact public health and safety), confidentiality proponents also dispute whether courts are the appropriate government institution to disseminate information or warnings concerning public hazards such as product defects. Professor Marcus, for example, contends that product safety is already subject to extensive regulatory scrutiny by agencies far better equipped than the courts to make such determinations. *See* Marcus, *Discovery Confidentiality*, *supra* note 52, at 481–82.

97 *See* Marcus, *Discovery Confidentiality*, *supra* note 52, at 470 (arguing that information dissemination is a collateral effect of litigation that should not be permitted to interfere with the primary role of courts); Miller, *supra* note 52, at 431 (asserting that “public access to information produced in litigation has always been a secondary benefit—a side effect—of civil adjudication”); *see also supra* notes 51–53 and accompanying text (discussing problem-solving conception of the justice system).

98 *See* CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 2d § 2042 (1994 & Supp. 1996) (criticizing sunshine efforts as misperceiving “function and the role of courts”); *see also* Marcus, *Discovery Confidentiality*, *supra* note 52, at 478 (affording access based upon public interest in materials diverges from basic dispute-resolving purpose of the courts); Miller, *supra* note 52, at 431–32 (contending that efforts to restrict judicial discretion promote goals unrelated to the litigation before the court and undermine its “primary goal”); Shull, *supra* note 73, at 11 (asserting that court should not function as advocate by funneling information to plaintiffs’ counsel).

99 *See Apr. 28, 1994 Advisory Comm. Minutes*, *supra* note 86, at 5 (noting that litigation might be brought “to foster generation of new disputes not to resolve old ones”); *id.* at 1 (recording view that current drive for increased access is motivated by a “desire for publicity,” not a need to inform or protect the public); Marcus, *Discovery Confidentiality*, *supra* note 52, at 485–86 (suggesting that increased access enhances incentive to undertake discovery for non-litigation purposes); Miller, *supra* note 52, at 483–84 (noting that facilitating the modification or vacatur of protective orders will increase the incentive to file suit in order to exploit discovery or to force a settlement); Shull, *supra* note 73, at 11 (arguing that access perpetuates the litigation explosion by facilitating the filing and prosecution of other litigation); Vangelisti, *supra*

proponents contend, mere "side effects" of litigation take precedence over the primary judicial function—the tail wags the dog, so to speak.

Not surprisingly, public access advocates rely heavily upon a contrasting public life conception of the judicial system to support reforms aimed at reducing the level of secrecy in the courts. They argue that courts are publicly funded government institutions that serve interests broader than those of the immediate parties. Courts thus play a role beyond the resolution of the case at hand by explicating public values and protecting public interests.¹⁰⁰ As representatives and guardians of the general public, courts should thus oppose even consensual attempts by litigants to shield information or documents that are of public interest or that are relevant to public health and safety.¹⁰¹

According to public access advocates, however, courts currently do not adequately consider the public interest in approving stipulated protective orders, sealing orders, or confidential settlements.¹⁰² They thus support reforms aimed at restricting the issuance or facilitating the modification or vacatur of such secrecy orders. In such a way, similarly situated plaintiffs, future consumers and victims, regulatory agencies, and the media might gain timely access to otherwise unavailable information concerning a defendant's wrongdoing, a product defect, or any other type of public hazard.¹⁰³

note 77, at 178–79 (characterizing anti-secrecy reform as an effort to facilitate other litigation, protect the public, or force a settlement).

100 See, e.g., Weinstein, *supra* note 55, at 513 ("The public, which created and funds our judicial institutions, depends upon those institutions to protect it."); *Mikva Testimony*, *supra* note 76, at 3 (arguing that courts do not exclusively serve the litigants given the "heavy expenditure of public funds and resources on the courts").

101 Although proposed sunshine regimes often focus upon products liability, toxic tort, personal injury, or other cases that arguably impact public health and safety, see *infra* Part II.C.2, a public life conception might also restrict secrecy in other suits that affect even broader public interests. See *infra* Part IV.D.2.d for a discussion of the public interest considerations that might guide a decision whether to modify or vacate a protective order.

102 See *Kohl Testimony*, *supra* note 9 (contending that "public interest receives far too little consideration in cases affecting public health and safety"); Ispahani, *supra* note 93, at 127 (finding that "courts appear to grant seals perfunctorily, as a matter of course" at the parties' request in order to facilitate settlement); Shull, *supra* note 73, at 3, 9 (arguing that courts give no consideration to policy in granting stipulated protective orders).

103 See Dorothy J. Clarke, *Court Secrecy and the Food and Drug Administration: A Regulatory Alternative to Restricting Secrecy Orders in Product Liability Litigation Involving FDA-Regulated Products*, 49 FOOD & DRUG L.J. 109, 117–18 (1994) (identifying arguments in favor of restricting secrecy orders). But see Weinstein, *supra* note 55, at 512–16 (acknowledging that increased public access in mass tort suits might discourage a de-

3. Party Autonomy

Perhaps the least controversial use of confidentiality to preserve party autonomy occurs when courts issue secrecy orders in order to protect a litigant's privacy or property interests. Stipulated secrecy orders thus engender little debate when used to protect intimate personal information, trade secrets, or proprietary confidential business information. Controversy does occur, however, in determining when those interests exist, what interests other than privacy or property merit confidentiality, and how those arguably lesser interests in secrecy should be balanced when pitted against the public's interest or desire for increased public access. Positions frequently divide on these more difficult questions based upon the value given to litigant autonomy and the parties' mutual desire for settlement.

Confidentiality proponents highly value litigant autonomy and the ability of parties to dispose of "their" private dispute in any manner as long as they consent. This includes utilizing as much secrecy as they mutually deem necessary to achieve settlement.¹⁰⁴ Confidentiality proponents express the fear that unless parties can rely upon stipulated secrecy agreements and orders, they may opt out of the public court system in favor of private dispute resolution or abandon the litigation altogether.¹⁰⁵

In contrast, public access advocates often assume a public ownership stance toward civil litigation. Once a matter has been brought before the courts for resolution, it is argued, it no longer belongs solely to the parties. Instead, the public, which creates and heavily subsidizes the courts,¹⁰⁶ has an interest in observing their operation to

fendant from recording the dangers of a product or activity, thereby increasing danger to society).

104 See Menkel-Meadow, *supra* note 32, at 2680, 2690; see also Marcus, *Myth and Reality*, *supra* note 52, at 44 (advocating settlement confidentiality orders as a "form of party autonomy that is critical to the reliability of such orders"); Resnik, *supra* note 4, at 1491, 1539 (suggesting that stipulated vacatur "enhances the autonomy of litigants on both sides of a dispute" and "installs preferences of the parties as the best measure of fairness available").

105 See Edward H. Cooper, *Memorandum on Protective Orders*, 1994 WL 23044 (F.D.C.H.) (April 20, 1994) [hereinafter *Cooper Memo*] (warning that sunshine legislation might encourage non-public means of dispute resolution or abandonment of litigation altogether); Marcus, *Discovery Confidentiality*, *supra* note 52, at 486 (suggesting that restrictions on protective orders may deter claimants from seeking court relief for fear of disclosure); Menkel-Meadow, *supra* note 32, at 2684 (fearing that parties who seek to "privatize their disputes will simply avoid the public courts completely").

106 Party-borne court costs and filing fees do not begin to cover the overall costs of operating the civil justice system. See Thomas E. Baker, *A View to the Future of Judicial*

ensure their proper functioning. Increased public access to pretrial matters and settlements, the bread and butter of civil courts today, enhances the opportunity to view the courts in action and to hold them publicly accountable. In the process, public confidence in its court system is encouraged.¹⁰⁷

C. *Fallout from the Debate*

The confidentiality debate has prompted varying responses from commentators, courts, and legislatures. One reaction argues for the continued maintenance of the status quo, which deposits confidentiality issues in the discretionary and largely unreviewable hands of the trial court. A counter-response presumes that courts are ill-equipped, over-worked, or too self-interested to perform the necessary balancing of public and private interests, and thus supports legislative curbs on litigation confidentiality. Finally, some courts, disturbed by their previously cavalier approach to confidentiality, have self-imposed flexible, but articulated, limits on the issuance or modification of secrecy orders.¹⁰⁸

Federalism; "Neither Out Far Nor in Deep", 45 CASE W. RES. L. REV. 705, 731 (1995) (noting the describing "free-rider problem" caused by discrepancy between revenues generated by current filing fees and the "cost of running a typical trial court [which] is estimated at between \$400 and \$600 an hour, upwards of \$5000 a day").

107 See Clarke, *supra* note 103, at 118-19 (restricting secrecy orders arguably furthers public debate and confidence in the judicial system); Marcus, *Discovery Confidentiality*, *supra* note 52, at 470 (examining the argument that increased access improves public's opportunity to observe the functioning of the courts). For a discussion of the rationales that support public access to judicial proceedings, see *infra* Part III.D.

108 Although beyond the scope of this Article, sunshine reform could also arguably be accomplished through more stringent ethical prohibitions on a lawyer's ability to enter into secrecy agreements. See Attorneys Face Legal, Ethical Dilemma in Battles Between Privacy and Access: Protective Orders, BNA's 50 State Survey (BNA) No. 47, at 46-48 (Nov. 1992) [hereinafter *BNA Survey*] (reporting on proposed ethical amendments that would restrict attorney's ability to confidentially settle cases involving public health and safety); Ispahani, *supra* note 93, at 112, 128-30 (arguing that plaintiffs' lawyers are better positioned than judges to determine whether a settlement should be confidential). Such ethical reform, however, would require an overhaul of existing regimes that emphasizes client choice and an attorney's duty to her client over any as-yet-to-be-defined duty to the general public. See *BNA Survey*, *supra* at 46, 48 (concluding that current ethics rules "emphasize the role of lawyers as advisors and confidantes rather than as society's whistleblowers and morality police"). But see Shull, *supra* note 73, at 9 (noting lawyer's conflict between procuring big settlement for client and her obligation to the general public and future clients).

1. Status Quo: Judicial Flexibility and Discretion

Most confidentiality proponents place great stock in a trial court's discretion to flexibly fashion secrecy orders on a case-by-case and issue-by-issue basis.¹⁰⁹ They would thus leave the issue of discovery confidentiality to the flexible and undefined "good cause" rubric of Federal Rule 26(c),¹¹⁰ permit sealing of judicial records if the interests in confidentiality outweigh a rebuttable presumption of public access,¹¹¹ and leave settlements, at least to the extent that they are consummated without the prodding or imprimatur of the trial court, largely to the private dictates of the parties.¹¹² Existing practice, it is argued, already allows a trial court to consider potential public and nonparty interests when deciding to issue or modify secrecy orders. Any attempt to limit further or to channel judicial discretion would jeopardize the intricate balancing of interests that judges evaluate best and would restrict the necessary flexibility to fashion appropriate secrecy orders in individual cases.¹¹³

2. Sunshine Statutes and Rules

In contrast, advocates of legislative reform question whether courts do or can undertake the necessary balancing of public interests and policy that should come into play in resolving confidentiality issues.¹¹⁴ A court's self-interest in clearing its docket, its reluctance to

109 See Richard A. Rosen & Karen Steinberg Kennedy, *New Developments in State Protective Order Legislation and Procedural Rules*, C915 ALI-ABA 315, 320-21 (Winter 1994) (concluding that it is "certainly better . . . to leave the resolution of these delicate issues to the discretion of the court on a case by case basis").

110 Professor Arthur Miller, for example, ardently opposes any attempt to restrict existing judicial discretion to issue or modify protective orders governing discovery. See Miller, *supra* note 52, at 435-36, 467, 476. See *infra* Parts IV.A-B for a discussion of existing protective order practice under Federal Rule of Civil Procedure 26(c).

111 See *infra* Part V (discussing the sealing of judicial records).

112 See *infra* Part VI (discussing secrecy in settlement).

113 See, e.g., *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993) (stating that courts need "wide latitude" and "broad discretion" regarding when and what confidentiality protection is needed and should be afforded "great deference . . . framing and administering" secrecy orders); see also *Concerning Protective Orders in Federal Litigation Before the Senate Judiciary Subcommittee on Courts and Administrative Practice*, 1994 WL 230134, at *5 (1994) (Statement of Patrick E. Higginbotham, U.S. Judge for the Fifth Circuit Court of Appeals) [hereinafter *Higginbotham Testimony*] (noting the "infinite degrees" of interests to be balanced in issuing a protective order); Miller, *supra* note 52, at 435-36 (describing existing law as affording courts the flexibility and discretion to balance competing interests).

114 In introducing one of the many proposed, but never enacted, federal sunshine bills, for example, Senator Herbert Kohl rejected judicial reform of Federal Rule of

disturb the parties' mutual resolution of a controversy, and the current emphasis on settlement arguably reduce the likelihood that a court will actually consider nonparty interests or the benefits of public access in deciding whether to issue or modify a secrecy order.¹¹⁵

This distrust of unbridled judicial discretion motivated a push for legislative "sunshine" reforms that began sweeping federal and state legislatures in the early to mid-1990's.¹¹⁶ While all federal and most state attempts to enact such antisecrecy legislation ultimately failed,¹¹⁷

Civil Procedure 26(c), arguing that it would perpetuate a status quo that fails to adequately consider the public interest in cases affecting public health and safety. *See Kohl Testimony*, *supra* note 9; *see also* Marianne Lavelle, *Hearings Reveal Deep Divisions Over the Issue of Court Secrecy*, N.L.J., May, 2, 1994, at A12 (quoting Judge Mikva's view that "policy issues here should be decided by policy makers, not by appointed judges"); Larry Smith, *No More Court Secrecy on Dangerous Products*, HOUSTON CHRON., Mar. 13, 1992, at B15 (stating that courts are "ill-equipped" to balance the benefit of open information against the harm to corporations).

115 Citing a court's natural desire to clear its dockets, as well as its reluctance to undercut a plaintiff's optimal recovery, Professor Luban argues that "[j]udges are unlikely to exercise their discretion to scuttle a settlement in the name of the publicity principle." Luban, *supra* note 3, at 2658; *see also* Weinstein, *supra* note 55, at 517 (suggesting that neutral ombudsman determine secrecy issues given courts' conflict of interest in clearing their dockets).

116 *See generally* Miller, *supra* note 52, at 430 n.7 (noting that in 1990-1991, protective order legislation was proposed in 30 states and rejected in 25); Rosen & Kennedy, *supra* note 109, at 317-19 (describing "movement to restrict and channel judicial discretion" as being a subject of activity in "virtually every state"); *Study Finds Web of Conflicts, Activity in Protective Order Issue*, 7 BNA'S CORP. COUNS. WEEKLY (BNA), Dec. 2, 1992, at 1 (surveying protective order activity in 50 states).

117 Attempts to legislate federal sunshine reform have failed at two levels, both in Congress and with the drafters of the Federal Rules of Civil Procedure.

Congressional Proposals. Senator Herbert Kohl unsuccessfully introduced three substantially identical versions of a Federal Sunshine in Litigation Act [the "Act"] in 1993, 1994, and 1995. *See* S. 1404, 103d Cong. (1993); 140 Cong. Rec. 7719, (103d Cong. Amend. 1930 to S. 687) (1994); S. 374, 104th Cong. (1995). The Act sought to limit a federal district court's discretion to enter a Rule 26(c) discovery protective order "or an order restricting access to court records in a civil case." S. 374, 104th Cong. § 2 (1995). Before issuing such an order, a district court would need to make "particularized findings of fact" that disclosure of information "relevant to the protection of public health or safety" would not be impeded or that a "specific and substantial interest" in the confidentiality of the particular information "clearly outweighed" the public interest in disclosure. The party seeking confidentiality bore the burden of persuasion, and the protective order could be "no broader than necessary to protect the privacy interest asserted." *Id.* at § 2. Finally, the Act voided any agreement that would have prohibited or restricted the parties to a federal lawsuit from disclosing relevant information "to any Federal or State agency with authority to enforce laws regulating an activity relating to such information." *Id.*

The Act, which faced strong opposition from many federal judges, the Advisory Committee on Civil Rules, senators, academics, and practitioners, died in the Senate.

Objectors argued that, among other things, the Act attempted to circumvent and transform the federal rulemaking process from a transsubstantive and neutral activity that considered the federal rules as a coordinated whole to a political exercise fueled by special interest groups that sought piecemeal reforms myopically aimed at protective orders in particular categories of cases. Opponents further asserted that Senator Kohl's legislation misperceived the function of the civil judiciary and unduly restricted necessary judicial discretion. *See generally Hearing Testimony, supra* note 76; 140 Cong. Rec. S13041-044, (daily ed. Sept. 21, 1994) (statement of Senator Charles Grassley); 140 Cong. Rec. S7685-98, (daily ed. June 27, 1994); *see also* Vangelisti, *supra* note 77, at 171-73 (critiquing alleged circumvention of the rulemaking process).

Rules Proposals. The efforts to statutorily amend Federal Rule of Civil Procedure 26(c) prompted the Judicial Conference of the United States to undertake its own study of discovery protective orders. Proposed amendments were first published for public comment in 1993 and, in March of 1995, the Advisory Committee on Civil Rules submitted a modified amendment of Rule 26(c) to the Judicial Conference. *See* Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules, 1994 WL 880348, at *5 (Oct. 20, 1994) [hereinafter *Oct. 20, 1994 Jud. Conf. Minutes*]. In order to accommodate the "delicate balance of privacy and public interests" surrounding protective orders and to codify what the Advisory Committee perceived as existing practice, the proposed rule permitted the parties to stipulate to discovery protective orders. At the same time, the proposal recognized a court's continuing authority to modify or vacate its protective orders and established procedures and standards allowing nonparty intervention.

The proposal to permit a district court to issue a protective order "for good cause shown or on stipulation of the parties" proved extremely controversial before the Judicial Conference, which ultimately voted to delete the amendment's explicit approval of stipulated protective orders and to send the proposed rule back to the Advisory Committee for further study and public comment. *See* Linda Greenhouse, *Judicial Conference Rejects More Secrecy in Civil Court*, N.Y. TIMES, Mar. 15, 1995, at B9; *see also infra* notes 232-43 and accompanying text (further discussing amendment controversy). The Advisory Committee, however, believed that deletion of the stipulation language would upset the "closely laced and interrelated set of interest reconciliations" represented by the proposed rule, and, in April of 1995, submitted the amendment unchanged for public comment. *Higginbotham Letter, supra* note 82, at 95. After the period for public comment expired in March of 1996, the Advisory Committee tabled further consideration of Rule 26(c) pending a comprehensive review of the general scope of discovery. *See* Report of the Advisory Committee on Civil Rules to Standing Committee on Rules of Practice and Procedure (May 17, 1996). *See generally* Bruce D. Brown, *Secrecy Dispute Heats Up*, LEGAL TIMES, Feb. 26, 1996, at 6.

Other Federal Efforts. Thus, efforts to increase or facilitate public access to discovery materials stalled in the formal rulemaking process as well as in Congress. A similar fate befell federal endeavors to establish guidelines for the sealing of judicial records and for the confidentiality of settlements. *See* H.R. 3803, 102d Cong. (1991) (proposing the Federal Court Settlements Sunshine Act that would have required clear and convincing evidence of a compelling public interest to justify sealing any settlement of a civil action in which the United States or a federal agency, department, or official was a party in interest); *Oct. 20, 1994 Jud. Conf. Minutes, supra*, at 5 (tabling proposed amendment to Rule 5(d) that would regulate agreements to return or destroy unfiled discovery); *Apr. 28, 1994 Advisory Comm. Minutes, supra* note 86, at

a handful of states have enacted some type of open records law governing their courts. Texas, which has enacted the broadest of these sunshine reforms, illustrates the legislative approach to the secrecy crisis.¹¹⁸

Texas Rule of Civil Procedure 76(a) creates a presumption of public access to "court records," which, in addition to documents filed of record, are defined to include unfiled settlement agreements and unfiled pretrial discovery that "have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."¹¹⁹ These broadly defined court records may not be sealed unless the party seeking the secrecy order establishes (1) a "specific, serious, and substantial interest which clearly outweighs" a presumption of public access and any adverse impact on public health or safety, and (2) the absence of any less restrictive alternative than sealing.¹²⁰ The Texas Rule thus covers the gamut of secrecy orders, from discovery, to judicial records, to settlements. It further squarely places the burden of establishing the need for confidentiality on the party seeking secrecy and reigns in judicial discretion by specifying a substantive balancing test to be undertaken pursuant to numerous procedural safeguards.¹²¹

*22 (distinguishing proposed amendment to Rule 26(c) from possible Rule 77.1 governing sealing orders that limit "public access to judicial records or proceedings").

118 Texas and Florida were among the first states to enact relatively wide-ranging sunshine legislation—Texas, by rule of civil procedure, and Florida, by statute. See TEX. R. CIV. P. 76a; FLA. STAT. ANN. § 69.081 (West Supp. 1998). The Florida statute, which is almost as broad as the Texas rule, prohibits a court from entering any order or judgment that "has the purpose or effect of concealing a public hazard or any information concerning a public hazard," or "any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard." FLA. STAT. ANN. § 69.081(3). In addition, the Florida statute goes further than Texas by voiding, as against public policy, any settlement provision that conceals information concerning public hazards, *id.* §4, or any settlement of a claim with a government entity. *Id.* § 8(a). See also *infra* Part VI.A (discussing litigants' ability to privately contract for settlement confidentiality).

119 TEX. R. CIV. P. § 76a(2)(b)–(c). The presumption does not encompass references to monetary consideration in settlements, *id.* § (2)(b), "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights," *id.* § (2)(c), or documents filed in camera for the purpose of obtaining a discovery ruling, *id.* § (2)(a)(1).

120 *Id.* § 76a(1)(a)–(b).

121 Under the Texas rule, a court may not issue a secrecy order without a preceding motion, notice of a public hearing, and an open hearing in which any interested person has the right to intervene. See *id.* §§ (3) & (4). For a discussion of Texas Rule 76a and the debate surrounding its enactment, see generally Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1990); Robert C. Nissen, *Open Court Records in Products Liabil-*

Other states undertaking sunshine reform have been less ambitious than Texas. Their narrower legislation is generally limited in scope to the sealing of judicial records,¹²² to confidential settlements with a government entity,¹²³ to particular types of public hazards,¹²⁴ or to the sharing of information in related litigation.¹²⁵

Although much controversy surrounded the initial enactment of these sunshine reforms, there has been little subsequent appellate discussion or empirical review of them. Assessment of their actual effect upon the judicial system itself, the parties, or the public in general thus remains speculative at best.¹²⁶

ity *Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931 (1994); and Jennifer S. Sickler & Michael F. Heim, *The Impact of Rule 76a: Trade Secrets Crash and Burn in Texas*, 1 TEX. INTELL. PROP. L.J. 95 (1993).

122 See, e.g., DEL. SUPER. CT. R. 9(bb) (requiring a judicial determination that good cause exists for continued seal of court records); GA. SUPER. CT. R. 21.1 (establishing procedural and substantive requirements for sealing of judicial records); IDAHO CT. R. 32(f) (requiring that courts make a factual finding "as to whether the interest in privacy or public disclosure predominates" before sealing judicial records in least restrictive fashion); IND. CODE ANN. § 5-14-3-5.5 (West 1989) (requiring specific balancing of interests, findings of fact and conclusions of law before sealing judicial public record); MICH. STAT. ANN. R. 8.105(D) (Law. Co-op. 1992) (limiting court's discretion to seal any "documents and records of any nature that are filed with the clerk"); N.Y. CT. R. § 216.1 (requiring written finding of good cause and consideration of public interest before sealing court records).

123 See N.C. GEN. STAT. § 132-1.3(b) (1995) (restricting agencies of government or its subdivisions from entering into confidential settlements without "overriding interest"); OR. REV. STAT. ANN. § 30.402 (Michie Supp. 1996) (prohibiting public body from entering into confidential settlement).

124 See ARK. CODE ANN. § 16-55-122 (Michie Supp. 1997) (voiding settlement agreements or provisions concealing environmental hazard); WASH. REV. CODE ANN. § 4.24.611 (West Supp. 1998) (restricting confidentiality provisions in a court order or private agreement that involves product liability or hazardous substance claims).

125 See VA. CODE ANN. § 8.01-420.01 (Michie 1992) (providing that protective orders issued in personal injury or wrongful death cases shall not prohibit sharing of discovery in similar or related matters). See also *infra* Part IV.D.2.c for a discussion of discovery sharing as a consideration in modifying or vacating a protective order.

126 Other than one unsuccessful challenge to the constitutionality of the Florida statute, there is a surprising paucity of caselaw surrounding even the relatively mature Florida and Texas statutes. See Clarke, *supra* note 103, at 121-22 (concluding that "the actual effect of reforms on the judicial system remains speculative" given the lack of controversial motions or appeals in states that have enacted sunshine reforms); Luban, *supra* note 3, at 2655 (characterizing criticisms of sunshine laws as mere conjecture without empirical study concerning their effect upon discovery).

3. Common Law Sunshine

The common law approach taken by the United States Court of Appeals for the Third Circuit in *Pansy v. Borough of Stroudsburg*¹²⁷ illustrates yet another response to the perceived secrecy crisis in our courts. Faced with what it saw as the "current trend of increasing judicial secrecy,"¹²⁸ the Third Circuit in *Pansy* executed a later-described surprising "shift from the previous practice" of routine judicial endorsement of confidentiality agreements.¹²⁹ The court criticized stipulated confidentiality orders, whether sought "at the discovery stage or any other stage of litigation, including settlement," as potential abdications of judicial discretion to private judgment:

Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders. Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement.¹³⁰

Dubious that confidentiality is, in fact, essential to most settlements, the Third Circuit held the general interest in encouraging settlements (so often cited in support of stipulated confidentiality orders) insufficient to support entry of such orders.¹³¹ Instead, before issuing or deciding to modify any confidentiality order, a district court in the Third Circuit must balance both public and private interests to determine whether "good cause" exists to justify its entry or continued maintenance.¹³² To that end, and to further circumscribe trial court

127 23 F.3d 772 (3d Cir. 1994).

128 *Id.* at 789.

129 *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 481 n.8 (3d Cir. 1995). *See also id.* at 483 n.11; *Pansy*, 23 F.3d at 788–89.

130 *Pansy*, 23 F.3d at 785–86. The *Pansy* court drew no distinction between protective orders governing discovery, sealing orders, and confidentiality orders concerning settlements, finding that they were all "functionally similar," that they shared "comparable features," and that they implicated "similar public policy concerns." *Id.* at 786. *See infra* Part III.A (criticizing generic treatment of secrecy orders).

131 Instead, the *Pansy* court required "a particularized showing of the need for confidentiality in reaching a settlement." *Pansy*, 23 F.3d at 788.

132 *See id.* at 786 ("We therefore . . . conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order."); *id.* at 790 ("The appropriate approach in considering motions to modify confidentiality orders is to use the same balancing test that is used in determining whether to grant such orders in the first instance . . .").

discretion, the Third Circuit has identified a set of nonexhaustive and nonmandatory factors that a court should consider in determining the existence of "good cause."¹³³ While party reliance upon confidentiality and its "particularized" importance in effecting settlement remain proper considerations, they are not dispositive, and must instead be weighed against a number of equally (if not more) important non-party and public interests.¹³⁴ In effect, then, a common law sunshine regime governs the Third Circuit, whose courts appear increasingly reluctant to approve the parties' mutual request for confidentiality.¹³⁵

133 *Glenmede Trust*, 56 F.3d at 483; *Pansy*, 23 F.3d at 787-92. While the Third Circuit commits the "balancing of factors for and against access" to the trial court's discretion, it does not accord that determination "the narrow review reserved for discretionary decisions based on first-hand observations." *Pansy*, 23 F.3d at 781 (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344 (3d Cir. 1986)).

134 These public interest factors inquire whether the information is relevant to the public health and safety or is otherwise in the public interest, whether a government entity or public official is a party, whether the arguably confidential information would otherwise be subject to a freedom of information request, and whether public access would facilitate discovery sharing in other related cases. See *Pansy*, 23 F.3d at 787-92. Many of the private and public factors identified by the *Pansy* court will be discussed at length in connection with the modification of discovery protective orders. See *infra* Part IV.D.2.

135 See, e.g., *St. Paul Fire & Marine Ins. Co. v. Gould Elec. Inc.*, No. 95-5203, 1996 WL 383307, at *1 (E.D. Pa. July 1, 1996) (rejecting stipulated protective order absent briefing on *Pansy* factors); *Aetna Cas. & Sur. Co. v. George Hyman Constr. Co.*, 155 F.R.D. 113, 115-16 (E.D. Pa. 1994) (refusing to enter stipulated protective order that permitted parties to self-select documents entitled to confidential protection); *Horgan v. Independence Blue Cross*, No. 93-CV-2528, 1994 WL 24662, at *2 (E.D. Pa. Jan. 24, 1994) (elevating parties' stipulation to confidentiality order would waste judicial resources and furnish a false sense of protection); *Frupac Int'l Corp. v. M/V "Chucabuco"*, No. Civ. A. 92-2617, 1994 WL 269271, at *1-*2 (E.D. Pa. June 15, 1994) (refusing to endorse "generally worded non-case specific agreement worked out between the parties" because parties failed to provide court with sufficient information to conduct balancing test); *Musicom Int'l, Inc. v. Serubo*, 22 Media L. Rep. (BNA) 2507, No. Civ. A. 94-1920, 1994 WL 410818, at *2 (E.D. Pa. Aug. 5, 1994) (holding that "broad abdication of judicial authority as . . . contemplated by the parties is wholly inconsistent with the good cause standard"); see also Shanon P. Duffy, *Rules Are Changed on Confidentiality; Spate of Federal Rulings Make Protective Orders Uncertain*, LEGAL INTELLIGENCER, July 11, 1994, at 1 (reading *Pansy* "to disapprove the judicial rubber-stamping of stipulated protective orders" and noting "minor boomlet" in denials of such orders in the Eastern District of Pennsylvania).

III. A FUNCTIONAL TOUCHSTONE: THE RIGHT OF PUBLIC ACCESS

A. *The Need for an Individual and Functional Analysis*

As the Third Circuit's decision in *Pansy* illustrates, participants in the confidentiality debate often broadly frame the debate to encompass secrecy orders that govern functionally dissimilar information and materials. For example, in expansively defining "confidentiality order" to include "any court order which in any way restricts access to or disclosure of any form of information or proceeding," the Third Circuit commingles "protective orders" concerning information exchanged during discovery, "sealing orders" concerning judicial records and proceedings, and "secrecy orders" concerning settlement terms.¹³⁶ Sunshine statutes and rules likewise tend to mix the different types of secrecy orders, regulating not only filed documents and pleadings, but also unfiled discovery and settlement agreements.¹³⁷ Sometimes even academics treat these varying uses of litigation confidentiality as interchangeable.¹³⁸

Stipulated protective, sealing, and confidentiality orders do share common attributes and, in many respects, are functionally similar. As recognized by the Third Circuit:

Protective orders over discovery materials and orders of confidentiality over matters relating to other stages of litigation have comparable features and raise similar public policy concerns. All such orders are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings. [Both protective orders and secrecy orders] are often used by courts as a means to aid the progression of litigation and facilitate settlements.¹³⁹

136 *Pansy*, 23 F.3d at 777 n.1.

137 See, e.g., TEX. R. CIV. P. 76a(2). The Florida statute not only restricts the court's entry of any order that "has the purpose or effect of concealing a public hazard," but also voids any private agreement that might carry a similar effect. FLA. STAT. ANN. § 69.081 (3), (4) (West Supp. 1998). Similarly, the proposed Federal Sunshine in Litigation Act, while expressly aimed at discovery protective orders, also sought to limit a court's discretion to enter any "order restricting access to court records in a civil case." See *supra* note 117.

138 Professor Luban, for instance, regards the "underlying issues" as "very similar" concerning "sealed settlements with the blessing of a court, secret settlements without the blessing of a court, and predisposition gag orders." Luban, *supra* note 3, at 2650. See also Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 124 n.21 (1992) (defining "secrecy order . . . to encompass all judicial orders that prevent document disclosure, including protective orders in discovery and orders sealing settlements").

139 *Pansy*, 23 F.3d at 786.

This functional similarity requires that a court balance common public and private concerns before issuing these orders and that some level of "good cause" support them.¹⁴⁰ As the remainder of this Article demonstrates, however, the necessary mix of balancing factors, as well as the requisite showing of good cause, do and should fluctuate with each of these arguably discrete uses of confidentiality.

Complex but distinct issues of public access surround stipulated protective orders governing discovery, the sealing of judicial records, and confidential settlements. This Article presents a functional approach that assesses stipulated confidentiality in light of the various rationales that traditionally support the often-amorphous "right" of public access to judicial proceedings. Under this approach, the value given to party autonomy and the systemic benefits of settlement will hinge upon the nature of the confidentiality order, the materials or information it seeks to protect, and the role those materials play in the civil courts' principal adjudicative function.

Before addressing the individualized and shifting inquiry applicable to these diverse secrecy issues, this section will examine the touchstone to any functional analysis—the right of public access to judicial proceedings and records. After briefly discussing the source and existence of any such right, the section will probe its underlying rationales and their applicability to civil litigation.

B. Potential Sources of a Right of Public Access

Three potential sources arguably give rise to a right of public access to civil judicial proceedings and the information and documents generated in their wake. The sunshine statutes and rules previously discussed represent one such source. As with the Freedom of Information Act applicable to federal agencies, a legislature may statutorily provide a right of public access to particular information generated by the litigation process or deposited with the courts.¹⁴¹ A future or ex-

140 *Id.* (finding that protective and confidentiality orders are functionally similar, involve similar balancing, and require good cause).

141 The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1995), functions as a disclosure statute aimed at curbing perceived excesses in executive branch secrecy. The FOIA mandates disclosure of certain "agency" records requested from a government "agency." *Id.* § 552(a)(3). The FOIA contains numerous exceptions, however, *see id.* § 552(b), and the federal courts are expressly exempted from its coverage, *see id.* § 551(1)(B). In particular, a federal agency may withhold otherwise disclosable information or documents that are the subject of a judicial secrecy order. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 377 (1980); *see also infra* Part IV.D.2.d (discussing how the government status of a party might impact the decision whether to grant or modify a protective order). *See gener-*

isting rule of civil procedure might similarly support increased public access to the civil judiciary.¹⁴² As previously discussed, however, federal efforts to provide this type of statutory access have been largely unsuccessful.¹⁴³

The other two potential sources of public access, the First Amendment to the United States Constitution and the common law, derive from United States Supreme Court precedent exploring the right of public access in criminal cases. The Supreme Court has found a First Amendment right of public access to criminal trials and certain criminal pretrial proceedings.¹⁴⁴ The Court has also recognized an admittedly ill-defined federal common law right to inspect and copy judicial records.¹⁴⁵

In the civil context, however, the Supreme Court has never established either a First Amendment or a common law right of public ac-

ally Toran, *supra* note 138, at 122, for an exploration of the "conflict between the government's perceived need for secrecy as a means of encouraging the voluntary submission of information and the public's undeniable interest in monitoring the health and safety activities of a government agency."

142 As discussed below, for example, a handful of courts have found that Federal Rule of Civil Procedure 5(d) provides a statutory right of public access to even unfiled discovery. See *infra* Part IV.C.1.

143 See *supra* note 117.

144 In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court found the right to attend criminal trials implicit in the First Amendment guarantees of free speech, press, and peaceable assembly. Such guarantees, according to the Court, include the freedom to assemble, listen, and receive information and thus "prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 575-80. See also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [*Press-Enterprise II*] (excluding public access to preliminary hearing in murder case); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [*Press-Enterprise I*] (allowing access to jury selection in criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (excluding the press and the general public from trial involving sexual offenses against minors).

145 In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the Supreme Court addressed whether the public had a right to inspect and copy the Nixon tapes, which had been played in open court during the criminal trials of several Watergate defendants. The Court recognized a common law right of access to judicial records, but acknowledged the sharp controversy "over its scope and the circumstances warranting restrictions of it." *Id.* at 597. Although the paucity of precedent made it difficult to formulate any comprehensive definition of this common law right, the Court agreed that the access decision "is one best left to the sound discretion of the trial court . . . to be exercised in light of the relevant facts and circumstance of the particular case." *Id.* at 599. The Court thus upheld the trial court's refusal to publicly release copies of the tapes in its custody. See *id.* at 611. For a more complete discussion of the common law right of access as recently applied to the sealing of civil judicial records, see *infra* Part V.

cess.¹⁴⁶ Nor do the lower courts that have addressed this issue agree which, if any, of these two independent sources apply to civil litigation.¹⁴⁷ Fortunately, the differences in the two sources do not appear to affect either the content of any right of public access or its articulated rationales. Instead, a court's decision to rely upon the Constitution as opposed to the common law apparently influences only the strength of any presumption of public access and the showing of confidentiality necessary to rebut that presumption.¹⁴⁸

Moreover, while the more rigorous First Amendment standard might offer more "substantive protection to . . . the press and public,"¹⁴⁹ it is generally regarded as more limited in scope than the common law, applying only to certain judicial proceedings and records.¹⁵⁰ Accordingly, while some courts base their decisions concerning public access to litigation-generated documents and information on the First Amendment, most are rightly reluctant to constitutionalize the issue and, to the extent that they find any right of public access, rely upon the more readily rebuttable common law presumption.¹⁵¹

146 Indeed, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), the Supreme Court upheld the constitutionality of a discovery protective order, ruling that "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." See *infra* Part IV (discussing *Seattle Times* and stipulated protective orders).

147 See *infra* note 352 and accompanying text (discussing right of public access to civil trials).

148 Neither a First Amendment nor a common law right of access is absolute. Instead, if a court finds a constitutional right of public access to judicial proceedings or records, any denial of access must be necessitated by a compelling government interest and be narrowly tailored to serve that interest. See *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). In contrast, it is generally easier to overcome a common law right of public access with "reasons favoring secrecy." *Mokhiber v. Davis*, 537 A.2d 1100, 1108 (D.C. 1988); see also *Nixon*, 435 U.S. at 599. This ill-defined common law right generally attaches a presumption of public access to "judicial records" that can be overcome if "significant countervailing interests heavily outweigh the public interest in access." *Rushford*, 846 F.2d at 253; see also *Brazil*, *supra* note 27, at 1019 (describing common law right as a "controversial, ill-defined and unevenly supported doctrine, especially as it applies to civil litigation").

149 *Rushford*, 846 F.2d at 253.

150 See *In re Policy Management Sys. Corp.*, Nos. 94-2254, 94-2341, 1995 WL 541623, at *3 (4th Cir. Sept. 13, 1995); *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988).

151 In choosing to rest its decision concerning the sealing of filed materials on common law, rather than First Amendment considerations, the state court in *Mokhiber* argued that the "constitutionalization of the right to pretrial records could freeze the law in this area of only recent first amendment development beyond the reach of modification by either legislative act or court rule." *Mokhiber*, 537 A.2d at 1108. But

It makes little sense to fret over the precise origin of any access requirement concerning civil litigation. As discussed below, courts appear to utilize the same two-pronged analysis in determining whether the press or public have any right to access particular litigation materials or judicial proceedings. More importantly, analogous rationales support access under both the First Amendment and the common law.

C. *When Does a Right of Public Access Exist?*

In determining whether there is a presumption of public access to materials created in connection with civil trial and pretrial proceedings, courts frequently utilize a two-pronged analysis established by the Supreme Court in evaluating claims of access to criminal proceedings. The Supreme Court has indicated that a right of public access hinges upon two complementary considerations. The first, involving a tradition of accessibility, asks whether the place and judicial process at issue have been historically open to the press and the general public. The second, assessing functional utility, inquires whether public access plays a significant positive role in the functioning of the particular process in question. If the proceeding passes muster under these two tests, a qualified right of public access attaches.¹⁵²

Although the Supreme Court developed this two-tiered test in evaluating First Amendment access claims in criminal cases, lower courts continue to extrapolate from it in determining whether a presumption of access exists in civil litigation as well.¹⁵³ Unlike criminal proceedings that are deeply rooted in constitutional tradition, however, civil process—largely a product of legislative grace—is continually evolving. Given the changing face of civil litigation today, particularly the move away from trial and adjudication toward pretrial proceedings and settlement, courts should not place too heavy an emphasis upon the “tradition and history” prong of this test in evaluating civil access claims. While tradition should play some role in the access decision, functional utility remains the primary consideration.¹⁵⁴ As

see *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570–71 (11th Cir. 1985) (assuming common law presumption, but applying more stringent First Amendment test).

152 See *Press-Enterprise II*, 478 U.S. 1, 8–9 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982).

153 See, e.g., *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (examining common law right of public access to civil trial exhibits); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178–79 (6th Cir. 1983) (applying historical and functional prongs with respect to the sealing of civil records).

154 But see Eugene Cerruti, “*Dancing in the Courthouse*”: *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 295–96 (1995) (proposing transfor-

assessment of functional utility, in turn, requires examination of the various rationales that arguably support public access to judicial proceedings and documents.

D. *The Rationales for Public Access*

Although one could question whether a test devised for assessing public access to criminal proceedings properly translates to the civil context,¹⁵⁵ most of the rationales supporting public access in criminal cases apply to private disputes as well.¹⁵⁶ Public access arguably (1) facilitates public monitoring of the judicial system; (2) enhances public confidence in and respect for the legal process; (3) educates the public about the justice system; and (4) ensures fair and accurate fact-finding and decision-making.

Our democratic government often depends upon public participation in and access to the judicial process. In the criminal context, public access assures the fairness of the proceedings by serving as a check upon an overzealous or corrupt prosecutor or a biased or incompetent judge.¹⁵⁷ While our adversary system of civil litigation counters the one-sided nature of criminal proceedings, public access to, at the very least, civil trials, would likewise help to guard against any judicial incompetence or misconduct.¹⁵⁸

mation of two-pronged test from one based on functional utility of access to "an instrument of court-based information").

155 In her concurring opinion in *Globe Newspaper*, for example, Justice O'Connor stressed the singularly important public concern with "the manner in which criminal trials are conducted" and cautioned against extending that decision outside the criminal context. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring). The court in *Mokhiber* similarly refused to transfer a First Amendment right of access to the civil pretrial arena, reasoning:

[C]ivil litigation generally deals not with the coercive power of the state exercised against an individual in satisfaction of a wrong to the public-at-large, but, rather, concerns disputes between private parties. The parties have selected the civil courts as one of a number of acceptable dispute resolution mechanisms. The public interest in preliminary sparring between two parties protected by the adversary system is significantly different from the public interest in preliminary criminal proceedings.

Mokhiber, 537 A.2d at 1108.

156 See *Mokhiber*, 537 A.2d. at 1108; see also *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179 (finding the rationales supporting public access to criminal trials equally applicable to civil case involving the sealing of judicial records).

157 See *Press-Enterprise II*, 478 U.S. at 12-13.

158 Monitoring may be particularly important in federal court, where judges are appointed for life and impeachment is a rare and cumbersome occurrence. As noted by the Second Circuit in *United States v. Amodeo*:

Moreover, observation of fair and open decision-making inspires public respect for the administration of justice. Indeed, even if the public does not generally take advantage of its right to observe civil proceedings, knowledge of its opportunity to do so fosters the appearance of fairness essential to public confidence.¹⁵⁹ The desire to deter vigilantism and to channel the public concern and outrage often provoked by criminal acts make it particularly important to foster public confidence in the administration of criminal justice.¹⁶⁰ While similar communal emotions may not accompany civil misdeeds, our civil justice system likewise depends upon public support and confidence. Party-borne court costs do not begin to defray the expense of civil courts, which depend upon public subsidies for their existence. The voluntary nature of the civil justice system, where parties self-select the civil courts as one of several dispute resolution alternatives, likewise requires public confidence if it is to prevent parties from opting out of the system entirely.

Our system of self-government further depends upon effective public participation in and free, informed discussion of governmental affairs.¹⁶¹ A public trial offers citizens, often through media representatives, an "opportunity both for understanding the system in general and its workings in a particular case."¹⁶² Public access to at least some civil proceedings would similarly promote this informed discus-

Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control.

Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995); see also *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (explaining that access to civil cases "diminishes the possibilities for injustice, incompetence, perjury, and fraud").

159 See *Press-Enterprise II*, 478 U.S. at 12-13.

160 The Supreme Court has identified the "community therapeutic value" or "community catharsis" achieved by public access to certain criminal proceedings: "When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). See also *Press-Enterprise II*, 478 U.S. at 12-13 (discussing the "community therapeutic value" of open criminal proceedings); *Press-Enterprise I*, 464 U.S. 501, 509 (1984) (asserting that "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct").

161 See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982).

162 *Richmond Newspapers*, 448 U.S. at 572 (discussing "educative effect" of open criminal trials). The Supreme Court has held that the press has no greater right of

sion and educate the public concerning its civil justice system.¹⁶³ Finally, public access also arguably enhances the quality and safeguards the integrity of the fact-finding process by discouraging perjury and encouraging witnesses to come forward.¹⁶⁴ This rationale might similarly apply with equal force to civil cases.¹⁶⁵ Ironically, however, a frequent rationale for sealing civil discovery and judicial documents is the belief that valuable testimony or information will be withheld absent a guarantee of confidentiality.¹⁶⁶

Thus, many of the rationales that support public access to pretrial criminal proceedings arguably transfer to the civil arena as well. Certainly, those justifications carry significant weight in the decision of most courts to presumptively open civil trials to the press and public.¹⁶⁷ As previously discussed, however, most civil lawsuits settle before trial and without any definitive judicial determination of their merits. The more difficult question then becomes whether any of these traditional rationales (or any additional nontraditional ones) trigger access to the larger category of suits that terminate during the pretrial phase of civil litigation.

IV. DISCOVERY AND STIPULATED PROTECTIVE ORDERS

Discovery continues to attract the lion's share of the confidentiality debate, a frequent subject of which concerns protective orders and public access to confidential discovery materials.¹⁶⁸ Recently, that dis-

access to judicial proceedings than the general public. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978).

163 See *Leucadia, Inc.*, 998 F.2d at 161 (suggesting that open civil proceedings provide "public with a more complete understanding of the judicial system").

164 See *Globe Newspaper*, 457 U.S. at 606.

165 See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of the proceedings.").

166 See, e.g., *United States v. Amodeo*, 71 F.3d 1044, 1052 (2d Cir. 1995) (expressing concern that public access to sealed progress reports would deter confidential informants from cooperating with the monitoring of a consent decree).

167 See *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178; see also *WRIGHT ET AL.*, *supra* note 98, § 2042 n.31 ("In general, there should be a constitutional right to attend civil trials just as there is to attend criminal trials.").

168 The push to enact sunshine legislation in the late 1980s and early 1990s generated a wealth of commentary concerning discovery confidentiality. See, e.g., Diane L. Bratvold, Note, *Protective Orders and the Use of Discovery Materials Following Seattle Times*, 71 MINN. L. REV. 171 (1986); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771 (1990); Katie Eccles, Note, *The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 STAN. L. REV. 1577 (1990); Marcus, *Discovery*

cussion has focused upon the extent to which a court should, or indeed, may accede to the parties' mutual desire for confidentiality in an effort to facilitate the progression of discovery and the ultimate settlement of the case. Stipulated protective orders that endorse the litigants' private confidentiality agreements have become a lightning rod for current debate.¹⁶⁹

This section examines the existing use of and continuing controversy surrounding confidentiality agreements and stipulated protective orders governing discovery materials that have not yet been filed with the court in support of a request for judicial action.¹⁷⁰ Such discovery includes documents produced in response to requests for production, interrogatory answers, and deposition testimony. As a prelude, the section first explains the general need for confidentiality and protective orders under our exceedingly liberal discovery regime. It then specifically turns to stipulated protective orders and demonstrates how their current operation, characteristics, and rationales fuel the current discovery debate. Using the functional approach to public access outlined in Part III, this section urges that the preference for settlement and the essentially private character of discovery both call for selective judicial endorsement, rather than knee-jerk rejection, of stipulated protective orders. The decision whether to enter or later

Confidentiality, *supra* note 52; Marcus, *Myth and Reality*, *supra* note 52; Miller, *supra* note 52; Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109 (1989).

169 See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-86 (3d Cir. 1994) (criticizing routine signature of confidentiality orders).

170 Although the current version of Federal Rule of Civil Procedure 5(d) continues the requirement that discovery be filed with the court, it permits individual districts to dispense with this requirement in order to avoid the expense associated with the filing and storing of often voluminous discovery that is rarely used after filing. See FED. R. CIV. P. 5(d) (permitting a court, on motion or on its own initiative, to "order that depositions . . . and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding"); see also FED. R. CIV. P. 5(d) advisory committee's note to the 1980 amendments. Accordingly, most federal judicial districts have standing local rules that prohibit the filing of discovery unless ordered by the court. See, e.g., N.D. & S.D. Iowa L.R. 15(a) (providing that discovery materials may not be filed); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 779 (1st Cir. 1988) (noting that standing local rule "actually reverses in part the filing presumption of Rule 5(d)"). But see *infra* notes 262-63 (discussing proposed amendment to Rule 5(d) that would invalidate such local rules and, instead, prohibit the filing of unused discovery unless otherwise ordered by the trial court). This section of the Article solely concerns such unfiled or unused discovery. A different analysis arguably applies once discovery materials are appended to a motion, considered by the court, or made the basis of judicial decision. See *infra* Part V (discussing confidentiality and judicial records).

modify such agreed confidentiality orders, however, rests ultimately in the trial court's extensive discretion. The section thus concludes by examining some of the private and public considerations that are relevant to the exercise of this discretion, not only with respect to stipulated protective orders, but also with respect to sealing and confidentiality orders that are subsequently discussed.

A. *The Scope of Discovery and the Need for Protective Orders*

The extraordinarily broad scope of discovery necessitates the availability of confidentiality agreements and discovery protective orders. As currently framed,¹⁷¹ the discovery regime often requires production of voluminous amounts of arguably private or sensitive information concerning parties and nonparties alike that would not otherwise be subject to compelled public disclosure and that might ultimately prove inadmissible.¹⁷² Unless prohibited by court order, a

171 Besides proposing to amend Federal Rule of Civil Procedure 5(d), the Advisory Committee on Civil Rules has proposed several amendments to the discovery Rules and the general scope of discovery. See *infra* note 172. Indeed, it was this possibility of systemic reform that motivated the Advisory Committee to table the proposed amendment of Federal Rule of Civil Procedure 26(c) governing protective orders. See Report of the Advisory Committee on Civil Rules, May 17, 1996 (holding proposed amendments to Rule 26(c) "for further consideration as part of a new project to study the general scope of discovery . . . and the scope of document discovery"). The Advisory Committee's proposed amendments, however, have only recently been published for public comment and have not been considered or approved by the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, or the Supreme Court. See *Request for Comment to Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, (visited Sept. 29, 1998) <<http://www.uscourts.gov/review.html>> [hereinafter *1998 Preliminary Draft*].

172 The current standards for discovery under the Federal Rules (and state rules patterned upon them) are exceedingly liberal:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). See generally Miller, *supra* note 52, at 463–77 (advocating discovery protective orders as antidote to disclosure of trade secrets and confidential commercial information under broad scope of discovery). The recently proposed amendment of Rule 26(b)(1) would limit the scope of "lawyer-managed" discovery to non-privileged material that "is relevant to the claim or defense of any party" asserted in the pleadings. *1998 Preliminary Draft*, *supra* note 171, at 40–41, 56. Upon good cause shown, however, the trial court could broaden discovery to "any information relevant to the subject matter involved in the action"—the presently governing standard. *Id.* at 40–41. The amendments would additionally clarify that inadmissible evi-

party may disclose discovered information to whom it wishes or use the materials for any purpose.¹⁷³

To counter the potential for abuse of arguably confidential discovery, Rule 26(c) authorizes a district court, upon "good cause shown," to issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."¹⁷⁴ This provision vests a district court with wide discretion to fashion appropriate protective orders concerning confidential information obtained through discovery.¹⁷⁵ Courts, for example, may restrict the disclosure of such discovery to designated persons or forbid its use for purposes unrelated to the preparation and settlement of the case at hand.¹⁷⁶

dence, even if "reasonably calculated to lead to the discovery of admissible evidence," must be relevant in order to be discoverable. *See id.* at 42, 46-57. As previously discussed, these proposals to limit the scope of attorney-controlled discovery and more actively involve the court "in regulating the breadth of discovery," *id.* at 55, must still undergo an extensive review and approval process. *See supra* note 171.

173 *See* *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994); *Public Citizen*, 858 F.2d at 780; *Oklahoma Hosp. Ass'n v. Oklahoma Publ'g Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984). *But see* *Marcus, Myth and Reality*, *supra* note 52, at 54-55 (questioning assumption that parties can use unprotected discovery for any purpose).

174 FED. R. CIV. P. 26(c). Although Federal Rule of Civil Procedure 26(c) identifies eight kinds of protective orders that a district court might issue, *see infra* note 176, this list is non-exclusive and a court may utilize its wide discretion to order other appropriate discovery restrictions. *See* WRIGHT ET AL., *supra* note 98, § 2036, at 489.

175 *See* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (noting that "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery"). Of course, a protective order will not prevent a party from disclosing its own information or documents to others. *Florida ex rel. Butterworth v. Jones Chem., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993). Nor can it constitutionally prohibit the dissemination of information gained from nondiscovery sources. *See Seattle Times*, 467 U.S. at 37; *see also infra* note 212.

176 Three related provisions of Federal Rule of Civil Procedure 26(c) authorize protective orders that limit the use and dissemination of confidential information obtained through discovery. Rule 26(c)(5) permits the court to order "that discovery be conducted with no one present except persons designated by the court." Rule 26(c)(6), as construed, allows the sealing of depositions and other discovery responses. Finally, Rule 26(c)(7) authorizes a court to order that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." *See generally* WRIGHT ET AL., *supra* note 98, §§ 2041-43. In addition to the powers invested by Rule 26(c), a court also possesses inherent authority to impose confidentiality over unfiled discovery materials. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (noting court's "inherent power to grant orders of confidentiality over materials not in the court file").

In *Seattle Times Co. v. Rhinehart*,¹⁷⁷ the United States Supreme Court upheld just such a protective order against a First Amendment challenge. In so doing, the Court shed valuable light on the "unique character of the discovery process"¹⁷⁸ and the importance of discovery protective orders in that process. In *Seattle Times*, a religious group, the Aquarian Foundation, and its head "median," Rhinehart, sued the *Seattle Times* for defamation and invasion of privacy over a series of exposés the newspaper had published regarding Rhinehart and the Foundation. The newspaper then sought wide-ranging discovery concerning the Foundation's membership, donors, and financial affairs.¹⁷⁹ At the Foundation's request, and over the newspaper's objection, the trial court issued a protective order that confined the use and dissemination of this information to the defamation lawsuit and forbade the newspaper from using it in future articles concerning Rhinehart. The newspaper objected to the protective order, claiming it was a prior restraint violative of the First Amendment.¹⁸⁰

In rejecting that challenge and upholding a trial court's discretion to issue protective orders, the Court noted its concern with the breadth and intrusiveness of pretrial discovery, the "sole purpose" of which is to assist "in the preparation and trial, or the settlement, of litigated disputes."¹⁸¹ The significant potential for abuse of information gained "only by virtue of the trial court's discovery processes" and "made available only for purposes of trying [a litigant's] suit,"¹⁸² required that a trial court retain "substantial latitude" to "weigh fairly the competing needs and interests of parties affected by discovery" and to fashion appropriate protective orders.¹⁸³ Moreover, restrictions on "discovered, but not yet admitted, information are not a restriction on a traditionally public source of information," given that discovery is not conducted in public and "pretrial depositions and in-

177 467 U.S. 20 (1984).

178 *Id.* at 36.

179 Because truth is a defense to a defamation claim and because Rhinehart had alleged that the defamatory articles had adversely affected Foundation income, membership, and donations, such information satisfied the relevance standard of Federal Rule of Civil Procedure 26(b)(1). See *supra* note 172.

180 See *Seattle Times*, 467 U.S. at 27-28.

181 *Id.* at 34. Justice Powell, writing for the majority, noted that the discovery rules permitted "extensive intrusion" into the affairs of litigants and third parties, *id.* at 30, and thus provided litigants an opportunity to "obtain—incidentally or purposefully—information that is not only irrelevant but if publicly released could be damaging to reputation and privacy." *Id.* at 35.

182 *Id.* at 32.

183 *Id.* at 36.

terrogatories are not public components of a civil trial.”¹⁸⁴ The Court thus held that a protective order will not offend the First Amendment if it “is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources”¹⁸⁵

B. The Controversy Concerning Stipulated Protective Orders

1. Contested and Stipulated Protective Orders

The protective order at issue in *Seattle Times* likely typifies the preponderance of protective orders entered by federal courts.¹⁸⁶ The order shielded specific “confidential” materials that implicated the personal privacy, reputation, and safety of individual members and donors of the Foundation.¹⁸⁷ The newspaper contested the protective order, which the district court issued only after weighing the competing interests affected and finding good cause. This arguably contrasts with stipulated protective orders that are commonly agreed to at the inception of discovery, generally involve wholesale categories of confidential commercial information, and are frequently issued by courts with little, if any, particularized review.

a. Contested Protective Orders

Absent party agreement, discovery confidentiality is generally litigated document-by-document or request-by-request.¹⁸⁸ The party seeking to limit dissemination of discovery bears the ultimate burden of making a factually particularized showing of “good cause.”¹⁸⁹ This

184 *Id.* at 33.

185 *Id.* at 37. The Court noted that “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” *Id.* at 32.

186 Approximately one-half of all motions for protective orders examined in the *FJC Study* were contested. See *FJC Study*, *supra* note 79, at 4. Moreover, a significant percentage of protective orders were issued to protect personal information concerning individual parties and witnesses. *Id.* at 9.

187 The plaintiffs had argued that unprotected disclosure of the requested discovery would subject Foundation members to harassment and reprisals and would violate the privacy rights of individual members and donors. See *Seattle Times*, 467 U.S. at 25–27.

188 See MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432 (describing “document-by-document adjudication” as one of two alternatives for seeking protection of discovery materials).

189 See WRIGHT ET AL., *supra* note 98, § 2035, at 483–84 (describing good cause determination as “factual matter” requiring “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements”).

entails establishing that the information implicates a cognizable property or privacy interest entitled to protection¹⁹⁰ and that disclosure of such information would work a clearly defined and serious injury.¹⁹¹

A business entity, for example, may have difficulty making this particularized showing. Although trade secrets and other confidential commercial information trigger Rule 26(c) protection,¹⁹² much information exchanged in discovery will resist classification under these inherently ambiguous categories.¹⁹³ And even if the requested discovery is sufficiently confidential, the movant for a protective order must still establish that cognizable harm would result from its disclosure. While embarrassment to an individual might justify issuance of a protective order, courts generally frown upon claims of commercial embarrassment or damaged corporate reputation.¹⁹⁴ To successfully

190 In *Seattle Times*, the Supreme Court recognized that while Federal Rule of Civil Procedure 26(c) "contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." *Seattle Times*, 467 U.S. at 35 n.21. Commercial parties, who arguably have no such privacy rights, more commonly seek protection of "trade secret[s] or other confidential research, development, or commercial information" under Federal Rule of Civil Procedure 26(c)(7). FED. R. CIV. P. 26(c)(7).

191 See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-77 (3d Cir. 1994) (holding that good cause requires that party seeking protection must specifically demonstrate a "clearly defined and serious injury" and ultimately justify confidentiality of "each and every document"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (asserting that court must determine whether "disclosure [would] . . . cause a cognizable harm" based on particularized showing).

192 See FED. R. CIV. P. 26(c)(7). See generally Giles T. Cohen, *Protective Orders, Property Interests and Prior Restraints: Can the Courts Prevent Media Nonparties from Publishing Court-Protected Discovery Materials?*, 144 U. PA. L. REV. 2463, 2478-94 (1996) (discussing property interests in trade secrets and other commercially valuable information).

193 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 488-93 (describing trade secrets as a nebulous concept governed by inherently ambiguous law that is subject to elastic definitions). Professor Marcus notes that commercial parties that are unable to claim trade secret status often "invoke something akin to privacy interests," *id.* at 492, when they "rely on the more general protection" of Rule 26(c), *id.* at 491.

194 See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). The Third Circuit voiced the following rationale for this sentiment:

Rule 26(c) protects parties from embarrassment as well as from disclosure of trade secrets [B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground.

Id.

support such a claim, a business must specifically demonstrate that divulgence of embarrassing information would significantly harm the company's competitive or financial position.¹⁹⁵ A company might find it difficult to quantify this type of bottom line damage caused by adverse publicity surrounding the disclosure of unsubstantiated discovery.¹⁹⁶

Nor will a *prima facie* showing of good cause, in itself, guarantee issuance of a protective order. Rather, such a showing simply shifts the burden to the party seeking discovery and contesting the protective order. That requesting party must establish the relevance of and need for the requested information.¹⁹⁷ If both parties can satisfy these initial burdens, the court will balance the competing interests of persons affected by the discovery to determine if the harm from disclosure outweighs the asserted need. If so, assuming that some discov-

195 See *id.*; see also *Pansy*, 23 F.3d at 787 (requiring that embarrassment be "particularly serious" to justify protective order); *Allied Corp. v. Jim Walter Corp.*, Civ. A. Nos. 86-3086, 95-5530, 1996 WL 346980, at *3 (E.D. Pa. June 17, 1996) (rejecting claim of embarrassment that might "cast [a corporation] or its officers in a bad light"). But see *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 n.2 (1st Cir. 1993) (suggesting that commercial embarrassment might justify protection of discovery so long as opposing party can obtain and use information if needed at trial).

196 See *Allied Corp.*, 1996 WL 346980, at *6 (holding that corporation's "claimed injury is a 'difficult to quantify' detriment to its bottom line" that "does not constitute a precise enough showing of injury"); see also *Miller*, *supra* note 52, at 467-74 (warning that unprotected disclosure of unsubstantiated discovery could damage a business' reputation and profitability and harm entire product lines).

197 In some cases, a third party may seek to intervene in the proceedings to contest issuance of the protective order. See *infra* note 294 (discussing intervention for limited purpose of contesting protective order). The extent to which a district court should consider and balance the access interests of nonparties such as other litigants, the press, public interest groups, or the general public, remains a hotly debated topic, particularly in the context of stipulated protective orders. See *infra* Part IV.B (exploring debate concerning stipulated protective orders) and Part IV.D.2 (discussing modification factors). The district court generally possesses case-specific discretion whether to permit the intervention, to grant the third party a hearing, or to accept or reject these nonparty interests. See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.43, at 65 (indicating that court should consider "not only rights and needs of the parties but also . . . the existing or potential interests of those not involved in the litigation"); *Miller*, *supra* note 52, at 435-36 (stating that existing law gives courts case-by-case discretion to accept or reject nonparty interests); see also *McCarthy v. Barnett Bank*, 876 F.2d 89, 91 (11th Cir. 1989) (holding that intervenors have no right to hearing).

ery is warranted,¹⁹⁸ the court will craft an appropriate protective order restricting disclosure.¹⁹⁹

b. Stipulated Protective Orders

i. Procedure

Litigating confidentiality document-by-document through narrow protective orders covering specific information and documents can be time-consuming and costly to parties and courts alike, particularly in cases involving large-scale discovery. To expedite discovery and avoid repeated motions for a protective order regarding every document believed to be confidential, parties will frequently agree to, and courts will regularly issue, umbrella protective orders.²⁰⁰ Umbrella protective orders are generally entered early in a lawsuit and, to reap the potential benefits of such an order, are put in place before discovery even commences.²⁰¹ As described by the *Manual of Complex Litigation*, umbrella orders “provide that all assertedly confidential material disclosed (and appropriately identified usually by stamp) is presumptively protected unless challenged. The orders are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.”²⁰²

198 In rare cases, a court may order “that the disclosure or discovery not be had.” FED. R. CIV. P. 26(c)(1).

199 For a description of existing practice and procedure governing protective orders, see generally Miller, *supra* note 52, at 432–36; WRIGHT ET AL., *supra* note 98, §§ 2035–44.1.

200 Umbrella orders have become so common in cases involving large volumes of discovery that the *Manual for Complex Litigation* offers two sample confidentiality orders. See MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 41.36 (offering sample confidentiality orders and acknowledgment).

201 See *id.* § 21.43, at 65 (emphasizing need to address protective order issues early, preferably before discovery); see also *infra* Part IV.B.1.b.iii (discussing benefits of stipulated protective orders).

202 MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432, at 67. Some confusion exists regarding the terminology used to designate this type of protective order. The *Manual for Complex Litigation* uses the term “umbrella” order to describe this alternative, usually stipulated, method of protecting discovery materials. *Id.* § 24.432, at 67. Others refer to such an order as a “blanket” protective order. See *Bayer AG & Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 465–66 (S.D.N.Y. 1995) (blanket orders permit parties to designate confidential documents, subject to challenge by other party). True “blanket” orders, however, tentatively protect all discovery materials until otherwise ordered by the court. See *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993) (describing various kinds of protective orders entered in civil cases). The *Manual for Complex Litigation* does not discuss blanket orders, which, to the extent

Unlike contested protective orders, then, stipulated umbrella orders postpone, perhaps indefinitely, the obligation to make a particularized showing regarding the need for confidentiality. The order will generally define categories of materials that presumptively qualify as "confidential."²⁰³ The producing party bears responsibility for designating documents that it, in good faith, believes merit such confidential treatment.²⁰⁴ Documents and information produced under this designation will be automatically subject to the order's confidentiality restrictions unless the requesting party contests their confidential status.²⁰⁵ If no one disputes the confidentiality stamp, the conditions on disclosure and use will apply without any particularized showing of need or judicial review of the discovery. If the requesting party contests a confidentiality designation, however, the designating party must demonstrate a specific need for confidential protection.²⁰⁶ Only

used in litigation today, represent the exception, rather than the norm in protective order practice.

203 The sample orders provided by the *Manual for Complex Litigation* suggest two possible approaches to defining "confidential" materials. One approach appears to leave to each designating party the task of determining whether a document "contains information believed to be subject to protection under Fed. R. Civ. P. 26(c)." *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 41.36, at 453 (Form A Confidentiality Order). The other approach specifically enumerates in advance categories of information entitled to presumptive protection. Such categories, for instance, might include "documents containing trade secrets, special formulas, company security matters, customer lists, financial data, projected sales data, production data" and similar confidential commercial information. Documents not so described, and for which confidential status is subsequently sought, require individual application to the court. *See id.* § 41.36, at 459 (Form B Confidentiality Order). As discussed below, courts might be less willing to enter, and more willing to modify, the first, less specific type of umbrella order. *See infra* notes 282-88 and accompanying text.

204 Stipulated protective orders arguably invite over-designation by ultra-cautious counsel afraid of producing sensitive business information. The *Manual for Complex Litigation* addresses that criticism by equating a confidential designation with a motion for protective order. Counsel certifies that designated material merits protection under Federal Rule of Civil Procedure 26(c) and may be sanctioned under Federal Rule of Civil Procedure 37(a)(4) for improper designations. *See* *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 67 n.141; *see also* *FED. R. CIV. P. 26(c)* (applying sanctions provisions of Federal Rule of Civil Procedure 37 to the award of expenses incurred in relation to unsuccessful motions for protective order). The specter of sanctions thus should deter bad faith or overly broad designation. *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 n.17 (3d Cir. 1986).

205 Umbrella orders will typically outline the procedures that the parties must follow in identifying, designating, and logging items subject to the order and in challenging particular confidentiality claims. *See* *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 67-68.

206 The ultimate burden of justifying the confidentiality of challenged documents thus remains on the designating party. The requesting party shoulders only the bur-

then will the court determine the confidential status of the challenged materials and balance affected interests.

ii. Standard Provisions

Trial courts possess extensive latitude in designing stipulated protective orders.²⁰⁷ Because umbrella orders are frequently the product of the parties' agreement, however, courts will often treat them as they do any other agreed order and defer to the parties' own resolution of its terms.²⁰⁸ As such, the particular confidentiality provisions of a stipulated protective order can be as varied as the parties' imaginations.²⁰⁹

Most stipulated umbrella orders will, at the very least, identify the persons entitled to access confidential discovery materials and will prohibit disclosure of such information to any other persons.²¹⁰ To

den of raising the confidentiality issue by contesting the designation of particular documents. See *Cipollone*, 785 F.2d at 1122 (placing "burden of proof . . . at all times on the movant" and shifting "only the burden of raising the issue with respect to certain documents"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 893 (E.D. Pa. 1981) (holding that stipulated protective order "does not shift the burden of proof, but requires that, upon objection, the party electing to classify information justify its action pursuant to the Federal Rules of Civil Procedure"); see also MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432, at 68 n.149 (relieving challenger of need to produce affidavit in order to contest confidentiality designation).

207 See *Poliquin*, 989 F.2d at 534 (noting that "design of the [protective] order is . . . largely within the trial court's discretion").

208 As noted by Judge Becker in *Zenith Radio Corp.*, a court may well apply "a less rigorous standard to consent orders" like stipulated protective orders. *Zenith Radio Corp.*, 529 F. Supp. at 889 n.40. For a discussion of a trial court's ability to enter a stipulated protective order without any independent determination of good cause, see *infra* Part IV.B.2.

209 The enforceability of certain contractual provisions might vary among the courts. See *infra* note 405 and accompanying text (discussing freedom to privately contract for settlement confidentiality). Moreover, as discussed below, some standard provisions might render the stipulated protective order more vulnerable to later modification. See *infra* Part IV.D.

210 The parties generally cannot agree to prohibit the disclosure of information mandated by court order or otherwise required by law. See MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432, at 69 n.157. For instance, a stipulated protective order could not validly prohibit the disclosure of information legally required to be filed with a regulatory agency. To help ensure the enforceability of a stipulated protective order, then, parties should expressly except such legally required disclosures. See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) (recommending that protective order exclude material subject to disclosure under the Freedom of Information Act); see also *infra* Parts IV.D.2.d (discussing public interest as a factor in modification) and Part VI.B.3.d (examining confidential settlements that suppress relevant evidence).

the extent that the order authorizes use of confidential discovery by experts or other witnesses preparing for testimony, it will typically require that the witness review and consent to its confidentiality provisions.²¹¹

The parties might further stipulate to the permissible use and disclosure of confidential information obtained through discovery.²¹² For example, the parties would not want confidential material to automatically forfeit its protection if filed with the court or introduced into evidence. Stipulated orders thus typically require that designated information be filed under seal and often provide for an *in camera* procedure by which the designating party can move for continued postfiling protection.²¹³ Parties to agreed protective orders also frequently anticipate the potential relevance of the discovery to related

211 The *Manual for Complex Litigation* reviews the possible universe of permissible recipients of confidential discovery:

For example, counsel are ordinarily permitted to disclose such information to assistants in their offices and potential expert witnesses. On the other hand, disclosure to clients may be prohibited where, for example, the information has commercial value and the parties are competitors; alternatively, the order may (1) limit disclosure to named individuals not involved in the relevant corporate activity, (2) create a special class of highly confidential documents that only attorneys and non client experts may view, (3) require particularized record keeping of disclosures to client personnel, and (4) require individual undertakings by those receiving such information not to misuse it.

MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432, at 68 n.146.

212 Any effort to judicially restrict disclosure of confidential materials obtained outside of the discovery process might violate the First Amendment's prohibition of prior restraints. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (upholding protective order that limits dissemination of information procured through discovery so long as it does not restrict disclosure of identical information "gained through means independent of the court's processes"); cf. *Grove Fresh Distribs., Inc. v. John Labatt, Ltd.*, 888 F. Supp. 1427, 1442 (N.D. Ill. 1995) (requiring judicial pre-clearance before disclosing information that was allegedly "independently available from a public source").

213 Under the sample confidentiality order in the *Manual for Complex Litigation*, if documents designated as confidential must be filed, "they shall be filed under seal and shall remain sealed while in the office of the clerk so long as they retain their status as stamped confidential documents." If such documents are introduced into evidence at trial or other hearing, advance notice must be given to the designating party, who may then move "for an order that the evidence be received *in camera* or under other conditions to prevent unnecessary disclosure." MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 41.36, at 455 (Form A, ¶¶ 5 & 7). For a discussion of how the filing of discovery might influence access issues and analysis, see *infra* Part V (assessing the sealing of judicial records).

litigation involving the producing party and either expressly permit or prohibit the sharing of discovery in these collateral lawsuits.²¹⁴

Finally, litigants often desire to ensure that confidential discovery remains confidential following the termination or settlement of the lawsuit.²¹⁵ To some extent, litigants are unable to completely accomplish such an objective, as stipulated protective orders, like other injunctions, remain subject to modification or termination by the court at any time during or after a lawsuit.²¹⁶ Subject to that caveat, however, the parties can stipulate to the order's continued validity after resolution of their dispute,²¹⁷ provide for liquidated damages upon breach of the confidentiality provisions,²¹⁸ and expressly recognize

214 The *Manual for Complex Litigation* offers both options in a sample order:

Use. Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and trial of this litigation (including appeals and retrials), and shall not use such information for any other purpose, including business, governmental, commercial, administrative, or judicial proceedings. [For purposes of this paragraph, the term 'this litigation' includes other related litigation in which the producing person or company is a party.]

MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 42.36, at 456 (Form A, ¶ 10). For a discussion of discovery sharing as a factor in the decision whether to issue or modify a confidentiality order, see *infra* Part IV.D.2.c.

215 As recognized by the First Circuit, "the lubricating effects of the protective order on pre-trial discovery would be lost if the order expired at the end of the case or were subject to ready alteration." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993).

216 Party intent notwithstanding, a court retains jurisdiction to modify its protective orders, even after termination of the litigation in which they are entered. *Poliquin*, 989 F.2d at 535 (recognizing "inherent power of the district court to relax or terminate" its protective orders, "even after judgment"); see also *infra* Part IV.D.2 (discussing court's power to modify protective orders). A stipulated order should explicitly recognize the court's ongoing modification authority in order to avoid undue reliance upon its current provisions. See *infra* Part IV.D.2.b (discussing party reliance as factor in modification decision).

217 See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 41.36, at 456 (Form A, ¶ 11) ("provisions of this order shall not terminate at the conclusion of these actions").

218 See, e.g., *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 307 (N.D. Ill. 1993). Such a damages provision aims to avoid subsequent litigation concerning the harm caused by the unauthorized disclosure. See Joseph A. Golden, *Secrecy Clauses: A Negotiated Restraint on Free Speech*, 73 MICH. B.J. 550 (1994) (recommending payment of settlement over time to monitor adherence to confidentiality restrictions). But see Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 292 (1998) (contending that such liquidated damages clauses are unenforceable because they "would not be a reasonable estimate of the plaintiff's potential liability").

the trial court's ongoing enforcement jurisdiction.²¹⁹ An order will further typically mandate that once a dispute is over, the requesting party will timely return all confidential materials to the producing party or destroy the materials.²²⁰

iii. Benefits of Stipulated Protective Orders

Stipulated protective orders undoubtedly enhance the efficiency of discovery in individual cases, to the benefit of both the court and the litigants.²²¹ Protracted litigation over confidentiality delays the ultimate resolution of the lawsuit by diverting the attention of the courts and the litigants away from issues that, unlike confidentiality, are central to the merits of the case.²²² Absent a stipulated umbrella order, confidentiality would be litigated on a time-consuming and costly document-by-document basis and courts would be forced to resolve discovery objections that would not otherwise be made.²²³ The self-

219 A court that lacks an independent basis for federal subject matter jurisdiction may lose enforcement jurisdiction after settlement of the lawsuit unless the stipulated protective order survives dismissal, is embodied in an order of dismissal, or the court expressly retains enforcement jurisdiction. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); see also *infra* Part VI.A (discussing conundrum faced by litigants who desire to enhance enforceability of confidential settlements).

220 *Poliquin*, 989 F.2d at 535 (“[I]t is common to provide . . . for post-trial protection including the return or destruction of protected material”). For a discussion of public access to confidential discovery after the settlement and dismissal of a lawsuit, including criticisms frequently leveled against such “return or destroy” provisions, see *infra* Part VI.B.1 and note 398.

221 See *Poliquin*, 989 F.2d at 535 (noting that umbrella protective orders foster “effective discovery with a minimum of disputes”); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (noting that stipulated protective order “makes the discovery process in a particular case operate more efficiently”); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (commenting upon the “tremendous saving of time effected” by stipulated protective orders); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 n.18 (3d Cir. 1986) (stating that umbrella orders “encourage efficiency and allow litigation to proceed more quickly”); *Standard Chlorine of Del., Inc. v. Sinibaldi*, 821 F. Supp. 232, 256 (D. Del. 1992) (requiring parties to contest confidentiality on document-by-document basis is “extremely inefficient and burdensome to the [c]ourt”).

222 See *Cipollone*, 785 F.2d at 1122 n.18 (suggesting that umbrella protective orders prevent the parties and the courts from “los[ing] the forest for the trees”); see also *Marcus, Myth and Reality*, *supra* note 52, at 15 (contending that confidentiality issues are not material to the merits of a case).

223 See *In re Alexander Grant & Co. Litig.*, 820 F.2d at 356 (acknowledging that in complex cases “[b]usy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document”).

Any restriction on the availability of stipulated protective orders thus arguably jeopardizes these benefits. See *Higginbotham Testimony*, *supra* note 113, at 3 (restricting

regulating nature of agreed protective orders, in contrast, encourages parties to work out confidentiality issues among and between themselves and to conduct discovery with a minimum of judicial involvement.²²⁴

Moreover, stipulated protective orders minimize discovery disputes altogether by encouraging disclosure of sensitive information that might otherwise be protected by the court or withheld by a party.²²⁵ Persons with arguable grounds for resisting discovery are more likely to produce such information to a litigation or business adversary if the confidentiality of sensitive materials is assured and its disclosure is restricted.²²⁶ Indeed, a stipulated protective order might encourage voluntary production of a broader range of even tangentially relevant information in response to expansive discovery requests.²²⁷ In addition to receiving information that might otherwise be withheld as nonresponsive, then, the requesting party avoids any risk that a district court might deny discovery of certain confidential or irrelevant information altogether.²²⁸ Further, as long as the requesting party can use the confidential materials in the preparation,

protective orders would increase the burden and expense of discovery and impose significant burdens on court system); Marcus, *Discovery Confidentiality*, *supra* note 52, at 484–85 (contending that increased public access would “foment . . . opposition to broad discovery” and “disrupt cooperative exchange of information between the parties”); Miller, *supra* note 52, at 467, 483–84 (restricting protective orders or facilitating their modification or vacatur would “impose a superfluous and inordinate work burden on courts” and jeopardize cooperative discovery); Vangelisti, *supra* note 77, at 177–78 (restricting protective orders would tax judicial resources and halt discovery).

224 See *Cipollone*, 785 F.2d at 1122 n.18 (noting that extensive judicial involvement would deter “parties from themselves conducting discovery to a significant extent”); *Videon Chevrolet, Inc. v. General Motors Corp.*, No. Civ. A. 91-4202, 1995 WL 395925, at *2 (E.D. Pa. June 28, 1995) (enforcing stipulated protective order “reinforces each party’s ability to freely enter and control the content of such protective agreements”). For a discussion of the self-regulatory nature of the discovery process, see *infra* Part IV.C.2.

225 See *Poliquin*, 989 F.2d at 535 (describing the “lubricating effects” that stipulated protective orders have on pretrial discovery).

226 See *United Nuclear Corp.*, 905 F.2d at 1427 (asserting that umbrella orders “may encourage disclosures that otherwise would be resisted”).

227 See *In re Alexander Grant & Co. Litig.*, 820 F.2d at 357 (noting that stipulated protective orders “encourage maximum participation in the discovery process”); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1978) (describing protective order as encouraging “full disclosure of all evidence that might conceivably be relevant”).

228 See Marcus, *Myth and Reality*, *supra* note 52, at 21–23 (attributing risk of nondisclosure as one danger flowing from presumptive public access to discovery); Miller, *supra* note 52, at 467, 483–84 (predicting that sunshine reforms could potentially lead to denial of discovery altogether).

settlement, or trial of his case, he need not undertake the burden of challenging their confidential status.²²⁹

Stipulated protective orders thus extricate both the court and the litigants from the need to litigate confidentiality when neither party desires to do so. In so doing, such orders expedite discovery, conserve judicial and litigant resources, and encourage fuller participation in discovery. Further, by facilitating the cooperative exchange of information (information that might not otherwise be produced), stipulated protective orders pave the way toward the ultimate settlement or resolution of the lawsuit. In short, stipulated umbrella protective orders assist in fulfilling the "just, speedy, and inexpensive determination of every action"—the mantra of our civil justice system.

2. The Continuing Controversy: Stipulated Protective Orders and "Good Cause Shown"

Until fairly recently, this interest in facilitating settlement or expediting discovery was thought to provide "good cause" sufficient to justify issuance of a stipulated protective order.²³⁰ A number of courts and commentators, however, have begun to challenge this assumption and, in the process, question the propriety of such orders.²³¹

The current controversy over agreed protective orders recently came to a head over the ill-fated effort to amend Rule 26(c) to authorize issuance of protective orders either "for good cause shown *or on*

229 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 501 (contending that plaintiff's ability to prepare a case "makes burdensome inquiry into confidentiality" unwarranted and unnecessary).

230 In *In re Alexander Grant & Co. Litigation*, for example, the Eleventh Circuit cited the efficiency benefits that result from and that justify issuance of stipulated umbrella orders in complex cases:

We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c).

In re Alexander Grant & Co. Litig., 820 F.2d at 357.

231 See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (holding that general interest in encouraging settlement will not constitute good cause); see also Marcus, *Myth and Reality*, *supra* note 52, at 18–21 (contending that presumptive access to discovery would threaten to eliminate stipulated protective orders).

stipulation of the parties."²³² Proponents of that amendment, including the Advisory Committee on Civil Rules, argued that it simply mirrored existing practice, under which courts routinely issue agreed protective orders without any independent or rigorous determination of "good cause."²³³ Stipulated protective orders arguably exist in order to avoid the particularized scrutiny and complex interest balancing associated with contested orders.²³⁴ Moreover, if stipulated protective orders are to achieve their maximum potential, they should be entered at the inception of the discovery process, a point at which it is very difficult to make any more than a threshold showing of good cause concerning general categories of as-yet-to-be requested or produced materials.²³⁵ Under this view, then, party consent to the terms of a protective order

232 See *supra* note 117 (discussing proposed amendment as part of failed federal sunshine reform).

233 See Apr. 20, 1995 Advisory Comm. Minutes, *supra* note 82, at 9–10 (stating that proposed rule "recognizes well-established current practice"); *Higginbotham Letter*, *supra* note 82, at 96 ("In the advisory committee's view, it is not the case that the language would change present practice."). In refusing to delete the "on stipulation" language after its rejection by the Judicial Conference, the Advisory Committee emphasized that a judge need not enter an agreed protective order and could "insist upon a showing of good cause beyond the stipulation." *Higginbotham Letter*, *supra* note 82, at 96.

Some commentators argue that party agreement eliminates the need to show good cause, which standard thus applies only to contested protective orders. See Vangelisti, *supra* note 77, at 182 (arguing that good cause standard "does not impose an independent obligation . . . in the absence of a contest"). Others contend that while party agreement does not obviate the good cause standard, the parties can stipulate that good cause exists or that no countervailing third party or public interests apply to their discovery. See *Videon Chevrolet, Inc. v. General Motors Corp.*, No. Civ. A. 91-4202, 1995 WL 395925, at *1 (E.D. Pa. June 28, 1995) (stating that by freely consenting to the protective order, "each party agreed that there was good cause present for the entry of the order"); see also Patrick S. Kim, Note, *Third-Party Modification of Protective Orders Under Rule 26(c)*, 94 MICH. L. REV. 854, 854 n.4, 859 n.27 (1995) (arguing that parties' stipulation that "their privacy and property interests are strong enough to warrant [stipulated protective] order" is "functionally equivalent" to formal showing of good cause).

234 The advisory committee feared that any mandatory good cause requirement would necessitate "extensive satellite litigation" involving the balancing of public and private interests. Oct. 20, 1994 Jud. Conf. Minutes, *supra* note 117, at 7; see also *Higginbotham Letter*, *supra* note 82, at 96 (citing danger that court would need to convene public interest hearing before entering stipulated protective order); Marcus, *Discovery Confidentiality*, *supra* note 52, at 500–02 (advocating umbrella protective order that makes detailed judicial scrutiny unnecessary and unwarranted); Rosen & Kennedy, *supra* note 109, at 328 (predicting that distrust of stipulated protective orders may necessitate "mini-trials" at case threshold).

235 Marcus, *Myth and Reality*, *supra* note 52, at 20 (contending that strict scrutiny of access issues at stipulation stage would be "time-consuming" and "unworkable").

should suspend, at least temporarily, the litigant's obligation to make a particularized showing regarding the propriety of or need for confidentiality, as well as the court's need to convene a full-blown good cause hearing.²³⁶ That showing and judicial determination can be more accurately and efficiently made later when either the requesting party challenges the confidential designation of particular materials or an intervening third party seeks to modify the confidentiality order.²³⁷

It is unrealistic, however, to regard stipulated protective orders as merely a temporary dispensation of good cause. As long as the party seeking disclosure can freely use the protected discovery in the trial or settlement of his case, he has little incentive to contest a confidentiality designation.²³⁸ Unless a third party moves to intervene in order to contest issuance or modification of the agreed order, a large amount of discovery designated by the parties as confidential will indefinitely remain subject to the order's restrictions on dissemination and use without any judicial review whatsoever. In most cases, then, a court will never make a good cause determination concerning the discovery materials subject to stipulated protective orders.

Many regard any such dispensation or even suspension of the good cause requirement as a departure from existing practice and a

236 The district court in *Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater New York, Inc.*, enunciated this view of stipulated protective orders as temporary or interim dispensations of good cause:

[T]he [p]rotective [o]rder can be viewed as providently granted, if it is interpreted as an order designed as a temporary measure, to facilitate discovery by protecting documents from immediate disclosure, without requiring a showing of good cause, but contemplating a subsequent lifting of the order in appropriate circumstances if the proponents of confidentiality fail to continue to show good cause for protection.

Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc., 138 F.R.D. 33, 37 (S.D.N.Y. 1991); see also Rosen & Kennedy, *supra* note 109, at 328 (suggesting interim protective order that would defer question of permanent protective order until trial on the merits).

237 The advisory committee considered the stipulation option an essential counterweight to the proposed expansion of the right to intervene and modify stipulated protective orders because of a "public interest" in the discovery. See *Higginbotham Letter*, *supra* note 82, at 96.

238 See *supra* note 229 and accompanying text. Moreover, even if a good cause determination is later required upon challenge, the requesting party bears the burden of contesting particular documents subject to the designation. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 893-94 (E.D. Pa. 1981) (shifting burden to party seeking "wholesale declassification" of documents subject to umbrella order).

blatant violation of the express terms of Rule 26(c).²³⁹ Under this literal stance, Rule 26(c) authorizes a district court to issue a protective order only for "good cause shown." It does not carve out any exception, temporary or otherwise, for stipulated orders. Even if the parties agree to the terms of a protective order, then, they must still demonstrate good cause to justify its issuance.²⁴⁰ Nor should the litigants be permitted to stipulate to the existence of good cause, given that they may not, indeed probably will not, consider or protect non-party interests in their discovery, the public interest in information relevant to public health or safety, or the increased costs of litigating related lawsuits. Instead, under this view, the court retains a duty to conduct an independent inquiry into the existence of good cause,²⁴¹ an inquiry which entails evaluation and balancing of both private and public, party and nonparty interests.²⁴² If good cause is

239 Judge Gilbert S. Merritt, Chief Judge of the Sixth Circuit and Chairman of the Chief Executive Committee of the Judicial Conference that rejected the "on stipulation" language, criticized that proposal as "depart[ing] from the long-established practice of judges issuing protective orders only for 'good cause.'" Richard B. Schmitt, *Judicial Conference Kills Proposal To Broaden Protective Order Use*, WALL ST. J., Mar. 15, 1995, at B4.

240 See *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994).

241 See *id.* This duty is arguably analogous to that involved in a court's decision to enter a consent decree or approve a class action settlement. Professor Miller, for example, has characterized stipulated protective orders as presenting an "essentially non-adversarial situation" in which the court "must assume the duty of making an independent inquiry" akin to that made with respect to class action settlements. Miller, *supra* note 52, at 492 n.322. According to Miller, the issuance of protective orders must never be "routine, let alone automatic, even when . . . supported by all the parties." Instead, the judge, as "neutral arbitrator," rather than the parties, must determine what, whether, and to whom discovery must be disclosed in the interest of public health and safety. *Id.* at 491-93. But see Arthur R. Miller, *Effective Rulemaking Damaged by Politics*, N.L.J., May 1, 1995, at A21 (arguing that proposed amendment to Rule 26(c) "made no changes to the 'good cause' showing that must be made for issuing a protective order absent a stipulation").

242 See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-86 (3d Cir. 1994) (lamenting courts' routine entry of stipulated protective orders "without considering the propriety of such orders, or the countervailing public interests"); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993) (relying "in first instance on the district courts to protect the legitimate public interest . . . from overly broad and unjustifiable protective orders agreed to by the parties for their self-interests"); *St. Paul Fire & Marine Ins. Co. v. Gould Elec. Inc.*, Nos. Civ. A. 95-5203, 96-2890, 1996 WL 383307, at *1 (E.D. Pa. July 1, 1996) (rejecting stipulated protective order absent briefing on public and private balancing factors); *Musicom Int'l, Inc. v. Serubo*, 22 Media L. Rep. (BNA) 2507 (E.D. Pa. 1994) (refusing to issue stipulated protective order without considering *Pansy* factors).

not so established, the discovery should not merit judicial protection.²⁴³

Thus, to the extent that they dispense with or dilute the "good cause" standard, stipulated protective orders arguably abdicate judicial responsibility for supervising discovery and improperly permit the litigants themselves to control public access to discovery based upon self-, not public, interest.²⁴⁴ Accordingly, a growing number of courts regard stipulated protective orders with increasing suspicion and almost knee-jerk rejection. To these courts, a generalized interest in encouraging settlement will not, in itself, constitute good cause.²⁴⁵ Nor will broad, unsubstantiated stipulations regarding the existence of good cause or the need for protection suffice.²⁴⁶ Instead, these courts require a particularized showing that specific documents or, at the very least, categories of documents,²⁴⁷ constitute trade secrets or other confidential information entitled to protection and that the un-

243 See *Jepson, Inc.*, 30 F.3d at 858-59 (criticizing trial court's failure to independently determine if discovery contained confidential information or if good cause existed for its protection); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 147-48 (2d Cir. 1987) (suggesting that umbrella protective order would be improvidently granted if entered without a judicial determination of good cause).

244 See *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (criticizing stipulated protective orders that authorize the filing of documents under seal as judicial abdication of authority over discovery); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3d Cir. 1995) (refusing to permit parties to control issuance of protective order); *Aetna Cas. & Sur. Co. v. George Hyman Constr. Co.*, 155 F.R.D. 113, 116 (E.D. Pa. 1994) (seeking to avoid "judicial discretion yielding to private judgment" by refusing to enter stipulated protective order in dispute between private commercial parties); *Musicom Int'l, Inc.*, 22 Media L. Rep. (BNA) at 2501 (characterizing entry of stipulated protective order without necessary balancing as "broad abdication of judicial authority" whereby "exercise of private judgment would be given force by the public sanction of contempt").

245 See *Pansy*, 23 F.3d at 755; *Rosen v. Fidelity Fixed Income Trust*, No. Civ. A. 95-2365, 1995 WL 684864, at *2 (E.D. Pa. Nov. 14, 1995) (both finding general interest of encouraging settlements insufficient to justify entry of agreed umbrella order).

246 See *Rosen*, 1995 WL 684864, at *2 (declining to enter stipulated umbrella order based upon "unsubstantiated allegation" that "discovery . . . is likely to involve the disclosure of confidential information, and that there is good cause for preserving the confidentiality of such information"); *Frupac Int'l Corp. v. M/V "Chucabuco"*, No. Civ. A. 92-2617, 1994 WL 269271, at *1-*3 (E.D. Pa. June 15, 1994) (refusing to enter stipulated protective order based upon "generally worded, non-case specific agreement" with "virtually limitless standards").

247 In *Frupac International*, for example, the court required the parties to address specific information, rather than general categories of documents, in their stipulated protective order. See *Frupac Int'l Corp.*, 1994 WL 269271, at *2; cf. *Lepage's, Inc. v. 3M*, No. Civ. A. 97-3983, 1997 WL 736866, at *1 (E.D. Pa. Nov. 19, 1997) (approving stipulated protective order containing specific and scheduled categories of protected information with supporting party declarations).

restricted disclosure of those materials would cause specific cognizable harm.²⁴⁸ Thus, while the parties remain free to negotiate confidentiality restrictions,²⁴⁹ many judges, out of fear of having their hands tied by the litigants' wishes, refuse to convert the parties' private agreement into a court order subject to enforcement by judicial contempt.²⁵⁰

C. *Functional Utility and Public Access to Discovery*

The changing face of civil litigation impacts the above-described controversy concerning stipulated protective orders. The central importance of discovery in our civil justice system and the increasing judicial involvement in that process arguably call for presumptive public access to and expanded public scrutiny of even unfiled discovery. Before examining the considerations that can guide a court in deciding whether to enter or modify a stipulated protective order, then, one must determine whether party autonomy and the importance of settlement—values that underlie agreed confidentiality orders—should contend with any presumption of public access to discovery.

248 See *Glenmede Trust Co.*, 56 F.3d at 484 (holding that general allegations of embarrassment or injury to reputation and client relationships are "insufficient to justify judicial endorsement of an umbrella confidentiality agreement"); *Jepson, Inc.*, 30 F.3d at 859–60 (holding that proponent of protective order never made showing that information in deposition constituted a trade secret or confidential information); *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (noting that proponent of "overinclusive" blanket order never established, through "specific examples or articulated reasoning," any need to protect depositions); *Rosen*, 1995 WL 684864, at *1 (requiring that parties demonstrate "particularized showing of the need for confidentiality"); *Frupac Int'l Corp.*, 1994 WL 269271, at *2 (requiring parties to establish the relevance of the materials, the need for their protection, and what general/specific interests in disclosure will be sacrificed by the order); *Horgan v. Independence Blue Cross*, No. Civ. A. 93-CV-2528, 1994 WL 24662, at *2 (E.D. Pa. Jan. 24, 1994) (refusing to sign stipulated protective order concerning information that was not "confidential" within the "narrow circumstances" authorized by Federal Rule of Civil Procedure 26(c)(7)).

249 See *Frupac Int'l Corp.*, 1994 WL 269271, at *1–*2 (encouraging parties to enter confidentiality agreement, but refusing to endorse a stipulated protective order). This freedom of contract assumes, of course, that secrecy agreements are not illegal, violative of public policy, or otherwise unenforceable. See *infra* note 405 and accompanying text (discussing litigants' freedom to contract for confidentiality).

250 See *City of Hartford v. Chase*, 942 F.2d at 130, 138 (2d Cir. 1991) (Pratt, J., concurring) (arguing that courts should "carefully and skeptically" review stipulated protective orders in order to avoid converting private agreement into court order subject to enforcement by contempt); see also *No Secrets*, N.L.J., Mar. 27, 1995, at A20 (allowing parties to stipulate to protective order would curtail judge's discretion and prevent court from defending public health and safety "in contradiction to the wishes of the parties").

Under the Supreme Court's two-pronged test for public access, the existence of any such presumption hinges upon whether a tradition of privacy still surrounds the discovery process and, more importantly, whether a presumption of openness would further any of the rationales that support a right of access.²⁵¹

1. Tradition of Accessibility: Private Versus Public Nature

Tradition views discovery as a private affair between the litigants that takes place outside of public view.²⁵² Under this conception, discovery is not intended to function as a source or clearinghouse of public information.²⁵³ Instead, the "sole function" of discovery is to "assist in the preparation and trial, or the settlement of litigated disputes."²⁵⁴ Accordingly, a court can restrict the dissemination of discovered information in an effort to eliminate or reduce any nonlitigation consequences, such as invasions of privacy, competitive injury, or damaged reputation, that would not otherwise exist but for the compelled disclosure.²⁵⁵ Under this litigation-oriented, dispute resolution model, discovery is a traditionally private activity to which the public has no presumptive right of access.²⁵⁶

251 See *supra* Parts III.C–D (discussing Supreme Court's two-pronged test and the rationales supporting public access).

252 In *Seattle Times*, the Supreme Court reviewed both historical and modern practice to conclude that discovery does not occur in public and therefore does not constitute a "public component of a civil trial." *Seattle Times v. Rhinehart*, 467 U.S. 20, 33 (1984).

253 See *Wyeth Lab. v. United States District Court of Kansas*, 851 F.3d 321, 324 (10th Cir. 1988) (holding that court lacked authority to compel private parties to file discovery to create DTP public library); see also Marcus, *Discovery Confidentiality*, *supra* note 52, at 469, 478–84 (contending that discovery should not serve as source of information for general public or government agencies); Marcus, *Myth and Reality*, *supra* note 52, at 53 (rejecting information-gathering as legitimate purpose of discovery); Miller, *supra* note 52, at 487–89 (arguing that courts are inappropriate and underfunded institutions to function as "information clearinghouse[s]").

254 *Seattle Times*, 467 U.S. at 34–35; see also Marcus, *Myth and Reality*, *supra* note 52, at 15, 54–55 (asserting that discovery rules compel disclosure of information for use only in connection with the litigation and to assist in trial preparation).

255 In *Seattle Times*, Justice Powell noted that the newspaper gained the information it sought to publish "only by virtue of the trial court's discovery processes," and only for the purpose of trying its lawsuit. *Seattle Times*, 467 U.S. at 32. The government thus had "a substantial interest" in preventing the various abuses "that can attend the coerced production of information" under its legislatively prescribed discovery rules. *Id.* at 35–36.

256 See *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) (describing discovery as "presumptively private phase of litigation"); *United States v. Kentucky Utils. Co.*, 927 F.2d 252, 254 (6th Cir. 1991) (asserting that discovery documents "are

Juxtaposed against this view are the growing number of courts and commentators that regard discovery as a public, presumptively open activity that is imbued with a public interest and that generates public goods.²⁵⁷ Although most acknowledge the absence of any First Amendment or common law right of access,²⁵⁸ these authorities find a statutory presumption of public access to discovery created by Federal Rules 5(d) or 26(c).²⁵⁹ Moreover, while the litigants admittedly drive

not a part of the public court records and, absent discovery, would have remained private"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (contrasting summary judgment proceedings with privately conducted discovery); see also *Higginbotham Testimony*, *supra* note 113, at 3 (stressing importance of maintaining "essential litigation oriented and private role of discovery"); Kim, *supra* note 233, at 864-65 (asserting that "litigants have strong privacy interests in pretrial discovered materials" and "have right to expect that discovered information will not be disseminated"); Vangelisti, *supra* note 77, at 176-77 (distinguishing between private discovery and public records).

257 Professor Luban, for example, embraces this public conception, arguing that "[d]iscovery material is a public good which is 'purchased' by one litigant and should be made available for other litigants to avoid unnecessary multiplication of expense." Luban, *supra* note 3, at 2653. Luban similarly contends that discovery can achieve public goods by serving as a "public warning" and informing "public debate." *Id.* See also *supra* notes 41-45 and accompanying text (discussing public goods created by adjudication).

258 In *Seattle Times*, the Supreme Court found no First Amendment right of access to pretrial civil discovery subject to a protective order entered upon a showing of good cause. See *Seattle Times*, 467 U.S. at 37. While stipulated protective orders arguably obviate the good cause showing, the consensual restrictions on dissemination should waive any First Amendment concerns. But see Garfield, *supra* note 218, at 347-62 (exploring the possibility that some "contracts of silence" might violate the First Amendment). In addition, unfiled discovery is not a judicial record subject to any common law right of access. See *McCarthy v. Barnett Bank*, 876 F.2d 89, 91 (11th Cir. 1989). Thus, neither the First Amendment nor the common law grants any right of access to unfiled discovery materials. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788 (1st Cir. 1988); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 353-54 (11th Cir. 1987).

259 In holding discovery presumptively open to public scrutiny absent a protective order, the Second Circuit, in *In re "Agent Orange" Product Liability Litigation*, found that Federal Rules of Civil Procedure 26(c) and 5(d) created a statutory access right. See *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987). The court there reasoned that unless a presumptive right of access existed, there would be no need for a movant under Rule 26(c) to demonstrate good cause. See *id.* at 145-46. Moreover, the court read Rule 5(d) to manifest a substantive policy decision to grant public access to discovery materials. See *id.* at 146-47. See *supra* note 170; *infra* notes 262-63 (discussing Rule 5(d)'s filing requirement); see also *Public Citizen*, 858 F.2d at 780-81, 789-90 (stating that while Rule 5(d) did not create any right of access, Rule 26(c) suggests that "pretrial discovery must take place in the public unless compelling reasons exist for denying the public access"); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660 (D.D.C. 1986) (acknowledging that "Federal Rules create a statutory

discovery, it is the governmental authority that backs the publicly funded process that actually compels the production of information that would not otherwise be revealed.²⁶⁰ Under this increasingly popular view, discovery should take place in and be available to the public, except insofar as limited by a protective order. Accordingly, any restriction on public access can only be justified for "good cause shown," a determination that encompasses interests beyond those of the immediate litigants.²⁶¹

While this contemporary public conception of discovery may pre-empt a crack in our traditional view of the process as private, discovery remains a largely cloistered activity that should not be considered subject to any statutory presumption of access. Federal Rule 5(d) expressly excuses the filing of discovery with the court and most judicial districts in this country prohibit such filing by local rule.²⁶² Discovery requests, responses, and depositions thus generally are not publicly available and, for the most part, are never considered or utilized by the court. Although the filing of discovery might be appropriate in some cases of public interest,²⁶³ Rule 5(d) merely gives the trial court

presumption in favor of open discovery"); Resnik, *supra* note 4, at 1494 n.85 ("As interpreted, both FRCP 26(c) and 5(d) make discovery available to third parties absent court orders, which should only preclude access upon a showing of 'good cause.'").

260 Indeed, it is this specter of public sanction that arguably motivates litigants to utilize formal discovery, rather than exchanging information outside of the system. See Luban, *supra* note 3, at 2654 n.140 (arguing that public ownership of even unfiled discovery materials "result[s] from invocation of public authority by litigants"). But see Marcus, *Discovery Confidentiality*, *supra* note 52, at 470-73 (rejecting argument that use of public resources makes discovery public).

261 See *Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (presuming that pretrial discovery must take place in the public unless compelling reasons to deny public access exist); *Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc.*, 138 F.R.D. 33, 36 (S.D.N.Y. 1991) (stating that absent showing of good cause, discovery "should be publicly available whenever possible"); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403 (W.D. Va. 1987) (indicating that raw fruits of discovery "should be available to the public" except to the extent limited by Rule 26(c)).

262 See *supra* note 170. The "collective wisdom reflected in so many local rules" prompted the Advisory Committee on Civil Rules to propose amending Federal Rule 5(d) so that it too would forbid, rather than merely excuse, the filing of discovery. If eventually approved, that amendment would obviate this source of public access and further buttress the traditionally private nature of discovery. See *1998 Preliminary Draft*, *supra* note 171, at 15-16, 25-26.

263 See FED. R. CIV. P. 5(d) Advisory Committee's notes to 1980 amendment (recognizing that discovery "materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally"). Even the proposed amendment of Fed-

discretion to control this potential source of public information; it does not create any statutory right of access.²⁶⁴

Nor does Rule 26(c), authorizing protective orders for "good cause shown," create any such presumption. Denying a protective order will not guarantee public access to discovery materials. Although the parties may freely disseminate the information that they obtain through discovery and that is not subject to any protective order, they certainly are not *required* to do so. As courts have recognized, the public has no right of access to discovery in the hands of private litigants, and a court cannot compel parties to a confidentiality agreement to disseminate unfiled discovery.²⁶⁵ By stipulating to a protective order, then, litigants simply choose to exercise their right not to publicly distribute their discovery. Thus, neither current practice nor the discovery Rules themselves establish any presumption of access to unfiled discovery or alter the traditionally private nature of those materials.

2. Functional Utility: Party Autonomy Versus Judicial Involvement

The tradition of accessibility forms only one part of the access inquiry, however. The more pertinent and difficult question concerns whether increased public disclosure of pretrial discovery would significantly advance any of the fundamental values served by the right of public access. The inherent tension between our commitment to party autonomy, on one hand, and the increased judicial involvement in discovery, on the other, complicates this inquiry.

Discovery is a self-executing process that takes place outside of the public view with a minimum of judicial involvement and oversight.²⁶⁶ Its self-regulating nature affords litigants significant flexibil-

eral Rule of Civil Procedure 5(d) would permit the trial court to order the filing of discovery "to ensure public access to information of interest to the public." 1998 *Preliminary Draft*, *supra* note 171, at 161.

264 See *Seattle Times v. Rhinehart*, 467 U.S. 20, 33 n.19 (1984) (holding that, notwithstanding Rule 5(d), discovery is not a traditional source of public information); see also Kim, *supra* note 233, at 863 (contending that "Rule 5 'seeks to insure a full exchange of the written communications among the *litigants*,' not to create a public access file for the general public").

265 See *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1232-33 (1st Cir. 1992) (holding that nonparty cannot access discovery when none of the parties wish to share it); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988) (recognizing that public has no right to access discovery held by private party litigants, who are free, but not required, to publicly release it); *Oklahoma Hosp. Ass'n v. Oklahoma Publ'g Co.*, 748 F.2d 1421, 1425 (10th Cir. 1984) (holding that court cannot compel parties to stipulated protective order to publicly distribute unfiled discovery).

266 Professor Yeazell notes the self-regulating nature of discovery today:

ity to modify discovery procedures and to stipulate to less expensive and time-consuming methods of acquiring information and documents.²⁶⁷ Indeed, the most recent amendments to the discovery Rules encourage such self-regulation by mandating that the parties formulate discovery plans²⁶⁸ and attempt to privately resolve discovery disputes before seeking court intervention.²⁶⁹ In short, our discovery system continues to emphasize and highly value party autonomy.

At the same time, however, the trial court shoulders the ultimate duty and discretion to oversee the discovery process.²⁷⁰ To the extent that party control can actually impede or delay discovery, the Rules expressly charge the court with streamlining and, when necessary, propelling the process.²⁷¹ The liberal scope of discovery and the po-

[L]awyers skirmish without immediate judicial supervision [Discovery is a] cooperative venture among the adversaries, who, guided by the Rules, explore the facts. Lawyers conduct discovery without any but the slightest judicial supervision unless something goes wrong. So long as things remain in this state, discovery has virtually disappeared from the judicial arena.

Yeazell, *supra* note 6, at 651 (citation omitted); *see also* Luban, *supra* note 3, at 2647-48 (describing discovery as "a contact sport with an absentee umpire"); Marcus, *Discovery Confidentiality*, *supra* note 52, at 468 ("In the great majority of civil cases, . . . information exchange . . . takes place out of the public eye and without involvement by the judge, who learns about the material disclosed only when it is presented to the court at trial or in a motion.").

267 Federal Rule of Civil Procedure 29, which permits modification of discovery procedures and limitations by written stipulation, was amended in 1993 to afford litigants greater opportunity "to agree on less expensive and time-consuming methods to obtain information" without prior court approval. FED. R. CIV. P. 29 Advisory Committee's note to 1993 amendments.

268 *See* FED. R. CIV. P. 26(f) (requiring early meeting of counsel in order to, among other things, "develop a proposed discovery plan").

269 The 1993 amendments to the discovery rules added a certificate of conference as a prerequisite to a motion for a protective order, *see* FED. R. CIV. P. 26(c), a motion to compel, *see* FED. R. CIV. P. 37(a)(2), and a motion for sanctions for failure to answer interrogatories or respond to requests for production, *see* FED. R. CIV. P. 37(d). *See also* Frupac Int'l Corp. v. M/V "Chucabuco," No. Civ. A. 92-2617, 1994 WL 269271, at *1 (E.D. Pa. June 15, 1994) (linking this amendment to "recent legal trend toward conserving judicial resources by allowing parties to resolve many discovery issues privately").

270 *See* *Seattle Times v. Rhinehart*, 467 U.S. 20, 31 (1984) (rejecting constitutional right to disseminate discovery as "unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process"); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (discussing district court's "responsibility to oversee the discovery process").

271 The Federal Rules vest broad discretion in the district court to control the methods, frequency, extent, and timing of discovery. *See, e.g.*, FED. R. CIV. P. 16(b)(3)-(4), 16(c)(6), 26(b)(2), 26(c); *see also* Miller, *supra* note 52, at 447-50 (stating that discovery amendments recognize that "discovery regime cannot operate on a

tential for its abuse further intensify the need for early and vigorous judicial involvement in discovery, including tighter supervision to curb, and more stringent sanctions to deter, such abuse.²⁷² Although discovery remains an essentially party-driven activity, then, it operates against a background of earlier, intensified and ongoing judicial oversight, management, and control.

Because the courts today play an increasingly active role in the management and supervision of discovery, expanded access to the discovery process would arguably aid the public in monitoring and understanding this judicial function. Such enhanced public understanding, however, would come, if at all, from access to the court's discovery decisions and the materials on which they are based. Unfiled discovery that is never presented to or utilized by the court would not advance even this purpose. That is, while access to the raw fruits of discovery might educate the public about the litigants themselves or the subject matter of their dispute,²⁷³ it sheds little light on the court's determination of the parties' substantive rights for the simple reason that there has been no such determination. Nor does such access facilitate the fairness or accuracy of judicial fact-finding or decision-making, again because no such fact-finding or decision-making has occurred.

Moreover, when a court schedules a discovery deadline or imposes discovery sanctions, or limits the number or length of interrogatories or depositions, it acts in the capacity of a referee, oftentimes an absentee referee, who gets involved on an as-needed and when-requested basis. The litigants are the players who continue to self-exe-

self-executing basis" and therefore call for "increased judicial management and streamlining of discovery").

272 The Federal Rules authorize an extensive panoply of sanctions to combat discovery abuse. *See, e.g.*, FED. R. CIV. P. 26(g) (unjustifiable certification of discovery responses and disclosures); FED. R. CIV. P. 30(d) (improper deposition conduct); FED. R. CIV. P. 37 (discovery sanctions generally); *see also* Miller, *supra* note 52, at 447-50 (describing evolution of discovery rules as "designed to impose stricter control over discovery and provide judicially applied remedies to curb abuse"). Indeed, the "almost universal" belief "that the cost of discovery disputes could be reduced by greater judicial involvement and that the earlier in the process that judges became involved, the better," underlies the recently proposed amendments to the discovery rules. 1998 *Preliminary Draft*, *supra* note 171, at 3. The Advisory Committee thus proposes to distinguish the scope of attorney-managed discovery from that of court-controlled discovery in order "to involve the court more actively in regulating the breadth of discovery in cases involving sweeping or contentious discovery." *Id.* at 55 (Proposed Committee Notes to FED. R. CIV. P. 26(b)(1)).

273 One can question how well increased access to discovery would perform even this function, given that neither the parties nor the court ever tests the reliability of the vast amount of information obtained in discovery.

cute and self-police the process. Although public access might inspire confidence in the court's managerial competence or impartial umpiring, the primary purpose of an access presumption—to ensure fair, accurate, and unbiased decision-making—would not be served.²⁷⁴

Finally, functional utility gauges whether public access confers a significant positive benefit on the particular process at issue. Discovery primarily facilitates the trial or settlement of litigated disputes. Presumptive public access to unfiled discovery would arguably impede this objective.

The discovery Rules compel litigants to produce information and documents not otherwise available or subject to disclosure in order to ensure fair and accurate decision-making if the case is to be resolved on its merits or, as more typically happens, to afford the parties a realistic appraisal of their case from which they can assess settlement.²⁷⁵ Altering these prime objectives to include public warning or debate ignores the exceedingly liberal scope of discovery that can require disclosure of a vast amount of private, irrelevant, and potentially unreliable information.²⁷⁶ To the extent that discovery forms the basis of judicial decision-making, it will be filtered through relevance and admissibility standards and be subject to the common law presumption of access to judicial records.²⁷⁷ To the extent that unfiled discovery facilitates the litigants' decision to settle their dispute, however, it con-

274 See *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (holding that documents that pass between the parties in discovery "play no role in the performance of Article III functions" and thus lie beyond presumption of public access); *West Virginia v. Moore*, 902 F. Supp. 715, 717–18 (S.D. W. Va. 1995) (refusing to classify as judicial records unfiled depositions that were never used to determine litigants' substantive rights); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660 (D.D.C. 1986) (finding that disclosure of pretrial discovery would not serve purpose of presumption); see also Marcus, *Discovery Confidentiality*, *supra* note 52, at 458, 473–77, 478–84 (contending that neither the insights that access "might afford the public about the operation of the civil justice system" nor the public's interest in the subject matter of discovery justifies a shift from traditionally private view of discovery).

275 See *April 28, 1994 Advisory Comm. Minutes*, *supra* note 86, at 4 (suggesting that discovery aims to facilitate accurate decisions and resolve disputes).

276 As noted by the Second Circuit in *Amodeo*, "[T]he temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material." *Amodeo*, 71 F.3d at 1048.

277 In *Seattle Times*, the Supreme Court partially based its "private" view of discovery on the broad relevance standard and the assumption that discovered information will be screened for admissibility at trial. *Seattle Times v. Rhinehart*, 467 U.S. 20, 33 (1984); see also *infra* Part V (discussing public access to filed discovery).

tributes to an equally private process—settlement—to which the public has no similar right of access.²⁷⁸

In sum, no tradition of accessibility surrounds the discovery process. More importantly, access to discovery that is never filed with or considered by the court does not materially advance the purposes of public access. Because no presumption of access should attach to such discovery, litigant autonomy and the efficient resolution of the particular dispute should continue to guide a court in considering whether to enter a stipulated protective order.²⁷⁹

D. Considerations in Issuing or Modifying Stipulated Protective Orders

Because the court retains responsibility for monitoring the discovery process,²⁸⁰ and has the discretion, under Rule 5(d), to order that discovery be filed, the court should not feel hamstrung by party stipulations concerning confidentiality. In order to safeguard the integrity of the discovery process, a court can and should exert some preliminary control over the terms of the agreed order. Such control would balance the desire to expedite discovery and respect litigant autonomy against the recognition that there are some instances in which other litigants or the public in general might have a need to access some, if not all, of the discovery. Moreover, even if the stipulated protective order is granted, the court retains the authority to later vacate or modify its terms in light of numerous case-specific factors.

1. “Good Cause”

Rule 26(c) expressly requires that “good cause” support a court’s issuance of a protective order. Existing practice notwithstanding, the Rule does not distinguish between contested and stipulated orders and thus does not except agreed protective orders from this prerequisite. The parties’ stipulation accordingly cannot dispense with or substitute for the court’s independent determination of good cause.

At the same time, however, a court issuing a stipulated protective order should not be required to engage in the kind of particularized

278 Parties settle cases for any number of reasons, many of which are unrelated or only peripherally related to their merits. For a discussion of public access to the litigants’ settlement negotiations and agreements, see *infra* Part VI.

279 See *infra* Part IV.D.1 for a discussion of the extent to which a court can consider these values in assessing whether “good cause” supports issuance of a stipulated protective order.

280 See *Seattle Times*, 467 U.S. at 35 n.20 (noting substantial governmental interest in “protecting the integrity of the discovery process”).

review or complex interest balancing associated with contested protective orders. Such an approach would negate the many benefits gleaned by early entry of agreed umbrella orders, particularly in the increasingly typical case that involves a significant amount of discovery. Indeed, at the advent of the process when most stipulated protective orders are entered, parties may find it virtually impossible to make a factually particularized showing concerning anticipated, but as yet unrequested, discovery. A court may likewise find it infeasible to balance hypothetical, potentially applicable interests yet to be identified through adversarial development.

Further, a court should not refuse to enter an agreed order simply because the litigants remain free to negotiate privately a confidentiality agreement concerning their discovery. Aside from the difficulty of computing damages attributable to breach of such an agreement, contractual penalties will not likely deter such breach as effectively as court-ordered restrictions that are subject to judicial sanction or the pain of contempt.²⁸¹ Moreover, litigants may hesitate to produce sensitive personal or commercial information to an adversary without an advance, albeit preliminary, indication as to whether the court will protect that material if the agreement is breached. In other words, a private confidentiality agreement will not expedite the free-flow of discovery to the same extent as a confidentiality order.

The court can accommodate these competing concerns by insisting on a threshold showing of good cause prior to entering a stipulated protective order.²⁸² Although a particularized document-by-document showing cannot be made, unsubstantiated, abstract claims

281 Courts possess wide discretion to punish litigants who violate the confidentiality restrictions of a stipulated protective order. They can hold the violating party in civil contempt and assess attorneys' fees and court costs. See, e.g., *Grove Fresh Distrib., Inc., v. John Labatt, Ltd.*, 888 F. Supp. 1427, 1452 (N.D. Ill. 1995); *Poliquin v. Garden Way, Inc.*, 154 F.R.D. 29, 30-32 (D. Me. 1994); *Colaprico v. Sun Microsystems, Inc.*, Civ. No. 90-20610 SW, 1994 WL 514029, at *4 (N.D. Cal. Aug. 22, 1994); *Kramer v. Boeing Co.*, 134 F.R.D. 256 (D. Minn. 1991). In some circumstances, the court may find the violator to be in criminal contempt and assess a fine payable to the government. See *Grove Fresh*, 888 F. Supp. at 1452; see also *Cordray*, *supra* note 5, at 62 (distinguishing between civil and criminal contempt). A court unwilling to hold a litigant in contempt of court may nevertheless censure a party for disclosing confidential information in breach of an umbrella order and without leave of court. See *Chemical Bank v. Affiliated FM Ins. Co.*, 154 F.R.D. 91, 93 (S.D.N.Y. 1994). Finally, particularly egregious violations may even result in the dismissal of a claim. See *Hi-Tek Bags, Ltd. v. Bobtron Int'l, Inc.*, 144 F.R.D. 379, 383 (C.D. Cal. 1992), *rev'd on stip.*, 887 F. Supp. 230 (C.D. Cal. 1993); see also *Garfield*, *supra* note 218, at 289 (noting "that contractual remedies are somewhat ill-suited to remedy breaches of contracts of silence").

282 See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 n.17 (E.D. Pa. 1994) (suggesting threshold showing to support entry of umbrella protective order).

about a general need for confidentiality concerning unspecified discovery should not suffice. For example, a stipulation that baldly asserts that "discovery will likely involve the disclosure of confidential information, whose confidentiality there is good cause to preserve," should probably fail to establish good cause even for the entry of a stipulated protective order.²⁸³ At the very least, parties should define "confidential information" with a reasonable degree of specificity²⁸⁴ and then identify specific categories or types of materials that discovery will likely generate and that arguably satisfy that definition.²⁸⁵ Given the heightened emphasis upon party autonomy in discovery, the fact that Rule 26(c) implicitly protects a wide spectrum of unspecified privacy interests,²⁸⁶ and the inherently private nature of the discovery process, a court should afford the litigants significant latitude in devising these confidential categories.²⁸⁷

Additionally, our current procedural system places a significant premium on the expeditious resolution of disputes and the efficient administration of justice. That interest, which motivates so many current judicial reform efforts, cannot be lightly dismissed or entirely dis-

283 *Rosen v. Fidelity Fixed Income Trust*, No. Civ. A. 95-2365, 1995 WL 684864, at *2 (E.D. Pa. Nov. 14, 1995). See also *supra* note 246 and accompanying text.

284 Many courts will require a specific violation of the clear terms of a stipulated protective order before they will hold a litigant in contempt. See, e.g., *Grace v. Center for Auto. Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996) (reversing civil contempt for violation of ambiguous stipulated protective order); *Washington Nat'l Ins. Co. v. Jeffries & Co., Inc.*, No. 89 C 2216, 1992 WL 186057 (N.D. Ill. July 27, 1992) (refusing to hold attorney in contempt for violating ambiguous protective order that did not clearly define the term "confidential information").

285 See, e.g., *Lepage's, Inc. v. 3M*, No. Civ. A. 97-3983, 1997 WL 736866, at *1 (E.D. Pa. Nov. 19, 1997) (entering stipulated protective order based upon parties' declarations concerning specific and scheduled categories of protected information).

286 See *Seattle Times v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984) (finding "privacy" and "other rights or interests" "implicit in the broad purpose and language" of Rule 26(c)); see also *FED. R. Civ. P. 26(c)* (setting forth non-exhaustive list of potential protective orders).

287 Federal Rule of Civil Procedure 26(c) merely provides a nonexhaustive list of the potential protective orders that a court may issue "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Thus, a court need not restrict corporate litigants to the unnecessarily narrow categories of "trade secret[s] or other confidential research, development, or commercial information" itemized in Rule 26(c)(7). Compare *Marcus, Myth and Reality*, *supra* note 52, at 10 n.45 (arguing that "parties may devise their own version of confidentiality" to govern materials that might not otherwise qualify for protection under Rule 26(c)) with *Horgan v. Independence Blue Cross*, Civ. A. No. 93-CV-2528, 1994 WL 24662, at *2 (E.D. Pa. Jan. 24, 1994) (contending that "narrow circumstances" authorized by Rule 26(c)(7) furnish "predictable guideposts" for courts).

counted in assessing good cause.²⁸⁸ The lubricating effect of a stipulated protective order in a given case, in other words, should rightly factor into a trial court's independent determination of good cause.

As part of its duty to safeguard the integrity of the discovery process, however, the trial court retains broad discretion concerning even stipulated protective orders and thus need not feel irrevocably bound by the parties' agreed terms. For instance, although the parties can rightly insist that confidential discovery be filed under seal to retain its confidential status, they should not be permitted to use such a provision to circumvent the stricter standards that govern the sealing of judicial records.²⁸⁹ Moreover, if the court can anticipate the possible need for or relevance of the protected discovery in pending or future related litigation, the court can veto any provision that prohibits outright the sharing of the materials in collateral litigation.²⁹⁰ Finally, and as discussed below, a court always retains the inherent power to modify or dissolve its protective orders, either *sua sponte* or on motion of a party or interested nonparty. This power extends to stipulated orders, which, to prevent undue and unwarranted reliance on the permanence of the confidentiality restrictions, should explicitly recognize both the power and possibility of such modification.²⁹¹

288 Some would argue that a concern with the efficient administration of justice is not cognizable under Federal Rule of Civil Procedure 26(c). See *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 342–43 (3d Cir. 1987) (noting that Rule 26(c) focuses on individual harm rather than efficient case management). Rule 26(c), however, expressly permits a court to protect a party or person from undue burden and expense. See Fed. R. Civ. P. 26(c). Moreover, courts must construe all of the Rules of Civil Procedure, including Rule 26(c), “to secure the just, speedy and inexpensive determination of every action.” Fed. R. Civ. P. 1. See also *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (asserting that Rule 26(c) promotes the “overriding goal” of Federal Rule of Civil Procedure 1).

289 The order, for example, can temporally limit such a seal unless the party seeking continued protection can rebut the common law presumption of public access to judicial records. See *infra* Part V.

290 The *Manual for Complex Litigation*, for example, offers the court the option of defining “this litigation” to include “other related litigation in which the producing person or company is a party.” *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 41.36, at 456 (¶ 10). See also *supra* note 214. A court might wish to explicitly include such a provision in the stipulated order to expressly put the parties on notice of the possibility that a court might order the sharing of their confidential discovery in related cases. See *infra* Part IV.D.2.c (discussing discovery sharing as a factor in the modification of stipulated protective orders).

291 See *infra* Part IV.D.2.b (discussing party reliance (or lack thereof) as a factor in a court's modification decision).

2. Modification of Stipulated Protective Orders

A court retains the inherent authority to modify or terminate its protective orders at any time, even after judgment on the merits or settlement.²⁹² Such modification can occur *sua sponte* or via motion by a party to the protective order, a person bound by its terms,²⁹³ or a nonparty intervenor.²⁹⁴ The power to modify acts as a safety valve that permits a court to tighten, relax, or terminate confidentiality restrictions in light of changed circumstances, public interest concerns, or nonparty interests.²⁹⁵ This safety valve assumes particular importance in the context of stipulated umbrella orders, which, by definition, are generally entered without extensive, if any, balancing of affected interests. Indeed, the uncontested nature of stipulated protective orders and the absence of any judicial determination of good cause with respect to specific documents arguably make such confidentiality orders particularly vulnerable to subsequent modification.²⁹⁶

292 See MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432, at 69, 72 (describing stipulated protective order as always subject to modification or termination even after judgment or settlement); see also *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) (recognizing court's inherent power "to relax or terminate the order, even after judgment"); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (noting court's power to modify even after dismissal of underlying suit). Although a court retains authority to modify its protective orders, it cannot expand them after dismissal to impose new, affirmative discovery obligations. See *Poliquin*, 989 F.2d at 532 n.1; *United Nuclear Corp.*, 905 F.2d at 1428; *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (1st Cir. 1988).

293 See generally *Cohen*, *supra* note 192 (discussing circumstances under which a protective order can bind nonparties).

294 Federal courts have reached a growing consensus that permissive intervention under Federal Rule of Civil Procedure 24(b) is the appropriate vehicle by which nonparties can move to modify or dissolve a protective order. See WRIGHT ET AL., *supra* note 98, § 2044.1 (indicating that a "considerable body of law" supports intervention for limited purpose of modifying protective order). Because intervention in such cases only aims to modify or dissolve a protective order and does not purport to adjudicate or re-litigate the underlying merits, many courts have relaxed the standing, timeliness, and commonality requirements otherwise applicable to permissive intervention. See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994); *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992); *Public Citizen*, 858 F.2d at 783-84.

295 In *Poliquin*, the First Circuit recognized the importance of this inherent authority, stating: "This retained power in the court to alter its own ongoing directives provides a safety valve for public interest concerns, changed circumstances or any other basis that may reasonably be offered for later adjustment." *Poliquin*, 989 F.2d at 535.

296 See *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994) (cautioning that stipulated protective orders should not be given binding effect and requiring court to balance affected interests at time motion to modify is made); *Beck-*

Courts divide over who bears what burden concerning a motion to modify or dissolve a protective order.²⁹⁷ Some, relying upon the presumptive correctness of trial court action or the court's and parties' reliance upon agreed restrictions, require that the party seeking modification demonstrate "extraordinary circumstances" or "compelling need" to justify access to protected discovery.²⁹⁸ Such a standard effectively insulates the protective order from subsequent alteration. In contrast, a greater and growing number of authorities place the burden of demonstrating "good cause" for continued confidentiality upon the party or parties opposing modification.²⁹⁹ According to

man Indus., Inc., 966 F.2d at 476 (holding that reliance upon stipulated blanket order could not, in itself, justify refusal to modify upon reasonable request for disclosure); *Public Citizen*, 858 F.2d at 790 (finding blanket protective order "peculiarly subject to later modification").

297 See generally *Omega Homes, Inc., v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403 (W.D. Va. 1987) (noting split in circuits regarding who bears burden of showing good cause for continued protection); Toran, *supra* note 138, at 153-54 & nn.167-75 (discussing inconsistency and confusion surrounding standards for modifying secrecy orders).

298 See, e.g., *United States v. Kentucky Utils. Co.*, 927 F.2d 252, 255 (6th Cir. 1991) (holding that "outsider" reporter must demonstrate "extraordinary circumstances" and "compelling need" to justify vacatur of a stipulated dismissal order that required destruction of discovery documents); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (holding that parties can rely upon protective order absent a showing of improvident issuance, extraordinary circumstances, or compelling need by third-party intervenor); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342-43 (S.D. Iowa 1993) (placing burden on party seeking to modify protective order to show intervening circumstances that had eliminated any prejudice or potential prejudice to original parties); *Richard Wolf Med. Instruments Corp. v. Dory*, 130 F.R.D. 389, 392 (N.D. Ill. 1990) (finding that parties seeking modification of stipulated protective order failed to make sufficient "extraordinary showing").

Even in these circuits, however, confusion exists concerning whether the "extraordinary circumstances" test applies in all cases of modification or is limited to cases where the government, with extensive investigative powers, intervenes. In *Bayer AG & Miles, Inc.*, for example, a New York district court attempted to reconcile the diverging standards for modification within its own Second Circuit. *Bayer AG & Miles, Inc., v. Barr Labs., Inc.*, 162 F.R.D. 456, 460-67 (S.D.N.Y. 1995). The court found that the standard for modification of a stipulated protective order varies depending on who is seeking to modify and for what reason. For instance, a nonparty governmental intervenor with substantial investigatory powers must demonstrate extraordinary circumstances and compelling need to warrant modification. See *id.* at 460-61. In contrast, when a nonparty seeks to modify a protective order and gain access to information in the public interest, the burden remains on the party seeking continued confidentiality. See *id.* at 460, 462. Finally, the court held that a party to a stipulated protective order cannot later renege on its agreement unless it can show good cause for modification. See *id.* at 466-67 n.16.

299 See *Beckman Indus., Inc.*, 966 F.2d at 475 (rejecting extraordinary circumstances test when disclosure is necessary to meet the needs of other parties in pending litiga-

many of these courts, because the parties never made any showing of "good cause" to support issuance of a stipulated protective order, continued maintenance of confidentiality depends upon a particularized and present demonstration that cognizable harm will result from modification.³⁰⁰

Ultimately, the appropriate standard for modification of a stipulated protective order lies between these two extremes. Because discovery protective orders derive from Rule 26(c), the "good cause" touchstone should continue to guide trial courts in their determination of whether to continue, modify, or terminate their confidentiality provisions. That is, in determining whether to modify a stipulated protective order, a trial court must make a present determination of good cause, and the burden should remain on the party seeking continued protection under that order. That burden, however, should be tempered by the essentially private nature of the discovery process and the absence of any presumption of public access thereto.³⁰¹ Moreover, stipulated protective orders should rest upon at least a threshold showing of good cause and thus should not perfunctorily be lifted upon any "reasonable request" or "minimal" showing of need.³⁰² Instead, whether good cause continues to support confidentiality requires the court to balance the original parties' reliance upon the protective order and their need for continued secrecy against the movant's need for disclosure of the protected discovery and any broader public interests favoring or disfavoring modification.³⁰³ A discussion of some of the factors potentially involved in such a balancing follows.

tion); *Public Citizen*, 858 F.2d at 790 (rejecting extraordinary circumstances test (at least for non-governmental intervenors) and applying instead the good cause standard of Rule 26(c)); *Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (requiring person who seeks continued protection to show tangible prejudice to substantive rights).

300 See cases cited *supra* note 296.

301 Indeed, a good deal of the confusion surrounding the appropriate modification burden can be attributed to the fact that most courts, in choosing a standard, fail to differentiate between discovery protective orders, sealing orders, and secrecy orders concerning settlements. See *Toran*, *supra* note 138, at 153 (noting that courts' choice of standard does not depend upon the type of secrecy order being modified).

302 See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) (concluding that even minimal need for protected materials justifies access absent significant harm to legitimate secrecy interest); *Beckman Indus., Inc.*, 966 F.2d at 476 (holding that "reliance on a [stipulated] protective order . . . could not, without more, justify refusal to modify when there is a reasonable request for disclosure").

303 In *Pansy*, for example, the Third Circuit required that the party seeking modification articulate both a reason to modify the secrecy order and a need for the protected materials and that the party seeking continued closure demonstrate some harm to a secrecy interest. See *Pansy*, 23 F.3d at 790. The trial court must balance

a. Modification by Party to Stipulated Order

While the placement of the burden of proof on modification should not vary with the identity of the person seeking modification,³⁰⁴ that factor should weigh in the court's determination of good cause. For example, because of the injunctive nature of a stipulated protective order, even a party to such an order can subsequently move to modify it in light of changed circumstances. That party may not appreciate the public interest or safety implications of confidential discovery until after it has been produced and viewed in context with other discovered information.³⁰⁵ By the same token, however, a party who agrees to confidentiality restrictions, and thereby induces broad discovery thereunder, should not lightly be permitted to subsequently avoid those limitations and disseminate that discovery, particularly when that party could have foreseen the need to modify at the time it negotiated the stipulation.³⁰⁶ A party's previous consent to a stipulated protective order tacitly acknowledges the existence of good cause and the assumption that discovery was for use in that case alone.³⁰⁷ That initial consent, together with the party's failure to exer-

these competing interests to determine whether good cause continues to support a secrecy order. *Id.* See also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 70 (suggesting that court consider "requesting party's need for the information" in the modification decision).

304 *But see supra* note 298 (discussing one court's decision to vary standards based upon who seeks modification).

305 *See Apr. 28, 1994 Advisory Comm. Minutes*, *supra* note 86, at 4 (noting that party may not recognize the public interest impact until the "fruits of discovery have been uncovered").

306 *See Elm Energy & Recycling (U.K.) Ltd. v. Basic*, No. 96 C 1220, 1996 WL 596456, at *16 (N.D. Ill. Oct. 9, 1996) (stating that nonparty may show good cause for modification easier than party); *Bayer AG & Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 464-67 (S.D.N.Y. 1995) (noting that party's prior consent to stipulated protective order weighs against modification, especially if need to modify was foreseeable); *Davis v. Transamerica Commercial Fin. Corp.*, No. 93 C 5177, 1995 WL 534294, at *3 (N.D. Ill. Sept. 5, 1995) (noting that stipulated protective order should be "accorded great weight" and should not be retroactively modified by plaintiff "absent exceptional circumstances"); *Viskase Corp. v. W.R. Grace & Co.*, No. 90 C 7515, 1992 WL 13679, at *3-*4 (N.D. Ill. Jan. 24, 1992) (requiring that "plaintiff . . . make a substantial showing of good cause to relieve it of the burden of the agreed [p]rotective [o]rder, particularly when the proposed modification relates to a matter within the parameters of reasonable foresight at the time of the parties' agreement"); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) (refusing to endorse tactic of inducing broad discovery and then attempting to avoid agreed restrictions).

307 *See Bayer AG & Miles, Inc.*, 162 F.R.D. at 464 (viewing stipulation as demonstrating parties' implicit acknowledgment of good cause); *Omega Homes, Inc.*, 656 F. Supp. at 403-04 (denying plaintiff's request to modify stipulated protective order that mani-

cise its contractual right to challenge its opponent's specific designations, should weigh against modification.³⁰⁸

b. Party Reliance

Courts differ regarding the importance of party reliance as a factor in modification of stipulated protective orders.³⁰⁹ Obviously, parties would be unwarranted in regarding such an order as an absolute shield against further disclosure of their discovery. A confidentiality designation does not bind the court and is subject to challenge by the opposing party. Materials produced pursuant to such a designation have not received particularized judicial (or likely even party) scrutiny and one can never know how a court would rule if a designation were put to the test. Moreover, confidential discovery may be needed for, or made the basis of, judicial decisions—thereby subjecting that discovery to the more stringent standards applicable to the sealing of judicial records. Finally, and as previously stated, courts always retain the inherent, often explicit, authority to modify or terminate their protective orders. For these reasons, a growing number of courts discount party reliance significantly, if not completely, in deciding whether to modify a stipulated protective order.³¹⁰

Party reliance, however, should remain a central concern of courts in the modification decision. Aside from the resulting unfairness to the litigants, failure to accord reliance at least some weight in the modification decision would, in the long run, undercut the sys-

fested a "shared and explicit assumption that discovery was for the purpose of one case alone").

308 Judge Becker aptly voiced this sentiment in *Zenith Radio Corp.*: "plaintiffs cannot now attempt to undo what they have willingly wrought; having made their bed, they must sleep in it." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Pa. 1981); see also *Videon Chevrolet, Inc. v. General Motors Corp.*, 1995 WL 395925, No. Civ. A. 91-4202, at *3 (E.D. Pa. June 28, 1995) (placing a "higher burden" upon party to stipulated protective order to justify modification); *Bayer AG & Miles, Inc.*, 162 F.R.D. at 466, 466 n.16 (denying modification because of party's failure to challenge specific designations); *Viskase Corp.*, 1992 WL 13679, at *3 (refusing to consider "whether material [was] properly designated" because plaintiff never challenged its confidential designation).

309 See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 789-90 (3d Cir. 1994) (describing split of authority concerning the weight to be accorded party reliance).

310 See *Pansy*, 23 F.3d at 790 n.26 (finding less party reliance with umbrella orders); *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (discounting party reliance on "overinclusive" blanket protective order); *Chemical Bank v. Affiliated FM Ins. Co.*, 154 F.R.D. 91, 94 (S.D.N.Y. 1994) (doubting party reliance upon blanket stipulated protective order); see also *WRIGHT ET AL.*, *supra* note 98, § 2044.1 (acknowledging that stipulated protective order constitutes a "less forceful basis for reliance").

temic benefits of stipulated protective orders by reducing future litigants' confidence in them.³¹¹ To guard against routine, unsubstantiated claims of reliance, courts can insist upon a showing of actual and reasonable reliance,³¹² both at the time of entering the stipulation and at the time of disclosure.³¹³ The mere production of discovery pursuant to the protective order, then, is not, in itself, dispositive.³¹⁴ Instead, the court must determine whether the stipulation reasonably induced such production. In making this determination, the foreseeability of modification at the time of discovery, rather than 20/20 hindsight, should guide the court.

A number of factors can inform this assessment of reasonable reliance. A primary consideration negating reasonableness, for example, is the prospect or pendency of related litigation involving one or more of the parties at the time they negotiate and enter a confidentiality stipulation. Thus, repeat players, like products liability defend-

311 In suggesting that a court consider party reliance, the *Manual for Complex Litigation* notes:

If a party freely disclosed information without contest based on the premise that it would remain confidential, subsequent dissemination may be unfair and may, in the long run, reduce other litigants' confidence in protective orders, rendering them less useful as a tool for preventing discovery abuse and encouraging strenuous objections to discovery requests.

MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 21.432, at 70 n.159; *see also* Bayer AG & Miles, Inc., 162 F.R.D. at 467 (emphasizing need to send message that litigants can rely upon blanket stipulated protective orders); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660 (D.D.C. 1986) (finding public interest in disclosure outweighed by "judicial system's and the public's interest in encouraging reliance on protective orders to speed the resolution and reduce the expense of litigation"). *But see* *Frupac Int'l Corp. v. M/V "Chucabuco"*, No. Civ. A. 96-2617, 1994 WL 269271, at *3 (E.D. Pa. June 15, 1994) (characterizing stipulated protective orders as "actually illusory as a presumed worthwhile tool upon which either party can rely regarding their genuine concern about confidentiality and anticipated Court protection").

312 *See* WRIGHT ET AL., *supra* note 98, § 2044.1 (suggesting that courts focus on the reasonableness of reliance given that "litigants may lard the record with routine claims of reliance").

313 For instance, no reliance should attach to materials produced prior to entry of the stipulated protective order. *See* *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 345 (3d Cir. 1987) (finding no justifiable reliance concerning documents produced before entry of blanket protective order); *Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc.*, 138 F.R.D. 33, 37 (S.D.N.Y. 1991) (finding no party expectations concerning testimony or documents produced prior to confidentiality order).

314 *See* Marcus, *Discovery Confidentiality*, *supra* note 52, at 497-98 (proposing that party resisting modification demonstrate "actual reliance," rather than mere fact that material was produced).

ants or governmental agencies, arguably cannot reasonably expect their discovery to be exclusively contained in one lawsuit.³¹⁵

Disclosure of the discovered information to governmental agencies, who may well be subject to freedom of information requirements, also undercuts a party's reliance.³¹⁶ Likewise, and as discussed below, the presence of the government as a party to the litigation might, in itself, imbue the case with a "public interest" that belies reliance on continued confidentiality.³¹⁷

Another consideration is whether the parties' behavior during discovery was consistent with reliance on the stipulated order. For example, did the protective order, in fact, expedite the free flow of information that might not otherwise have been voluntarily produced—one of the principal benefits of stipulated orders? Or, did the parties, in spite of the umbrella order, continue to object to the production of information in response to legitimate discovery requests?³¹⁸

A parallel consideration concerns the nature of the discovery produced pursuant to the confidential designation. Although the parties should be afforded significant latitude in devising the categories of materials subject to designation, they cannot legitimately expect that a court will, when asked to modify that order, preserve the confidentiality of discovery that would not likely merit the protection of a contested protective order. On the other hand, a party that produces, without objection, privileged or irrelevant materials that fall outside the scope of discovery or information that would likely be deemed

315 See *id.* at 498 (indicating that court's willingness to allow discovery sharing in collateral litigation defeats reasonable reliance); WRIGHT ET AL., *supra* note 98, § 2044.1, at n.33 (asserting that reliance is less reasonable if collateral litigation is pending or threatened); see also *supra* note 290 and accompanying text (discussing court's ability to craft protective order in anticipation of discovery sharing).

316 See Miller, *supra* note 52, at 500 (noting that disclosure of information to public entity may negate reliance).

317 See *infra* Part IV.D.2.d (examining public interest as a factor in modification decision).

318 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 497–98 (advocating a presumption of reliance raised by "cooperative and open-handed behavior in discovery" that can be rebutted by the "showing of obstructive behavior"); WRIGHT ET AL., *supra* note 98, § 2044.1, at nn.28, 29, 33 (proposing that reasonable cooperation should create a presumption of reliance); see also *Bayer AG & Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 467 (S.D.N.Y. 1995) (considering fact that party produced over six million pages of documents with only limited objections to broad discovery requests in reliance on blanket stipulated protective order); *Mirak v. McGhan Med. Corp.*, 142 F.R.D. 34, 40 (D. Mass. 1992) (noting that party "opened its doors to freewheeling document inspection . . . without reference to issue of relevancy, privilege, and/or admissibility").

inadmissible, demonstrates cognizable reliance that should support continued protection.³¹⁹

c. Discovery Sharing

As previously discussed, the parties to an agreed protective order might anticipate the potential relevance of their discovery to pending or future litigation and will often, via that order, prohibit its disclosure in these collateral cases.³²⁰ The desire to shield oneself from other potential claims, however, does not alone justify issuance of a protective order,³²¹ and such a provision will not necessarily protect against limited divulgence of discovery relevant to other lawsuits. Indeed, one of the most compelling reasons to modify a stipulated protective order is to permit the sharing of discovery in related litigation.³²²

Discovery sharing, while arguably undermining the efficiency of discovery in the immediate lawsuit, potentially avoids the wasteful duplication of discovery in collateral litigation, thereby ultimately advancing the efficient resolution of disputes.³²³ Moreover, a court

319 Materials that might subject a party to mere commercial embarrassment or that do not qualify as a "trade secret or other confidential research, development, or commercial information," FED. R. CIV. P. 26(c)(7), then, are particularly vulnerable to modification requests. In contrast, reliance on a protective order would be particularly great with regard to the production of a trade secret or the testimony of a witness who fails to invoke an applicable Fifth Amendment privilege. See *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992).

320 See *supra* notes 214, 290 and accompanying text.

321 See *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3d Cir. 1995) (warning that courts should not act as a shield to potential claims); *In Re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 696 (9th Cir. 1993) (describing purpose of stipulated protective order as ensuring the "[p]rivacy of proprietary information, not immunity from suit"); *Elm Energy & Recycling (U.K.), Ltd. v. Basic*, No. 96 C 1220, 1996 WL 596456, at *17-*18 (N.D. Ill. Oct. 9, 1996) (holding that mere possibility of discovery sharing in other litigation does not demonstrate good cause under Rule 26(c)); *Zapata v. IBP, Inc.*, 160 F.R.D. 625, 628-29 (D. Kan. 1995) (refusing to amend stipulated protective order to prohibit dissemination of non-confidential discovery to other litigants suing IBP).

322 See *Marcus, Myth and Reality*, *supra* note 52, at 41-46 (characterizing discovery sharing as "the most important justification for granting nonparties access to discovery information"); *WRIGHT ET AL.*, *supra* note 98, § 2044.1, at n.25 (describing discovery sharing as "most forceful" ground for modification of protective order); REPORT OF FEDERAL COURTS STUDY COMMITTEE 1990, at 102 (indicating that courts should be prepared to prevent duplicative discovery in collateral litigation).

323 See *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427-28 (10th Cir. 1990) (crediting countervailing efficiency interest of "saving time and effort in the collateral case"); *Kerasotes Mich. Theaters, Inc. v. National Amusements, Inc.*, 139 F.R.D. 102, 106 (E.D. Mich. 1991) (noting conflicting interests of expediting discovery in case before court and sharing discovery in related litigation).

generally can accommodate the confidentiality interests of the litigants before it by conditioning discovery sharing upon the intervenors' consent to the terms of the original protective order and to the court's enforcement jurisdiction.³²⁴ For these reasons, courts appear especially willing to relax restrictions on the dissemination of discovery to permit its use in other related cases.³²⁵

The feasibility of discovery sharing, however, should not automatically merit modification.³²⁶ A court must still balance the litigants' mutual desire and need for confidentiality, the interests of the persons who seek information arguably relevant to other cases, and the costs and benefits in efficiency to both the case at hand and the collateral litigation.

For instance, parties stand a better chance of successfully opposing discovery sharing if they can demonstrate that it would cause them to suffer some tangible injury to a cognizable privacy or property in-

324 See *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994) (holding that secrecy concerns could be accommodated by including consumer class within protective order's parameters); *Beckman Indus., Inc.*, 966 F.2d at 475 (proposing to minimize fear of disclosure in other suits by subjecting intervenors to restrictions in stipulated protective order); *United Nuclear Corp.*, 905 F.2d at 1427-28 (accommodating concern with disclosure to general public by subjecting collateral litigants to stipulated restrictions); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 345 (S.D. Iowa 1993) (conditioning modification on submission to the court's continuing jurisdiction and to the terms of the order that limited dissemination of the protected discovery and required its return).

The *Manual for Complex Litigation* suggests that a court can further minimize potential prejudice by crafting the modified order to circumscribe persons with access to the released information and by redacting confidential materials unnecessary to the collateral case. See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 70.

325 See, e.g., *Grove Fresh Distribs., Inc.*, 24 F.3d at 896 (modifying protective order to permit consumer class action plaintiffs to obtain discovery in similar litigation against orange juice manufacturers); *Beckman Indus., Inc.*, 966 F.2d at 476 (permitting access to deposition transcripts of employees of defendant insurance company concerning the drafting and interpretation of environmental impairment policies at issue in pending state litigation against insurer); *United Nuclear Corp.*, 905 F.2d at 1427-28 (amending protective order in case settled three years earlier to permit use of discovery in collateral litigation); *Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1296 (7th Cir. 1980) (modifying uncontested protective order to permit sharing of 100,000 documents and 100 depositions in similar litigation).

326 See *Marcus, Myth and Reality*, *supra* note 52, at 43 (suggesting "workable guidelines" for discovery sharing as opposed to "rule of automatic access"); *Miller*, *supra* note 52, at 497 (rejecting per se rule). But see *Kim*, *supra* note 233, at 866 (proposing per se rule that would always justify modification to permit discovery sharing among similarly situated litigants willing to submit to protective order).

terest.³²⁷ Additionally, the parties manifest greater reliance on the protective order if they could not reasonably anticipate any need to share their discovery at the time they negotiated the stipulation or produced discovery thereunder.³²⁸ Finally, because a court's primary task is to resolve the dispute of the litigants before it, the extent to which modification would impair the discovery process in that case must factor into its balancing.³²⁹

A stipulated protective order will not necessarily preclude other litigants from obtaining equivalent information through independent discovery in the collateral lawsuits.³³⁰ Modification should essentially

327 See *Grove Fresh Distribs., Inc.*, 24 F.3d at 896 (holding that efficiency concerns justify discovery sharing unless party opposing modification can demonstrate tangible prejudice to substantial rights that outweighs benefits of modification).

328 See *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) (refusing to allow plaintiff to renege on stipulated protective order when parties did not propose or anticipate discovery sharing either when they negotiated the order or when defendant disclosed information); see also Marcus, *Discovery Confidentiality*, *supra* note 52, at 497 (suggesting denial of access when "sharing idea only surfaces after disclosure has occurred").

329 In *Poliquin*, for example, the First Circuit rejected a request to modify a protective order in order to permit discovery sharing in collateral litigation. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993). The Court reasoned that while discovery sharing factors into modification, "[a]bsent an immediate threat to public health or safety, the first concern of the court is with the resolution of the case at hand." *Id.* Given the benefits of protective orders and the costs of impairing the discovery process, a court "retains broad discretion to protect discovery material, despite the burden of rediscovery imposed on future litigants in future cases." *Id.*

330 See *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 526 (5th Cir. 1994) (noting that collateral litigants could protect their interest in materials by filing discovery request in collateral lawsuit); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1232-33 (1st Cir. 1992) (noting that parties who do not wish to share discovery need not do so and that intervenor could seek information through its own discovery).

Protective orders present thorny procedural issues when related litigation exists in several states and in both federal and state legal systems. Discovery sharing encompasses the situation where collateral litigants intervene in a related lawsuit in order to access discovery already produced pursuant to a stipulated protective order. Alternatively, collateral litigants can seek information covered by another court's protective order through independent discovery in their own lawsuit. See *Kalinauskas v. Wong*, 151 F.R.D. 363, 366 (D. Nev. 1993) (discussing two options).

In the first instance, the court considering modification must determine the discoverability of the protected discovery in the collateral litigation. See *infra* notes 331-33 and accompanying text. Yet, the collateral court appears better situated to judge the relevance and need for the information in the related case. See *United Nuclear Corp.*, 905 F.2d at 1428-29 (cautioning that questions of relevance or privilege must be addressed by collateral courts); *Superior Oil Co. v. American Petrofina Co. of Tex.*, 785 F.2d 130 (5th Cir. 1986) (indicating that question of discoverability was one for court in collateral state proceeding). Conversely, in the case of independent discovery, the court must determine whether to recognize a protective order entered by

aim to place the collateral litigants in the position that they would otherwise occupy only after duplicating the parties' discovery requests.³³¹ Thus, the relevance and discoverability of the protected discovery in the collateral proceedings bears greatly on the decision to modify, as there is no right of access to privileged or irrelevant materials.³³² Such relevance, in turn, hinges upon the degree of overlap in

another court—a court which is arguably better positioned to evaluate the original justification for its order and the repercussions of changing it. See *In re Grand Jury Subpoena*, 945 F.2d 1221, 1225–26 (2d Cir. 1991) (noting that sealing court was “obviously best situated to evaluate the original need for the [stipulated protective] order and the ramifications of changing it”); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 303 (N.D. Ill. 1993) (suggesting that defendant go to issuing court to enforce protective order or expand its protection); see also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 70 n.161 (proposing that issuing court should normally determine “the effect given the earlier protective order”). Both situations may require formal or informal communication between the different courts. See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 71 & n.164 (suggesting the possibility of “informal communication” between courts to accommodate competing interests).

A comprehensive discussion of the inter-system and interstate ramifications of confidentiality orders exceeds the scope of this article. In drafting and issuing stipulated protective orders, however, courts should require that any party served with a discovery request to produce protected material in another proceeding provide notice thereof to the designating party. See, e.g., *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 41.36, at 455 (suggesting sample provision).

331 The Seventh Circuit regards this as the operative factor. In *Wilk*, that court held that “where an appropriate modification . . . can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice the substantial rights of the party opposing modification.” *Wilk v. American Med. Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1980); see also *Videon Chevrolet, Inc. v. General Motors Corp.*, Civ. A. No. 91-4202, 1995 WL 395925, at *3 (E.D. Pa. June 28, 1995) (condoning discovery sharing when collateral litigation “would eventually exchange the same material”).

332 See *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 860–61 (7th Cir. 1994) (permitting disclosure of depositions that were relevant and discoverable by ITC in collateral proceeding); *Wilk*, 635 F.2d at 1300 (indicating that no right of access exists concerning privileged or irrelevant information); see also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 70 n.160 (finding “little need to require redundant discovery proceedings” when collateral litigant “would be entitled to obtain [information] in the other litigation”); Marcus, *Discovery Confidentiality*, *supra* note 52, at 458, 493–98 (advocating discovery sharing when material is both relevant and properly discoverable in collateral litigation).

Authorities diverge concerning who bears the burden concerning the discoverability of the protected materials in the collateral litigation. Compare *Grove Fresh*, 24 F.3d at 896 (stating that party opposing modification must demonstrate that intervenors are not entitled to discovery because of privilege or relevance) with Marcus, *Myth*

facts, parties, and issues between the suit covered by the protective order and the collateral proceedings.³³³

Moreover, modification should favor only bona fide litigants able to demonstrate a legitimate need for the protected discovery in pending litigation.³³⁴ Discovery sharing should not fuel fishing expeditions by prospective litigants contemplating future lawsuits.³³⁵ Nor should courts sanction backdoor attempts to circumvent discovery limits in other cases.³³⁶

Finally, discovery sharing should not justify modification unless it will result in a significant saving of time and expense in the collateral proceedings.³³⁷ If sharing will avoid needless duplication of discovery

and Reality, *supra* note 52, at 43–44 (contending that collateral litigant should demonstrate its right to obtain the materials in the collateral litigation).

333 Cases that derive from a single accident or event, for example, present a very strong case for discovery sharing. See *Miller*, *supra* note 52, at 498–99 (describing spectrum of relationships bearing upon modification); see also *Videon Chevrolet, Inc.*, 1995 WL 395925, at *3 (evaluating whether complaints were “founded on virtually identical allegations”); *WLIG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 235–36 (E.D.N.Y. 1994) (assessing whether a sufficient identity of parties and overlap of issues existed to justify modification of stipulated protective order to permit use of discovery in pending administrative action). But see *Kerasotes Mich. Theaters, Inc. v. National Amusements, Inc.*, 139 F.R.D. 102, 106 (E.D. Mich. 1991) (adopting a very broad relevancy standard that does not require factual identity).

334 See *Wilk*, 635 F.2d at 1300 (stating that other litigant must be “bona fide” and not merely seek to use modification as a device to exploit discovery in original case); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 343–44 (S.D. Iowa 1993) (evaluating relevance of documents and the intervenor’s need for them in preparing related case for trial).

335 See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 71 & n.163 (suggesting greater possibility that information is sought for a “fishing expedition” or other improper purpose “when related litigation . . . [is] merely anticipated rather than pending”); *Miller*, *supra* note 52, at 499 (arguing that persons merely contemplating suit must demonstrate extraordinary need to justify modification).

336 See *In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig.*, 664 F.2d 114, 117 (6th Cir. 1981) (reminding courts to be sensitive to abuse of federal discovery process); *Elm Energy & Recycling (U.K.), Ltd. v. Basic*, No. 96 C 1220, 1996 WL 596456, at *7–*8 (N.D. Ill. Oct. 9, 1996) (approving discovery sharing except when used as a sham to assist discovery in another forum or to circumvent discovery limits in a different court).

337 See *Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986) (denying intervention to modify protective order when collateral litigants had already conducted substantial discovery and simply believed that some materials had not been produced in their own lawsuit); *Videon Chevrolet, Inc.*, 1995 WL 395925, at *3 (requiring movant to demonstrate that sharing of discovery “will prevent repetitive and inefficient discovery”); *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 71 (suggesting that court evaluate whether modification would save significant time and expense); see also *Miller*, *supra* note 52, at 497.

that would otherwise take place in sufficiently related cases, however, and if the intervenors submit to the terms of the protective order and agree to use the shared discovery only in the preparation, settlement, or trial of the collateral litigation, fairness and efficiency weigh heavily in favor of modification.

d. Public Interest

An argument frequently advanced in favor of modification is the claim that the protected discovery concerns issues of communal importance and that its disclosure would thus serve the "public interest."³³⁸ Because the public interest in disclosure probably does not factor heavily into the threshold showing that can justify issuance of a stipulated protective order, a court should balance that factor against competing privacy interests in deciding whether to lift the order's restrictions. Discerning those cases where discovery legitimately implicates this rather amorphous "public interest," and gauging the appropriate weight to accord it, however, can be daunting, if not insurmountable, tasks that implicate the very tensions that underlie the confidentiality debate itself.³³⁹

In answering these questions, a court must divine a very fine line between idle public curiosity (an illegitimate concern) and licit public interest.³⁴⁰ Two discrete public interests, interests that seem to dominate recent sunshine reforms, can inform a court's discretion in this regard, however. Discovery is most commonly said to implicate a public interest in disclosure where it concerns either public health and safety or the administration of public office and the operation of government.

Some lawsuits potentially implicate public health and safety more than others. For example, product liability lawsuits involve allegedly

338 The *Manual for Complex Litigation*, for instance, directs courts to balance the "public interest served . . . by release" of the protected information in deciding whether to modify a protective order. *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 21.432, at 70.

339 Weighing the public interest in disclosure arguably clashes with the equally strong public interest in fair and efficient settlement of disputes, the traditional deference to party autonomy in discovery, and the problem-solving view of the judiciary. See *supra* Part I.B; see also Marcus, *Discovery Confidentiality*, *supra* note 52, at 469 (arguing that line between "public law" and "private law" litigation blurs in many cases); Menkel-Meadow, *supra* note 32, at 2667 n.24 (noting difficulty of identifying particular disputes worthy of public interest).

340 See Marcus, *Myth and Reality*, *supra* note 52, at 51 (arguing that public interest exception "does not apply to purely private activity that has generated great public interest"); Miller, *supra* note 52, at 467 (criticizing reform proposals as failing to distinguish between interests of curiosity or voyeurism and legitimate public concerns).

defective products distributed to consumers at large. Likewise, toxic torts involving damage to the environment or hazardous substances affect a class of individuals broader than the immediate litigants. At the same time, the duty of protecting the public from both these dangers rests principally in other branches of government (which are presumably better qualified than the courts to evaluate such risks) and there may be no need to release confidential discovery, at least to the degree requested, as additional protection.³⁴¹ Moreover, the impact of discovery upon public safety can be especially difficult to assess without prejudging the merits of a case, or after a case has been settled and dismissed.³⁴² Despite these difficulties, a court should determine whether continued confidentiality of particular discovery will have a probable (not merely possible) and significant adverse effect upon public health and safety that cannot otherwise be averted without modifying or terminating the protective order.³⁴³

Discovery that bears upon the administration of public office or the functioning of government can likewise justify vacating or relaxing confidentiality restrictions. Thus, the presence of a public official or government entity as a party to a case, while not dispositive, might signal a situation where public interest outweighs the litigants' need for secrecy.³⁴⁴ Governments and government officials stand apart from private litigants in that they represent and serve a public constituency, even in litigation.³⁴⁵ To the extent that discovery in such a case would educate the public or inform societal debate concerning the government as official actor, a public interest may well be served by its disclosure.³⁴⁶ For much the same reason, a court should hesitate to

341 See Marcus, *Discovery Confidentiality*, *supra* note 52, at 480 (contending that many public interests are likely to already be subject to "public regulation and scrutiny by other branches of government").

342 A court must necessarily make some determination that a safety risk exists before deciding whether it must be publicly disclosed. See *id.* at 481-82 (questioning "ability of courts to discern whether discovery materials bear on public safety").

343 Obviously, not all confidential discovery in a products liability or environmental case poses a probable and significant risk to public health and safety. Given the presumptively private nature of discovery, a court should not cast too broad a net in ordering disclosure. Moreover, a court may be able to accommodate any legitimate public safety concerns by a careful crafting of the modified order.

344 See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-86 (3d Cir. 1994) (indicating that public interest is "particularly legitimate and important" where one of the parties is a public entity or official).

345 See *Toran*, *supra* note 138, at 127 (contending that government's "very identity derives from the populace it serves" and thus makes it unique from the typical private litigant).

346 See, e.g., *Wiggins v. Burge*, 173 F.R.D. 226, 230 (N.D. Ill. 1997) (striking confidentiality designation of police internal investigation regarding allegations of police

continue a confidentiality order that would block disclosure of information that would otherwise be publicly available under federal or state freedom of information laws.³⁴⁷

Of course, the instances in which the public interest in disclosure can appropriately override the litigants' interest in secrecy are ultimately case-sensitive and thus too varied to enumerate here.³⁴⁸ In making the modification decision, however, a court should be mindful of its principal function of resolving concrete disputes of the litigants before it. While this goal can be stretched to permit discovery sharing among other litigants, it might not justify modification on behalf of the public at large aimed at remedying all manner of societal woes.

E. Conclusion Regarding Discovery

Stipulated protective orders governing unfiled discovery serve valuable public, as well as private, interests. These orders guard against abuse of the very liberal scope of discovery, while facilitating the efficient resolution of disputes. Because discovery concerns a traditionally (perhaps even presumptively) private phase of litigation, the importance of party autonomy and the significant public interest in

torture); *Savitt v. Vacco*, No. 95-CV-1842 (RSP/DRH), 95-CV-1853 (RSP/DRH), 1996 WL 663888, at *8 (N.D.N.Y. Nov. 8, 1996) (requiring the filing of deposition of state attorney general in case challenging hiring practices in state attorney general's office); see also Marcus, *Myth and Reality*, *supra* note 52, at 50-53 (acknowledging that nonparty access to discovery might be justified in "very rare" case involving public interest in governmental acts).

347 Freedom of information laws generally do not apply to the courts or to confidentiality orders issued in actions where the government is a party. See *supra* note 141 and accompanying text; see also Pansy, 23 F.3d at 791-92 (viewing accessibility of information under freedom of information laws as significant factor militating against entering or maintaining confidentiality order). See generally Toran, *supra* note 138, at 177, 181-82 (cautioning courts to consider impact of confidentiality orders upon present and future freedom of information requests).

348 For example, many courts will relax a protective order to further a law enforcement interest. See, e.g., *Chemical Bank v. Affiliated FM Ins. Co.*, 154 F.R.D. 91, 93 (S.D.N.Y. 1994) (stating that legitimate law enforcement need for information outweighs the need to avoid embarrassment); *Westchester Radiological Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc.*, 138 F.R.D. 33, 35 (S.D.N.Y. 1991) (modifying protective order to permit Blue Cross to disclose evidence of Medicaid fraud to federal government). Accordingly, many jurisdictions have adopted a per se rule that permits a grand jury subpoena to trump a civil protective order. See, e.g., *In re Grand Jury Subpoena* (Meserve & Hughes), 62 F.3d 1222 (9th Cir. 1995); *In re Grand Jury Subpoena* (Williams), 995 F.2d 1013 (11th Cir. 1993); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988). But see *In re Grand Jury Subpoena* (Doe), 945 F.2d 1221 (2d Cir. 1991) (refusing to adopt per se rule).

settlement should occupy center stage in a court's threshold decision to enter an agreed protective order. The court's ongoing duty to supervise discovery, however, in tandem with its independent obligation to determine good cause, require that the court exercise its discretion in initially issuing the order and that it later balance affected private and public factors in deciding whether to maintain confidential protection. In some instances, broader public interests may well override the litigants' mutual desire for secrecy.

V. SEALING OF JUDICIAL RECORDS

As previously described, stipulated protective orders routinely provide that if discovery stamped "confidential" must be filed with the court in connection with a motion or other court application, it shall be filed under seal and will remain sealed pending contrary order of the court.³⁴⁹ Likewise, and as discussed further in Part VI, the parties might ultimately settle their lawsuit contingent upon the sealing of all or part of the court's file in the case.³⁵⁰ When a confidentiality agreement dictates closure of the judicial record, however, the interests in party autonomy and the efficient administration of justice may need to yield to the often greater public interest in fair and open judicial proceedings.³⁵¹

Unlike discovery, a trial is a presumptively public phase of a civil lawsuit to which a common law, if not a constitutional, right of access

349 See *supra* note 213 and accompanying text (discussing typical sealing provision in stipulated protective orders). Without such a requirement, a party could circumvent the confidentiality stipulation simply by attaching the protected discovery to a pleading or motion or by introducing it in a pretrial hearing. See, e.g., *Davis v. Transamerica Commercial Fin. Corp.*, No. 93 C 5177, 1995 WL 534294, at *2 (N.D. Ill. Sept. 5, 1995) (refusing to permit a plaintiff to "undermine the entire confidentiality agreement" and effectively "undesignate" confidential documents by filing them as exhibits to a motion to enforce subpoena and then disseminating motion with attachments to prospective class members); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993) (recognizing that "public good" of protective orders would be "substantially disserved" if confidentiality of documents could be stripped by their introduction in civil trial); *Standard Chlorine of Del., Inc. v. Sinibaldi*, 821 F. Supp. 232, 256 (D. Del. 1992) (noting that absence of sealing provision in umbrella order "would make the confidentiality stipulation worthless and hollow since confidential information discovered in this litigation then could be disclosed simply by including it in a 'pleading' filed with court).

350 See *infra* Part VI.B.2.a (examining settlements conditioned upon the sealing of judicial records).

351 See *Marcus, Discovery Confidentiality*, *supra* note 52, at 477 & n.125 (recognizing that public access to discovery filed with pretrial motions raises "qualitatively different" and more difficult issues than access to unfiled discovery).

attaches.³⁵² Moreover, and again unlike the raw fruits of discovery, a judicial officer has presumably screened evidence prior to its introduction at trial to determine its relevance and admissibility.³⁵³ Notwithstanding the existence of a stipulated protective order, then, if confidential documents or deposition testimony are admitted into evidence during trial, without any objection or request that they be sealed, the designating party likely waives their confidential status.³⁵⁴ Even with such a request, and notwithstanding the litigants' agreement, the exceptionally strong presumption of public access to civil trials dictates that "only the most compelling showing" of a need for closure will justify the sealing of testimony or documents introduced at trial.³⁵⁵

352 See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068 (3d Cir. 1984) (finding First Amendment right of public access to civil trials); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (holding that First Amendment secures the public and press a right to access civil proceedings); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (applying policies supporting right to access criminal trials to civil cases); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-81 (6th Cir. 1983) (vacating seal of records based upon common law and First Amendment right of public access to judicial proceedings); see also *supra* Part III.D (examining rationales underlying the right of public access).

353 As discussed below, the right of public access to judicial records, while bolstered by the admissibility of discovery, does not depend upon it. See *infra* note 369 and accompanying text.

354 See *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (holding that BIC waived whatever right to confidentiality it had under a protective order when it failed to raise documents' confidentiality at the time they were introduced into evidence); *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421-22 (6th Cir. 1981) (finding waiver of right to further restrict disclosure once discovery was released in open trial). But see *Jochims*, 151 F.R.D. at 341 n.6 (refusing to find that party waived confidential status of materials that were introduced as exhibits in open court at sparsely attended trial that would be difficult to replicate without transcript).

355 *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993). In *Poliquin*, the distinction between presumptively private discovery governed by protective orders and the presumptively public trial affected by sealing orders convinced the First Circuit to vacate the sealing of an entire videotaped deposition and interrogatory answers admitted at trial. See *id.* at 534.

The *Manual for Complex Litigation* suggests several methods by which parties can attempt to avoid the loss of confidentiality caused by the introduction of protected discovery at trial. The stipulated protective order can require that a party who plans to introduce confidential discovery into evidence at trial or a hearing notify the designating party in advance so that he can move for continued protection. See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 41.36, at 455. Parties can also stipulate to "material nonconfidential facts to avoid the need to introduce confidential material into evidence." *Id.* § 21.432, at 72. Finally, parties can move under Federal Rule of Evidence 403 to bar the admission of confidential discovery, arguing that the undue prejudice from its disclosure outweighs its minimal relevance. See *id.*; see also

As discussed in Part I, however, trial no longer holds center stage in our civil justice system, which instead focuses increasingly and predominantly upon events that occur instead of or before trial. Confidential discovery thus more often enters the public record in support of or in opposition to a pretrial motion to the court. The extent to which the parties' confidentiality agreement and the court's discovery protective order support the sealing of these pretrial motions and their attachments has generated much debate, but no consensus of opinion.

Most courts recognize a strong presumption of public access to "judicial records" that can be rebutted only by significant countervailing interests favoring nondisclosure.³⁵⁶ Courts widely diverge, however, in defining what constitutes a "judicial record" and in applying that definition to the multitude of various pleadings, motions, and requests that come before a court for consideration. Courts further divide concerning the appropriate weight to accord the presumption of public access and in identifying the competing interests sufficient to rebut the presumption and warrant sealing of judicial records. This Part of the Article offers a sliding scale functional approach to help resolve these lingering dilemmas.

Poliquin, 989 F.2d at 534 (suggesting that, if necessary, trial court can utilize Federal Rule of Evidence 403 to exclude marginally relevant, sensitive information).

356 *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (describing "heavy burden" of articulating compelling countervailing interests sufficient to rebut "strong presumption" of openness); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("Absent a showing of extraordinary circumstances set forth by the district court in the record . . . the court file must remain accessible to the public."); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (holding that common law right of access must be heavily outweighed by significant countervailing interests to justify sealing of judicial records); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11 (1st Cir. 1986) (holding that absent exceptional circumstances, materials important to a court's adjudication of a important substantive right must be open to public scrutiny); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 691 (W.D. Mich. 1996) (stating that "only the most compelling reasons [would] justify non-disclosure of judicial records").

The Eighth Circuit, while recognizing that a presumption of public access to judicial records exists, refuses to make it a "strong" one. Instead, that circuit leaves the decision whether to seal judicial records to the trial court's discretion after balancing the various competing interests. See *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990); *Independent Sch. Dist. No. 283, St. Louis Park, Minnesota v. S.D.*, 948 F. Supp. 892, 898 (D. Minn. 1996); *Jochims*, 151 F.R.D. at 341-42. The Fifth Circuit may likewise accord the presumption less weight than most. See *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. Unit A Aug. 1981) (characterizing common law presumption as only "one of the interests" that a court must balance in sealing records).

A. *What Constitutes a Judicial Record?*

In the United States Court of Appeals for the Third Circuit, a document's status as a "judicial record" hinges upon the "technical question of whether [it] is physically on file with the court."³⁵⁷ In the majority of other circuits that have wrestled with the issue, however, "the mere filing of a document with a court does not render the document judicial."³⁵⁸ Instead, these other courts tie the definition of a judicial record to the purpose underlying the presumption of public access—public monitoring or oversight of the judicial system.³⁵⁹ They accordingly utilize a functional, albeit more ambiguous, approach that turns upon a document's use and the role it plays in the adjudicative process.³⁶⁰

357 *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994). Thus, in the Third Circuit, "there is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith." *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993). By the same token, if a document is not physically on file with the court, "it is not a 'judicial record.'" *Pansy*, 23 F.3d at 782. *But see id.* at 783 (acknowledging that a more "persuasive and perhaps desirable rule" would hinge judicial status of record "on the use the court has made of it rather than on whether it has found its way into the clerk's file").

358 *In re Policy Management Sys. Corp.*, Nos. 94-2254, 94-2341, 1995 WL 541623, at *4 (4th Cir. Sept. 13, 1995).

359 In *Amodeo*, the Second Circuit explained the purpose of the access presumption as "based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *see also* *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 412–13 (1st Cir. 1987) (characterizing common law presumption as "basic to the maintenance of a fair and open judicial system and to fulfilling the public's right to know"); *Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980) (explaining that common law right checks judicial abuses).

360 *See In re Policy Management Sys. Corp.*, 1995 WL 541623, at *4 (holding that a "document becomes a judicial document when a court uses it in determining litigants' substantive rights," and that "a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach"); *Amodeo*, 44 F.3d at 145 (holding that "item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document"); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) (discussing press' right of access to "judicial decisions and the documents which comprise the bases of those decisions"); *Standard Fin. Management Corp.*, 830 F.2d at 409 (ruling that "relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *Anderson*, 805 F.2d at 13 (limiting common law presumption to "materials on which a court relies in determining the litigants' substantive rights"); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180–81 (6th Cir. 1983).

Under such a functional approach, materials used by a court in granting summary judgment, a dispositive motion that adjudicates the legal merits of a case and that essentially substitutes for trial, present the clearest example of judicial records presumptively subject to public scrutiny.³⁶¹ At the opposite end of the spectrum lie discovery motions and documents submitted for *in camera* review as part of a discovery dispute. Requests for a court to compel, prohibit, or circumscribe disclosure do not seek disposition of any substantive rights and are "actually one step further removed in public concern from the trial process" than the raw fruits of discovery themselves.³⁶² As such, courts generally do not classify discovery motions and their attachments as judicial records or recognize any presumption of public access applicable thereto.³⁶³

Beyond these two extremes, however, matters become decidedly uncertain.³⁶⁴ Motions less central to merits determinations, such as

(noting the public interest in "evidence and records . . . relied upon in reaching [judicial] decisions"); *Wilk*, 635 F.2d at 1299 n.7 (reasoning that common law right of access "should only extend to materials upon which a judicial decision is based").

361 In *Rushford*, the Fourth Circuit chastised the trial court for failing to make sufficient findings to justify sealing a summary judgment record, which included three documents protected by a discovery protective order. See *Rushford*, 846 F.2d at 254. While the protective order facilitated privately conducted discovery, summary judgment materials "lose their status of being raw fruits of discovery" because they aid the court in adjudicating substantive rights and thereby "substitute for a trial." *Id.* at 252; see also *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (subjecting report of special litigation counsel filed in derivative lawsuit to right of public access because it formed the basis of the court's grant of summary judgment).

362 *Anderson*, 805 F.2d at 11-13. Such materials have not yet even been determined to be discoverable. See *id.*

363 See *United States v. Wolfson*, 55 F.3d 58, 59-61 (2d Cir. 1995) (refusing to unseal documents submitted for *in camera* inspection decades earlier and held not discoverable); *Anderson*, 805 F.2d at 11 (finding it "clear . . . that there is no right to public access to documents considered in civil discovery motions").

Even the Third Circuit, which uses a technical filing test, refuses to catalog discovery motions as judicial records subject to any presumptive right of access. See *Leucadia* 998 F.2d at 165; (declining to find a presumptive right of public access "to discovery motions and their supporting documents"); *Allied Corp. v. Jim Walter Corp.*, Civ. A. Nos. 86-3086, 94-5530, 1996 WL 346980, at *4 (E.D. Pa. June 17, 1996) (acknowledging absence of any common law or First Amendment right of public access to "discovery motions filed with the court or to the raw fruits of discovery").

364 See *Marcus, Discovery Confidentiality*, *supra* note 52, at 477 n.115 (suggesting that discord surrounding judicial records "shows that there are genuine areas for disagreement concerning the access issues raised in civil litigation"); *Miller*, *supra* note 52, at 440 & n. 58 (conceding that stronger public access arguments surround dispositive motions, but describing existing case law as "in some disarray"); *WRIGHT ET AL.*, *supra* note 98, § 2042, at nn.28-34 (stating that while merits resolutions strongly favor ac-

documents that a court examines, but does not rely upon in making a decision, or materials submitted to, but never considered by a court, all continue to perplex courts in their quest to categorize judicial records. For example, how should courts treat materials submitted in support of or in opposition to a motion for summary judgment that is ultimately denied? Do such documents "play a useful and relevant role in the adjudicative process" even though the court, in denying summary judgment, essentially declines to decide the case's merits?³⁶⁵ Should a presumption of public access attach to confidential discovery filed in connection with a motion to dismiss for failure to state a claim—a motion that, unlike one for summary judgment, looks no farther than the factual allegations in a complaint to assess whether they invoke a legal claim for relief?³⁶⁶ What about motions for a pre-

cess, it "cannot be said that courts have developed a clear test" concerning access to motions less central to the merits).

365 While courts unanimously classify materials relied upon by a court in *granting* summary judgment as judicial records, they disagree on the status of documents that support a *denial* of summary judgment. Compare *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985) (finding no presumptive right of access to materials submitted in connection with denied motion for summary judgment) with *Republic of the Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 56 (D.N.J. 1991) (unsealing confidential discovery materials submitted in connection with denied summary judgment motion); see also Marcus, *Myth and Reality*, *supra* note 52, at 48–49 (suggesting that denial of summary judgment may not justify public access because it involves no decision on the merits).

366 The Fourth Circuit's split decision in *In Re Policy Management Systems Corp.* illustrates this confusion. See *In Re Policy Management Sys. Corp.*, Nos. 94-2254, 94-2341, 1995 WL 541623 (4th Cir. Sept. 13, 1995). In that case, the Fourth Circuit examined the propriety of sealing confidential discovery produced under a stipulated protective order and submitted by a plaintiff in opposition to a Rule 12(b)(6) motion to dismiss. Notwithstanding the dispositive nature of the motion, which the district court had partially granted, the panel majority held that the "documents did not achieve the status of judicial documents" and that no First Amendment or common law presumption of access thus attached. *Id.* at *4. The majority noted that unlike a motion for summary judgment, which requires a court to examine the entire summary judgment record, "[a] motion to dismiss tests only the facial sufficiency of the complaint." *Id.* Because the district court did not, and indeed could not, consider or rely upon the discovery attachments in ruling on the dismissal motion, "the documents played no role in the court's adjudication of the motion" and thus retained their status as discovery materials. *Id.*

In dissent, Judge Michael argued that "documents . . . filed in connection with a potentially dispositive motion" must carry a presumptive right of access or else the trial judge could act as "unchallengeable censor" of the public record. *Id.* at *6 (Michael, J., dissenting). Moreover, because a motion to dismiss "measure[s] the factual allegations in the complaint against the legal theory invoked," the court's decision thereon determines substantive rights and thus carries a "presumption of openness." *Id.*

liminary injunction that, while prefatory to any final determination of substantive rights, nevertheless judge a party's probable success on the merits³⁶⁷ Is an evidentiary ruling upon the admissibility of confidential discovery sufficiently "relevant to the performance of the judicial function" to justify a presumption of public access to that discovery?

The *en vogue* analysis yields varying answers to these questions due, in part, to the vagueness of its principal component—the "judicial function" to which it is indexed. A definition limited to dispositive merits determinations takes too narrow a view of the adjudicatory process, which in modern process frequently consists of a host of preliminary or nondispositive determinations.³⁶⁸ At the same time, an interpretation that effectively encompasses everything submitted to the court would include matters never subject to any judicial review whatsoever.

A proper definition of "judicial records" must avoid putting definitional blinders upon the public's right to observe and oversee its court system, while limiting that right to materials that bear sufficiently upon a judicial function. "Judicial records" should include materials submitted for the court's consideration that are "relevant and useful" to the multifaceted, decision-making role of courts today. This means that documents or testimony can qualify as "judicial records" even if they do not form the basis of a court's decision on the merits, and even if the court ultimately determines not to consider or rely upon them. Otherwise, a judge could censor the public record, and thereby shield herself from public scrutiny, simply by ruling documents or testimony inadmissible or by declining to consider or rely upon them. If the right of public access is to serve as a check upon

367 In *Methodist Hosps., Inc. v. Sullivan*, the Seventh Circuit gave conflicting signals regarding the status of a brief containing confidential salary information that the defendants had filed in opposition to a motion for temporary restraining order. See *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026 (7th Cir. 1996). Because the defendants had agreed not to apply the disputed Medicaid reimbursement rules pending resolution on the merits, the trial court never ruled upon the injunctive request. The Seventh Circuit held that because the trial court had not relied upon the state's brief in deciding the TRO application, "[t]he principle that materials on which a judicial decision rests are presumptively in the public domain . . . [was] not in play." *Id.* at 1031. The Seventh Circuit nevertheless criticized the trial court's sealing of the entire brief, holding that only the irrelevant salary information should have been redacted. See *id.* at 1032.

368 But see Marcus, *Discovery Confidentiality*, *supra* note 52, at 477 & n.125 (suggesting that inquiry should focus on decision-making role of the court and whether a motion results in a decision on the merits); Marcus, *Myth and Reality*, *supra* note 52, at 49 (advocating for public access when discovery forms the "basis for decision on the merits").

the judiciary, it cannot be contingent solely upon the judge's view of the significance, relevance, or admissibility of any given document.³⁶⁹

For similar reasons, the "judicial" status of a particular record should not necessarily depend upon the outcome of the motion or request to which it is attached. The presumptive right of access is "immediate and contemporaneous" and attaches the moment the evidence becomes a part of the judicial record.³⁷⁰

B. *The Weight of the Resulting Presumption*

One hazard of broadly defining "judicial records" to comprise anything relevant or useful to a court's decision-making is that a court might regard all such records as generating the same near-irrebuttable presumption of public access. Under the prevailing all-or-nothing approach, if material qualifies as a judicial record, the resulting presumption of public access is "strong," the rebuttal burden "heavy," and the competing interests required to justify sealing "exceptional" or "compelling." In contrast, if something does not rise to the level of a judicial record, no presumption of access whatsoever will attach.

Courts would be better served by focusing instead on the weight that should be accorded the presumption of public access. That is, a preferable alternative would broadly define judicial records, but then calibrate the weight of the resulting presumption to the core judicial

369 As noted by the dissenting justice in *In re Policy Management Systems Corp.*, in deciding to reject or ignore documents submitted in connection with a motion, a trial court nevertheless considers them: "[I]t is the public's function to evaluate the judge's performance and to determine whether the documents should have been used in deciding the motion." *In re Policy Management Sys. Corp.*, 1995 WL 541623, at *6-*7 (Michael, J., dissenting); see also *Republic of the Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50 at 58 (D.N.J. 1991) (holding that court's preliminary refusal to consider inadmissible summary judgment materials formed the basis of its denial of summary judgment and thus was subject to presumptive right of access); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 899 (E.D. Pa. 1981) (asserting that even inadmissible materials submitted in connection with a motion for summary judgment are subject to right of access).

370 As explained by the Seventh Circuit in *Grove Fresh*, "a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous. The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); see also *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 691 (W.D. Mich. 1996) (suggesting that "policy underlying public access to judicial records would be furthered by immediate access to those records" the "moment" they become part of the judicial record); *Republic of the Philippines*, 139 F.R.D. at 60 (holding that right of access attaches when motion is pending and thus does not depend upon its outcome).

function of determining a litigant's substantive rights.³⁷¹ The strength of the presumption would hinge upon the role the disputed materials play in that central function and the extent to which access would facilitate its public oversight. Indeed, the Second Circuit recently adopted such a sliding scale approach, stating:

We believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance.³⁷²

Rather than nitpicking the definition of judicial records, a definition which, if erroneously applied, can further insulate the courts from public scrutiny,³⁷³ this approach varies the weight of the presumption of public access. The greater a role the disputed materials play in the determination of the litigants' substantive rights, the stronger the resulting presumption. The farther removed from a merits determination that documents and testimony fall, the weaker the ensuing presumption.³⁷⁴

371 As noted by the Second Circuit in *Amodeo*, the determination of the litigants' substantive rights lies "at the heart of Article III" and the adjudicative process. *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995).

372 *Id.* *Amodeo* concerned reports periodically filed under seal by a court officer appointed under a RICO consent decree to investigate allegations of union corruption. The court officer was under no filing obligation and reportedly would not have filed the progress reports had she known they could be made public. Because the trial court reviewed the investigative reports to monitor the performance of the court officer under the consent decree, they were "relevant to the performance of the judicial function and useful in the judicial process." The Second Circuit thus did not hesitate in classifying the officer's reports as judicial records subject to a presumptive right of public access. *See id.* at 1045-46. That presumption was "weak," however, because the investigative reports bore "only a marginal relationship to the performance of Article III functions." *Id.* at 1051-52.

373 The presumption of access that attaches to judicial records simply increases the litigants' burden to justify closure. The fact that a document may not qualify as a judicial record, however, does not require that a court grant the litigants' request that it be sealed. Good cause must still support continued court-ordered protection. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (requiring that good cause support confidentiality order concerning unfiled settlement); *see also supra* Part IV (examining public access issues surrounding confidential discovery).

374 *See Amodeo*, 71 F.3d at 1049-50. According to the Second Circuit:

Where testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason. Documents that play no role in the performance of Article III func-

Thus, documents or testimony introduced at trial or that form the basis of a summary judgment or other merits determination carry an exceptionally strong presumption of public access that can be overcome only by the most compelling of competing considerations. In contrast, procedural matters unrelated or only tangentially related to a decision on the merits would call for a much lower and more readily rebuttable presumption of public access. The weight to accord the presumption applicable to documents or testimony that fall "in the middle of the continuum" necessarily falls to the judgment of the court to be exercised on a case-specific basis.³⁷⁵

C. *Rebutting the Presumption*

Even the strongest of presumptions of public access to judicial records can be overridden by sufficiently compelling competing interests.³⁷⁶ In order to justify sealing of judicial records, however, the party requesting it must demonstrate a present and ongoing need to protect the confidentiality of particular testimony or documents that outweighs the presumptive interest in public disclosure.³⁷⁷ This entails demonstrating that the information sought to be sealed "is the kind of information that the courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure."³⁷⁸

tions, such as those passed between the parties in discovery, lie entirely beyond the presumption's reach.

Id. at 1050.

375 *Id.* at 1050. The court in *Amodeo* indicated that tradition can inform this requisite exercise of judgment: "Where such documents are usually filed with the court and are generally available, the weight of the presumption is stronger than where filing with the court is unusual or is generally under seal." *Id.*

376 See *supra* note 148 and accompanying text. For example, in *Doe v. Shapiro*, an AIDS employment discrimination lawsuit, the district court granted a stipulated motion to seal the defendant's motion for summary judgment whose legal theory required disclosure of the details of the plaintiff's personal life. See *Doe v. Shapiro*, 852 F. Supp. 1256 (E.D. Pa. 1994). The court characterized the "narrowly tailored" request to seal the single motion as "reasonable" and "humane." *Id.* at 1258.

377 See *Amodeo*, 44 F.3d at 147-48 (placing burden on party seeking seal "to demonstrate that the interests favoring non-access outweigh those favoring access"); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166-67 (3d Cir. 1993) (requiring that party seeking to maintain secrecy make a document-by-document showing of current competitive harm).

378 *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994); see also *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 412 (1st Cir. 1987) (requiring a "compendium of chapter and verse" reciting cognizable, specific, and severe harm from disclosure); *Department of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449,

The secrecy interests sufficient to rebut the presumption of access to judicial records are highly case-specific. For some courts, however, only the most compelling individual privacy interests or the most confidential of commercial information—trade secrets—can overcome the exceptionally strong presumption that most courts indiscriminately accord all judicial records.³⁷⁹ Claims of commercial embarrassment or damaged corporate reputation will not qualify and even confidential commercial information may not suffice.³⁸⁰ Moreover, confidentiality agreements that require the sealing of judicial records arguably supersede a court's nondelegable, supervisory authority over its own records and proceedings.³⁸¹ Many courts thus refuse to factor into their sealing calculus a party's reliance on such a provision and will accord the corresponding interest in settlement little, if any, countervailing weight.³⁸²

487 (S.D.N.Y. 1996) (rejecting "blanket claim[s]," "stereotyped or conclusory statements," and "unparticularized assertion[s]" regarding the need for confidentiality).

379 See *Standard Fin. Management Corp.*, 830 F.2d at 412 (recognizing that in some cases, privacy rights of individuals and third parties can limit presumptive right); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179–80 (6th Cir. 1983) (prohibiting courts from sealing judicial records, even pursuant to confidentiality agreement, unless "legitimate trade secrets" are involved); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 61–62 (D.N.J. 1991) (requiring that Westinghouse assert interest almost to the level of a trade secret to justify sealing). But see *Leucadia, Inc.*, 998 F.2d at 166 (recognizing that trade secrets and other confidential business information may be shielded); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340 (S.D. Iowa 1993) (contending that the need to protect confidential business information relevant to competitive standing can override right of access).

380 See *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (holding that private litigants' interest in protecting their vanity or their commercial self-interest failed to justify the sealing of materials supporting motion to amend complaint); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179–80 (rejecting bald assertion of reputational harm); *Republic of the Philippines*, 139 F.R.D. at 61–62 (dismissing claims involving mere confidential business information or commercial embarrassment).

381 See *Amodeo*, 44 F.3d at 147 (holding that trial court erroneously delegated its authority to redact confidential information from judicial records).

382 See *Procter & Gamble Co.*, 78 F.3d at 227 (noting that protective order cannot permit parties to control public access to court papers); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180 (cautioning that confidentiality agreement will not bind the court regarding the sealing of judicial records); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (contending that interest in settlement did not permit parties to agree to seal public records); *Greater Miami Baseball Club Ltd. Partnership v. Selig*, 955 F. Supp. 37, 39–40 (S.D.N.Y. 1997) (refusing to accord parties' pre-deposition designation any weight given the lack of justifiable reliance that the deposition would remain sealed). But see *Jochims*, 151 F.R.D. at 342 (suggesting that court can balance harm to "efficient administration of justice" if "no assurance of continued protection for confidential business information" can be given).

Rather than entirely discounting these "lesser" competing interests, however, a court should again consider the role the particular judicial records play in the adjudication of the litigants' substantive rights. If the disputed judicial records form the basis for a court's decision on the merits, only exceptional circumstances that implicate the most compelling of personal or property interests should justify closure of the judicial records. Party reliance should not override the presumption, as the litigants cannot reasonably expect a court to perpetually shield from public scrutiny the materials on which it bases its substantive decisions. Even a settlement conditioned upon sealing generally will not rebut the very strong presumption applicable in those cases.

In contrast, if access to particular records would only minimally benefit public monitoring of the principal adjudicative function, the resulting presumption of public access becomes merely predictive.³⁸³ In such cases, a court might justify the sealing of confidential commercial information that does not amount to a trade secret so long as it is the kind of information that courts routinely protect.³⁸⁴ Moreover, if the presumptive right of access is low, it is appropriate for a court to consider the litigants' mutual desire for confidentiality, their actual and reasonable reliance on the sealing provision, and its role in achieving settlement.³⁸⁵

383 See *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

384 See *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994). Courts thus probably still cannot justify sealing judicial records to prevent commercial embarrassment or to protect corporate vanity. See *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998); see also *supra* notes 192-96 and accompanying text.

385 The balancing of competing interests might additionally encompass the intended use of the information by the person seeking access. A court may exercise its supervisory authority over its own records to prevent them from becoming "a vehicle for improper purposes." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). Although the motive of the person seeking access to sealed records should not affect the records' status as "judicial," it should factor into whether competing interests override the presumptive right of public access. See *Amodeo*, 71 F.3d at 1050-51. For example, a court can seal judicial records sought only to fulfill a personal vendetta or to gain commercial, as opposed to litigation, advantage. See *Nixon*, 435 U.S. at 598 (indicating that person improperly used judicial records to gratify private spite, make libelous statements, or harm opponent's competitive standing); *Amodeo*, 71 F.3d at 1051 (suggesting that "how the person seeking access intends to use the information" bears upon the "nature and degree of injury" from its disclosure). Similarly, a court might decide to maintain a seal over stamped confidential discovery that an opposing party filed in bad faith to evade stipulated restrictions on disclosure. See *supra* note 349; see also *In re Policy Management Sys. Corp.*, 1995 WL 541623, at *7 (4th Cir. 1995) (Michael, J., dissenting) (asserting that balancing test should encompass good or bad faith of person filing documents).

D. Bolstering the Presumption

Of course, a court may also find that considerations, in addition to the presumption, require public access to the court's file. As with issuance or modification of a discovery protective order, for instance, the presence of the government as a party to a lawsuit intensifies the need for access to the court's files.³⁸⁶ In such cases, "the public's right to know what the executive branch is about coalesces with the concomitant right of citizenry to appraise the judicial branch."³⁸⁷ Sealing might similarly contravene the public interest if the lawsuit implicates significant public health or safety concerns.³⁸⁸ As with unfiled discovery, however, a court might experience difficulty identifying these or other cases that fall within a broader public interest.³⁸⁹ Finally, the pendency of related litigation strongly militates against sealing judicial records. In such instances, long-term judicial efficiency may benefit if these other courts and litigants are fully privy to the proceedings.³⁹⁰

E. Conclusion Regarding Judicial Records

In sum, a broad definition of judicial records, in conjunction with a presumption of public access whose weight varies with a document's role in the core adjudicative function, can guide a court in deciding whether to seal all or part of its file in a case.³⁹¹ While the public policy favoring settlement probably cannot justify sealing records on which a court bases its substantive decisions, then, that interest can support closure of records only minimally or peripherally relevant to the court's decision-making. As with unfiled discovery, however, the interests of other litigants or the broader public can enhance even a weak presumption and require denial of a joint request to seal.

386 See *supra* notes 344–47 and accompanying text (discussing government status of litigant as factor in modification of stipulated protective order).

387 *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987).

388 See, e.g., *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180–81 (6th Cir. 1983) (finding strong public health interest in suit alleging errors in program testing tar and nicotine levels in cigarettes).

389 See *supra* Part IV.D.2.d (examining public interest as a factor in modifying stipulated protective orders).

390 See, e.g., *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015 (11th Cir. 1992) (vacating seal of record to permit access by litigant in related pending case). For a discussion of the considerations relevant to a court's decision whether to modify a stipulated protective order to permit the sharing of discovery in related, pending litigation, see *supra* Part IV.D.2.a.

391 For a discussion of the difficulties that settling litigants might (and should) experience in convincing a court to seal an entire court file, see *infra* Part VI.B.2.d.

VI. CONFIDENTIAL SETTLEMENTS

Thus far, this Article has focused on the presettlement uses and limits of litigation confidentiality—protective orders designed to facilitate the efficient and expeditious progress of discovery and sealing orders intended to preserve the confidentiality of discovery and other materials filed of record with the court. Confidentiality, however, is also critical to the ultimate settlement of many civil lawsuits. Secrecy undoubtedly facilitates the settlement process, and in some cases, compromise could not be reached without some assurance of its confidentiality.³⁹²

Litigants possess extensive freedom to privately contract for settlement secrecy and may enforce their confidentiality agreement in a separate suit for breach of contract.³⁹³ Thus, many confidential settlements can and do occur without any involvement of the court or any judicial review or approval of their terms or their fairness.³⁹⁴ As discussed previously, however, courts today are increasingly involved in the settlement process, with many actively encouraging, if not strong-arming, civil litigants to compromise their disputes.³⁹⁵ Likewise, many litigants are not content to rely upon contractual confidentiality

392 See Luban, *supra* note 3, at 2656 (recognizing that some settlements will collapse without confidentiality); Miller, *supra* note 52, at 429 (asserting that confidentiality is “not only acceptable, but essential” to settlement); Weinstein, *supra* note 55, at 510–11 (noting that many mass tort cases could not otherwise settle without secrecy agreement). But see Ispahani, *supra* note 93, at 119 (asserting that settlements will occur even without confidentiality because they benefit all parties); Schneider, *supra* note 93, at 111 (predicting that elimination of secret settlements will have no impact upon settlement frequency or amount).

393 See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (noting that even if litigants cannot demonstrate good cause to support confidentiality order, they possess “option of agreeing privately to keep information concerning settlement confidential, and may enforce such an agreement in a separate contract action”); *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 936–37 (9th Cir. 1993) (holding that protective order does not foreclose existence of separate and independent nondisclosure agreement that renders parties directly liable to each other for breach of its terms). But see Garfield, *supra* note 218, at 266 (recommending that courts refuse to enforce contracts of silence “when the public interest in access to the suppressed information outweighs a legitimate interest in enforcement”).

394 Various exceptions to this general rule of judicial indifference to settlement do exist. For instance, a court must approve the settlement of class actions certified under Federal Rule of Civil Procedure 23. See FED. R. CIV. P. 23(e). Similarly, actions “wherein a receiver has been appointed shall not be dismissed except by order of the court.” FED. R. CIV. P. 66.

395 See *supra* Part I.B.1.a (discussing the push toward judicial promotion of settlement).

clauses and additionally seek judicial imprimatur of their compromise, either by filing it for approval with the court or requesting that it be otherwise embodied in a court order containing confidentiality or sealing provisions. Given that public access hinges upon the need to monitor the judicial process and that judicial records are presumptively open to public scrutiny, however, this trend toward increased judicial participation in what has heretofore been a private process arguably bodes for expanded public access to civil settlements.³⁹⁶

This final section discusses some of the public access issues that surround secret settlements. It first explores the litigants' ability to contractually shield their settlement and the factual and documentary evidence underlying it from public scrutiny. It concludes by examining the extent to which courts can or should sanction such confidentiality in pursuit of the strong public policy favoring settlement.

A. Confidentiality Through Private Agreement

Although the extent of judicial participation in settlement may vary, settlements, by definition, require party agreement and ultimately are a matter of private contract. To the extent that confidentiality is a settlement objective, litigants will provide for it in various ways in their agreement.³⁹⁷ For example, settlements often seek to maintain the nondisclosure provisions of stipulated protective orders and might reiterate the postdismissal obligation to return or destroy confidential documents received in discovery.³⁹⁸ Subject to court ap-

396 See *supra* Parts V (judicial records) and III.D (rationales supporting public access); see also Marcus, *Discovery Confidentiality*, *supra* note 52, at 505 n.285 (admitting that increased role of judiciary in promoting settlement "may one day provide a basis for allowing the public to observe judges at work on this effort"); Miller, *supra* note 52, at 485-86, 486 n.290 (refusing to rule out public access in cases involving "significant judicial participation in the [settlement] process").

397 In rarer cases, the litigants might come to terms concerning everything but settlement secrecy. In such instances, the parties might compromise their dispute without a confidentiality agreement, anticipating that one of them would request a confidentiality order from the court. A court, however, is unlikely to issue a secrecy order over one party's objection. See, e.g., *Smith v. MCI Telecommunications Corp.*, Civ. A. No. 87-2110-EEO, 1993 WL 142006, at *3-*4 (D. Kan. Apr. 28, 1993) (rejecting contested request for sealing order as "prior restraint" upon public disclosure of settlement).

398 See, e.g., *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1229 (1st Cir. 1992) (examining stipulated protective order embodied in agreed judgment); *United States v. Kentucky Utils. Co.*, 927 F.2d 252, 253 & n.1 (6th Cir. 1991) (discussing stipulated dismissal that required destruction of unfiled discovery).

Agreements to return or destroy discovery after settlement often draw criticism to the extent that they potentially facilitate destruction of evidence relevant to pending or future lawsuits. Ethical rules default to state law on this issue by prohibiting lawyers

proval, litigants might further condition their compromise on the sealing or continued sealing of particular documents or of the court's entire file in the matter.³⁹⁹ Litigants commonly agree not to disclose the existence of their settlement or its terms, conditions, or amount, and may further resolve not to voluntarily disclose factual information relevant to their underlying dispute.⁴⁰⁰ Finally, to enhance and facilitate enforcement of confidentiality provisions, a settlement contract might authorize the recovery of liquidated damages, attorneys' fees, and costs for breach of settlement.⁴⁰¹

Parties can maximize (but not ensure) the confidentiality of their settlements and minimize (if not eliminate) judicial involvement

from "unlawfully" destroying (or counseling others to destroy) materials "that have potential evidentiary value." See Model Rules of Professional Conduct Rule 3.4(a). In a few states, a party who intentionally destroys evidence can be sued for the tort of "spoliation." See, e.g., *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986); *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984). Otherwise, absent a court order, litigants have no obligation to preserve discovery documents after dismissal and expiration of any right to appeal. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (1st Cir. 1988). This current state of affairs has prompted some to urge guidelines requiring the post-dismissal maintenance of discovery records. See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 1, § 41.36, at 456 (proposing that producing party retain one copy of confidential materials before requesting their destruction); see also *Doggett & Mucchetti*, *supra* note 121, at 664 (suggesting that obligation to retain discovery should parallel guidelines for maintaining court records); *Weinstein*, *supra* note 55, at 519-20 (advocating court review of agreements requiring return of files to defendants). But see *Apr. 20, 1995 Advisory Comm. Minutes*, *supra* note 82, at 9-10; *Oct. 20, 1994 Jud. Conf. Minutes*, *supra* note 117, at 5 (tabling proposal to prohibit agreements to return or destroy unfiled discovery unless producing party retains materials and corresponding discovery requests for five years after discovery concludes); *Marcus, Discovery Confidentiality*, *supra* note 52, at 497 n.236 (characterizing provision requiring return and retention of discovery as "overkill").

399 See, e.g., *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014 (11th Cir. 1992) (noting that defendant "agreed to settle the case for an amount exceeding any of its previous settlement offers in exchange for [plaintiff's] agreement that the record be sealed"); *City of Hartford v. Chase*, 942 F.2d 130, 132 (2d Cir. 1991) (conditioning settlement of case on sealing of court file).

400 See, e.g., *Wendt v. Walden Univ.*, 69 Fair Empl. Prac. Cas. (BNA) 1542, No. CIV. 4-95-467, 1996 WL 84668 (D. Minn. Jan. 16, 1996) (addressing confidential settlements that prohibited former employees from disparaging University or disclosing any aspect of their confidential settlement); *Kalinauskas v. Wong*, 151 F.R.D. 363 (D. Nev. 1993) (assessing sealed confidential settlement that prohibited plaintiff from discussing any aspect of her employment with defendant).

401 For a discussion of the advantages of including a stipulated damages clause in a confidentiality agreement, see *supra* note 218. But see *Garfield*, *supra* note 218, at 292 (suggesting that court could impose "significant damage limitations for breaches of some contracts of silence" or refuse to enforce liquidated damages provisions).

therein simply by filing a stipulation of dismissal with the court and relying exclusively on such contractual assurances of secrecy.⁴⁰² Because a stipulated dismissal does not call for the exercise of any judicial discretion and cannot, unless requested, be judicially conditioned, a court cannot order the litigants to file their settlement agreement (and thereby risk making it a judicial record)⁴⁰³ or to otherwise publicly disclose its terms.⁴⁰⁴

Moreover, although a handful of sunshine laws regard certain secret settlements as violative (at least potentially) of public policy,⁴⁰⁵ litigants generally possess wide latitude to contract for settlement confidentiality. Contractual nondisclosure provisions, however, merely prohibit the parties to the contract from *voluntarily* disseminating information relevant to their settlement. A private confidentiality agreement will not bind nonparties, does not create any evidentiary privilege, and might not justify withholding protected information in the face of a freedom of information request or a court order compel-

402 Federal Rule of Civil Procedure 41(a)(1)(ii) provides that "an action may be dismissed by the plaintiff without order of the court . . . by filing a stipulation of dismissal signed by all parties who have appeared in the action." FED. R. CIV. P. 41(a)(1)(ii); *see also* *Smith v. Phillips*, 881 F.2d 902, 905 (10th Cir. 1989) (noting that Rule 41(a)(1)(ii) anticipates that court will have "no role to play in settlement unless requested by the parties, or unless the settlement is embodied in a court order by agreement of the parties and the court"); *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986) (stating that normally court stands "'indifferent' to the terms the parties have agreed to" and "plays no role whatever" in their settlement).

403 *See infra* Part VI.B.2.c (discussing status of filed settlements as judicial records); *see also* *Resnik*, *supra* note 4, at 1495 (indicating that third party cannot access settlement that is not filed or approved by the court).

404 *See Smith*, 881 F.2d at 904-05 (holding that court lacked post-dismissal authority to order litigants to publicly disclose terms of settlement in "publicized case against public officials"); *Daines v. Harrison*, 838 F. Supp. 1406, 1409 (D. Colo. 1993) (refusing to deprive parties of right to unconditional dismissal by ordering disclosure of unfilled settlement).

405 The Florida sunshine statute, for example, declares that "[a]ny portion of an agreement or contract which has the purpose or effect of concealing" either a "public hazard" or a government settlement "is void, contrary to public policy, and may not be enforced." FLA. STAT. ANN. § 69.081(4) & (8)(a) (West Supp. 1998); *see also* ARK. CODE ANN. § 16-55-122 (Supp. 1995) (voiding settlements that restrict disclosure concerning the "existence or harmfulness of an environmental hazard"); WASH. REV. CODE § 4.24.611 (Supp. 1996) (making private agreement settling or terminating a product liability or hazardous substance claim voidable by the court); *Garfield*, *supra* note 218, at 275, 332 (criticizing inadequacy of existing law regulating confidential settlements that keep important information from reaching the public and characterizing contract precedent concerning enforceability of such agreements as "sparse").

ling its production in other proceedings.⁴⁰⁶ While a court will likely enforce bargained-for secrecy in a suit between the parties to the contract, then, it may not necessarily enforce the litigants' private confidentiality agreement against third parties with a right to access the confidential information.⁴⁰⁷

In addition, litigants who rely exclusively on contractual confidentiality provisions potentially limit their enforcement options. A confidentiality order that embodies the parties' settlement converts a private agreement into a court order that will serve as a "powerful means of maintaining and enforcing secrecy."⁴⁰⁸ An unconditional, stipulated order of dismissal, in contrast, forfeits contempt of court as an additional deterrent to breach.⁴⁰⁹ Moreover, unless an independent basis for federal subject matter jurisdiction exists, litigants will surrender subsequent federal oversight of their agreement if the order of dismissal fails to embody their compromise or otherwise retain jurisdiction to enforce it.⁴¹⁰ In such cases, litigants faced with an actual or

406 Indeed, the settlement agreement risks violating public policy unless it expressly excepts and excuses subsequent court-ordered or legally required disclosures. See *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993) (holding that plaintiff was not subject to contractual penalties in settlement that expressly excepted court-ordered release of information). In addition, even a court order of confidentiality may not stave off later court-ordered disclosures. See *supra* note 330 and *infra* note 441 and accompanying text (discussing the enforcement of confidentiality orders in other courts).

407 As stated by the court in *Mike v. Dymon, Inc.*: "Confidentiality is generally not grounds to withhold information from discovery. Confidentiality does not equate to privilege. . . . That plaintiff may have a contractual legal obligation not to reveal confidential information . . . is not a valid objection to the requested discovery." *Mike v. Dymon, Inc.*, Civ. No. 95-2405-EEO, 1996 WL 606362, at *3 (D. Kan. Oct. 17, 1996); see also *Brazil*, *supra* note 27, at 1026 (cautioning that private confidentiality agreements will not bind nonparties with respect to discovery or trial and might not be enforced by federal courts determined "to make sure that all the evidence that will help the jury ascertain the truth is accessible").

408 *City of Hartford v. Chase*, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring).

409 Unless provided otherwise, a private agreement will not merge with a confidentiality order and generally "may be enforced without affecting the order or interfering with the court's enforcement of that order." *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993). Violation of a confidentiality order may make the parties liable to the court for sanctions, while breach of the agreement makes the parties "directly liable to each other." *Id.* at 936-37.

410 In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court indicated that if a court embodies a "settlement contract in its dismissal order (or, what has the same effect, retain[s] jurisdiction over the settlement contract)," "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Kokkonen v. Guardian Life Ins. Co. of Am.*,

threatened breach of their compromise are left to bring an independent enforcement action, suing for private damages, injunctive relief, or both.⁴¹¹

B. Judicial Oversight of Settlement Secrecy

Thus, a number of motives may drive some litigants to more deeply involve the court in their confidential settlements. Some may wish to facilitate and enhance enforcement of their compromise, particularly if they foresee a dispute concerning its terms or a need for future judicial recourse.⁴¹² Others may hope that a court order will further shield their agreed confidences from the prying eyes of third parties, either by recognition of the confidentiality order in other courts or as an exception to statutorily required disclosures.⁴¹³ In addition to their settlement contract, then, litigants frequently request the court to issue a confidentiality order that either approves and incorporates their agreement or at least references and retains jurisdiction over it.⁴¹⁴

511 U.S. 375, 381–82 (1994). “Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.” *Id.* See generally Cordray, *supra* note 5 (discussing *Kokkonen*).

411 See *Kokkonen*, 511 U.S. at 378 (discussing enforcement of settlement agreement “through award of damages or decree of specific performance”); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788–89 (3d Cir. 1994) (noting that option of enforcing confidential settlement in separate contract action is “more arduous” than resorting to court’s contempt powers); *Smith v. Phillips*, 881 F.2d 902, 905 (10th Cir. 1989) (holding that absent a confidentiality order, unauthorized disclosures must be remedied by individual contract action, rather than contempt of court).

The Circuits split concerning whether a party can move under Federal Rule of Civil Procedure 60(b)(6) to set aside an order of dismissal and reopen a dismissed case for breach of the settlement agreement that induced the dismissal. See *Kokkonen*, 511 U.S. at 378 (noting circuit split and distinguishing enforcement of settlement from “merely reopening the dismissed suit” because of breach of agreement); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (holding that district court’s vacatur of dismissal for breach of settlement agreement did not justify immediate appeal under collateral order doctrine); see also Cordray, *supra* note 5, at 50–61 (favoring reinstatement of suit for breach of settlement).

412 See *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986) (citing this as a reason why litigants may file their settlement and forgo a stipulated dismissal).

413 See *infra* Part VI.B.3.d (examining confidentiality orders that might suppress evidence) and *supra* notes 141 & 347 and accompanying text (discussing confidentiality orders as exception to freedom of information laws).

414 Although Federal Rule of Civil Procedure 41(a)(1)(ii) does not permit a court to *sua sponte* condition the parties’ stipulated dismissal, a court “is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain

The parties' agreement in this regard, however, will not bind the court, and a confidentiality order, if entered, need not be coextensive with that agreement. Instead, the court possesses discretion whether to reserve or later terminate continuing jurisdiction over a confidential settlement or to sanction a secrecy agreement via court order.⁴¹⁵

1. Unfiled Discovery

Many of the considerations that inform the exercise of this discretion have already been discussed. For instance, factors relevant to the decision whether to modify or vacate a stipulated protective order should similarly guide the decision whether to continue nondisclosure requirements governing unfiled designated discovery in an agreed judgment or order of dismissal.⁴¹⁶ No presumption of public access attaches to such materials. And, although there is no longer any need to expedite discovery, the strong systemic interest in settlement, together with the litigants' actual and justifiable reliance upon the postsettlement maintenance of the stipulated protective order, can continue to supply the necessary "good cause."⁴¹⁷

2. Sealing Orders

In contrast, and also as previously discussed, courts should take a more critical view of settlements conditioned upon the sealing of judicial records, to which a presumption of public access attaches.⁴¹⁸ Depending upon the weight of that presumption, the interest in facilitating settlement may well fall short of that necessary to rebut the presumption and justify sealing.

jurisdiction over the settlement contract) if the parties agree." *Kokkonen*, 511 U.S. at 381–82.

415 See *Kokkonen*, 511 U.S. at 382 (placing decision whether to retain jurisdiction within the court's discretion); *Arata v. Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1268–69 (9th Cir. 1996) (holding that court is under no obligation to reserve jurisdiction in accordance with the parties' settlement and has discretion, even if it initially retains jurisdiction, to later terminate it); see also *infra* Part VI.B.3 (offering guidance concerning exercise of judicial discretion).

416 See *supra* Part IV.D.2 (discussing factors relevant to issuance or modification of stipulated protective orders).

417 See *Miller*, *supra* note 52, at 486 (asserting that if "effectiveness of the protective order cannot be relied upon, its capacity to motivate settlement will be compromised").

418 See *supra* Part V (examining the sealing of judicial records).

a. Sealing the Entire Record

For instance, the aim of achieving settlement should not warrant the indiscriminate sealing of the entire record in a case.⁴¹⁹ Because both the status of a document as a judicial record and the strength of the resulting presumption vary with what role that document plays in the adjudicative process, the sealing decision necessarily requires particularized judicial review.⁴²⁰ The litigants, in turn, must “itemize for the court’s approval which documents have been introduced into the public domain.”⁴²¹

Although the litigants’ reliance upon a sealing provision and its importance in achieving settlement may override the low presumption of public access that attaches to documents that bear only marginally upon the determination of their substantive rights, they cannot rebut the stronger presumption that applies to records more central to the merits. Yet, these latter types of judicial records are the ones most likely to motivate litigants to condition their settlement on the sealing of the entire record.⁴²² Since a court should opt for the least restric-

419 See *Hagestad v. Tragesser*, 49 F.3d 1430, 1434–35 (9th Cir. 1995) (reversing district court’s seal of entire record pursuant to parties’ compromise for failure to articulate supporting reasons); *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (describing burden on party seeking to seal entire record as especially heavy); *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) (finding it “immaterial” that sealing of entire record was “key negotiated element” of court-facilitated settlement); *Crothers v. Pilgrim Mortgage Corp.*, No. 95 Civ. 4681 (SAS), 1997 WL 570583, at *6–*7 (S.D.N.Y. Sept. 11, 1997) (holding that interest in settlement did not justify sealing of court’s file without particularized judicial review).

420 To facilitate appellate review of a decision to seal, a trial court should clearly articulate the countervailing considerations that override the presumption of access. See *Hagestad*, 49 F.3d at 1434 (insisting that court base decision to seal upon factually articulated and compelling reasons, not hypothesis and conjecture); *United States v. Amodio*, 44 F.3d 141, 148 (2d Cir. 1995) (directing that any restriction on access to judicial records be supported by specific findings); *Miller*, 16 F.3d at 551 (requiring that court make specific findings, provide an opportunity for third parties to be heard, and articulate countervailing interests to be protected); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1176 (6th Cir. 1983) (requiring that courts articulate findings of fact and conclusions of law before sealing).

421 *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994); see also *Doe v. Methacton Sch. Dist.*, 878 F. Supp. 40, 43 (E.D. Pa. 1995) (recommending that parties should move to seal specific documents rather than court’s docket and entire record).

422 In *Wilson v. American Motors Corp.*, for example, the defendant requested the sealing of the entire record pursuant to a court-facilitated settlement after the jury had rendered adverse findings via special interrogatories. *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1569 (11th Cir. 1985). The trial court granted the litigants’ stipulated request to seal the record, but the Eleventh Circuit reversed. While the appellate court acknowledged the public interest in encouraging settlement, it re-

tive alternative to sealing⁴²³ and since litigants must demonstrate a particularized need for continued confidentiality,⁴²⁴ only exceptional circumstances should warrant such wholesale closure.

b. Sealing Court-Sponsored Bargaining

Qualitatively different access issues arise when the litigants seek to shield from public view their judicially sponsored settlement negotiations or the final product of that bargaining—the settlement agreement itself. In cases of public interest, for example, the media or other interested third parties may request access to settlement conferences with the court or to court-annexed alternative dispute resolution techniques like summary jury trials.⁴²⁵ Assuming that the common law presumption of public access attaches to judicial proceedings as well as judicial records,⁴²⁶ one could argue that the need to monitor our judiciary at work requires that the public be given ac-

garded the defendant's "desire to prevent the use of [the] trial record in other proceedings," *id.* at 1571, and the defendant's "attempted suppression of a jury verdict" in order to evade collateral estoppel, as "contrary to the most basic principle of American jurisprudence" and thus an inadequate justification for sealing the record, *id.* at 1572 n.4.

423 Before sealing, a court should consider available alternatives, such as redaction of the confidential information, and fashion the least restrictive option. *See Siedle v. Putnam Ins., Inc.*, 147 F.3d 7, 12 n.6 (1st Cir. 1998) (recommending that trial court institute sealing procedure whereby only privileged material would be redacted and sealed); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1032 (7th Cir. 1996) (instructing district court to redact confidential salary information from brief and to unseal remainder); *In re Policy Management Sys. Corp.*, Civ. Nos. 94-2254, 94-2341, 1995 WL 541623, at *7, n. 4 (4th Cir. Sept. 13, 1995) (Michael, J., dissenting) (approving district court's redaction of trade secret and propriety information before it unsealed motion to dismiss); *Methacton Sch. Dist.*, 878 F. Supp. at 42 (stating that court failed to take "the least restrictive course" when it sealed docket and entire record).

424 *See supra* notes 297-303 and accompanying text (discussing modification burden).

425 *See, e.g., In re Cincinnati Enquirer*, 94 F.3d 198 (6th Cir. 1996) (involving a newspaper's seeking a writ of mandamus against a district court in order to permit public access to summary jury trial in class action arising from prison riots); *B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995) (public guardian challenges court's decision to hold nonpublic in-chambers conferences to discuss implementation of consent decree in suit brought by Illinois Department of Children and Family Services); *United States v. Town of Moreau*, 979 F. Supp. 129 (N.D.N.Y. 1997) (newspaper and reporter request access to settlement conferences and position papers in CERCLA lawsuit involving town water supply); *Resolution Trust Corp. v. Hess*, 859 F. Supp. 1411 (D. Utah 1994) (congressional committee seeks financial information submitted by defendants to RTC as part of settlement negotiations).

426 *See Town of Moreau*, 979 F. Supp. at 134 (noting that "it is not clear that the common law right of access is applicable to judicial proceedings although some

cess to the "cluster of dispute processes" over which courts today preside.⁴²⁷

Settlement techniques, like in-chambers settlement conferences and summary jury trials, however, do not constitute a public component of a civil trial. Such settlement proceedings enjoy no historical right of access and, in fact, are traditionally closed to the public.⁴²⁸

More important, although courts today actively encourage and, to varying degrees, facilitate settlements, settlement proceedings present no issue for adjudication by the courts.⁴²⁹ As stated by one jurist, a "court can exercise all of its Article III powers to determine a case or controversy without ever convening a settlement conference"⁴³⁰ or mandating the litigants to participate in a summary jury trial. Because court-facilitated settlement proceedings play a negligible role in the adjudication of the litigants' substantive rights, then, any presumptive right of access should carry little, if any, weight.⁴³¹

A closed bargaining forum fosters the full ventilation of views and the give-and-take necessary to achieve compromise.⁴³² Negotiation itself may depend upon court assurances of confidentiality, and public access to settlement conferences and summary jury trials could thus

courts have suggested that it is"); see also *supra* Part III.B (discussing common law right of public access).

427 Galanter & Cahill, *supra* note 11, at 1390 (arguing that "courts do more than adjudicate" by presiding "over a cluster of dispute processes").

428 See *In re Cincinnati Enquirer*, 94 F.3d at 199 (equating summary jury trial to settlement proceedings which are "historically closed procedures"); *Town of Moreau*, 979 F. Supp. at 134 (noting that "[s]ettlement conferences are not now and have never been part of the public process of litigation").

429 See *In re Cincinnati Enquirer*, 94 F.3d at 199 (holding that summary jury trial "does not present any matter for adjudication by the court, but functions to facilitate settlement"); *McDonald*, 49 F.3d at 300 (noting that court will not be "adjudicating anyone's rights or enforcing any provision of the consent decree" in settlement conference).

430 *Town of Moreau*, 979 F. Supp. at 134-35.

431 As stated by the district court in *United States v. Town of Moreau*:

[I]t cannot be said that discussions of compromise among parties to a lawsuit, even with a judge in attendance, play a large role in the exercise of Article III judicial power. The presumption of public access in the case of settlement conferences is therefore very low indeed, if not nonexistent.

Town of Moreau, 979 F. Supp. at 135.

432 See *McDonald*, 49 F.3d at 301; *Town of Moreau*, 979 F. Supp. at 135. Confidential settlement negotiations are arguably even more crucial in cases of significant public interest where litigants may be reluctant to publicly state what may be no more than a bargaining position. See *Town of Moreau*, 979 F. Supp. at 135 (doubting whether public settlement conference in case of significant concern "would ever permit the type of give and take that would lead to an agreed resolution").

undermine their core purpose of promoting settlement.⁴³³ The significant governmental interest in the judicial promotion of settlement, then, likely outweighs the negligible presumption of public access that may apply to court-sponsored settlement techniques, and can supply the good cause necessary to judicially seal such proceedings.⁴³⁴

c. Sealing Settlements

A confidentiality order that seals court-sponsored settlement techniques merely permits the litigants to negotiate in private. The necessary balancing of private and public interests, however, arguably shifts when the parties reach a final accord and request court assistance to ensure its confidentiality. For instance, if the settling parties file their settlement with the court, they may lose control over its continued secrecy.

Litigants presumably do not file their agreement unless they want the court to take some action concerning it—either by issuing a confidentiality order incorporating its terms or, at the very least, a dismissal order retaining jurisdiction to enforce the accord. Thus, filed settlements are relevant, at least peripherally, to the decision-making role of the courts and, therefore, probably do constitute judicial records that are subject to a presumptive right of public access.⁴³⁵

433 See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904 (6th Cir. 1988) (stating that “public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement”); *Town of Moreau*, 979 F. Supp. at 136 (warning that public settlement conference “would be the death knell of settlement negotiations” in cases of vital public interest); *Resolution Trust Corp. v. Hess*, 859 F. Supp. 1411, 1412 (D. Utah 1994) (noting that access to settlement negotiations might “undermine the amicable resolution of disputes”).

434 See *McDonald*, 49 F.3d at 301, 303 (Easterbrook, J., concurring) (asserting that “public has no right to follow the negotiators into the negotiation room,” even when “judge himself plays the role of mediator”); *Town of Moreau*, 979 F. Supp. at 133–36 (indicating that good cause supported closed settlement conferences upon which further negotiations depended); *Resolution Trust Corp.*, 859 F. Supp. at 1413 (justifying continued maintenance of confidentiality order with need to promote “judicially supervised settlement of litigation”); see also Resnik, *supra* note 4, at 1494 (finding no express public right of access to court-sponsored ADR).

435 In the Third Circuit, the mere filing of a settlement with the court automatically renders it a judicial record subject to a strong presumption of public access. See *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344–45 (3d Cir. 1986); cf. *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 n.4, 849 (5th Cir. 1993) (finding that settlement agreement becomes a judicial record once filed and submitted to court for approval, but refusing to assign any particular weight to resulting presumption).

Under the functional analysis suggested in this Article, however, the resulting presumption of public access is likely weak given that even filed confidentiality agreements generally present no substantive issue for adjudication by the court.⁴³⁶ While filed settlements will be presumed accessible, then, countervailing factors, such as party reliance upon the sealing order and its importance in achieving settlement, may rebut that presumption.⁴³⁷ Ultimately, the decision whether to seal the agreement will depend upon a balancing of the private and public interests implicated by the settlement.⁴³⁸

436 The presumption of public access would be much stronger in cases where the litigants subsequently dispute the terms of their settlement and file it for judicial interpretation or enforcement. In such cases, the court does adjudicate the litigants' substantive contractual rights under the settlement. See *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 345 (holding that litigants lose the confidentiality ordinarily accorded settlements when they "utilize the judicial process to interpret the settlement and to enforce it"). A similarly strong presumption would exist in cases where a settlement agreement plays "an integral role" in a court's summary judgment or other important pretrial rulings. See, e.g., *Ex parte Knight Ridder, Inc.*, 982 F. Supp. 1080, 1082-83 (D.S.C. 1997).

437 A court might be more willing to seal a settlement agreement (or less willing to subsequently unseal it) if its own assurances of confidentiality induced the parties to file the settlement in the first place. See *Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 347-48 (Garth, J., dissenting) (arguing for greater burden on party seeking to unseal settlement where sealing order induced parties to file settlement and parties acted in reliance on continued secrecy); *Palmieri v. New York*, 779 F.2d 861, 864-65 (2d Cir. 1985) (noting that magistrate's assurances of confidentiality induced parties to negotiate and later file their settlement).

438 A court, for instance, may appropriately refuse to seal a settlement agreement with the government or an agreement that implicates public health or safety or other matters of legitimate public concern. See, e.g., *Town of Moreau*, 979 F. Supp. at 136-37 (noting that "entirely different question" would be presented if litigants had requested court to seal final consent decree and related settlement documents); *Arkwright Mut. Ins. Co. v. Garrett & West, Inc.*, 782 F. Supp. 376, 381 (N.D. Ill. 1991) (refusing to seal settlement because case involved disruption of phone service to thousands of citizens and was thus a matter of significant public interest); *Society of Prof'l Journalists v. Briggs*, 675 F. Supp. 1308, 1309-11 (D. Utah 1987) (holding that settlement agreement between ex-county assessor and state was a "public document" subject to state freedom of information laws and a constitutional right of access). But see *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981) (notwithstanding "historical importance" of bank failure, tremendous savings of time and legal expenses justified sealing settlement).

For a more extensive discussion of the various private and public interests that a court can consider in deciding whether to seal a filed settlement, see *supra* Part IV.D.2 (discussing factors relevant to issuance or modification of stipulated protective orders) and *infra* Part VI.B.3 (exploring judicial discretion and confidentiality orders).

3. Judicial Discretion and Confidentiality Orders

Settling parties generally can skirt any presumption of public access to their agreement simply by refusing to file it with the court.⁴³⁹ They cannot, however, altogether avoid judicial review of their confidentiality agreements and should not expect courts to blindly endorse or enforce agreed confidentiality orders concerning their settlements. Instead, such orders necessarily call for the exercise of judicial discretion, not only by the court whose docket will be lightened if the case is settled,⁴⁴⁰ but also by other courts in similar lawsuits who are faced with requests to discover information protected by a confidentiality agreement or order.⁴⁴¹

439 If a document is never filed with the court or, after filing, is returned to the parties' possession, it will not constitute a judicial record subject to further court control. See *Littlejohn v. BIC Corp.*, 851 F.2d 673, 681-83 (3d Cir. 1988) (holding that district court lacks authority to compel return of trial exhibits for inspection and copying by third parties after such exhibits have been returned to the parties or destroyed by the clerk); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571-72 (11th Cir. 1985) (noting that while only a compelling government interest can justify sealing a trial record, trial exhibits need not remain in court custody). But see *Littlejohn*, 851 F.2d at 688 (Scirica, J., dissenting) (arguing that trial exhibits returned to litigants after trial or settlement should remain public records as long as they are available from any source). Thus, if a settlement agreement is not filed with the court, it will not constitute a judicial record, even if the court retains jurisdiction to enforce it or reviews the agreement before issuing a confidentiality order. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994). But see TEX. R. CIV. P. 76a(2)(b) (designating certain settlement agreements "not filed of record" as "court records" that are presumptively open to the general public); Luban, *supra* note 3, at 2650 & n.140 (arguing that litigants should not be permitted to invoke public authority, but avoid public scrutiny, simply by failing to file their agreement).

440 This court exercises discretion initially with respect to the entry and terms of a confidentiality order, and later with respect to its potential modification or vacatur. Some commentators argue that this judicial discretion should be statutorily circumscribed given a trial court's self-interest in clearing its own calendar. See *supra* notes 114-15 and accompanying text.

441 Recently, in *Baker v. General Motors Corp.*, the United States Supreme Court addressed whether a court in one state must give Full Faith and Credit to the confidentiality orders and injunctions entered by a court in another state. See *Baker v. General Motors Corp.*, 118 S. Ct. 657 (1998). In that case, a Michigan court entered a stipulated injunction that barred a former employee of General Motors ("GM") from testifying against GM in other product liability cases. Plaintiffs in another product liability action against GM in Missouri subpoenaed the ex-employee's testimony, which GM argued was barred by the Michigan injunction. See *id.* at 660-63. While noting that the settlement agreement and injunction could prevent the settling employee from volunteering his testimony, the Supreme Court held that they could not bind persons not parties to the Michigan proceeding nor dictate the admissibility of the testimony to another court. See *id.* at 665-66. Thus, the Missouri court could

a. "Good Cause"

No consensus of opinion exists concerning the showing necessary to justify a confidentiality order concerning the terms of a private settlement. Unfiled settlement agreements, however, are similar to unfiled discovery; both are traditionally private components of a civil trial, implicate the privacy interests of litigants, and carry a potential for abuse if disclosed.⁴⁴² To that extent, one can rightly analogize to protective orders governing discovery and require that the litigants similarly demonstrate "good cause" to justify entry of a confidentiality order governing their settlement.⁴⁴³ In deciding whether to initially enter a confidentiality order or to later modify or vacate it, therefore, a court can consider many of the factors associated with entry or modification of stipulated protective orders.⁴⁴⁴

b. Public Interest and Settlements with the Government

As with discovery orders, a legitimate public interest in a lawsuit may defeat the litigants' mutual desire to consummate their settlement with a confidentiality order.⁴⁴⁵ In the settlement context, the public has a particular interest in overseeing the receipt or expenditure of public funds. A confidentiality order that binds the government might impede such monitoring under applicable freedom of information laws.⁴⁴⁶ A court should thus consider a settlement's po-

compel the employee to testify without violating the Full Faith and Credit Clause. *See id.* at 660; *see also infra* Part VI.B.3.d (discussing settlements that suppress evidence).

442 *See* *Grove Fresh Distrib., Inc. v. John Labatt, Ltd.*, 888 F. Supp. 1427, 1440-41 (N.D. Ill. 1995) (comparing sealing order governing filed settlement to protective order concerning discovery); *see also supra* Part IV.A (discussing *Seattle Times Co. v. Rhinehart*).

443 In *Pansy*, the Third Circuit adopted such a standard, stating:

Protective orders and orders of confidentiality are functionally similar, and require similar balancing between public and private concerns. We therefore . . . conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order.

Pansy, 23 F.3d. at 786.

444 *See supra* Part IV.D.2 (discussing factors).

445 *See City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) (recognizing court's larger role reviewing resolutions of suits affecting the public interest); *see also supra* Part IV.D.2.d (examining public interest considerations).

446 For a discussion of the intersection of confidentiality orders and freedom of information laws, *see supra* note 141 and accompanying text.

Although a confidentiality order might insulate a settlement from statutorily-required disclosure, vacatur of such an order will not guarantee public access to an agreement that has never been filed with the court. Instead, it

tential accessibility under such laws before entering or drafting any gag order concerning a compromise with a public entity or official.⁴⁴⁷

c. Contents of Settlement

In contrast, disclosing the specific terms, amounts, or conditions of a settlement involving an essentially private dispute between purely private litigants generally will not advance any legitimate public interest and may invade the privacy rights of the parties. While such information might strategically assist other present or future litigants in assessing the settlement value of their cases, it will not materially advance the adjudication of the underlying merits of these other controversies.⁴⁴⁸ At the same time, many defendants pay a premium to secure the confidentiality of their compromise and would not settle at all if its amount or conditions could be readily broadcast to the media or other existing or potential claimants.⁴⁴⁹ Unlike the historical facts giving rise to the settlement, settlement facts lay peculiarly within

merely frees the public to seek disclosure via other legal avenues, including freedom of information-type laws. See *Pansy*, 23 F.3d at 784 (recognizing that newspaper was free to seek access through other legal channels without interference of court order); *Daines v. Harrison*, 838 F. Supp. 1406, 1409 (D. Colo. 1993) (indicating that newspapers must seek disclosure of unfiled settlement under Colorado Open Records Act).

⁴⁴⁷ See *Pansy*, 23 F.3d at 791–92 (asserting that even particularized need for confidentiality in reaching settlement will not “outweigh important values manifested by freedom of information laws”); *Mullins v. City of Griffin*, 886 F. Supp. 21, 22–23 (N.D. Ga. 1995) (vacating confidentiality order that prohibited discussion of settlement in sexual harassment suit against city, city manager, and chief of police); *Daines*, 838 F. Supp. at 1408–09 (stating that neither the desire to hide bad behavior nor the strong interest in promoting settlement will outweigh the “public’s interest in seeing that public funds are utilized properly”).

A court may be able to accommodate the various competing interests either by conditioning a confidentiality order to become inoperative if settlement information is later determined to be accessible under freedom of information laws or by limiting the scope of such an order to exclude legally-required disclosures. *Pansy*, 23 F.3d at 791.

⁴⁴⁸ See *In re New York County Data Entry Worker Prod. Liab. Litig.*, 616 N.Y.S.2d 424, 426 (N.Y. Sup. Ct. 1994) (holding that defendants’ need to obtain settlement agreements was “nothing more than trial strategy” and did not arise “out of materiality or necessity but, rather, desirability”).

Although a confidentiality agreement may shield the contents of a settlement, it might not preclude disclosure of the existence of the compromise itself. See *id.* at 427 (asserting that witness’ credibility can be tainted by “the mere fact that there was a settlement” between plaintiffs and settling co-defendants).

⁴⁴⁹ See *id.* at 428 (noting that “[m]any defendants would almost certainly proceed to trial rather than to broadcast to all potential plaintiffs how much they might be willing to pay”).

party control and would not exist but for the litigation in which they were generated.⁴⁵⁰ Absent some unusual and compelling need for disclosure, then, the strong public policy favoring finality, repose, and settlement can justify protecting the contents of many confidential settlements.⁴⁵¹

d. Suppression of Evidence

In addition to agreeing not to disclose the terms of their settlements, litigants sometimes further consent not to discuss the factual or legal merits of their settled dispute. In determining whether good cause justifies entry of a confidentiality or protective order, however, courts appropriately distinguish between the facts concerning the settlement itself and evidentiary information relevant to the underlying merits.⁴⁵²

450 In this respect, settlement facts would seem to merit greater protection than even the raw fruits of discovery, which, while generated by the litigation process, pre-date and exist independent of that process. See *supra* Part IV (discussing public access to unfiled discovery).

451 Just as the court in the settled case might find good cause to enter a confidentiality order concerning settlement terms, so might a court in a collateral lawsuit determine that good cause supports entry of a protective order that prevents discovery of the confidential contents by third parties. See *Butta-Brinkman v. FCA Int'l, Ltd.*, 164 F.R.D. 475, 476-77 (N.D. Ill. 1995) (denying motion to compel production of confidential settlement agreement in other sexual harassment suits against defendants unless plaintiff could not otherwise obtain information); *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993) (requiring a collateral litigant to "show a compelling need" to justify disclosure of specific terms of settlement). Even if such discovery is warranted, a collateral court can protect the continued confidentiality of settlement terms by conditioning discovery upon a confidentiality agreement or by issuing a protective order that prohibits further disclosure. See *LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 400-01 (5th Cir. 1995) (noting a district court's order to condition Hartford's discovery of settlement amount and terms upon its confidentiality agreement); *Wendt v. Walden Univ., Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 1542, No. Civ. 4-95-467, 1996 WL 84668, at *3 (D. Minn. Jan. 16, 1996) (entering protective order that prohibited deposition attendees from divulging revealed confidences).

452 See *Wendt*, 1996 WL 84668, at *2 (finding requests for contents of settlement agreements "emphatically different" in scope from effort to discover underlying facts); *Kalinauskas*, 151 F.R.D. at 367 (distinguishing amount and conditions of settlement from factual information surrounding case); see also *Menkel-Meadow*, *supra* note 32, at 2685 (distinguishing "settlement facts" from adjudicative facts); *Weinstein*, *supra* note 55, at 517 (finding "much less public interest" in settlement terms and amounts than in evidence relevant to the merits); *Yeazell*, *supra* note 6, at 650 (comparing distinction to work product immunity that only prevents disclosure of information generated by litigation and that does not bar disclosure of underlying historical facts).

A confidential settlement should not significantly impede persons not privy to that agreement from collecting testimony or evidence that is relevant to a sufficiently related existing lawsuit. Notwithstanding the strong commitment to party autonomy and private settlement, secrecy agreements that purport to derogate the discovery rights of third parties violate a countervailing public policy.⁴⁵³ "While parties have the freedom to contract, courts must carefully police the circumstances under which legitimate areas of public concern are concealed."⁴⁵⁴

Thus, while the parties might privately agree not to voluntarily disclose factual information relating to the underlying merits of their controversy, a court should hesitate to "condone the practice of 'buy[ing] the silence of a witness with a settlement agreement.'"⁴⁵⁵ Although a confidentiality order concerning a dispute's underlying merits might be a linchpin to its ultimate resolution, such an order should not prevent discovery by other bona fide litigants with a legitimate need to obtain the historical facts underlying the settlement.⁴⁵⁶

453 In these cases, "the parties' contractual confidentiality provision . . . impacts on the public interest, namely the ability of a non-party to the contract to pursue discovery in support of its case" *Wendt*, 1996 WL 84668, at *2. See also *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 240 (S.D.N.Y. 1997) (noting that parties to consent decree may not "seal existing evidence that would ordinarily be accessible to other litigants"); *In re Subpoena Duces Tecum Served on Bell Communications Research, Inc.*, No. MA-85, 1997 WL 10919, at *3 (S.D.N.Y. Jan. 13, 1997), *mod. by* No. MA-85, 1997 WL 16747 at *1 (S.D.N.Y. Jan. 17, 1997) (stating that confidentiality agreements cannot impede "the truth-seeking function of discovery in federal litigation").

454 *Wendt*, 1996 WL 84668, at *2. See also *Kalinauskas*, 151 F.R.D. at 365. In both *Wendt* and *Kalinauskas*, plaintiffs in sexual harassment and discrimination cases sought to depose former employees who had confidentially settled similar sexual discrimination claims against the defendant employers. The *Kalinauskas* settlement expressly prohibited the former employee from discussing any aspect of her employment with the defendant, other than the dates of her employment and her job title. See *Kalinauskas*, 151 F.R.D. at 365. The defendants in both cases moved to quash the depositions, arguing that the requested discovery would compel the former employees to breach their confidentiality agreement, which was a critical component of their settlements. The courts in both cases permitted the plaintiffs to depose the former employees concerning their employment with defendants, knowledge of sexual harassment, and other "factual information" surrounding their settled cases. See *id.* at 367; see also *Wendt*, 1996 WL 84668, at *2.

455 *Kalinauskas*, 151 F.R.D. at 365; see also *Baker v. General Motors*, 118 S. Ct. 657, 667 (1998) (noting that stipulated injunction could prevent party to settlement from volunteering his testimony); *Wendt*, 1996 WL 84668, at *2 (distinguishing case before court from one that involves "disputes between the parties to the contracts").

456 See *Kalinauskas*, 151 F.R.D. at 365-67 (refusing to enter protective order that would prevent deposition of party to confidential settlement); *Grundberg v. Upjohn*

Just as a court might modify a protective order to permit discovery sharing in sufficiently related litigation, so might a court decline to enter any order that would suppress relevant evidence.⁴⁵⁷

C. Conclusion Regarding Confidential Settlements

Thus, a court possesses little authority to open a private settlement that the litigants choose to effect through an unconditional, stipulated dismissal. Even court-sponsored or filed settlements carry little to no presumption of public access. A court can and should, however, exert significant discretion when asked to convert a confidentiality agreement into a court order.

In exercising this discretion, courts should resist the urge to leave the litigants entirely to their own contractual devices and instead take advantage of the opportunity presented to reconcile the legitimate private and public interests implicated by a confidential settlement. A confidentiality order will undoubtedly facilitate the settlement of many cases—a significant objective that serves public as well as private interests. At the same time, some settlements do radiate beyond the immediate lawsuit and may affect persons and interests not necessarily represented by the settling parties. To promote settlement, then, a court should give the litigants significant autonomy in crafting a confidentiality order concerning matters of essentially private concern—unfiled discovery or the terms and conditions of their settlement. Even the interest in promoting settlement, however, may not justify the indiscriminate sealing of judicial records or the suppression of evidence relevant to other proceedings.

Co., 140 F.R.D. 459, 473 (D. Utah 1991) (vacating confidentiality order to avoid interfering with discovery in other pending cases); *cf.* *Flynn v. Portland Gen. Elec. Corp.*, Civ. No. 4-88-0681, 1989 WL 112802, at *2 (D. Or. Sept. 28, 1989) (granting protective order concerning matters within scope of confidential settlement in case with “sufficiently distinguishable” facts).

457 As previously discussed, a stipulated protective order merely confines confidential discovery to the case in which it is generated and does not prevent independent discovery to obtain the equivalent information in collateral proceedings. *See supra* note 330 and accompanying text. In contrast, a confidentiality order that enjoins settling parties from discussing the underlying facts or merits of their controversy may impede even this right to independent discovery. The discovery sharing rationale for modifying a stipulated protective order thus affords even greater support for a decision either to vacate a confidentiality order or to deny its enforcement in another lawsuit. *See supra* Part IV.D.2.c (discussing discovery sharing as a rationale for modifying a stipulated protective order).

CONCLUSION

Any resolution of the numerous issues of public access discussed in this Article necessarily hinges upon what side one takes in the perhaps irresolvable broader debate over the appropriate role of the civil justice system, the traditional primacy of party autonomy, and the institutional value of settlement. One must acknowledge, however, that we are moving away from a completely party-centered view of litigation where the litigants can, by mutual consent, automatically dictate a shield of silence over their dispute and its settlement. Indeed, there are some cases in which nonparties (whether other litigants, third parties, or the general public) legitimately possess a stake in the dispute, the information generated in its wake, and its ultimate resolution. At the same time, however, fair and efficient dispute resolution remains a primary objective of our civil courts, which confidentiality can, in many cases and at certain stages, promote.

This Article has suggested a functional construct that helps identify when the interest in public access may appropriately override our strong preference for settlement and the litigants' mutual desire for confidentiality. That approach assesses stipulated confidentiality in light of the underlying objective of public access—the monitoring of the courts' primary dispute-resolving, adjudicative function. That touchstone guides analysis of the diverse issues that surround stipulated protective orders, the sealing of judicial records, and confidential settlements. It can also facilitate discussion of other possible uses of agreed secrecy to promote settlement.⁴⁵⁸

For the time being, however, litigation confidentiality best remains in the hands of a court's sound discretion. Guidelines can influence the exercise of that discretion. But the infinite array of public and private interests potentially affected by settlements requires that a court be given broad authority to perform the necessary balancing.

458 For example, a court's orders, decrees, judgments, and opinions that resolve the factual and legal merits of a case are the "quintessential" product of the adjudicative function. See *EEOC v. National Children's Ctr.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) ("A court's decrees, its judgments, its orders, are the quintessential business of the public's institutions."). Because they carry an exceptionally strong presumption of public access, then, courts should carefully scrutinize settlements conditioned upon the sealing of consent decrees, *see id.* at 1410 (holding that trial court erred by sealing the consent decree); *B.H. v. McDonald*, 49 F.3d 294, 300 (7th Cir. 1995) (distinguishing consent decree from private settlements), or the stipulated vacatur of civil judgments. See *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (holding that only "exceptional circumstances" can justify vacatur of "civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought").