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I. Introduction

In a 1913 Harper's Weekly article entitled "What Publicity Can Do," the late Supreme Court Justice Louis D. Brandeis, addressing public trust, transparency, and "the wickedness of people shielding wrongdoers," famously wrote:

> ***Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.*** [1]

Fast forward to 2020 and our modern-day civil justice system. Confidentiality in court proceedings—including discovery, trial, and settlement—is as pervasive as ever. How many times, in representing a client against a corporate or governmental entity, have you heard: "We'll produce those documents if you'll agree to a 'standard' confidentiality order"? Or spent years in litigation, finally reaching a settlement, only to have opposing counsel raise a last-minute request that the settlement (and all details of the case) be treated as confidential? The instances are likely too numerous to count.

Yet openness in court proceedings serves as a bedrock of our judicial system's "playing-field-leveling" function. If what occurs in litigation (or the existence of it altogether) is closed off from public view, the most vulnerable and voiceless in our society suffer. As famed jurist Jeremy Bentham once said, "Where there is no publicity there is no justice. Publicity is the very soul of justice." Secrecy should not be the status quo.

II. What's the Harm?

This is not a new problem, and this article is hardly the first to address it. At this Association's 2016 convention, Arthur Bryant, then Chairman of the non-profit, Public Justice, gave a presentation entitled "Court Secrecy Kills: Time to Stop." The title was a reference to a dangerous defect in Remington's Model 700 rifles—firing when no one pulled the trigger—and the ensuing secret settlements with injury victims that allowed these deadly products to remain on the market by keeping their dangers under wraps. Bryant's earlier article on the societal impact of these secret settlements—and secrecy in litigation generally—aptly summarized the dilemma that trial lawyers and our courts still face today:

Many plaintiffs and their lawyers go along [with confidentiality] because fighting takes time and money. Defendants will say, "You can have the information now if you agree to keep it secret or you can spend a year or two trying to get it."

BEST DISINFECTANT:

NFIDENTIALITY IN CIVIL LITIGATION"

by Liam D. Duffy , Esq. • Yarborough Applegate, LLC

But as that same article recognized, confidentiality comes at a steep price to our clients, our court system, and our society:

The problem is that unjustified secrecy undermines our system of justice, threatens public health and safety, and subverts the democratic principles on which our country is based. It makes learning and proving the truth harder, prevents injured people from holding wrongdoers accountable, and makes it more costly to do so. Even when they win, they get less compensation than they should. They have to pay the costs of (again) discovering the key documents . . .

[T]he judicial system and the taxpayers pay an enormous cost. Judges must decide the same discovery disputes, over and over again. Cases that would have been easily resolved, if the truth was known, take years. And the system is perverted. When documents are sealed, instead of ensuring that the truth comes out and justice is done, the judicial system can be used to ensure that the truth remains hidden and justice is denied. Meanwhile, people are injured and die. [2]

The Remington secret settlements certainly aren't alone in causing harm to society. Think of the Ford Explorer rollover cases or the clergy sex abuse scandals, to name a few. But most lawyers don't handle these types of high-profile, public-impact cases on a regular basis. So, understandably, you may be wondering how pushing back against confidentiality—while a noble idea—can be reconciled with your duty to diligently and expediently prosecute each of your clients' cases to resolution. Especially when championing this cause may carry the added burden of filing motions rather than acquiescing.

The issue isn't merely idealistic or academic. When lawyers consent to confidentiality and courts permit it without good cause, clients ultimately suffer. For example, let's say you handle premises liability cases and a client comes to you after a slip-and-fall injury at a national retail store. You file a lawsuit and propound discovery requesting "all safety procedures, guidelines, and/or policies utilized by Defendant for maintaining safe walking surfaces within Defendant's store." Opposing counsel says, sure, they'll produce those documents, but only if you sign a protective order (perhaps the so-called "standard" federal court order), prohibiting their use outside this litigation. You want to move your client's case along, so you agree in exchange for prompt production of the documents. What's the harm?

For one, you're likely not getting the full truth about the danger that caused your client's injury (and therefore not maximizing her case). Your investigation is hampered, because you can't speak to or share information with other attorneys who have represented clients injured by the same negligently caused condition. They're bound to silence by an order just like the one you signed. The game-changing value of other similar incidents ("OSIs") disappears, along with the possibility of punitive damages for the defendant's prolonged course of conduct that may have harmed many more than just your client. Full justice is never realized, and the cycle continues. Not to mention, if secrecy is part of the settlement, your client may have to remain silent about certain details of the case for the rest of her life.

III. Making the Case Against Confidentiality

Unfortunately, it appears those who desire and benefit from court-imposed secrecy are largely

winning this battle, which in many cases goes uncontested. However, not all hope is lost. In my estimation, a key to turning the tide against the prevalence of confidentiality is that we, as trial lawyers, must properly frame and present the issue for judicial resolution in each case where secrecy is unwarranted (which are many). To that end, what follows is the legal framework our firm has successfully employed in several recent cases, and which has been adopted in judicial orders [3] granting our motions to compel and finding confidentiality improper.

(a) There is a strong presumption against secrecy in civil litigation.

An important first step in the right direction is reminding yourself (and perhaps the court) that there is nothing "standard" whatsoever about confidentiality. In fact, "judicial proceedings and court records are ***presumptively open*** to the public under the common law, the First Amendment of the federal constitution, and the state constitution." [4]

The principles of openness apply equally to pre-trial discovery. There is a presumptive right of public access to discovery materials that may ***only*** be overcome by a particularized factual demonstration of harm. [5] As one court has stated, this "good cause" requirement of Rule 26(c) means that, "[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." [6] Blanket protective orders are disfavored, [7] and the court's discretion "is circumscribed by a long-established legal tradition which values public access to court proceedings." [8]

Importantly, openness fosters judicial economy by not requiring parties to start every new piece of litigation regarding a particular danger to the public from scratch. As Judge Joseph Anderson has noted, court-imposed secrecy "means that in any future litigation involving the same issue . . . the litigants will bear the cost of duplicative discovery. . . . When the case is over, the documents go back [to the defendant] and the 'needle in the haystack' process is repeated . . . The burden on the judiciary is repeated as well." [9]

(b) The required threshold showing of "good cause" is a high bar.

Don't lose sight of who bears the burden in requesting court-imposed confidentiality. If ***and only*** if the defendant demonstrates a particularized harm that will result from the disclosure of documents does the burden then shift back onto the plaintiff to show that the information sought is "relevant and necessary" to the case. [10] The trial judge is then required to weigh the factors of whether the information sought is 'relevant and necessary' evidence against any particularized harm the defendant may suffer.

Broad, vague, or conclusory allegations of harm, unsubstantiated by specific examples or articulated reasoning ***do not*** satisfy the good cause requirement. "The harm must be significant, not a mere trifle." [11] When allegedly confidential commercial information is involved, this standard requires a showing that disclosure will result in a "***clearly defined and very serious injury***" to a company's business, [12] or, stated differently, will cause "great competitive disadvantage" and "irreparable harm." [13]

South Carolina courts haven't explicitly articulated what constitutes "good cause" to satisfy the

threshold showing incumbent upon a defendant seeking confidentiality in discovery. However, several factors considered by other courts include: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate or improper purpose; (3) whether disclosure will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. [14]

In a recent dram shop case against a national restaurant chain, we requested the defendant's policies and procedures related to safe alcohol service, as well as written job descriptions and training materials. Defense counsel responded that these "internally developed and drafted policies, procedures, training materials, and similar documents are highly proprietary and confidential, and [defendant] maintains a legitimate interest in preserving such confidentiality." Faced with this bald, unsubstantiated claim, we filed a motion to compel and argued that all of the factors above (with the exception of #6) militated heavily against the need for confidentiality. These were documents related to public health and safety, and just because the defendant may have spent time or money drafting them does not mean they demand confidentiality. Frankly, we argued, the defendant should have been proud to publicly disclose these documents and tout its alleged commitment to safety. The judge agreed and granted our motion, finding the defendant had failed to meet its initial burden of showing "good cause."

(c) Rarely are the requested documents "trade secrets."

A popular refrain from defendants seeking protective orders is that the requested documents contain "commercially sensitive" information or trade secrets. Trade secrets are formulas, processes, designs, prototypes, procedures, or codes which derive independent economic value from not being readily ascertainable by others. [15] Typical examples include things like the formula to Coca-Cola, a unique manufacturing process, a computer code, or a customer list. Matters affecting public health or safety generally are not trade secrets. Trade secrets likewise do not include general knowledge which may be obtained by anyone as a result of being employed in an industry. [16]

Additionally, to garner protection from disclosure, trade secrets must be the subject of efforts that are reasonable under the circumstances to maintain their secrecy. [17] The "reasonable-efforts-to-maintain-secrecy" requirement sets a high bar for trade secret protection. Defendants seeking trade secret protection for certain information must "exercise eternal vigilance" in protecting the its secrecy. [18] The exercise of "eternal vigilance" imposes a heavy burden on the owner of a trade secret and "calls for constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it." [19]

Several factors may be relevant in determining if information deserves trade secret protection, including: (1) the extent to which the information was known by proper means outside of the party's business; (2) the extent of measures taken by the party to maintain the secrecy of the information; (3) the value of the information to the party and its competitors; (4) the amount of effort or money expended in developing or acquiring the information; and (5) the ease or difficulty with which the information could be properly acquired or duplicated by others. [20]

In the dram shop case referenced above, we explained to the judge that we were not seeking the defendant's secret wing sauce recipe, its commercial contracts, marketing strategies, customer lists, or the like. The documents we requested (alcohol service policies, job descriptions and training materials) were shared with nearly every low-level employee across the company's 1000+ restaurant locations. In fact, a thorough internet search revealed several of the company's "employee handbooks" and related materials were publicly available online. This could hardly be characterized as "eternal vigilance" in protecting the information's secrecy. These are just a few arguments to consider the next time you get a response from defense counsel claiming a protective order is necessary to protect a defendant's "proprietary" and "confidential" information or "trade secrets."

IV. Conclusion

As you review the legal analysis above, I hope you'll begin to see how defense counsel's knee-jerk requests for confidentiality—in even the most routine of cases—are improper under the law and should not be tolerated without good reason. If nothing else, perhaps this article gives you some ammunition to use next time you're facing an unjustified request for secrecy. What one court wrote more than eighty years ago remains true today: "We believe truth is more important than the trouble it takes to get it."[21]

Liam D. Duffy , Esq.

Liam Duffy has handled numerous catastrophic injury and wrongful death cases involving construction accidents, dram shop liability, products liability, tractor-trailer collisions, premises liability, electrocutions, and more. His has helped his clients achieve numerous seven-figure recoveries, as well as a record-setting $21 million jury verdict in 2019.

Liam has been recognized by Super Lawyers as one of South Carolina's "Rising Stars" and by the Charleston Business Magazine as one of the region's "Best & Brightest Under 35." He serves as Chair of SCAJ's Young Lawyers Section, as well as 9th Circuit Representative for the SC Bar YLD. He a former chair of the ABA YLD's Law Practice Management Committee, a member of the SC Bar House of Delegates, and President of the Charleston Lawyers Club.

Endnotes

1. https://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.ssl.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf.
2. https://www.cnbc.com/2015/12/18/remington-case-shows-court-secrecy-is-dangerous-commentary.html.
3. E.g., https://publicindex.sccourts.org/Dillon/PublicIndex/PIImageDisplay.aspx?ctagency=17002&doctype=D&docid=1597683249004-682&HKey=891224910756485081471106511511190661221058182112687811289547371529710885801118411957117118521111127548.
4. Ex Parte Capital U-Drive It Inc. v. Beaver, 396 S.C. 1, 10, 630 S.E. 2d 464, 469 (2006).
5. See Hamm v. PSC, 312 S.C 238, 439 S.E.2d 852 (1994) (before the court will even weigh competing factors, the party seeking protection "must initially show good cause by alleging a particularized harm which will result if the challenged discovery is had."); see also Rule 26(c), SCRCP.
6. American Telephone and Telegraph Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); see also Public Citizen v. Liggett Group, 858 F.2d 775 at 790 (1st Cir. 1988); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 38 41 (C.D. Cal. 1984).
7. United States v. Carriles, 654 F. Supp. 2d 557, 565 (W.D. Tex. 2009) citing United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999).
8. Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996) (quoting Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983), cert. denied 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984)).

9. See Joseph F. Anderson Jr., Hidden from the Public by Order of the Court: The Case Against Government Enforced Secrecy, 55 S.C. L. Rev. 711, 744 (2004); See also Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987) ("The 'rules of the game' encourage parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts . . . The truth about relevant matters is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise . . . Shared discovery is an affirmative means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare these responses.").
10. Hollman v. Woolfson, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (citing Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009)).
11. Citizens' Utility Board of Oregon v. Oregon Public Utility Commission, 877 P.2d 116, 121-122 (Or. Ct. App. 1994).
12. United States v. Exxon Corp., 94 F.R.D. 250, 251 (D.C. 1981).
13. Essex Wire Corp. v. Eastern Electric Sales Co., 48 F.R.D. 308, 310 (E.D. Pa. 1969); Loveall v. American Honda Motor Co., Inc., 694 S.W.2d 937, 939–940 (Tenn. 1985).
14. Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) (citing Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994)).
15. Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 422 S.C. 643, 649–50, 813 S.E.2d 696, 700 (4th Cir. 2018) (quoting S.C. Code Ann. § 38-9-20(5)(a)(i)).
16. Id. see also Navarro v. Eskanos & Adler, No. C-06-02231 WHAEDL, 2007 WL 902550, at *4 (N.D. Cal. Mar. 22, 2007) ("A policy and procedure manual which restates "truisms of the industry"—such as the need to comply with certain laws—"may have value to the company, but that does not suggest that there is any value in keeping the manual secret.") (Citing Buffets, Inc. v. Klinkie, 73 F.3d 965, 969 (9th Cir. 1996) (affirming district court holding that job manuals from nationwide chain of budget buffet restaurants were not trade secrets, as they were not the subject of reasonable protective efforts, and they "contain little more than such food service truisms as 'when tasting foods, never use [ ] cooking utensils' or 'follow the recipe exactly'")).
17. S.C. Code Ann. § 39-8-20(5)(a)(ii).
18. Hill Holliday Connors Cosmopulos, 433 F. App'x at 214 (4th Cir. 2011) (citing Lowndes Products, Inc. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (1972)).
19. Id.
20. See Uhlig LLC v. Shirley, No. 6:08-CV-01208-JMC, 2012 WL 2923242, at *17 (D.S.C. July 17, 2012) (finding jury charge with these factors was proper).
21. Publicker v. Shallcross, 106 F.2d 949, 952 (3d Cir. 1939).