

**TWO STEPS FORWARD, TWO STEPS BACK: LESSONS TO BE
LEARNED FROM HOW FLORIDA’S INITIATIVES TO
CURTAIL CONFIDENTIALITY IN LITIGATION
HAVE MISSED THEIR MARK**

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I. INTRODUCTION

“By creating a culture that fosters public trust and confidence, we become a government truly operating in the sunshine.”¹ –Charlie Crist

What if you knew that you were going to be in an automobile accident today? What if you knew that your young child or baby was going to be with you in the vehicle when the accident happened? Would you be confident that the infant safety seat into which you strapped your child would protect him from the collision? What if you learned that in 2007 a major infant car seat manufacturer confidentially settled a lawsuit with a plaintiff whose fourteen-month-old daughter died after suffering severe head injuries during a side impact collision while secured into the child seat?² The child’s head allegedly forcefully contacted a sharp plastic edge located on the inner side panel of the child seat during the collision—a design problem that, according to the plaintiff, the company had been aware of since 2001.³ Worse still, what

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¹ Charlie Crist—The People’s Governor, Governor Crist Announces New Initiatives for Open Government, <http://www.charliecrist.com/news.php?id=56> (last visited Dec. 15, 2008).

² Lytal, Reiter, Clark, Fountain & Williams, *Firm Settles Case Against Car Seat Company*, *ADVOC.*, Winter 2007, at 5, available at http://www.lytalreiter.com/images/uploads/File/Advocate_4_2007.pdf.

³ *Id.*

if you knew that, to date, the company failed to notify consumers of the problem or recall the product?⁴

In Florida, this is not supposed to happen. Although in most states confidential settlement agreements are perfectly acceptable, in Florida, such agreements are void and unenforceable when their effect is to conceal information relevant to a *public hazard*.⁵ In the 1990s, Florida became a pioneer in the area of court access legislation with the enactment of the Sunshine in Litigation Act (Sunshine Act).⁶ The statute prohibits the entry of an order by a court that has the “effect of concealing a public hazard”⁷ It also voids as contrary to public policy any agreement, including settlement agreements, with the purpose to conceal a public hazard, regardless of whether that agreement is filed with the court.⁸ In a time where the Firestone product liability cases and other mass tort cases had not yet sparked public outrage over the use and role of secrecy in litigation, Florida’s statute was truly visionary and the first of its kind across the country.⁹

Florida’s policy of open government became even further entrenched in its laws when voters adopted the Sunshine Amendment to

⁴ *Id.*; see also Cosco Juvenile, Safety Notices, http://www.coscojuvenile.com/safety_notice/ (last visited Dec. 15, 2008) (indicating a lack of recall for the car seat involved in the accident).

⁵ FLA. STAT. § 69.081(4) (2004).

⁶ § 69.081(1); see also Richard A. Zitrin, *The Laudable South Carolina Court Rules Must be Broadened*, 55 S.C. L. REV. 883, 891 (2004) [hereinafter *The Laudable South Carolina*] (“[The Florida Sunshine in Litigation Act] is an excellent trailblazer and appears to void portions of settlement agreements that secretize information about public hazards.”).

⁷ § 69.081(3).

⁸ § 69.018(4); see also CHRISTINE HUGHES, NEW ENGLAND LEGAL FOUND., CONFIDENTIAL SETTLEMENTS: A WHITE PAPER 21 (2003), AVAILABLE AT <http://www.nelfonline.org/cases/Confidential%20Settlements%20White%20Paper.pdf> (“In the late 1980s and early 1990s anti-secrecy proponents . . . were successful in obtaining legislation in Florida, Virginia, Arkansas, and Washington, and a Supreme Court rule in Texas.”). *But see The Laudable South Carolina*, *supra* note 6, at 891 (“[T]he statute’s effectiveness and how broadly it has been interpreted is not clear. First, and perhaps most significantly, although the statute sounds broad enough to apply to unfiled settlements or even to agreements to secretize discovery, no court has so ruled.”).

⁹ *The Laudable South Carolina*, *supra* note 6, at 891.

the Florida Constitution in 1992.¹⁰ The amendment guarantees every person the right to inspect or copy any public record including records amassed by the judicial branch of the government.¹¹ That same year, the Florida Supreme Court adopted Rule of Judicial Administration 2.051,¹² which was renumbered as Rule of Judicial Administration 2.420,¹³ recognizing the public's broad right of access to court records and delineating limited types of records that could be, by judicial determination, exempt from public disclosure.¹⁴ Florida's goal was clear—the affairs of the state government and each of its branches should be transparent and readily accessible by the people.

Fast forward to the year 2008—after more than a decade of scandalous media exposés on the dangers of concealing important information in sealed court files and confidential settlement agreements, states across the country took action. South Carolina, Nevada, and Ohio, among other states, began making headlines for implementing reforms to curtail litigants' indiscriminate use of blanket sealing requests, protective orders, and confidential settlements.¹⁵ Florida, the once laudable ray of sunlight in the legal landscape, however, makes headlines for secreting away in sealed court files and secret dockets the mere existence of civil cases involving prominent local political, business, and

¹⁰ See FLA. CONST. art. I, § 24 (ensuring a right to access official government records and meetings).

¹¹ *Id.*

¹² FLA. R. JUD. ADMIN. 2.051 (2004).

¹³ FLA. R. JUD. ADMIN. 2.420 (2004); see also *In re Amendments to the Fla. Rules of Judicial Admin.—Reorganization of the Rules*, 939 So. 2d 966, 1005-10 (Fla. 2006) (per curiam) (“We adopt the proposed reorganization of the existing rules . . .”).

¹⁴ FLA. R. JUD. ADMIN. 2.420(a), (c)(9); see also *In re Amendments to Fla. Rule of Judicial Admin. 2.420—Sealing of Court Records and Dockets*, 954 So. 2d 16 (Fla. 2007) (per curiam) (“[O]ur rules strongly disfavor court records that are hidden from public scrutiny. The rules provide only a limited veil that is restricted to a second category of court records where a set of carefully defined interests are involved.”).

¹⁵ See Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, available at 2002 WLNR 4061559 (noting unanimous vote by South Carolina's federal judges to prohibit secret settlement agreements); Thomas Mitchell, *The Heavy Lifting Begins*, LAS VEGAS REV.—J., Jan. 6, 2008, at 2D, available at 2008 WLNR 388914 (noting changes in Nevada's court rules to increase access to court documents); James Nash, *Judges' Guidelines*, COLUMBUS DISPATCH, Nov. 17, 2007, at A1 (summarizing proposed changes in Ohio's access laws).

public figures.¹⁶ In addition, despite the Florida statute prohibiting the enforcement of settlement agreements that conceal public hazards, Florida law firms advertise their services and legal acumen by touting their ability to confidentially settle, for rather large monetary amounts, cases against formidable opponents such as the manufacturers of allegedly defective infant seats.¹⁷

But, what went awry in the state that sought to ensure transparency and public access to information by codifying this right in its state constitution, a state statute, and a state procedural court rule?¹⁸ As the Florida Supreme Court noted in a recent opinion “any procedures that the Court adopts . . . are only as good as the manner in which they are applied and enforced.”¹⁹ In Florida, interpreting, applying, and enforcing these rules of law have become a problem.

First, the Sunshine Act, section 69.081 of the Florida Statutes, is painfully underutilized.²⁰ Few reported cases exist interpreting the statute, even though it was enacted nearly twenty years ago.²¹ The statute’s less than optimal language and lack of a procedural framework crippled it, keeping the law from having any significant impact on confidential settlements in the state. Furthermore, because the parties in a case generally lack incentive to raise Sunshine Act issues during the course of litigation or during the settlement phase of a case, the statute fails to achieve its goal—to stop confidential settlements in public hazard cases.²²

A second distinct, but related, problem is raised by the courts’ interpretation and application of the state procedural court Rule addressing public access to judicial branch records, Florida Rule of Judicial Administration 2.420. Although as originally enacted, the Rule seemingly provided broad access to *all records* of the judicial branch, the

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part II.

¹⁸ See FLA. CONST. art. I, § 24; see also FLA. STAT. § 69.081 (2004); FLA. R. JUD. ADMIN. 2.420.

¹⁹ *In re Amendments to Fla. Rule of Judicial Admin.* 2.420, 954 So. 2d at 23.

²⁰ See Ray Shaw, *Sunshine in Litigation*, FLA. BAR J., Jan. 2000, at 63, 63 (“[T]here are not many appellate decisions which can help in the analysis of the statute.”).

²¹ See *id.* at 63-64 (identifying four cases interpreting the statute).

²² See *infra* Part III.

Rule was gutted of any substance by many exceptions to public disclosure and misapplication by judges.²³ Like the Sunshine Act, the Rule lacked the necessary procedural framework to induce compliance with its provisions and promote enforcement of its terms. As a result, Florida, a former trailblazer in the area of court access legislation, now finds itself mired in reports of improperly sealed cases.²⁴ Although the Supreme Court amended the Rule in 2007 to fix some of its perceived problems, lax enforcement of the Rule by some Florida courts continues to deny the public of access to information to which they have a right.²⁵ As more jurisdictions contemplate adopting substantive or procedural rules that curtail when and how litigants may agree to withhold disclosure of information, Florida becomes an important model for both its foresight in this area and the partial breakdown in the implementation of its rules.

This article examines how the two primary laws adopted in Florida to protect the public's right of access to court documents and information missed their mark by failing to accomplish their original purpose. Part II of this article begins by discussing the common law rights underlying Florida's initiatives to limit confidentiality in litigation. Then, Part II briefly examines how, over the past two decades, civil litigants used procedural mechanisms to slowly erode this right of access leading to notable media scandals involving Florida's courts. Part III of this article examines the provisions of the Sunshine Act and, in turn, discusses how confidential settlements continue to be a popular method of resolving civil cases in Florida. Part III also examines a few reasons why civil litigants have been able to continue this practice, even in cases that could implicate the existence of a public hazard. Part IV of this article examines Florida Rule of Judicial Administration 2.420, and how it too failed to ensure that only documents requiring confidentiality under Florida law be protected from public disclosure. Finally, Part V of this article identifies three critical lessons to be learned from Florida's experience with these initiatives and discusses alternatives that other jurisdictions could employ to avoid some of the pitfalls encountered by Florida in its application of access rules.

²³ See FLA. R. JUD. ADMIN. 2.420(a), (c) (granting public access to all records but enumerating ten exceptions).

²⁴ See *infra* Part IV.

²⁵ *Id.*

II. SECRECY IN LITIGATION AND THE COMMON LAW RIGHT OF ACCESS

In *Barron v. Florida Freedom Newspapers, Inc.*, the Supreme Court of Florida pronounced “that *all* trials, civil and criminal, are public events and [that] there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions.”²⁶ The court’s holding in *Barron* was hardly ground-breaking.²⁷ For over a century before *Barron*, courts agreed to the public’s broad common law right to access, inspect, and copy public records, including those records and documents collected by a court during the process of litigation.²⁸ Although more limited in its scope, the public also enjoys a right to access court records and documents by virtue of the First Amendment.²⁹ In 1884, in one of the earliest American cases to comment on the scope of the public’s right to inspect and copy judicial records, Justice Oliver Wendell Holmes construed the right very broadly, declaring the right of access was so expansive that, even if “the publication of [judicial] proceedings [would] be to the disadvantage of the particular individual concerned, . . . [the] vast importance to the public that the proceedings of courts of justice should be universally

²⁶ See *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113, 114 (Fla. 1988) (recognizing the public has a broad right to access court documents in civil as well as criminal trials).

²⁷ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (“[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.”); see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984) (“[Although the] common law right of access to judicial proceedings and records usually has been considered by the [United States] Supreme Court in connection with criminal trials and proceedings . . . , an examination of the authority [used by the Court] reveals that the public’s right of access to civil trials and records is as well established as that of criminal proceedings and records.”).

²⁸ *Warner Commc’ns*, 435 U.S. at 598, n.7.

²⁹ 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, 740-43 (2004) (“Unlike the common law right, the First Amendment guarantee of access has a more limited scope that ‘has been extended only to particular judicial records and documents.’”).

known” should prevail in favor of access.³⁰ The desire that courts not operate in secret and “that the trial of causes should take place under the public eye”³¹ firmly entrenches the right of access in American common law.³² Public scrutiny of the judicial process is essential “not because the controversies of one citizen with another [were] of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility”³³ An open judicial system serves various functions including providing the public with assurance that judicial proceedings are conducted fairly as well as discouraging the misconduct of participants and the making of judicial decisions based on secret or bias.³⁴

After the *Cowley v. Pulsifer* decision, few courts attempted to delineate the limits of the expansive right to access as construed by Justice Holmes.³⁵ As a result, by 1978, when the United States Supreme Court decided *Nixon v. Warner Communications, Inc.*, the common law right of access to court papers and information was still in its

³⁰ See *Cowley v. Pulsifer*, 137 Mass. 392, 394 (Mass. 1884) (quoting Justice Lawrence, who further stated “[t]he general advantage to the country in having [judicial] proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of [the] proceedings”).

³¹ *Id.*

³² *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

³³ *Cowley*, 137 Mass. at 394.

³⁴ See Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 134-35 (1990) (noting one of the fundamental functions of the public’s common law right of access in America today is to provide a means through which the public may act like “a check upon the judicial process by exposing misconduct, incompetence, and corruption”); see also Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. POL’Y. 53 (2000) (“[T]hat everything in court should be public . . . [because] [t]he assumption that all aspects of court-centered litigation are out in the open, on the record, and fully explained by the court is an important foundation for the confidence our public has in its courts.”).

³⁵ See, e.g., *Maryland v. Balt. Radio Show*, 338 U.S. 912, 920 (1950) (admonishing no inference should be drawn from the lack of adjudication on issues of right to access in criminal cases); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”); *State ex rel. Youmans v. Owens*, 137 N.W.2d 470, 474-75 (Wis. 1966) (abstaining from “catalog[ing] the situations in which harm to the public interest would justify refusal to permit inspection”).

infancy, and little else was known about its scope, other than the fact that there was a strong presumption in favor of public access to court documents and that such a right was not absolute.³⁶ Essentially, it was deemed that “[e]very court ha[d] supervisory power over its own records and files, and [that] access [w]as [typically] . . . denied where court files might . . . become a vehicle for improper purposes.”³⁷ The *Nixon* case became the first major U.S. Supreme Court decision to preliminarily outline the scope of the public right to access and to prescribe the appropriate balancing test that should be applied in determining whether certain records, documents, or evidence produced in litigation should be kept from public scrutiny.³⁸

In *Nixon*, the issue before the Court was whether the District Court for the District of Columbia should release to Warner Communications, a major media outlet, twenty-two hours of taped conversations between President Richard M. Nixon and some of his former advisors so that Warner could copy the tapes for broadcasting and sale to the public.³⁹ The U.S. Supreme Court admitted the tapes into evidence at the trial of President Nixon’s former advisors and the tapes were transcribed for the in-court use of the jurors, reporters, members of the public in attendance, and for general dissemination to the public outside of the courtroom.⁴⁰ However, Warner Communications sought access to the actual audio reels of the conversations in order to copy them and make them available for broadcast.⁴¹ The Court in *Nixon* ultimately

³⁶ *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598-99 (1978).

³⁷ *Id.* at 598 (“[T]he common-law right of inspection has bowed before the power of a court to insure that its records are not ‘used to gratify private spite or promote public scandal’ through the publication of ‘the painful and sometimes disgusting details of a divorce case’ Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption . . . or as sources of business information that might harm a litigant’s competitive standing[.]”).

³⁸ *See* Bechamps, *supra* note 34, at 125-26 (noting the Supreme Court’s earliest recognition of the right of access in dicta without elaboration of the right’s specific contours).

³⁹ *See Warner Commc’ns*, 435 U.S. at 591.

⁴⁰ *Id.* at 594 (“The transcripts were not admitted as evidence, but were widely reprinted in the press.”).

⁴¹ *See id.* at 601 (“[Warner Communications argued] that aural reproduction of actual conversations, reflecting nuances and inflections, [was] a more accurate means of informing the public about this important historical event than a verbatim written transcript.”).

decided to deny the release of the audio reels to Warner Communications on the premise that, pursuant to the Presidential Recordings Act, it was the Legislature's prerogative to determine "the most appropriate means of assuring public access to the material, subject to prescribed safeguards."⁴² The Court, although not directly weighing the relative strength of the interests favoring and opposing release of the tapes, set out the balancing test that would have applied had the Court been called upon, absent the congressional Act, to decide the issue at hand.⁴³ Although the Court reiterated that the right to inspect and copy judicial records and documents was a strong one, weighing heavily against denial of access, the *Nixon* decision left trial court judges with a great deal of latitude in deciding how to apply the balancing test and what weight to accord to each of the competing interests.⁴⁴

Shortly after the U.S. Supreme Court decided *Nixon* it became apparent that both state and federal judges were not uniformly balancing the public's right of access to court information against litigants' privacy interests.⁴⁵ In fact, it became apparent that, in certain cases, judges sometimes did not engage in a balancing of interests at all; instead the judges granted requests by litigants to seal documents or maintain the

⁴² *Id.* at 604.

⁴³ *Id.* at 600-06. Noting the competing interests the Court stated: "On respondents' side of the scales is the incremental gain in public understanding of an immensely important historical occurrence that arguably would flow from the release of aural copies of these tapes Also on respondents' side is the presumption . . . in favor of public access to judicial records." *Id.* On petitioner's side the court proceeded to weigh the arguments advanced by petitioner in favor of not releasing the tapes including: accuracy if only fractions of the tapes were played for the public rather than the complete twenty-hours of recording; the lack of safeguards, leaving petitioner at the mercy of the marketing medium; the contention that the public's right to know had already been served by releasing the transcripts of the audio cassettes to the general public. *Id.*

⁴⁴ Bechamps, *supra* note 34, at 126-27 ("[The] dicta [in *Warner Communications* had] given state and lower federal courts ample leeway to develop their own varying formulations for balancing the competing interests.").

⁴⁵ *Id.* at 139 (stating a system with no clear standards for protecting the public's right of access to court information "affords the trial judge broad discretion in granting and denying access and consequently results in inconsistent, unpredictable, and sometimes unfair outcomes").

confidentiality of certain information as a matter of course.⁴⁶ As a result, in the decades that followed the *Nixon* decision such practices sparked a public debate as the press began to uncover case after case where the court sanctioned secrecy at disastrous costs to the public.⁴⁷

One of the earliest cases to be highly publicized by the media involved the Xerox Corporation and allegations that a toxic spill at one of its plants caused serious illnesses for those exposed to the chemicals.⁴⁸ In 1984,

construction workers at the Xerox complex [in Rochester, New York,] discovered discolored water during excavation.⁴⁹ Xerox later learned that [sixty-three] pounds of trichloroethylene [TCE], a solvent used in cleaning and lubricating machinery, had leaked over a period of years from four underground storage tanks [contaminating the ground water in the adjacent area and a private well].⁵⁰

Two families sued Xerox seeking damages for injuries, including severe health problems, which they suffered due to the contamination.⁵¹ In

⁴⁶ See *id.* at 117 (discussing a case involving Xerox where the court sealed the records in accordance with the terms of the settlement agreement); see also Editorial, *Unseal Court Records Public has a Right to Know*, MIAMI HERALD, Apr. 17, 1990, at 10A, available at 1990 WLNR 2046063 (noting the practice of sealing court records after litigants settled a law suit became so common in Florida that it was “almost routine”).

⁴⁷ See, e.g., Bechamps, *supra* note 34, at 117 (reciting a story about public endangerment due to sealing of litigation records over contaminated water); Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Common Interest?*, 32 HOFSTRA L. REV. 1565 (2004) [hereinafter *The Judicial Function*] (providing another example where a settlement regarding defective tires was sealed); see also *The Laudable South Carolina*, *supra* note 6, at 905 (“Unfortunately, the rules are not broad enough to be truly effective— [sic] to ensure, at least in those cases dealing with the public health and safety, that the public these honorable courts serve will be protected from needless danger.”).

⁴⁸ Bechamps, *supra* note 34, at 117 (summarizing details of the Xerox toxic spill, subsequent case, and settlement).

⁴⁹ Benjamin Weiser, *Forging a ‘Covenant of Silence’; Secret Settlement Shrouds Health Impact of Xerox Plant Leak*, WASH. POST, Mar. 13, 1989, at A01 [hereinafter *Covenant of Silence*].

⁵⁰ *Id.*

⁵¹ Bechamps, *supra* note 34, at 117; *Covenant of Silence*, *supra* note 49.

1988, as part of a confidential settlement, Xerox paid the families about \$4.75 million and relocated them to another area.⁵²

The settlement came after medical specialists, hired by the families' attorneys, [stated that] they would testify that air and water discharges from the plant were a likely cause of neurological problems experienced by seven members of the two families and was a probable factor in a rare form of cancer found in one teen-age girl.⁵³

“Under terms of the settlement, a New York judge sealed all records of the lawsuits and prohibited those involved [with the case] from discussing [it]”⁵⁴ Joseph G. Fritsch, the New York State Supreme Court judge who approved the settlement, stated that “it was clear to him that Xerox would not have settled the suit without such secrecy.”⁵⁵ Without engaging in any of the necessary balancing of interests, Judge Fritsch sealed all of the court records merely because confidentiality had been *bargained for* by the parties.⁵⁶ The effect of the order was to deny other affected members of the community, regulatory agencies, and local health officials access to information the parties possessed pertaining to the contamination.⁵⁷ Amidst strong pressure from the legislature, the media, and public interest organizations, Judge Fritsch agreed to partially release some of the court records pertaining to the Xerox case almost a year after the parties reached a settlement.⁵⁸

⁵² Bechamps, *supra* note 34, at 117; *Covenant of Silence*, *supra* note 49.

⁵³ *Covenant of Silence*, *supra* note 49.

⁵⁴ *Id.*; see also Bechamps, *supra* note 34, at 117.

⁵⁵ *Covenant of Silence*, *supra* note 49.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Benjamin Weiser, *Release of Sealed Records Ordered in Xerox Toxic-Chemical Case*, WASH. POST, Aug. 17, 1989, at A24 (noting the “need to allay public fears” had lead the New York Attorney General’s office, New York senator Daniel Patrick Moynihan, and local authorities to call for unsealing of the records); see also Benjamin Weiser, *Secrecy in Toxic-Spill Case Assailed; Review of Xerox Settlement May Spur Legislation for Disclosure*, WASH. POST, Mar. 22, 1989, at A16 (“[Senator] Daniel Patrick Moynihan [] and New York state health officials [] sharply criticized [the] court-approved secret settlement . . . citing the case as an example of how such legal secrecy can inhibit scientific and medical inquiry into questions of health and safety.”).

A wealth of articles now exist detailing the various dangers hidden from the public over the past thirty years through court-sanctioned secrecy.⁵⁹ Many of the most infamous cases, like the Xerox case above, concealed information of critical importance to the public's health and safety through a sealed *confidential settlement*, an agreement reached by the parties that settles their individual legal dispute while requiring the facts of the case, all litigation documents, and any evidence in the case be kept confidential in a sealed court file.⁶⁰ Similar to the Xerox case, litigants often use a variety of procedural mechanisms to ensure the confidentiality of the information learned during the litigation process is maintained.⁶¹

Early in the litigation process, for example, a party may request the court enter an *umbrella* or blanket protective order that keeps any documents produced in discovery and designated by either party as confidential from being shown, copied, shared, discussed, or otherwise disclosed to anyone other than the litigants.⁶² These broad protective

⁵⁹ See generally Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 260-62 (discussing how Dow Corning hid evidence of the dangers of silicone breast implants for years and how the Catholic church settled hundreds of sexual abuse cases confidentiality); *The Judicial Function*, *supra* note 47 (summarizing how sealed settlements and overly broad protective orders prevented the public from finding out about hazards such as defective Firestone tires, defects in the Shiley Heart Valve, and the dangers of prescription drugs Zomax and Halcion); *The Laudable South Carolina*, *supra* note 6, at 888 (noting in 1996, records obtained from General Motors showed approximately 245 individual suits involving defective side-mounted gas tanks the company used in GM pickup trucks had been settled and almost all, some dating back to 1973, required the plaintiffs to keep the information they discovered during the litigation secret).

⁶⁰ Anderson, *supra* note 29, at 712-14 (explaining when case files are *sealed* the entire record in the case "including pleadings, exhibits, hearings, transcripts and prior opinions, memoranda[,] and orders of [the] court will be sealed" in an envelope and inaccessible to anyone outside of the parties and the judge in the case).

⁶¹ *Id.* at 713-14.

⁶² See *Chic. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001) (noting it has become commonplace in the federal courts for parties to stipulate to umbrella protective orders because it "replaces the need to litigate the claim to protection document by document, and postpones the necessary showing of 'good cause'"); see also *Burden of Proof—Umbrella Protective Orders*, AMERICAN LAW OF PRODUCTS LIABILITY § 53:65 (3d ed. 2008) ("An umbrella protective order initially protects all documents that the producing party has designated . . . as confidential."); Anderson, *supra* note 29, at 713 (noting protective

orders may allow a defendant, upon an initial threshold showing of good cause, to keep hundreds of documents hidden from the public simply by designating them as confidential documents.⁶³ Often, a court may simply sign off on the request for a blanket protective order, without any real determination of whether good cause exists for such an order, if the litigants stipulate to its terms.⁶⁴ Although such orders may be challenged, parties that stipulate to the order's terms have little incentive to do so and challenges by nonparties are generally ineffective.⁶⁵ If the parties later settle confidentially, as is usually the case, all of the evidence produced pursuant to the protective order will generally be returned to the respective parties—its contents never to be seen or heard by the general public.⁶⁶

orders generally “provide that discovery exchanged between the parties . . . will be kept confidential and [will] not be disclosed to parties outside of the litigation . . .”).

⁶³ *Burden of Proof—Umbrella Protective Orders*, *supra* note 62 (“While the party seeking a protective order has the burden of justifying the confidentiality of each and every document sought to be covered by the protective order . . . it may be proper for the court to construct a broad umbrella protective order upon a threshold showing by the moving party of good cause.”).

⁶⁴ *See Chic. Tribune*, 263 F.3d at 1307 (noting stipulations for umbrella protective orders “postpones the necessary showing of ‘good cause’ required for entry of a protective order until the [order] is challenged”); *see also* James B. Murphy, Jr. & Talibah Jaffree, *Securing, Resisting, and Limiting Discovery of Trade Secrets and Confidential Business Information*, BUSINESS LITIGATION IN FLORIDA § 7.4 (5th ed. 2008) (“These stipulated ‘umbrella’ confidentiality or protective orders are encouraged by many courts in complicated cases when document-by-document review of discovery materials would be burdensome or unfeasible.”); *Burden of Proof—Umbrella Protective Orders*, *supra* note 62 (2008) (“Depending on the circumstances of an individual case, good cause may be shown, for example, by a persuasive showing that the absence of an umbrella protective order would lead to such adverse pretrial publicity and embarrassment for the moving party that it would impair the fairness of the trial process.”); *The Laudable South Carolina*, *supra* note 6, at 886-87 (“[T]here [was] no allowance for scrutinizing agreements to seal or to submit to a protective order.”).

⁶⁵ *See* Murphy & Jaffree, *supra* note 64, § 7.4 (“The efficacy of stipulated confidentiality orders are usually upheld against challenges by nonparties because it is generally held that there is little or no public right of access to discovery materials.”).

⁶⁶ *The Laudable South Carolina*, *supra* note 6, at 889 (noting in most of these cases court approval of the settlement is usually not sought, but these settlement agreements usually require the return of all documents obtained through the legal discovery process that contain information that will “save lives and potentially prevent the recurrence of the incident that harmed the plaintiff”).

Requests to seal documents or other evidence filed with the court are often used in conjunction with umbrella protective orders and confidential settlement agreements.⁶⁷ If a document produced pursuant to a protective order is later filed with the court, the terms of the order generally provide that such documents will be filed under seal.⁶⁸ If the parties agree to settle the case, the litigants may ask the court to approve the terms of the settlement and require, as part of the agreement, the parties and their counsel never discuss the facts or any other information pertaining to the case or the settlement.⁶⁹ As part of the agreement, the litigants demand all materials exchanged in discovery be returned to the appropriate party.⁷⁰ The parties may also request that the judge seal the settlement agreement and the entire case file.⁷¹ Although, in most cases, the parties are not required to file the settlement agreement with the court, some litigants choose to do so in order to subject a party breaching the agreement to the court's contempt power.⁷²

In cases where the parties choose to settle privately, without seeking the court's approval or filing the settlement, confidentiality will be ensured by making all of these conditions a contingency to settlement and expressly incorporating them into the terms of the agreement

⁶⁷ See Anderson, *supra* note 29, at 713-14.

⁶⁸ See generally *Chi. Tribune*, 263 F.3d at 1312 (noting, pursuant to the parties stipulated protective order, discovery documents filed in court in connection with pre-trial motions were filed under seal).

⁶⁹ Anderson, *supra* note 29, at 712.

⁷⁰ *Id.* at 744.

⁷¹ *Id.* at 713.

⁷² *Id.* at 712-13 ("Litigants in such cases, not content simply to agree between themselves to remain silent about the settlement, prefer to involve the trial judge in a 'take it or leave it' consent order that would bring the might and majesty of the court system to bear on anyone who breaches the court-ordered confidentiality called for in the consent order."); see also Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 393 (2006) ("A privately reached settlement can be enforced only through state contract law, whereas a court-approved settlement is backed by a much bigger club: the court's power of contempt."); HUGHES, *supra* note 8, at 12 (noting some parties may file their settlement agreement with the court even when it is not required so they may later enforce its terms through a contempt proceeding).

between the parties.⁷³ These private confidential settlement agreements will usually be enforceable under state law as contracts.⁷⁴ A litigant violating the confidentiality provisions of the agreement, therefore, may be liable for breach of contract.⁷⁵ Even litigants settling privately, however, may later request that the court seal the case file, or particular documents in the case, thereby removing from public scrutiny any documents or evidence filed with the court.⁷⁶ In cases where the documents filed with the court, such as the complaint, are not sealed and are still accessible by the public, information about the case may still be difficult to obtain by members of the public who will have little reason to know about the existence of the case or its facts. The settlement's confidentiality provisions essentially silence the parties to the case and their counsel.⁷⁷ The earlier in the litigation process the case settles, the less information will be publicly available, even in cases where the court grants no formal sealing or closure.⁷⁸

Secrecy—whether achieved through a protective order granted early in the case, the sealing of court records, or a confidential settlement agreement—is a valuable commodity for civil litigants.⁷⁹ Defend-

⁷³ *The Laudable South Carolina*, *supra* note 6, at 889 (stating most of the agreements often involve returning all documents obtained through the discovery process).

⁷⁴ Goldstein, *supra* note 72, at 393.

⁷⁵ *See id.* at 393.

⁷⁶ HUGHES, *supra* note 8, at 12; *The Laudable South Carolina*, *supra* note 6, at 886-87 (“This secretization is accomplished in a forum provided and paid for by the public . . . [because] it almost always occurs in connection with a lawsuit filed in the court’s venue.”).

⁷⁷ Anderson, *supra* note 29, at 713 (noting the concepts of secrecy and confidentiality can include “[a]n agreement by plaintiff and plaintiff’s counsel never to discuss the case or share information about the case”).

⁷⁸ *See* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1458-59 (2006) (“The defendant has an incentive to settle secretly because it does not want information about the dispute to be publicized.”).

⁷⁹ *Id.* (“[B]oth the defendant and an early claimant – a claimant who discovers that he or she has a claim before other claimants do – have an incentive to enter into a secret settlement. The defendant has an incentive to settle secretly because it does not want information about the dispute to be publicized. The early claimant has an incentive to settle secretly because it can extract a higher settlement payment from the defendant to keep the dispute secret.”).

ants want to avoid negative publicity and subsequent lawsuits.⁸⁰ Therefore, plaintiffs will use this as a bargaining chip to obtain faster settlements for their clients for higher monetary amounts.⁸¹ Legal adversaries, therefore, often have significant incentives to agree to or to simply go along with requests for confidentiality.⁸² Judges with busy dockets have an incentive to move things along when the parties agree to resolve discovery disputes by stipulating to blanket protective orders or to settle a case on the contingency that certain information stay confidential.⁸³ Numerous arguments have been made as to why secrecy in litigation is undesirable.⁸⁴ Most impacting from the public's perspective, however, are cases where secrecy has the potential for tragic results, and where it seems, at least from the public's point of view, that our courts played a pivotal role in facilitating the hiding of information or simply doing nothing to stop it.⁸⁵

The notable failures of the judiciary to protect the public's right of access to court information in some very prominent cases began a wave of reform.⁸⁶ This wave of reform prompted states to adopt legislation or other rules setting clearer standards for when and how parties could agree to keep certain information or documents confidential during litigation and after the resolution of the case.⁸⁷ When it enacted the

⁸⁰ *Id.*

⁸¹ *Id.* at 1459.

⁸² *Id.* ("The parties have a strong incentive to maintain secrecy").

⁸³ See Goldstein, *supra* note 72, at 428 ("Judge Andrews told a newspaper that he had 'better things to do than spend hours upon hours to review documents.'").

⁸⁴ See, e.g., Leslie A. Bailey, *Public Justice Bailey Testifies on Sunshine in Litigation Act Before Senate Panel*, U.S. FED. NEWS, Dec. 11, 2007, available at 2007 WLNR 24864157 ("Unnecessary secrecy makes discovering the truth much more difficult and costly. When a defendant is able to keep its wrongdoing a secret, it does not have to pay as much money to subsequent victims. In addition, many other victims will never learn that they have legal claims against the corporation. Others who know they have claims will be unable to sue because of the high cost of obtaining information that only the defendant possesses. Those who do sue will face protective orders at every corner, and the few who do prevail will likely be forced to agree to a secret settlement.").

⁸⁵ See *id.* ("This secrecy subverts our system of open government, undermines public trust in the court system, and threatens public health and safety.").

⁸⁶ See *The Laudable South Carolina*, *supra* note 6, at 890.

⁸⁷ *Id.* at 890 ("Over half of the states [twenty-nine] have some kind of statute or rule regarding the sealing of court records in civil cases."); see also *Stivers v. Ford Motor*

Sunshine Act in 1990, Florida became one of the first states to proscribe the use of confidentiality in cases involving public hazards.⁸⁸ It is estimated that today, over half of the states have rules limiting the information that litigants in a civil suit can keep out of public view.⁸⁹ These rules codify and give substance to the common law right possessed by the general public to access court documents and records.⁹⁰ Simply put, these rules provide a substantive and procedural framework within which the public's broad common law right to access the information exchanged in courts can be interpreted.⁹¹

III. THE SUNSHINE ACT: ADMIRABLE REFORM OR USELESS LEGISLATION?

When the bill that eventually became Florida's Sunshine Act first circulated in the Florida House of Representatives and the Florida Senate, opponents of the bill vociferously criticized its provisions.⁹² For instance, a representative for corporations opposing the legislation argued that such a law would bring all pretrial discovery to a halt, eliminate all incentives to settle cases, and necessitate hundreds of more judges to handle the resulting increase in litigation.⁹³ In addition, some

Credit Co., 777 So. 2d 1023, 1025 (Fla. Dist. Ct. App. 2000) ("The legislative staff analysis of the [Sunshine in Litigation Act] supports the conclusion that section 69.081 arose from concerns about settlements . . . where health and safety issues were implicated.").

⁸⁸ *The Laudable South Carolina*, *supra* note 6, at 891 ("Florida was the first state to significantly regulate secret settlements when the legislature approved the 'Sunshine in Litigation Act.'").

⁸⁹ *Id.* at 890.

⁹⁰ *See* Goldstein, *supra* note 72, at 384 (noting the "common law right of public access" included access "to most forms of judicial information").

⁹¹ *See id.* at 382-85 (discussing the common law and First Amendment rights to access information).

⁹² *See, e.g.*, Jane Victoria Smith, *Senate May Revise Definition of 'Hazardous Product' in Disclosure Bill*, PALM BEACH POST, Apr. 26, 1990, at 5B, available at 1990 WLNR 1112535 [hereinafter *Definition of 'Hazardous Product'*].

⁹³ *Id.* Peter Wechsler, the representative for "Lawyers for Civil Justice, an organization of national defense lawyers for manufacturers such as Ford and General Electric," argued, "'If the bill passes, all pre-trial discovery will come to a halt. It will take years to unravel. We'll need hundreds more judges. There will be no more incentives to settle cases' . . ." *Id.*; Ellen Forman, *Panel Passes Public-Hazard Disclosure Bill*, SOUTH FLORIDA SUN-SENTINEL, Apr. 25, 1990, at 1D, available at

opponents alleged that the proposed Act would require companies “to disclose trade secrets and other confidential information”⁹⁴

In reality, the opponents’ predictions did not materialize. The process of civil discovery did not come to a screeching halt after the Legislature passed the statute. Civil litigants did not stop settling their disputes, and the courts were not flooded with litigation concerning the Act.⁹⁵ In fact, evidence suggests that the new law had very little impact on the use of confidentiality in civil litigation at all.⁹⁶

By passing the Sunshine Act, Florida’s Legislature sought to stop civil litigants in product liability cases from using the state’s public courts to settle their legal disputes and simultaneously hide any evidence of wrongdoing on the part of the defendant.⁹⁷ Consumer advocacy groups and Florida representatives became concerned that judges continually granted overly broad protective orders or sealed information in product liability cases as a matter of routine, without any consideration given to the public interest.⁹⁸ To achieve its purpose, the Florida

1990 WLNR 3813824 (“Peter Wexler of Lawyers for Civil Justice, an organization representing corporate clients, including General Motors, spoke against the bill, warning that it could spur more litigation and inhibit the discovery process. ‘If you do away with protective orders, you lose control,’ he said. ‘Trade secrets get out.’”).

⁹⁴ *Law Affecting Liability Suits Draws Concern*, MIAMI HERALD, Dec. 21, 1992, at 5B, available at 1992 WLNR 2289220; see also Forman, *supra* note 93.

⁹⁵ See Shaw, *supra* note 20, at 65 (“[T]he statute is underutilized.”).

⁹⁶ See *infra* Part III.A (discussing litigation occurring after the Act was passed).

⁹⁷ *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1025 (Fla. Dist. Ct. App. 2000). See generally Jane Victoria Smith, *Two Committees Ready to Discuss Product Hazards*, PALM BEACH POST, Apr. 25, 1990, at 11B, available at 1990 WLNR 1105445 [hereinafter *Two Committees*] (explaining defendants in product liability cases make large settlement offers in return for the plaintiff’s promise of confidentiality); *Definition of ‘Hazardous Product’*, *supra* note 92 (“The bill would forbid judges from entering protective orders that conceal the existence of products that cause serious injury or death in sealed court records. It would also ban secrecy agreements in product liability cases that shield the existence of hazardous products or people.”).

⁹⁸ *Two Committees*, *supra* note 97. Representative and sponsor of the House bill, Bruce Hoffmann, explained, “‘We have a growing situation in Florida, where as a normal court practice, records regarding public hazards are sealed as part of a deal’” *Id.*; see also Forman, *supra* 93. According to a Florida attorney, “courts were prohibiting the release of sealed information about a potentially dangerous pharmaceutical drug” being commonly prescribed and widely used in Florida. *Id.*

Legislature enacted a statute with expansive language that stringently regulates the following mechanisms most commonly used by litigants to keep information about a case out of the public eye: umbrella or blanket protective orders, orders sealing documents, and settlement agreements with broad confidentiality provisions.⁹⁹

The Act grants the public a “right of access to discovery materials” in cases where the subject of the litigation involves a public hazard.¹⁰⁰ For purposes of the Act, the term *public hazard* is defined as “an instrumentality, including but not limited to any device, instrument, person, procedure, product . . . that has caused and is likely to cause injury.”¹⁰¹ Subsection three of the Florida Sunshine Act prohibits a court from entering “an order or judgment,” the purpose or effect of which is to conceal 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.”¹⁰²

The language of the Act dramatically alters when civil litigants may secure the confidentiality of information through such devices as protective orders.¹⁰³ A protective order may not be entered by a court, even if it is stipulated to or agreed to by the parties, in cases where the purpose or effect of the order is to hide a public hazard.¹⁰⁴ Even when

⁹⁹ See FLA. STAT. § 69.081(3) (2004); § 69.081(4); § 69.081(8)(a); see also Anderson, *supra* note 29, at 713-14 (discussing the strategies used by litigants in civil cases to keep information about the case from being easily made available to the public).

¹⁰⁰ Murphy & Jaffree, *supra* note 64 (“[A]lthough there is no general common-law right of access to discovery materials, the Florida Legislature has determined that restricting public access to materials or documents relating to any ‘public hazard’ is contrary to public policy.”).

¹⁰¹ § 69.081(2); cf. *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2001) (holding the term public hazard “connotes a tangible danger to public health or safety” and does not encompass financing practices causing only financial harm).

¹⁰² § 69.081(3).

¹⁰³ See *id.*; see also Murphy & Jaffree, *supra* note 64, § 7.4 (discussing the changes that Rule 2.420 made to the common law right of access).

¹⁰⁴ § 69.081(3); see also Forman, *supra* note 93 (noting that, prior to the enactment of the Sunshine in Litigation Act, a judge could issue a protective order allowing a company to keep internal documents confidential, including documents containing admissions of product defects); THOMAS D. SAWAYA, 6 FLORIDA PERSONAL INJURY

such a request is made by the defendant to protect “alleged trade secrets” or other information the defendant alleges is confidential, the Act requires that the party seeking to protect the documents from disclosure establish good cause as to why the documents should be exempt from public disclosure.¹⁰⁵ The court cannot proceed to simply sign off on such a request, even if the litigants mutually agree on the confidentiality of the documents, but must conduct an in camera examination of the documents for which protection is sought.¹⁰⁶ If the court finds that the materials contain “information concerning a public hazard,” the court *must* “allow disclosure of the information” and deny the party’s request.¹⁰⁷ The Act’s legislative history indicates regulating the protective order was one of the Legislature’s primary aims in enacting the Act.¹⁰⁸

Subsection three of the Sunshine Act similarly proscribes a judge from entering orders that seal documents, evidence, or settlement agreements when doing so would effectively conceal a public hazard or

LAW & WRONGFUL DEATH ACTIONS §13:9 (2d ed. 2008-2009) (“The statute . . . applies to confidentiality or protective orders that prohibit the dissemination of information produced during the discovery process to the public.”); Anderson, *supra* note 29, at 713 (noting that protective orders are routinely requested by parties to a lawsuit to ensure that documents and information exchanged by the parties in discovery will be kept confidential and not disclosed to anyone outside of the litigation).

¹⁰⁵ § 69.081(7) (“Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1025 (Fla. Dist. Ct. App. 2001) (noting the legislative staff analysis of the Act included a description of *Oberg v. Honda Motor Co.*, a case in which the court ordered evidentiary documents identifying manufacturing defects of a vehicle be returned to the defendant, despite the fact that the defendant was found liable for product defects).

“information concerning a public hazard.”¹⁰⁹ Florida’s Sunshine Act is unique, however, because it goes beyond merely circumscribing a court’s ability to grant secrecy requests made by parties litigating a matter before it.¹¹⁰ The Florida Sunshine Act goes one step further by refusing to enforce any portions of an agreement or contract which have “the purpose or effect of concealing a public hazard” or information pertaining to a public hazard.¹¹¹ The import of the plain meaning of this statutory language is notable because, even parties who settle their disputes privately and incorporate confidentiality or nondisclosure provisions into their agreement, do so at their own peril.¹¹² Such provisions may later be found void and unenforceable if one of the parties breaches the agreement and it is determined by a court that the purpose or effect of agreeing to confidentiality was to conceal the existence of a public hazard.¹¹³

After a cursory review of the statutory language, it is not difficult to understand why critics of the Act were so apprehensive about its potential impact on civil litigation. It would seem that, after the enactment of section 69.081, Florida covered all of its bases, leaving very little wiggle room for defendants in product liability and other similar tort cases to demand confidentiality from plaintiffs. Furthermore, when coupled with the relatively few published cases interpreting the Act, it would appear that confidential settlements have been nearly eradicated

¹⁰⁹ § 69.081(3).

¹¹⁰ See Cheryl Barnes Legare, *United States: The Future of Confidential Settlements*, MONDAQ, Aug. 7, 2003, <http://www.mondaq.com/article.asp?articleid=21063&login=true&nogo=1> (“The whole point of this statute, and others like it, is to prevent making the courts a party to withholding public health and safety information.”).

¹¹¹ § 69.081(4) (“Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, 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, is void, contrary to public policy, and may not be enforced.”). *But see The Laudable South Carolina*, *supra* note 6 at 891 (noting, although the statute seems “broad enough to apply to unfiled settlements[,]” no court has reached such a conclusion).

¹¹² See § 69.081(4) (not limiting the statute’s effect to agreements filed with or approved by the court).

¹¹³ See *id.*

in Florida.¹¹⁴ However, things are often not what they seem. Evidence suggests that civil litigants in Florida continue to bargain for confidentiality quite liberally, even in cases involving defective products or other instrumentalities that could, arguably, be characterized as public hazards.¹¹⁵

A. *Continuing to Bargain for Confidentiality in an Era of Sunshine*

One would not have difficulty reaching the conclusion that litigants in Florida continue to enter into confidential settlements and obtain broad umbrella protective orders, despite the enactment of the Sunshine Act. Anecdotal and other evidence suggests this is true even in cases where the underlying crux of the lawsuit involves an instrumentality that could be characterized as a public hazard under the Act.¹¹⁶ A simple internet search of the terms *confidential settlement* and *Florida* reveals a plethora of law firm advertisements and legal advertising newsletters that openly, yet discretely, publicize the confidential settlements obtained by these firms on behalf of their clients. Law firms and attorneys often send fellow members of the Florida Bar these materials which briefly and very generally summarize the facts of cases

¹¹⁴ See SAWAYA, *supra* note 104 (“There are not many reported cases interpreting and applying section 69.081 to settlement agreements entered into between parties involved in products liability litigation.”).

¹¹⁵ See HUGHES, *supra* note 8, at 44 (noting despite the passage of section 69.081, Florida still experienced cases involving secret settlements, such as the Bridgestone/Firestone tire product liability case); Thomas A. Fogarty, *Can Courts’ Cloak of Secrecy Be Deadly?*, USA TODAY, Oct. 16, 2000, at 01B, available at 2000 WLNR 3555250 (discussing the case of a Circuit Court judge in Miami who, on two occasions, liberally granted protective orders submitted by lawyers of tire manufacturers in product liability cases); see also Noah Bierman, *Mistakes Hidden as Tire ‘Secrets,’* PALM BEACH POST, Sept. 23, 2000, at 1A, available at 2000 WLNR 1688382; Jenny Staletovich, *Secret Dealings Cast Dark Clouds Over Sunshine Laws*, PALM BEACH POST, June 18, 2000, at 19A, available at 2000 WLNR 1692199 (discussing several occasions where settlements were kept secret); Catherine Wilson, *Lawsuit Targets BMW SUV: A South Florida Woman Says She Was Injured By a Defective Airbag*, ORLANDO SENTINEL, July 22, 2004, at C3, available at 2004 WLNR 20163352 (recounting how BMW subsidiaries required consumers to sign confidentiality agreements before agreeing to repair defective airbags in their vehicles that deployed unexpectedly, thereby injuring the driver or occupants of the vehicle).

¹¹⁶ See HUGHES, *supra* note 8, at 44.

recently settled.¹¹⁷ Some of the most notable examples of cases settled confidentially involve allegedly defective products or conditions. For example, a law firm in Palm Beach County, Florida confidentially settled a case where a fifteen-year-old girl was killed after being ejected from a car.¹¹⁸ The vehicle rolled over after the tread on one of the vehicle's tires separated and caused the tire to explode.¹¹⁹ The plaintiff alleged the tire's manufacturer designed and manufactured the tire with defects.¹²⁰ The plaintiff settled confidentially with the tire manufacturer after extensive discovery.¹²¹

The law firm included a brief summary of the confidential settlement on their web site, but the summary omitted any identifying information that could lead a member of the public to obtain more information about the case.¹²² The same Palm Beach law firm confidentially settled the case of a twenty-two-year-old woman that suffocated due to smoke inhalation when she became trapped in her car after an accident.¹²³ The woman's vehicle struck a tree and burst into flames.¹²⁴ Her attorneys alleged that the manufacturer defectively designed the fuel system in the vehicle and the vehicle's structure, which kept the doors of the car jammed after the impact.¹²⁵ The parties settled the case confidentially with the car manufacturer.¹²⁶

Moreover, a law firm in Miami-Dade County, Florida confidentially settled a case against a hospital that was alleged to have negli-

¹¹⁷ See, e.g., *Firm Settles Case Against Car Seat Company*, *supra* note 2, at 5.

¹¹⁸ Lytal, Reiter, Clark, Fountain & Williams, Family Obtains Confidential Settlement in Daughter's Wrongful Death Due to Tire Failure – Pinellas County, http://www.lytalreiter.com/index.php?go=cases.case&case_id=69 (last visited Dec. 16, 2008).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* (referring to the plaintiffs in the case as “the Doe family” and stating only that suit was filed against the unnamed manufacturer in Pinellas County, Florida).

¹²³ Lytal, Reiter, Clark, Fountain & Williams, Firm Settles Defective Fuel System Case – St. John's County, http://www.lytalreiter.com/index.php?go=cases.case&case_id=86 (last visited Dec. 16, 2008) (referring to the plaintiff only as “Jane Doe” and omitting any identification of the named defendant or the make or model of the allegedly defective vehicle).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

gently left a pulmonary clamp inside of a female adolescent patient after heart surgery.¹²⁷ The young girl suffered irreparable damage to her lungs and other internal organs.¹²⁸ Yet another law firm announced that it reached a \$5,400,000 confidential settlement on behalf of a forty-seven-year-old woman injured by a defect in an automobile.¹²⁹ These cases, only a small sample of the reports of confidential settlements that can be found with minimal effort, illustrate that confidential settlements have been and continue to be part of the legal landscape in Florida.

One of the difficulties in assessing the prevalence and impact of confidential settlements, however, is obtaining concrete information about these cases beyond the tantalizing tidbits provided by plaintiffs' law firms for consumption by the general public. Legal advertisements purposefully describe the cases very broadly, omitting the parties' names and any identifying information that could help one locate information about the case.¹³⁰ Even in those cases where, in spite of a confidential settlement, the litigation documents in the case such as the complaint and the answer remain public, such documents are impossible to find unless someone can obtain the parties' names, a case number, or other information. Although newspapers sometimes elaborate on the facts of certain law suits, providing the plaintiff's name or other useful details,¹³¹ very few cases settled confidentially are actually reported in local or national newspapers.¹³² Absent the rare exception, therefore, there is great difficulty in determining with specificity what occurred in the case and what terms the parties agreed upon pursuant to their confi-

¹²⁷ Freidin Dobrinsky, Florida Personal Injury Settlements, <http://www.freidin-dobrinsky.com/CM/Custom/Settlements.asp> [hereinafter Florida Personal Injury Settlements] (last visited Dec. 16, 2008).

¹²⁸ *Id.*

¹²⁹ Stewart Tilghman Fox & Bianci, P.A., Verdicts and Settlements, <http://www.stfb-law.com/TOCVerdictsandSettlements.jsp> (last visited Dec. 16, 2008).

¹³⁰ See Florida Personal Injury Settlements, *supra* note 127.

¹³¹ See Wilson, *supra* note 115 (stating Lisa Vale, plaintiff, suffered chemical burns as a result of the driver side air bag explosion and her lawsuit sought court orders to force BMW to inspect air bags and ban the confidentiality agreements); Fogarty, *supra* note 115 (stating pervasive secrecy in America's court system delays national dialogue).

¹³² See Anderson, *supra* note 29, at 713 (noting some settlements require "[o]rders providing that evidence filed with the Clerk of Court . . . are available to the litigants . . . but are not available to the public . . .").

dential settlements. In fact, one can only assume that it is this truncated flow of information that the litigants desired to achieve by entering into a confidential settlement in the first instance.¹³³

While it is possible that in some of these cases the parties may merely agree to keep the settlement amounts confidential, it is much more common for litigants to enter into settlement agreements requiring the parties to maintain secrecy at various levels.¹³⁴ Protective orders will have been used to maintain the confidentiality of information during the course of discovery, the filing of documents under seal may have been used to keep information filed with the court out of the public eye, and the parties final settlement agreement will contain a broad confidentiality provision requiring that plaintiff return all evidence to the defendant and keep quiet about what he knows.¹³⁵

In 2004, a drunk driver struck the vehicle of a young woman traveling with her mother and fourteen-month-old daughter to a Florida zoo.¹³⁶ The woman and her mother walked away from the crash with minor injuries.¹³⁷ The child died from massive injuries sustained in the crash despite being strapped appropriately into a child infant safety seat.¹³⁸ Attorneys for the mother sued the manufacturer of the child

¹³³ See Fogarty, *supra* note 115 (indicating defense lawyers aim to obtain the broadest, most restrictive protective orders possible).

¹³⁴ See generally *The Laudable South Carolina*, *supra* note 6, at 887-89 (discussing private settlement agreements).

¹³⁵ Anderson, *supra* note 29, at 713-14; *The Laudable South Carolina*, *supra* note 6, at 889; see also HUGHES, *supra* note 8, at 12 (“[E]ven ‘private’ settlement agreements occur in the context of the judicial system; by definition, they are contracts between disputing parties to prevent litigation or to end it.”); Robert Schwaneberg, *The Dilemma of the Secret Settlements: Does a Common Lawsuit Practice Deprive the Public of Vital Information? Would Litigation Drag on Without It?*, STAR-LEDGER (Newark, N.J.), Oct. 19, 2003, at News, available at 2003 WLNR 15656726 (“[In the process of discovery] corporate defendants routinely insist on an order that says: ‘You can get them, but you can’t turn them over to anyone. No one is allowed to know they’re out there.’”).

¹³⁶ Amended Complaint at 4, *Raines v. Dorel Juvenile Group, Inc.*, No. 06 04005 K (13th Cir. June 8, 2006); see also Thomas W. Krause, *Report of Flaw Shocks Mother, Girl Fatally Hurt in Defective Seat*, TAMPA TRIB., May 17, 2007, at Metro, available at 2007 WLNR 9382552.

¹³⁷ See also Krause, *supra* note 136.

¹³⁸ Amended Complaint, *supra* note 136, at 4; Krause, *supra* note 136.

safety seat in a Florida state court alleging a defective seat design.¹³⁹ According to court documents, the side wings or inner side panels of the child seat had unpadding “hard ridges, plastic with sharp edges, protrusions and notches” that violently came in contact with the child’s head during the collision.¹⁴⁰ The plaintiff alleged company records revealed the manufacturer knew about defects in the seat as early as 2001, and the following year the company began making changes to the design to fix the problem.¹⁴¹ By 2003, the company began manufacturing the child seat without the protrusions, but the company did not issue a recall of the older model.¹⁴² Instead, the company continued to distribute the older model infant seat until 2005.¹⁴³ Attorneys for the plaintiff admit to requesting many of the manufacturer’s internal company records and interviewing several company officials, thereby obtaining information pivotal to the plaintiff’s case.¹⁴⁴

On September 13, 2006, the judge presiding over the case granted a Stipulated Protective Order for Confidential Documents; a standard umbrella protective order agreed upon by the plaintiff and the defendants in the case.¹⁴⁵ Pursuant to the protective order, the parties agreed that “all documents, computer disks, information, and tangible materials” in the case that the parties designated as *confidential* could not be “furnished, shown, or otherwise disclosed to any person” outside of the litigation.¹⁴⁶ Any party to the action could also designate as *confidential* any portion of a deposition, transcript, testimony, as well as briefs or other court papers, that quoted or referred to confidential documents.¹⁴⁷ Pursuant to the order, whenever such documents were to be

¹³⁹ Amended Complaint, *supra* note 136, at 7; *see also* Krause, *supra* note 136.

¹⁴⁰ Amended Complaint, *supra* note 136, at 4, 7.

¹⁴¹ Krause, *supra* note 136.

¹⁴² *Id.*

¹⁴³ *Id.*; Amended Complaint, *supra* note 136, at 7.

¹⁴⁴ Krause, *supra* note 136.

¹⁴⁵ Stipulated Protective Order for Confidential Documents, *Raines v. Dorel Juvenile Group, Inc.*, No. 06-04005 (13th Cir. Nov. 9, 2007).

¹⁴⁶ *Id.* at ¶¶ 1-4.

¹⁴⁷ *Id.* (“The parties may specifically designate as ‘confidential’ any documents, information, or materials of a proprietary, financial, or competitively sensitive nature, or which otherwise implicates any recognized privacy interest, by placing in a conspicuous location a stamp bearing the legend ‘confidential’ Prior to designating any material as confidential, the producing party must make a good faith

filed with the court for any reason, the documents were to be filed under seal.¹⁴⁸ The parties agreed that those involved in the litigation, including counsel, could not “advertise, or publicize any information provided and designated as ‘confidential’ by” a party.¹⁴⁹ No showing of good cause was required nor alluded to in the order, other than a statement by the parties that “[p]rior to designating any material as confidential, the producing party [had to] make a good faith determination that the material [was], in fact, a trade secret or other confidential . . . information as contemplated by the applicable Rules of Civil Procedure[.]”¹⁵⁰

In October of 2007, the parties settled the suit confidentially.¹⁵¹ To date, the child safety seat manufacturer has not issued a recall of the allegedly defective seat.¹⁵² It is unknown what the confidential settlement agreement between the parties in the case provided. The Amended Complaint, the Answer, and other litigation documents in the case remain public because the parties made no sealing request. Despite this, information about the case would be virtually inaccessible by a member of the public were it not for the cross-referencing of two documents that would not generally be available in most cases involving confidential settlements. In an advertising newsletter published by the law firm representing the plaintiff, lawyers for the plaintiff included a brief and vague factual summary of the case noting that the suit settled confidentially and that, to date, the defendant failed to take action to

determination that the material is, in fact, a trade secret or other confidential research, development or commercial information as contemplated by the applicable Rules of Civil Procedure, the dissemination of which would significantly damage the producing party’s business.”).

¹⁴⁸ *Id.* at 3 (“Whenever filed with the Court for any reason, all designated materials disclosed by any party shall be filed with the Court under seal and shall be kept under seal until further order of the Court.”).

¹⁴⁹ *Id.* at 4 (“All parties other than the designating party, including counsel, technical consultants, and/or experts of other parties, shall not sell, offer, advertise, or publicize any information provided and designated as ‘confidential’ by a designating party[.]”).

¹⁵⁰ *Id.* at 2.

¹⁵¹ Stipulation of Dismissal with Prejudice, *Raines v. Dorel Juvenile Group, Inc.*, No. 06-04005 (13th Cir. dismissed Nov. 9, 2007); Order Granting Stipulation for Dismissal, *Raines v. Dorel Juvenile Group, Inc.*, No. 06-04005 (13th Cir. dismissed Nov. 9, 2007).

¹⁵² *Firm Settles Case Against Car Seat Company*, *supra* note 2 (“To date, the company has failed to take any action to notify consumers of the problem.”); *see also* *Cosco Juvenile*, *supra* note 4.

notify consumers of the problem with the infant seats.¹⁵³ The summary provided in the newsletter omitted the parties' names and excluded information that could help identify the case specifically, other than a reference tying the incident to Hillsborough County, Florida and that the parties settled the case between June and October of 2007.¹⁵⁴ Searches of the Hillsborough County public records were useless in locating relevant information about the case without knowing the parties' names or the relevant case number. An extensive search of Florida news sources surprisingly revealed one article by a local newspaper that, when cross-referenced with the summary provided by plaintiff's counsel in their newsletter, exposed details about the case.¹⁵⁵ In May of 2007, shortly before the parties settled the litigation and almost simultaneously with the plaintiff's filings requesting to amend the complaint to ask for punitive damages, a local newspaper published one article, which revealed the plaintiff's name, the manufacturer's name, and the model of the allegedly defective seat, despite the existence of a protective order in the case.¹⁵⁶ Only by learning this information did the documents filed with the court in this case become accessible. All of the documents and information subject to the protective order, however, as well as any other information encompassed by the parties' confidential settlement agreement, is hidden from the public's view indefinitely.

Yet another layer of secrecy is added if the parties agreed, as part of their confidential settlement, to return all the documents and materials produced in discovery and subject to the umbrella protective order. Subsequent plaintiffs who file suit against the product manufacturer may not be able to access the documents and, in some cases, the defendant will have an opportunity to destroy critical documents.¹⁵⁷

¹⁵³ See *Firm Settles Case Against Car Seat Company*, *supra* note 2.

¹⁵⁴ See *id.*; see also Clerk of Circuit Court: Hillsborough County, Florida, Dorel Juvenile Group, Inc., http://publicrecord.hillsclerk.com/oridev/criminal_pack.ins; name search; type Dorel Juvenile Group, Inc. (last visited Dec. 21, 2008).

¹⁵⁵ See *Firm Settles Case Against Car Seat Company*, *supra* note 2; Clerk of Circuit Court: Hillsborough County, Florida, Dorel Juvenile Group, Inc., http://publicrecord.hillsclerk.com/oridev/criminal_pack.ins; name search; type Dorel Juvenile Group, Inc. (last visited Dec. 21, 2008); see also Krause, *supra* note 136.

¹⁵⁶ Krause, *supra* note 136.

¹⁵⁷ See *The Laudable South Carolina*, *supra* note 6, at 889. See generally Bierman, *supra* note 115 (indicating such agreements generally allow large corporations to bury or even destroy smoking gun type documents).

They also allow companies to hide their safety history from the public and even, at times, from government regulatory agencies.¹⁵⁸

In Palm Beach County, Florida, lawyers representing two women killed in a fatal car accident on Interstate 95 sued the tire company Uniroyal Goodrich and its parent company Michelin.¹⁵⁹ The van the women rode in rolled over after the tread on the vehicle's rear tire separated.¹⁶⁰ Attorneys for the plaintiffs claimed that the tire was defective.¹⁶¹ As part of the litigation, attorneys for the plaintiffs requested the company's records on tire complaints; complaints submitted to the company by customers who had problems with their tires.¹⁶² The plaintiffs argued that the records would help them to determine whether this was a manufacturing problem.¹⁶³ Uniroyal denied that any such records were kept by the company or ever existed.¹⁶⁴ Attorneys for the plaintiffs later discovered that those very records had been produced by the company in an earlier lawsuit filed in the state of Georgia.¹⁶⁵ Attorneys in the Georgia case settled confidentially with Uniroyal and agreed to return boxes of customer complaints produced by the company during the Georgia litigation.¹⁶⁶ The documents, subject to an umbrella protective order, could not be turned over to the Florida plaintiffs, could not be copied, and could not even be discussed.¹⁶⁷ Neither consumers nor the National Highway Transportation Safety Administrations had ever been privy to these records.¹⁶⁸ The protective order agreed to by the parties and the confidential settlement worked together to make and

¹⁵⁸ See Paul Wenske, *Company Recalling Child Car Seats Has Had Safety Problems Before*, KAN. CITY STAR, Feb. 9, 2008, at C1, available at 2008 WLNR 2505260 (noting Evenflow, a car seat manufacturer, knew of dozens of claims, lawsuits, and notices that one of its car seats was defective and failed to report these incidents to government safety administrators). See generally Bierman, *supra* note 115 ("Whatever the nature or validity of the complaints, consumers and the government have never seen them. The records are confidential.").

¹⁵⁹ Bierman, *supra* note 115.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

keep these documents confidential.¹⁶⁹ But before the confidential settlement agreement between the Georgia litigants could be finalized, lawyers in the Florida case requested that the Georgia state judge on the case modify the protective order shielding the documents so that the plaintiffs' attorneys could discuss them.¹⁷⁰ In his order allowing the Florida plaintiffs to obtain access to the documents, the Georgia state judge commented that he had "grave concerns that [Uniroyal] may be engaged in a pattern of misrepresentation with the aid of [the] court's protective order."¹⁷¹

B. Circumventing the Access Provisions of the Sunshine Act

Faulty child-infant safety seats, defective tires, medical malpractice, and defective automobiles—it is difficult to conceptualize how these things would not be characterized as public hazards and, therefore, how confidential settlements, umbrella protective orders, and sealing orders could continue to be granted in these cases in the face of section 69.081 of the Florida Statutes.¹⁷² Each of these, however, has been the subject of one or more confidential settlements in Florida over the past several years.¹⁷³ In all likelihood, all have been the subject of lawsuits where a judge entered one or more protective orders, effectively concealing information relevant to the determination of whether it harmed or will harm a member of the public again.¹⁷⁴ So, are we to conclude that attorneys and judges in Florida are brazenly ignoring the law and regularly flouting the provisions of Florida's Sunshine Act? At least one scholar suggested that the reason Florida's Sunshine Act is underutilized is because the statute is so clear in its intent and purpose that courts rarely get the opportunity to interpret it.¹⁷⁵ An examination of the few reported cases that exist interpreting the statute, however, reveal

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

¹⁷² FLA. STAT. § 69.081(2) (2004).

¹⁷³ *See supra* Part IIIA.

¹⁷⁴ *See, e.g.,* Fogarty, *supra* note 115 ("Twice in recent lawsuits, [a Florida Circuit Court judge] granted lawyers for tire companies airtight protective orders virtually assuring that the public wouldn't glimpse information raising doubts about the safety of their tires.").

¹⁷⁵ Shaw, *supra* note 20, at 63.

quite the opposite is true.¹⁷⁶ In reality, the statute's vagueness and lack of clarity robbed the Sunshine Act of its functionality, thereby producing a statute that, although once perceived as trailblazing, now has very little bite and generally does not accomplish its purpose.¹⁷⁷

Central to the statute's underutilization, or some may suggest dysfunctional application, are the provisions of the statute itself. The problem lies in what the statute prohibits.¹⁷⁸ By its terms, the statute only prohibits a court from entering an order or judgment that has the effect or purpose of concealing a public hazard.¹⁷⁹ In addition, the statute declares unenforceable "[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard"¹⁸⁰ The term *public hazard* is defined as "an instrumentality . . . that has caused and is likely to cause injury."¹⁸¹ The statute, however, provides no guidance as to when or how a court must make the determination of whether a product, condition, or other instrumentality is a public hazard for purposes of the Act.¹⁸² For all of the Legislature's good intentions, the statute suffers from a fatal flaw—it fails to provide a framework or

¹⁷⁶ See Goldstein, *supra* note 72, at 425-30 (examining the ambiguities in the Florida Sunshine in Litigation Act and the problems those ambiguities caused in deciding cases).

¹⁷⁷ *Id.* at 425 ("As a result of these ambiguities and omissions, in practice the Sunshine Act . . . has had far less impact than its supporters had imagined").

¹⁷⁸ See *id.* at 424 (arguing the categorical ban on protective orders in cases involving public harms under section 69.081 is too broad).

¹⁷⁹ FLA. STAT. § 69.081(3) (2004) ("[N]o court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.").

¹⁸⁰ § 69.081(4) ("Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, 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, is void, contrary to public policy, and may not be enforced.").

¹⁸¹ § 69.081(2) ("As used in this section, 'public hazard' means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.").

¹⁸² See Goldstein, *supra* note 72, at 424-25 (noting the definition of public hazard is limited in a detrimental way because it requires the instrumentality in question "have caused injury in the past and be likely to do so again in the future").

standard for courts to apply to effectively and uniformly address Sunshine Act issues during litigation.¹⁸³ Reported cases interpreting the provisions of the Act shed very little light on the statute as only a handful reported cases interpreting the statute exist.¹⁸⁴ In fact, a compilation of all of the reported opinions interpreting this Act show there are no certainties and very little uniformity when it comes to the treatment of Sunshine Act issues in litigation.¹⁸⁵ In addition, it seems that since the statute's enactment in 1990, judges and litigants had little incentive to raise Sunshine Act issues during litigation.¹⁸⁶

In one of the few cases to carve out some procedural definition for the statute, the Florida Second District Court of Appeal held that an evidentiary hearing is required when a trial court is called upon to re-

¹⁸³ *Id.* at 425 (stating that requiring a court to determine when an instrumentality is a public hazard for purposes of the act “creates considerable ambiguities and gives litigants a potential way of getting around the law”).

¹⁸⁴ Shaw, *supra* note 20, at 63.

¹⁸⁵ See *Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142, 145-46 (Fla. Dist. Ct. App. 2008) (plurality) (noting that the trial court failed to conduct the in-camera review required by section 69.081); *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. Dist. Ct. App. 2005) (“[T]he goal of protecting the public from hazards can only be accomplished by disallowing confidentiality orders which protect information related to the hazard after a verdict and judgment have been entered against the manufacturer of a hazardous product.”); *State Farm Fire & Cas. Co. v. Sosnowski*, 830 So. 2d 886, 888 (Fla. Dist. Ct. App. 2002) (plurality) (noting the Act applies only when “health and safety issues are implicated” and not where solely economic harm is at issue); *Novartis Pharm. Corp. v. Carnoto*, 798 So. 2d 22, 23 (Fla. Dist. Ct. App. 2001) (per curiam) (“[T]he trial court erred in deciding to defer ruling on petitioner’s discovery objections until resolution of the Sunshine Act issues.”); *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023 (Fla. Dist. Ct. App. 2001) (holding a settlement agreement requiring the plaintiff to maintain some level of secrecy did not violate the Act); *Smith v. TIB Bank of the Keys*, 687 So. 2d 895, 896 (Fla. Dist. Ct. App. 1997) (“While confidentiality agreements are necessary in some instances, to facilitate settlement, they may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent’s discovery.”); *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226, 228 (Fla. Dist. Ct. App. 1995) (plurality) (noting the trial court failed to hold an evidentiary hearing on the merits of the Sunshine Act issues); *Gen. Motors Corp. v. Dickerson*, 654 So. 2d 1036, 1037 n.1 (Fla. Dist. Ct. App. 1995) (plurality) (“No decision was apparently made by either the master or the trial court relative to applying the [A]ct.”); *AC & S, Inc. v. Askew*, 597 So. 2d 895, 898 (Fla. Dist. Ct. App. 1992) (per curiam) (noting section 69.081 applies to “a court order which conceals ‘any information concerning a public hazard’”).

¹⁸⁶ See Goldstein, *supra* note 72, at 425 (noting the Act is utilized infrequently).

solve Sunshine Act issues.¹⁸⁷ In *E.I. DuPont De Nemours & Co. v. Lambert*, the Second District held that a trial court judge could not summarily resolve Sunshine Act issues based on what the judge observed or heard during the course of the litigation.¹⁸⁸ The plaintiffs, a group of commercial plant growers, sued DuPont, who manufactured a chemical fungicide that plaintiffs alleged caused approximately \$500,000,000 in damages to their plants.¹⁸⁹ Early in the litigation, the presiding judge issued a protective order pursuant to which DuPont produced company documents which it claimed contained confidential trade secret information.¹⁹⁰ Florida's Agriculture Commissioner and others filed a motion requesting the judge set aside the confidentiality order because it violated the provisions of the Sunshine Act.¹⁹¹ Before a hearing on the motion could take place, the jury returned a verdict for the plaintiffs.¹⁹² Based on the jury's verdict and on the information the trial judge heard during the course of the trial, the trial court held that the fungicide was a public hazard within the meaning of the Sunshine Act and set aside its earlier confidentiality order.¹⁹³ Noting that due process required the litigants be afforded notice and the opportunity to be heard, the appellate court reversed the trial court's summary resolution of the Florida's Sunshine Act issues and remanded the case for an evidentiary hearing on Florida's Sunshine Act issues.¹⁹⁴

The court in *Lambert*, however, did not go much further than to decide an evidentiary hearing was necessary to resolve whether a product or other instrumentality constitutes a public hazard under the Act,¹⁹⁵

¹⁸⁷ *E.I. DuPont De Nemours & Co.*, 654 So. 2d at 228; see also *Coal. to Protect Florida's Elders, Etc. v. Fla. Convalescent Ctr., Inc.*, 747 So. 2d 938 (Fla. Dist. Ct. App. 1999) (unpublished table decision) ("After affording the parties an opportunity to be heard . . . the court shall determine whether the Act applies to these materials and rule accordingly.").

¹⁸⁸ See *E.I. DuPont De Nemours & Co.*, 654 So. 2d at 228.

¹⁸⁹ *Id.* at 227; see also *Benlate Battle Set in Broward: DuPont Plans to Defend its Fungicide in 200 Florida Suits Despite a Settlement in Georgia*, ORLANDO SENTINEL, Aug. 21, 1993, at D1, available at 1993 WLNR 4385261.

¹⁹⁰ *E.I. DuPont De Nemours & Co.*, 654 So. 2d at 227.

¹⁹¹ *Id.*

¹⁹² *Id.* at 228.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *E.I. DuPont De Nemours & Co.*, 654 So. 2d at 228; see also HUGHES, *supra* note 8, at 23 ("[O]ne of the earliest appellate decisions interpreting §69.081 held that it

a requirement not specifically set out in the statutory language of section 69.081 and that has only been adopted by one other jurisdiction in Florida.¹⁹⁶ The court provided no guidance as to when such a determination should occur and failed to recognize, at least in some situations, such a requirement might lead to a predicament for trial courts, particularly when a defendant requests a broad protective order early in a product liability case, before the parties present evidence in the case and exchange discovery.¹⁹⁷ While it is not difficult to conceptualize labeling a product as a public hazard after a jury returned a verdict for the plaintiff, it is much more difficult to understand how a judge could fairly make this determination before evidence is adduced at trial.¹⁹⁸ A Sunshine Act hearing in such a case would require the presiding judge to determine whether the product caused injury in the past and was likely to cause injury in the future—a determination akin to a ruling on the merits of the case.¹⁹⁹ The statute lacks meaningful standards by which the judge can make this assessment and it is unclear how the defendant would prove the product is not a public hazard, short of putting on its defense.²⁰⁰

was a denial of procedural due process for a court to make a determination of ‘public hazard’ without an evidentiary hearing.”).

¹⁹⁶ See *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1084 (Fla. Dist. Ct. App. 2005) (holding the trial court erred by entering a blanket protective order “without first holding a hearing to determine which documents related to the claimed public hazard and if any of the documents related to a trade secret”); see also FLA. STAT. § 69.081(7) (2004) (requiring an in-camera examination of documents or materials a party attempts to exempt from disclosure).

¹⁹⁷ Goldstein, *supra* note 72, at 425-26 (“[C]ourts are reluctant to rule that something is a public hazard until after either trial on the merits or a separate Sunshine Act hearing . . .”).

¹⁹⁸ See generally *Jones v. Goodyear Tire & Rubber, Co.*, 871 So. 2d 899 (Fla. Dist. Ct. App. 2003) (requiring reversal of a pre-trial confidentiality order after evidence produced at trial established that the product at issue was a public harm); see also HUGHES, *supra* note 8, at 22-23 (“Should a protective order be challenged at an early stage of litigation—for example, during discovery—a court applying §69.081 will have to determine whether the instrumentality in question ‘caused and is likely to cause’ injury long before that issue is established at trial, and possibly even before evidence that would inform that conclusion has been requested or produced in discovery.”).

¹⁹⁹ See HUGHES, *supra* note 8, at 22.

²⁰⁰ See § 69.081(7); see also Goldstein, *supra* note 72, at 426 (“But when the existence of a public hazard has yet to be established, the task of applying the Sunshine Act becomes exceedingly difficult.”).

Another problem with such a procedure is that it provides no mechanism to protect the defendant from the damaging effects of having its product labeled a public hazard early in the litigation, particularly if the jury later finds there was not liability or wrongdoing on the part of the defendant. A corporate defendant, for example, may suffer irreparable financial damage as a result of having one or more of its products branded a public hazard, even if it is later determined that the injuries were not caused by the product or that the product itself was not defective.²⁰¹

Similar problems may result if a judge takes the approach deciding that it is too early in a case to determine whether an allegedly defective product is a public hazard.²⁰² In such cases, a judge may preliminarily enter a broad protective order to facilitate the discovery process and hold off on resolving Sunshine Act issues until liability is fixed on the defendant at the conclusion of the trial.²⁰³ However, one Florida court held the defendant waives any right to later challenge the release of the documents to the public if a jury finds the product in fact injured the plaintiff.²⁰⁴

In *Jones v. Goodyear Tire & Rubber Co.*, a tire mechanic sued Goodyear alleging one of the tires it manufactured was defective.²⁰⁵ The plaintiff was severely injured while repairing a flat tire on one of his employer's vehicles.²⁰⁶ The tire exploded while the plaintiff attempted to fill the tire with air to check for leaks.²⁰⁷ During discovery, Goodyear objected to several of the plaintiff's requests to produce, alleging such requests were not restricted to only the substantially similar tires that allegedly injured the plaintiff.²⁰⁸ Although the judge ruled that

²⁰¹ See generally Goldstein, *supra* note 72 at 424-30.

²⁰² See generally *Goodyear Tire & Rubber Co.*, 929 So. 2d at 1084 (holding the trial court's granting of a blanket confidentiality order until the jury made a determination about the product in question was err because the trial court should have held "a hearing to determine which documents related to the claimed public hazard") .

²⁰³ *Id.*

²⁰⁴ *Id.* at 1084-85.

²⁰⁵ See *Jones v. Goodyear Tire & Rubber, Co.*, 871 So. 2d 899, 900 (Fla. Dist. Ct. App. 2003).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Goodyear Tire & Rubber Co.*, 929 So. 2d at 1082.

Goodyear had to supply the documents to the plaintiff, Goodyear sought a confidentiality order prohibiting the plaintiff from disclosing the documents and information obtained during discovery, claiming the documents contained trade secrets.²⁰⁹ The plaintiff objected, asserting that the documents were not entitled to trade secret protection and could not be the subject of a confidentiality order because they contained information concerning a public hazard, the concealment of which was prohibited by Florida's Sunshine Act.²¹⁰ The judge held it was too early in the case to make a determination that the tires constituted a public hazard, and thus did not hold a Sunshine Act hearing.²¹¹ Accordingly, the judge entered the confidentiality order requested by Goodyear stating he would later permit the documents to be made public if the plaintiffs prevailed in the action.²¹²

At the end of the trial, the jury concluded the tires in question injured the plaintiff, but the judge entered a directed verdict for the defense and decided to keep the confidentiality order in place.²¹³ On appeal, Florida's Third District Court of Appeal reinstated the jury's verdict and remanded the case to the trial court with the mandate that it vacate the confidentiality order.²¹⁴ The appellate court held that, because the jury found the tire injured the plaintiff, it was a public hazard and the confidentiality order violated Florida's Sunshine Act.²¹⁵

On remand to the circuit court, Goodyear argued it was entitled to "a hearing and an in-camera inspection of the documents covered by the confidentiality order" as provided for in subsection seven of the statute.²¹⁶ Goodyear claimed the Sunshine Act did not require all of the disputed documents be made public because they did not pertain to the make and model of tire that the appellate court determined to constitute

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1082-83.

²¹¹ *Id.* at 1083.

²¹² *Id.*

²¹³ *See Jones*, 871 So. 2d at 900, 906.

²¹⁴ *Id.*

²¹⁵ *Id.* at 906 ("Since the jury clearly found that Jones was injured by the tire in question, the tire is deemed a 'public hazard.'").

²¹⁶ *Goodyear Tire & Rubber Co.*, 929 So. 2d at 1083.

a public hazard.²¹⁷ The circuit court denied Goodyear's motion for a hearing and vacated the confidentiality order, consistent with the appellate court's decision.²¹⁸ Goodyear appealed, asserting the Sunshine Act entitled it to a hearing prior to making the documents public.²¹⁹ The Florida District Court of Appeal for the Third Circuit affirmed the circuit court's denial of Goodyear's request for a hearing, concluding that the trial court erred when it originally entered the confidentiality order without first holding a Sunshine Act hearing to determine which documents related to the public hazard and if any of the documents related to a trade secret.²²⁰ The court noted that, because the Act prohibits concealing a public hazard, "the trial court should have determined whether its order would have had such an effect prior to entering the order, rather than deferring until after trial."²²¹ The court held that Goodyear waived its right to any hearing on these issues by inviting the error and enjoying the benefits of that error for five years.²²² Accordingly, Goodyear was precluded from claiming that any of the documents were exempt from disclosure to the public.²²³

The Third District's holding in *Goodyear* suggests the determination of whether an instrumentality constitutes a public hazard pursuant to the Sunshine Act must be made when a litigant first requests confidentiality, irrespective of whether this occurs very early in the case.²²⁴ This interpretation of the statute, however, is far from unanimous across Florida jurisdictions and only one reported case reiterated the holding in *Goodyear*.²²⁵ The evidence suggests quite the opposite

²¹⁷ *Id.*; see also FLA. STAT. § 69.081(7) (2004) ("If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.").

²¹⁸ *Goodyear Tire & Rubber Co.*, 929 So. 2d at 1083.

²¹⁹ *Id.* at 1084.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1084-85 ("Goodyear led the trial court to error and thereby obtained a confidentiality order without a determination of whether its tires constituted a public hazard under the Sunshine in Litigation Act, or whether any exception to the Act applied.").

²²³ *Id.*

²²⁴ *Id.* at 1084.

²²⁵ See *Novartis Pharm. Corp. v. Carnoto*, 798 So. 2d 22, 23 (Fla. Dist. Ct. App. 2001) (per curiam) (discussing trial judge's decision that a determination on Sunshine Act

occurs in the majority of cases.²²⁶ Litigants regularly seek confidentiality, either in the form of a protective order or by settling confidentially outside of the court's purview, and Sunshine Act issues will never even be raised in court.²²⁷

In most cases, therefore, the significant procedural ambiguities inherent in the Florida Sunshine Act made the Act unworkable in its current form and provided litigants with a way to circumvent the statute with impunity.²²⁸ Because the statute's application hinges on whether the instrumentality in question is a public hazard, the parties are essentially at liberty to settle confidentially or to request or stipulate to blanket protective orders, unless the presiding judge in the case affirmatively attaches the public hazard label to the allegedly defective product.²²⁹ Similarly, judges are free to grant even the broadest of protective orders without running afoul of the statute until the judge determines the case involves a public hazard as defined by the statute.²³⁰ Unlike the *Goodyear* case, where the plaintiff vigorously argued the sunshine issues raised by the defendant's proposed confidentiality order, litigants in the majority of these cases lack incentives to raise these issues during the course of the litigation.²³¹

Instead, defendants have an incentive to settle early and settle confidentially because it can keep damaging information from being publicized.²³² Plaintiffs also have little reason to raise Sunshine Act

issues must be made before the trial court rules on pharmaceutical company's "discovery objections in a pending products liability lawsuit").

²²⁶ See Goldstein, *supra* note 72, at 425-26 (explaining that judges are often reluctant to determine whether a product is a public hazard before completion of the trial on the merits or a separate Sunshine Act hearing).

²²⁷ *Id.* at 425-26, 427-48 (discussing how the trial court's decision to resolve Sunshine Act issues using a general master before issuing a protective order in the case was overturned by the appellate court because both parties had not agreed to the appointment of the general master).

²²⁸ See *id.* at 425.

²²⁹ *Id.* at 433-34 ("The rules all attempt to restrict or prohibit settlements that conceal information concerning 'public hazards,' but parties can always argue that no court has yet determined that the product at issue is a public hazard.").

²³⁰ See *id.* at 433-34.

²³¹ See Drahozal & Hines, *supra* note 79, at 1458-59 (explaining the incentives of secret settlements to both the plaintiff and defendant).

²³² *Id.* (noting defendants have an incentive to settle secretly early in the litigation).

issues when confronted with confidentiality requests by a defendant.²³³ In fact, civil plaintiffs often have an incentive to agree to confidentiality because they will easily obtain greater information from the defendant during discovery and will potentially have the ability to extract a higher settlement amount from the defendant by agreeing to keep things quiet.²³⁴ Judges facing increasingly crowded dockets also uniformly lack incentives to sua sponte raise sunshine law issues and sometimes are not even aware of the litigants' agreement to conceal information.²³⁵ When the litigants in a case settle confidentially, the judge will not see the agreement or know its terms unless the parties specifically request to file the agreement with the court.²³⁶ Although the statute allows any person substantially affected by any order, judgment, or contract that violates the provisions of the Act, to intervene, absent the rare exception, nonparties will generally lack the knowledge or notice to enable them to challenge the use of secrecy in litigation.²³⁷ The result is a sunshine statute that rarely gets used and inevitably fails to accomplish its purpose.²³⁸

²³³ *Id.* at 1459 (stating the early claimant has an incentive to settle secretly because early secret settlements can extract a higher settlement payment).

²³⁴ *Id.*

²³⁵ See Goldstein, *supra* note 72, at 428 (quoting the trial court judge in a major Florida products liability case against a pharmaceutical company as stating, "he had 'better things to do than spend hours upon hours upon hours . . . review[ing] documents'"); see also *The Laudable South Carolina*, *supra* note 6, at 889 (noting secrecy in litigation is frequently lawyer driven and simply flies below the judge's radar screen in many instances because "court approval of the settlements was neither required nor sought").

²³⁶ *The Laudable South Carolina*, *supra* note 6, at 886 ("When the settlement of a case includes secretizing . . . discovery, the courts— [sic] which see neither the settlement agreement and release, nor the secrecy provision, nor the agreement to return unfiled discovery— [sic]are unaware of what truly happened.").

²³⁷ Goldstein, *supra* note 72, at 429 ("[T]he law does not provide for the kind of notice that would regularly attract intervenors."); see also *Chic. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1308 (11th Cir. 2001) (noting in the months following the settlement of an early suit brought against Firestone for the failure of one of its tires, media scrutiny of tread separation accidents intensified leading members of the media to intervene in the case in order to unseal documents in the case).

²³⁸ Goldstein, *supra* note 72, at 425 ("[I]n practice the Sunshine Act . . . has had far less impact than its supporters had imagined, largely failing in its purpose of preventing courts from entering protective orders that conceal public hazards.").

The intractability of the Sunshine Act alone, however, may not be the only reason attorneys in Florida have been able to continue the practice of bargaining for confidentiality. Another way litigants may circumvent the provisions of the statute is to avoid its applicability altogether.²³⁹ Plaintiffs may, for example, choose to file suit in federal court or in another state.²⁴⁰ Defendants may be able to remove the case to another jurisdiction.²⁴¹ This may be significantly easier for plaintiffs filing suit against large corporations that may be amenable to suit in multiple jurisdictions. In *Ronque v. Ford Motor Co.*, the United States District Court for the Middle District of Florida held that section 69.081 of the Florida Statutes is a procedural rule inapplicable in federal proceedings.²⁴² In that case, a wrongful death action where the plaintiff alleged the faulty design and manufacturing of a Ford Bronco was the proximate cause of plaintiff's death in a roll-over accident, the court granted defendant's request for an umbrella protective order, finding a document-by-document review of discovery materials was not feasible in the case.²⁴³ Once the suit is litigated in federal court, therefore, a party requesting an umbrella protective order or the sealing of a document or case file must only follow the provisions of rule 26(c) of the Federal Rules of Civil Procedure and local rules, if any.²⁴⁴ It is possible that litigants seeking to circumvent the provisions of the Sunshine Act may also be able to do so by opting to resolve their dispute through mediation or arbitration.²⁴⁵

²³⁹ Drahozal & Hines, *supra* note 78, at 1459.

²⁴⁰ *Id.* (“[A] claimant can circumvent restrictions adopted by a single state or federal court by filing suit in a state or court without such restrictions.”).

²⁴¹ *Id.* at 1459.

²⁴² *Ronque v. Ford Motor Co.*, No. 91-622-CIV-J-16, 1992 WL 415427, at *1 (M.D. Fla. May 19, 1992) (“To the extent the statute attempts to limit this Court’s authority to enter protective orders pursuant to [Federal Rule of Civil Procedure] 26(c), the state statute is ineffective.”).

²⁴³ *Id.* at *1-2 (“[A]n ‘umbrella’ protective order is necessary because a document-by-document review of discovery materials in such a case is not feasible if the case is to proceed in an orderly, timely manner.”).

²⁴⁴ *Chic. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001) (noting stipulations to umbrella protective orders have become a matter of routine in the federal courts).

²⁴⁵ Drahozal & Hines, *supra* note 78, at 1459 (“[E]ven if a nationwide ban on all secret settlements . . . were enacted, many parties could accomplish much the same result by use of predispute or postdispute arbitration agreements, taking advantage of the privacy of the arbitration process.”).

IV. CONTINUED SECRECY IN LITIGATION THROUGH LAX ENFORCEMENT OF THE RULES

The Sunshine Act is not the only open access law in Florida that missed its mark. In 1992, the Florida Supreme Court adopted Judicial Administration Rule 2.051.²⁴⁶ This rule sought to curtail secrecy in litigation by limiting when parties to a lawsuit could request and obtain a sealing order—a court order denying anyone other than the parties access to particular litigation documents, to evidence filed in the case, or to the case file altogether under the ominous threat of the court’s contempt power.²⁴⁷ The rule, adopted in anticipation of the enactment of article I, section 24 of the Florida Constitution, the Florida Sunshine Amendment, was evidence of the radical shift in the State toward openness and transparency in government.²⁴⁸ In certain ways, the rule was ahead of its time, anticipating a problem within both the state and federal judicial branches that was, at the time, just beginning to get people’s attention, but that had the potential of quickly undermining the public’s confidence in the legal system.²⁴⁹

The problem is categorized as government enforced or court enforced secrecy: a trend by civil litigants to agree to keep confidential, or out of the public’s purview, facts and other information about their cases coupled with judges’ willingness to allow such confidentiality.²⁵⁰

²⁴⁶ *In re Amendments to the Fla. Rules of Judicial Admin.*—Pub. Access to Judicial Records, 608 So. 2d 472, 472-75 (Fla. 1992) (“The amendments . . . are, in part, designed to clarify the rules on public access to the records of the judicial branch of government and its agencies.”).

²⁴⁷ FLA. R. JUD. ADMIN. 2.051; *see also* Anderson, *supra* note 29, at 712-15 (noting a sealing order generally has the effect of sealing the entire record of the case, including pleadings, exhibits, hearings, transcripts, prior opinions, memoranda, court orders and even, in some cases, the identities of the parties to the dispute).

²⁴⁸ *See In re Amendments to Fla. Rules of Jud. Admin.*—Pub. Access to Judicial Records, 608 So. 2d at 472, 472 (“In light of Florida’s strong policy in favor of open government, the public is entitled to inspect the records of the judiciary, with certain exceptions.”).

²⁴⁹ *See* Anderson, *supra* note 29, at 713 (“Recent disclosures of sealed settlements in several high profile cases affecting public safety have served to undermine public confidence in the legal system”); *The Laudable South Carolina*, *supra* note 6, at 891 (“Florida was the first state to significantly regulate secret settlements”).

²⁵⁰ Anderson, *supra* note 29, at 712-13, 715 (noting judges struggling under heavy case loads frequently comply with requests by parties to seal court records or

One federal judge admitted in his seventeen years on the bench he had been asked and granted orders restricting access to information in several notable cases.²⁵¹ For example, he sealed parts of the court record upon the settlement of a major surface water contamination case and sealed information about the settlement of a major aviation disaster.²⁵² It is this court-sanctioned secrecy which Judicial Administrative Rule 2.051 sought to eliminate or, at the very least, limit.

Rule 2.051 provided “[t]he public *shall* have access to *all* records of the judicial branch of government and its agencies” subject to ten enumerated exceptions.²⁵³ Certain records could remain confidential such as, administrative documents of the court including complaints of judicial misconduct not supported by probable cause, the performance evaluations of judges and other court personnel, copies of arrest and search warrants retained by judges until execution, and all records made confidential under the United States Constitution or state and federal law.²⁵⁴ Section nine of subsection (a), the ninth of the ten exceptions, embodies the broadest exception to the public access rule, and provides that the court could keep certain records confidential if, in its discretion, it determined confidentiality was required to:

prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

protect trade secrets;

protect a compelling government interest;

settlement agreements because they believe denying the request will break up the settlement between the parties); *see also* Bechamps, *supra* note 34, at 117-18 (noting such agreements have become common and judges consider these agreements necessary).

²⁵¹ Anderson, *supra* note 29, at 716.

²⁵² *Id.* at 716-17 (noting there are court orders on the dockets sealing the settlement terms in a case where “[a] child was killed while riding an allegedly defective go-cart,” in a case where “[a]n allegedly defective pharmaceutical, in widespread use in the United States, resulted in the death of a patient[,]” and others).

²⁵³ *See In re Amendments to the Fla. Rules of Judicial Admin.—Pub. Access to Judicial Records*, 608 So. 2d at 473-74 (emphasis added); *see also id.* at 473 (noting the exceptions to the public access are reasonable and “permit the judiciary to protect the rights of all citizens and perform its responsibilities”).

²⁵⁴ *See id.* at 473-74.

obtain evidence to determine legal issues in a case;

avoid substantial injury to innocent third parties;

avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law[.]²⁵⁵

Even in these instances, however, when and how judges could seal records were curtailed by the rule: “the degree and manner of confidentiality ordered by the court [could] be no broader than necessary to protect the interests” identified by the court as requiring confidentiality.²⁵⁶ Furthermore, in order to keep such records confidential, the court had to determine that no less restrictive measures, such as the redacting of documents, existed to protect the interests identified by the court.²⁵⁷

In 1995, the Court amended the rule to define what types of records constituted “records of the judicial branch . . . and its agencies.”²⁵⁸ *Judicial records* are now defined as any documents or exhibits in the custody of the court clerk as well as any materials created by or received by an entity of the judicial branch in connection with the transaction of official business by the court or court agency.²⁵⁹ The amended

²⁵⁵ See FLA. R. JUD. ADMIN. 2.051(a)(9)(A)(i)-(vii).

²⁵⁶ FLA. R. JUD. ADMIN. 2.051(a)(9)(B) (“[T]he degree and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A) . . .”).

²⁵⁷ FLA. R. JUD. ADMIN. 2.051(a)(9)(C) (requiring “no less restrictive measures are available to protect the interests set forth in subdivision (A)”).

²⁵⁸ See *In re* Amendments to Rule of Judicial Admin. 2.051—Pub. Access to Judicial Records, 651 So. 2d 1185, 1188 (Fla. 1995).

²⁵⁹ *Id.* (“Judicial records for this rule refer to documents, exhibits in the custody of the clerk, papers, letters, maps, books, tapes, photographs, films, recordings, data processing software or other material created by any entity within the judicial branch, regardless of physical form, characteristics, or means of transmission, that are made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any court or court agency.”).

rule also added a new subsection which provided that “reasonable notice shall be given to the public of any order closing any court record,” something for which the original formulation of the rule did not specifically provide.²⁶⁰ In 2002, the Court amended the rule again to more specifically define the phrase “records of the judicial branch.”²⁶¹ Under this revision, the rule guaranteed the public access to court records, including the contents of the court file, the case docket and transcripts, depositions, and exhibits filed with the clerk, and the administrative records made or received by a judicial branch entity.²⁶² Four years later, the Court reorganized the Rules of Judicial Administration and renumbered the rule to Rule 2.420.²⁶³

Like the Sunshine Act, however, Judicial Rule of Administration 2.420 lacked teeth, eventually compromising its overall effectiveness and functionality. For one thing, the procedure for requesting the confidentiality of judicial records under the rule was not transparent. The rule did not require a litigant seeking to keep a document in his case confidential, or the entire case file for that matter, had to submit any formal request to the court.²⁶⁴ The rule did not require those seeking confidentiality to file a written motion with the court or provide written justifications as to why one of the exceptions to the rule applied in the particular case, or why any other method short of sealing the document or file was insufficient.²⁶⁵ Absent a request from the judge presiding over the case, a party seeking closure of a record was not required to prove the need for confidentiality was properly grounded in one of the exceptions to the rule or soundly supported by fact and law.²⁶⁶ The rule only required the public be given reasonable notice once the court en-

²⁶⁰ *Id.* at 1189 (adding 2.051(c)(9)(D)) (“[E]xcept as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record.”).

²⁶¹ *See In re* Report of the Supreme Court Workgroup on Pub. Records, 825 So. 2d 889, 896 (Fla. 2002).

²⁶² FLA. R. JUD. ADMIN. 2.051(b)(1)(A)-(B) (2004).

²⁶³ *See In re* Amendments to the Fla. Rules of Judicial Admin.—Reorganization of the Rules, 939 So. 2d 966, 1005-10 (Fla. 2006) (renumbering rule 2.051 as rule 2.420).

²⁶⁴ *See* FLA. R. JUD. ADMIN. 2.420 (failing to require a formal request to the court before documents or a case file could be kept confidential).

²⁶⁵ *See generally id.* (requiring no formal request to keep information confidential).

²⁶⁶ *See generally id.* (requiring no showing that information a party requested be confidential falls within one of the exceptions in Rule 2.420).

tered a sealing order and provided for the expedited review if a sealing order was challenged.²⁶⁷ With no procedure in place to ensure litigants would have to legitimately overcome the presumption of access embodied in the rule, the rule made it rather easy for parties to a civil action to request and obtain the sealing of court documents or case files particularly when such closure was sought pursuant to Rule 2.420(c)(9)(A), the exception allowing a court to use its discretion to deny access to records fitting one of seven broad categories.²⁶⁸

The shortcomings of this rule began to become clearer in 2006 when Florida's judiciary began to capture the attention of the local media. Two local reporters began publishing a series of articles in *The Miami Herald* describing how cases in South Florida were being improperly sealed by judges and even, in some cases, being kept off of the public case docket all together, a practice commonly called supersealing.²⁶⁹ It was discovered that in Broward County alone "more than 400 civil cases and an unknown number of criminal cases have been sealed since 1989, many of them involving political figures, business owners, judges, lawyers and police officers."²⁷⁰ In 2003 for example, a Broward County judge improperly sealed the divorce case of Miriam Oliphant,

²⁶⁷ FLA. R. JUD. ADMIN. 2.042(d)(4), (e) ("Expedited review of denials of access to records of the judicial branch shall be provided through an action for mandamus . . .").

²⁶⁸ See generally FLA. R. JUD. ADMIN. 2.042(c)(9)(A)(i)-(vii).

²⁶⁹ Dan Christensen & Patrick Danner, *Concealed Cases Must Get Review, Chief Justice Says*, MIAMI HERALD, Oct. 5, 2006, at 1A, available at 2006 WLNR 17233826 [hereinafter *Concealed Cases*]; see Patrick Danner & Dan Christensen, *Three Broward Judges Failed to Obey Law with Sealed Cases*, MIAMI HERALD, Apr. 21, 2006, at 3B [hereinafter *Three Broward Judges*] (explaining that supersealing is the "practice of hiding all traces of a case by removing it from the public docket").

²⁷⁰ See *New Rules Sought for Sealed Court Cases*, SUN SENTINEL, Sept. 8, 2006, at 6B, available at 2006 WLNR 15587904 (noting many of the improperly sealed cases "were divorce files of politicians, judges and high-profile businessmen, raising the question of whether the rich and the important were getting different treatment from others"); see also *Concealed Cases*, supra note 269 (noting many of the improperly sealed cases "were divorce files of politicians, judges and high-profile businessmen, raising the question of whether the rich and the important were getting different treatment from others"); Patrick Danner & Dan Christensen, *High-Profile Names on Secret-Cases List*, MIAMI HERALD, June 14, 2006, at 1B, available at 2006 WLNR 10141488 [hereinafter *Secret-Cases List*] (compiling cases of locally prominent individuals that were sealed and taken off of the public docket).

Broward's former supervisor of elections.²⁷¹ The closing of the case went beyond merely sealing the file to prevent disclosure of its contents, however, and the case itself disappeared from the docket altogether—the case was supersealed.²⁷² In such cases, the case numbers, names of parties, and files are all hidden, so that, to the public, the cases appear to have never existed.²⁷³ Oliphant, who became the target of media scrutiny after the 2000 presidential election, requested that her case be sealed because of her public position as the elections supervisor.²⁷⁴

The problem, however, is that Florida's Rule of Judicial Administration does not allow a civil litigant to close access to court records merely because the litigant is a public or political figure.²⁷⁵ The divorce case of a local Broward County judge was also similarly improperly sealed.²⁷⁶ Like Oliphant's case, Judge Lerner-Wren's divorce case was not only sealed, but its existence was also deleted from the public court docket altogether.²⁷⁷ The Judge publicly stated she asked the court to seal her file for security reasons because she received death threats as a result of the divorce from her husband, a member of Fort Lauderdale's Downtown Development Authority.²⁷⁸ She claims, however, that she never asked the court to remove the case from the docket all together.²⁷⁹

In another case, the civil suit of a Florida man who was killed when his commuter plane crashed in North Carolina, a Broward County judge supersealed the case at the request of the attorneys for both

²⁷¹ *Concealed Cases*, *supra* note 269.

²⁷² *Id.*

²⁷³ *Three Broward Judges*, *supra* note 269.

²⁷⁴ *Concealed Cases*, *supra* note 269; *see also* Patrick Danner & Dan Christensen, *Judge Orders Oliphant's Divorce File Unsealed*, MIAMI HERALD, Oct. 4, 2006, at 4B ("The request to seal was done because of Oliphant's position as elections supervisor"); *see also* Patrick Danner & Dan Christensen, *Divorce Cases of Big Shots Hidden*, MIAMI HERALD, June 13, 2006, at 1A, *available at* 2006 WLNR 10077096 [hereinafter *Big Shots*] (listing the divorce cases of other prominent local judges whose cases were not only sealed, but removed from the court docket altogether, as if the cases never existed).

²⁷⁵ *See generally* FLA. R. JUD. ADMIN. 2.420 (2004) (failing to make special provisions for wealthy or public figures).

²⁷⁶ *Big Shots*, *supra* note 274.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

sides.²⁸⁰ Neither the parties nor the judge ever “cited any of the seven exemptions to public disclosure contained in Florida’s Rules of Judicial Administration” to justify the sealing.²⁸¹ The defendants in the case merely argued “secrecy was needed because other lawsuits arising from the crash were then being litigated.”²⁸² Another case, involving what the media refers to as Broward’s secret docket, involved a prominent attorney and partner of one of the county’s biggest law firms.²⁸³ The lawsuit involved an allegation made against the attorney by a woman identified only as Jane Doe.²⁸⁴ The partner, whose own firm defended him in the suit, had his case sealed after simply requesting confidentiality.²⁸⁵

Other Florida counties, including Miami-Dade, Palm Beach, Hillsborough, and Pasco were found to allow the improper sealing of court files as well.²⁸⁶ In Miami-Dade, for example, Chief Judge Joseph Farina reported that while there did not appear to be hidden cases or secret dockets in Miami-Dade, approximately twelve family and general jurisdiction division cases did not contain the party’s names, making the cases inaccessible by the public.²⁸⁷ Miami-Dade Chief Judge Farina also noted some cases may have been similarly wrongly obscured because they contained case numbers with incorrect judicial section numbers.²⁸⁸ Chief Judge Farina stated in other cases, the “judges who ordered cases sealed appear to have neglected to specify a reason, as the law requires.”²⁸⁹ In Palm Beach, Chief Judge Kathleen Kroll reviewed approximately forty-three cases sealed since 2001.²⁹⁰ In 2003 for exam-

²⁸⁰ *Three Broward Judges*, *supra* note 269.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Secret-Cases List*, *supra* note 270.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Dan Christensen & Patrick Danner, *Civil Cases Were Kept Hidden*, MIAMI HERALD, Oct. 17, 2006, at 1B, available at 2006 WLNR 17968564 [hereinafter *Civil Cases*] (noting a dozen civil cases in Miami-Dade Circuit Court had been improperly concealed from the public since 1993).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Susan Spencer-Wendel, *Chief Judge Reviewing More Secret-Docket Cases*, PALM BEACH POST, Jan. 24, 2007, at 1B, available at 2007 WLNR 1440537.

ple, the divorce case of Leslie Alexander, the wealthy owner of the Houston Rockets basketball team and a well-known restaurant, was improperly sealed as was the divorce case of a Broward County judicial candidate.²⁹¹ These cases were not only sealed, but maintained on a confidential docket as well.²⁹² In Sarasota, a judge agreed to seal a multimillion dollar lawsuit filed by Vern Buchanan, a millionaire auto dealer and candidate for the Florida House of Representatives, against a development company after the parties settled the suit and simply requested it be sealed by the judge.²⁹³ Thereafter, the judge presiding over the case supersealed the case, removing all reference of the lawsuit from public records.²⁹⁴ Among the claims in the lawsuit was an allegation of fraud against Buchanan.²⁹⁵ The judge refused to respond to media inquiries asking her to explain why the case required sealing, or supersealing.²⁹⁶

The specific reasons leading to the events that caused this local media scandal are unknown. However, the high-profile names attached to some of the secret cases throughout Florida publicly undermined the credibility of the State's judicial system and made people question whether some people, because of their political position or public persona, could easily get special treatment just by asking.²⁹⁷

²⁹¹ *Id.*; *Concealed Cases*, *supra* note 269.

²⁹² Spencer-Wendel, *supra* note 290; *see also* Dan Christensen & Patrick Danner, *Candidate's Divorce Among Hidden Cases*, MIAMI HERALD, Aug. 30, 2006, at 3B, available at 2006 WLNR 14983996.

²⁹³ Todd Ruger, *Buchanan Succeeds in Effort to Keep Court File Sealed*, SARASOTA HERALD-TRIB., Aug. 19, 2006, at BS1, available at 2006 WLNR 14402897.

²⁹⁴ *Id.*; *see also* Patrick Danner & Dan Christensen, *Congressional Candidate's Lawsuit Sealed by Judge*, MIAMI HERALD, Sept. 13, 2006, at 4B, available at 2006 WLNR 15867634.

²⁹⁵ Ruger, *supra* note 293.

²⁹⁶ *Id.*; *see also* Matthew Doig & Todd Ruger, *Civil Suits Disappear on Secret Docket: A Herald-Tribune Review of Sealed Cases in Sarasota Prompts Worries About Public's Right to Access*, SARASOTA HERALD-TRIB., July 30, 2006, at A1, available at 2006 WLNR 13190091 (compiling civil cases improperly sealed in Sarasota county).

²⁹⁷ *See Big Shots*, *supra* note 274 (“[T]he high-profile names on the [secret] docket further raise the question of whether some people get special treatment and are spared the indignity of having the details of their divorces open to all eyes.”).

Throughout Florida, “[j]udges and clerks have pointed the finger at one another for super-sealing.”²⁹⁸ In Broward County, where most of the sealed cases were found, “judges have accused clerks of misconstruing their sealing orders. Clerks claim they did only what judges wanted done.”²⁹⁹ There were similar issues in Pinellas County, but it was found that a computer glitch may have been responsible for some of the wrongfully sealed cases.³⁰⁰ There, the Clerk of the Circuit Court said they “will change the office’s computer system to allow managers to seal files without removing the existence of the entire case from public access; the current computer system seals the entire docket if the file is sealed.”³⁰¹ Although inefficiencies in the system may have contributed to the improper sealing of court documents and entire case files throughout the state, it is readily apparent that the provisions of Rule of Judicial Administration 2.420 made it easy for such a gross misapplication of the rule to occur.

In 2006, the Florida Supreme Court’s Chief Justice, R. Fred Lewis, “asked the state’s [twenty] chief judges last week to review all sealed court cases to make sure they were sealed in accordance with the law.”³⁰² He also asked the Judicial Administration Rules Committee to give recommendations on the issue.³⁰³ In April 2007, the Florida Supreme Court adopted amendments to rule 2.420, essentially overhauling

²⁹⁸ Dan Christensen & Patrick Danner, *Florida Supreme Court: High Court Prohibits Concealing Lawsuits*, MIAMI HERALD, Apr. 6, 2007, at A1, available at 2007 WLNR 6594696.

²⁹⁹ *Civil Cases*, *supra* note 286 (“In Broward, judges have accused clerks of misconstruing their sealing orders. Clerks claim they only did what judges wanted done.”).

³⁰⁰ See Chris Tisch, *Court Files Sealed in Error: New Policy Set*, ST. PETERSBURG TIMES, June 24, 2006, at A1, available at 2006 WLNR 10968582 (“[A] change [in] the office’s computer system [will] allow managers to seal files without removing the existence of the entire case from public access . . .”).

³⁰¹ *Id.*

³⁰² Dan Christensen & Patrick Danner, *Case Review Nixed in Broward*, MIAMI HERALD, Oct. 11, 2006, at 2B, available at 2006 WLNR 17567420; see also *Concealed Cases*, *supra* note 269 (discussing Florida’s chief justice asking all chief judges to review cases in their courts that have been sealed or hidden from the public).

³⁰³ See generally Bill Kaczor, *Stop Secret Civil Files – The Florida Supreme Court Will Decide on the Future of Sealing Criminal Cases*, ORLANDO SENTINEL, Apr. 6, 2007, at B5, available at 2007 WLNR 6618404 (explaining the creation of emergency rules and the processes behind it).

how parties are to request and obtain the sealing of court documents.³⁰⁴ Amendments adopted by the Florida Supreme Court added subdivision (d) to the rule, substantially changing the procedures for requesting court records be exempt from public disclosure.³⁰⁵ While the exemptions to public disclosure remained the same, requests to make records confidential under subdivision (c)(9), the rule's broadest exemption, must be made by written motion filed with the court.³⁰⁶ Pursuant to the rule, the motion must "identify the particular court records the movant seeks to make confidential" and "specify the bases for making such court records confidential."³⁰⁷ An attorney making such a request on behalf of a party may be subject to sanctions if the motion is not made in good faith and is not supported by a sound factual and legal basis.³⁰⁸ Notably, the new subdivision also requires judges issuing sealing orders to satisfy a laundry list of requirements, regardless of whether a litigant's opposing party contests the sealing.³⁰⁹ An order granting even a partial request to keep documents confidential must state with as much specificity as possible:

- (A) The type of case in which the order is being entered;
- (B) The particular grounds under subdivision (c)(9)(A) for making the court records confidential;
- (C) Whether any party's name is to be made confidential and, if so, the particular pseudonym or other term to be substituted for the party's name;
- (D) Whether the progress docket or similar records generated to document activity in the case are to be made confidential;

³⁰⁴ See *In re Amendments to Fla. Rule of Judicial Admin. 2.420—Sealing of Court Records and Dockets*, 954 So. 2d 16, 17-18 (Fla. 2007) ("These amendments provide a procedural vehicle for making circuit and county court records in noncriminal cases confidential . . .").

³⁰⁵ See FLA. R. JUD. ADMIN. 2.420(d)(1) (2004).

³⁰⁶ *Id.* at (d)(1)(A)-(B).

³⁰⁷ *Id.* at (d)(1)(A)-(B).

³⁰⁸ *In re Amendments to Fla. Rule of Judicial Admin. 2.420*, 954 So. 2d at 17-18.

³⁰⁹ See FLA. R. JUD. ADMIN. 2.420(d)(3).

(E) The particular court records that are to be made confidential;

(F) The names of those persons who are permitted to view the confidential court records;

(G) That the court finds that: (i) the degree, duration, and manner of confidentiality ordered by the court is no broader than necessary to protect the interests set forth in subdivision (c)(9)(A); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c)(9)(A); and

(H) That the clerk of the court is directed to publish the order in accordance with subdivision (d)(4).³¹⁰

According to the Court, the creation of these requirements was “to ensure that sealing orders that are agreed upon by the parties are not entered until the court has independently verified that sealing is indeed warranted.”³¹¹

While the new rule seems to go a long way to curtail the prevalent kind of abuse under its predecessor, specifically the long-standing practice of sealing a case merely because both parties to the litigation asked for it, it still leaves much to be desired with respect to notice and hearing requirements. A hearing on a motion to keep court records confidential, for example, is only required when the motion is contested.³¹² If the parties agreed to confidentiality, the rule does not require a hearing on the motion, although the court may, in its discretion, hold a hearing on such motion.³¹³ Notice of a motion requesting the closure of a case file or court document is similarly not required. Under the amended rule, an attorney is only required to send notification after the court enters a sealing order.³¹⁴ A member of the public or the media may then choose to challenge the sealing order, but must refute a presumption that the court’s order is correct and has the burden of proving

³¹⁰ FLA. R. JUD. ADMIN. 2.420(d)(3)(A)-(H).

³¹¹ *In re Amendments to Fla. Rule of Judicial Admin. 2.420*, 954 So. 2d at 22.

³¹² FLA. R. JUD. ADMIN. 2.420(d)(2).

³¹³ *See id.* at (d)(2).

³¹⁴ *See id.* at (d)(4).

the order is unsound.³¹⁵ These procedures make it unlikely that someone other than the litigants will contest a motion requesting confidentiality for court records. Looking at these examples, it is easy to see how the new and improved Rule of Judicial Administration leaves the public in a similar place to where they were before the recent amendments. In cases where the litigants agree *ex ante* on confidentiality and the judge presiding over the matter has incentives to move the case along or encourage settlement, a strong possibility exists that mere lip service will be paid to the requirements of the new rule and records may be sealed in a perfunctory manner.

While the amendments to rule 2.420 of Judicial Administration make it more difficult for civil litigants to summarily circumvent the public right of access to information filed with the court, even the Florida Supreme Court “recognized that the rule would only be as effective as the manner in which it was applied and enforced.”³¹⁶ Recent applications of the rule reveal, however, that some judges are lax in adhering to the requirements of the new rule, granting sealing orders without engaging in the independent verification called for by the amendments.³¹⁷

A short “[s]ix months after the Florida Supreme Court ordered tough new rules aimed at curbing the wrongful sealing of court records,” reports began surfacing that judges were not complying with

³¹⁵ See *id.* at (d)(5); see also *In re Amendments to Fla. Rule of Judicial Admin. 2.420*, 954 So. 2d at 22-23 (“[U]nder the new subdivision, regardless of whether a closure motion is contested or not, the court must state with specificity its grounds for closure under subdivision (c)(9)(A) and also must make specific findings supporting its ruling with respect to the (c)(9)(B) and (C) factors.”); Kaczor, *supra* note 303 (“The justices found it reasonable to give judges’ orders ‘a presumption of correctness’ and require challengers to show they are unsound.”).

³¹⁶ *In re Amendments to Fla. Rule of Judicial Admin. 2.420*, 954 So. 2d at 23 (“We note that any procedures that the Court adopts, whether today or in the future, to address this issue are only as good as the manner in which they are applied and enforced.”).

³¹⁷ See generally Patrick Danner & Dan Christensen, *New Rules on Court Records Often Ignored: Some Miami-Dade and Broward Judges aren’t Following Tough New Rules Meant to Prevent the Wrongful Sealing of Court Records*, MIAMI HERALD, Oct. 14, 2007, at A1, available at 2007 WLNR 20165367 [hereinafter *New Rules*] (“Six months after the Florida Supreme Court ordered tough new rules aimed at curbing the wrongful sealing of court records, judges in Miami-Dade and Broward [are not] following them.”).

the requirements of the new rule.³¹⁸ Local newspapers reported that in Broward County, judges issued ten sealing orders, eight of which failed to comply with the requirements of the new rule.³¹⁹ “Four of six sealing orders that judges issued in Miami-Dade [did] not comply” with the rule.³²⁰ According to *The Miami Herald*, “[t]he cases include[d] the divorce of a prominent Broward homicide prosecutor, a defamation suit against a Miami doctor, and a Fort Lauderdale law firm’s fee dispute in a probate matter.”³²¹ “Some cases involve records the law says should be public. Others involve sensitive information that appears to be exempt from public disclosure, like trade secrets, but were sealed with orders that don’t comply with the new standards.”³²² In some court sealing orders, the only evidence of independent verification by the presiding judge of the need for confidentiality was boilerplate language derived from the provisions of the rule itself.³²³ In one case, a Broward County judge ordered the court clerk to seal a defamation case against a local doctor and instructed the clerk to “seal the court file and docket in its entirety, and keep it hidden from public view by anyone, ever until the end of the earth.”³²⁴ The attorney for the defendant “requested the sealing[, but] [n]o motion for sealing the court file was ever filed, even though the new rules require sealing requests [to] be made in writ-

³¹⁸ *Id.*

³¹⁹ *See id.* (noting Broward County judge agreed to seal information pertaining to the divorce of the County’s homicide prosecutor without explaining why such closure was necessary); *see also* Dan Christensen & Patrick Danner, *Judge Fails to Explain Secret Settlement*, *MIAMI HERALD*, Apr. 20, 2007, at B1, *available at* 2007 WLNR 7439722 (describing how a judge sealed a settlement agreement in a civil rights lawsuit against the Broward Sheriff’s Office without specifying in his order any grounds to justify the sealing).

³²⁰ *New Rules*, *supra* note 321.

³²¹ *Id.*

³²² *Id.*; *see also* Petkovich v. Lopez, No. 06-19088 CA 22 (order making court record confidential) (stating that sealing was warranted to comply with the established public policy of the State of Florida favoring settlement of civil cases); Rodriguez v. Rodriguez, No. 03-22686 FC 12 (order to seal file and transcripts) (sealing file and hearing transcript without providing grounds exempting documents from public disclosure or making specific findings required by rule).

³²³ *See* Hausler v. Cuba, No. 02-12475 CA 09 (Oct. 18, 2007) (order granting motion to seal) (authorizing the sealing of the Petition for Authorization of Fee Contract without providing any grounds to support closure).

³²⁴ *New Rules*, *supra* note 317 (internal quotation marks omitted).

ing.”³²⁵ Also, the judge’s order provided no grounds to justify the sealing.³²⁶ The judge later withdrew the sealing order amid negative publicity by the local media.³²⁷

V. LESSONS TO BE LEARNED FROM HOW FLORIDA’S INITIATIVES TO CURTAIL CONFIDENTIALITY HAVE MISSED THEIR MARK

The perceivable shift of various jurisdictions in recent years toward preserving the openness of the civil litigation process is commendable.³²⁸ While Florida was considered a trailblazer in this area because it adopted one of the first statutes and court procedural rules aimed toward curtailing confidentiality in litigation, today over twenty-eight jurisdictions adopted some type of access rule.³²⁹ Whether sparked by the scandals that became prominent in the media in the late 1990s, or by concern over the erosion of the common law and constitutional right of access to our courts, the legislatures and courts created a marked response to move toward providing the public with more access to information revealed through litigation, particularly in product liability and other tort cases.³³⁰

Despite this overall trend toward greater access, it is clear that secrecy in litigation is still prevalent.³³¹ In order for these access initiatives to achieve their purpose, the statutes and court rules need to be

³²⁵ Patrick Danner & Dan Christensen, *Judge Voids Own Order to Seal File*, MIAMI HERALD, Oct. 18, 2007, at B1, available at 2007 WLNR 20415027.

³²⁶ See *id.* (noting the order in this case did not “follow new Florida Supreme Court rules aimed at preventing wrongful sealing of court records”).

³²⁷ See *id.* (“Judge Daryl Trawick tossed the order after The Miami Herald reported . . . it was among more than a dozen sealing orders issued by judges in Miami-Dade and Broward counties that didn’t follow new Florida Supreme Court rules aimed at preventing wrongful sealing of court records.”).

³²⁸ See *The Laudable South Carolina*, *supra* note 6 at 884 (“South Carolina’s federal judges have taken a courageous first step by moving to ban secret settlements in their courts. They should be accorded credit . . . for proposing the rule . . . and for raising the consciousness of other courts, attorneys, and the press on this important issue.”).

³²⁹ *Id.* at 890-91.

³³⁰ See *id.* at 887-97.

³³¹ See *id.* at 887-89; see also Goldstein, *supra* note 72, at 400-01.

functional, workable in practice, and enforceable.³³² Because of the relative newness of some of these access provisions, it is still questionable whether the reforms undertaken by many jurisdictions are effective in curtailing the use of confidentiality in civil litigation.³³³ However, as one the first states to enact this type of legislation nearly twenty years ago, Florida had ample opportunity to experiment with these initiatives and provides a good example of why these rules sometimes do not work.³³⁴

A lack of clear statutory language and the absence of a workable procedural framework robbed the Sunshine Act of its functionality.³³⁵ At first blush, the statute appears all encompassing. It purports to prohibit the use of blanket protective orders, orders sealing court documents or settlement agreements, and even, in some capacity, private confidential settlement agreements in matters where the public health and safety is implicated.³³⁶ However, the statute's actual application hinges on whether the subject of the litigation constitutes a public hazard.³³⁷ Although the definition of a public hazard is provided in the statute, Florida's Legislature left the courts to essentially guess when and how that determination should be made.³³⁸ Without a procedural framework to guide the courts in their application of the statute, the Sunshine Act is virtually untouched by the courts since its enactment.³³⁹ The statute has been easy to circumvent; if the allegedly defective product or instrumentality is labeled as a public hazard by the court, the

³³² See generally Goldstein, *supra* note 72 (rethinking the rules governing public access to information generated through litigation and noting the problems with interpretation and application of the Sunshine Act).

³³³ See *The Laudable South Carolina*, *supra* note 6, at 890-95; Goldstein, *supra* note 72, at 435.

³³⁴ See *The Laudable South Carolina*, *supra* note 6, at 891-92; Goldstein, *supra* note 72, at 425-30.

³³⁵ Goldstein, *supra* note 72, at 425-26 ("As a result of . . . ambiguities and omissions, in practice the Sunshine Act . . . has had far less impact than its supporters had imagined . . .").

³³⁶ FLA. STAT. § 69.081 (2004); *The Laudable South Carolina*, *supra* note 6, at 891-92.

³³⁷ § 69.081; Goldstein, *supra* note 72, at 424-26.

³³⁸ § 69.081(2); see Goldstein, *supra* note 72, at 424-26 (discussing when and how courts determine what constitutes a public hazard).

³³⁹ See Goldstein, *supra* note 72, at 424-31 (explaining the reasons why the Sunshine Act has been infrequently used).

parties are free to inject confidentiality at every turn in the litigation and judges are free to allow it.³⁴⁰

It is difficult to pinpoint precisely what changes should be made to this statute so the intent of the Legislature may be effectively carried out. However, one thing seems clear—tying the applicability of the statute to a term like public hazard, without more, simply does not work. In fact, states that enacted rules or statutes with provisions similar to those of the Sunshine Act encountered problems similar to those experienced in Florida.³⁴¹ Those statutes, like Florida's Sunshine Act, have been scantily developed by the states' courts and are underutilized.

For example, in 1995 the State of Louisiana amended Article 1426 of the Louisiana Code of Civil Procedure to limit when a court could issue protective orders in public hazard cases.³⁴² Similar to the Sunshine Act, the rule provides that a court may not issue a protective order preventing or limiting discovery or seal court records "if the information or material sought to be protected relates to a public hazard"³⁴³ Louisiana's rule of civil procedure also makes unenforceable any "agreement or contract which has the purpose or effect of concealing a public hazard"³⁴⁴ However, Louisiana's rule of civil proce-

³⁴⁰ See Goldstein, *supra* note 72, at 426 ("Because protective orders are issued at the outset of litigation . . . judges can continue to issue them without violating the law—even in products liability cases—under the theory that the determination of whether the product is a public hazard has not yet been made.").

³⁴¹ Goldstein, *supra* note 72, at 430-35 (noting Florida, Texas, Washington, and Louisiana all have similar problems regarding statutes prohibiting secret settlements agreements involving public hazards).

³⁴² LA. CODE CIV. PROC. ANN. art. 1426(C) (2005).

³⁴³ *Id.* ("No provision of this Article authorizes a court to issue a protective order preventing or limiting discovery or ordering records sealed if the information or material sought to be protected relates to a public hazard or relates to information which may be useful to members of the public in protecting themselves from injury that might result from such public hazard, unless such information or material sought to be protected is a trade secret or other confidential research, development, or commercial information.").

³⁴⁴ La. Code Civ. Proc. Ann. art.1426(D) (2005) ("Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information relating to a public hazard, or any information which may be useful to members of the public in protecting themselves from injury that might result from a public hazard is null and shall be void and unenforceable as contrary to public policy,

ture is even more ambiguous than the Florida statute because, unlike the Sunshine in Litigation Act, the Louisiana rule does not define the term public hazard.³⁴⁵ Despite being adopted over fifteen years ago, no reported decisions exist to interpret these rule provisions or define what constitutes a public hazard for purposes of the rule's application.³⁴⁶

Similarly, in 1991 the State of Arkansas adopted section 16-55-122 of the Arkansas Code.³⁴⁷ The statute voids any provision of a contract or agreement which conceals the existence of an environmental hazard.³⁴⁸ The term *environment hazard* is defined as "a substance or condition that may affect land, air, or water in a way that may cause harm to the property or person of someone other than the contracting parties to a lawsuit settlement" ³⁴⁹ No reported opinions exist interpreting or applying this statute.³⁵⁰ Similarly, no legal or scholarly commentary discusses the statute's impact on confidential settlements in Arkansas.³⁵¹

Perhaps a better way to achieve the underlying purpose of the statutory language in these rules is to make the statute's application contingent on whether the plaintiff in the case *alleged* the subject matter of the lawsuit caused some injury or some hazard exists that may be dangerous to other members of the public. Once it is determined that a case involves the existence of an alleged hazard, the court can then more vigilantly protect the public's right of access to documents, materials, or information in the case.

The State of Washington, for example, adopted a statute that states members of the public have a right to information necessary "to

unless such information is a trade secret or other confidential research, development, or commercial information.").

³⁴⁵ Compare *id.*, with FLA. STAT. § 69.081 (2004).

³⁴⁶ *The Laudable South Carolina*, *supra* note 6, at 894-95.

³⁴⁷ ARK. CODE ANN. § 16-55-122 (1991).

³⁴⁸ § 16-55-122(a) ("Any provision of a contract or agreement entered into to settle a lawsuit which purports to restrict any person's right to disclose the existence or harmfulness of an environmental hazard is declared to be against the public policy of the State of Arkansas and therefore void.").

³⁴⁹ § 16-55-122(b).

³⁵⁰ HUGHES, *supra* note 8 at 31.

³⁵¹ See *id.* ("[T]he Arkansas statute leaves much open to question . . .").

understand the nature, source, and extent of the risk” from an alleged hazard to the public.³⁵² Accordingly, the statute makes confidentiality provisions in settlement agreements enforceable only when the court determines that confidentiality is in the public’s best interest, after balancing the right of the public to information about the alleged risk against the right of the litigants to protect the confidentiality of certain information.³⁵³ The term *confidentiality provision* is defined as “any terms in a court order or a private agreement settling, concluding, or terminating a product liability/hazardous substance claim, that limit the possession, disclosure, or dissemination of information about an alleged hazard to the public”³⁵⁴ Notably, the statute defines the term *product liability/hazardous substance claim* as “a claim for damages for personal injury, wrongful death, or property damage caused by a product or hazardous or toxic substances, that is an alleged hazard to the public and that presents an alleged risk of similar injury to other members of the public.”³⁵⁵ Thus, the application of the statute does not hinge on being able to prove the existence of a public hazard. Instead, the prescriptions on confidentiality apply based merely on the type of suit the plaintiff chose to initiate—for example, those alleging claims for personal injury or wrongful death—and whether, as part of the suit, the plaintiff alleged that a hazard to the public exists. Language similar to that found in the Washington statute provides enough guidance to allow courts to monitor the use of confidentiality in cases where information pertaining to public hazards is most likely to exist. Additionally, because the applicability of the statute would hinge only on what the plaintiff *alleged*, such statutory language would protect the defendant from the stigma associated with having its product branded as a public hazard before a trial on the merits. Although the Washington statute

³⁵² WASH. REV. CODE ANN. § 4.24.611(2) (West 2005) (“[M]embers of the public have a right to information necessary for a lay member of the public to understand the nature, source, and extent of the risk from alleged hazards to the public.”).

³⁵³ § 4.24.611(4)(b) (“Confidentiality provisions may be entered into or ordered or enforced by the court only if the court finds, based on the evidence, that the confidentiality provision is in the public interest. In determining the public interest, the court shall balance the right of the public to information regarding the alleged risk to the public from the product or substance as provided in subsection (2) of this section against the right of the public to protect the confidentiality of information as provided in subsection (3) of this section.”).

³⁵⁴ § 4.24.611(1)(b).

³⁵⁵ § 4.24.611(1)(a) (emphasis added).

has other shortcomings, the language of its provisions may prove useful for states like Florida and other jurisdictions wanting to limit confidentiality in cases involving public hazards.³⁵⁶

A second component that is essential if any formulation of these access rules is to work is enforcement.³⁵⁷ As noted by Florida Supreme Court, “any procedures that the Court adopts . . . are only as good as the manner in which they are applied and enforced.”³⁵⁸ Judges should be the vigilant first line of defense in enforcing these rules. Judges must be willing to hold parties requesting protective orders to the applicable burden of proof and should also be willing to sua sponte raise sunshine law issues when litigants attempt to obscure or side-step such matters. However, this has not been the norm. It was the lax enforcement, or some might say lack of enforcement, of Judicial Rule of Administration 2.420 that led to one of the most embarrassing public scandals confronted by Florida’s courts.³⁵⁹ Despite the Florida Supreme Court’s adoption of tougher amendments to the rule in 2007, some judges simply refused to follow the rules and continue to grant requests to seal court records without complying with the new requirements.³⁶⁰

Some suggest that to improve the enforcement of these provisions, the rules of professional conduct applicable to attorneys and judges must be strengthened.³⁶¹ For example, the possibility that an attorney could be sanctioned for failing to follow the rules or violating

³⁵⁶ See § 4.24.611(4)(a) (“[N]othing in this chapter shall limit the issuance of any protective or discovery orders during the course of litigation pursuant to court rules.”).

³⁵⁷ See *The Laudable South Carolina*, *supra* note 6, at 887, 889 (explaining that the current rules do not work because they “allow the ‘smoking gun’ . . . to be buried while more people are hurt”).

³⁵⁸ *In re* Amendments to Fla. Rule of Judicial Admin. 2.420—Sealing of Court Records and Dockets, 954 So. 2d 16, 23 (Fla. 2007) (“We note that any procedures that the Court adopts, whether today or in the future, to address this issue are only as good as the manner in which they are applied and enforced.”).

³⁵⁹ See *supra* Part IV (discussing many instances of improperly sealed cases in Florida).

³⁶⁰ *Id.*

³⁶¹ See *The Laudable South Carolina*, *supra* note 6, at 904-05 (“Instead of lawyers feeling, as they do under current rules, the chilling effect on their duties to the client . . . should they refuse to secretize information, they will feel the chilling effect of the prohibition against putting the public in danger when the damages to the individual client are minimal.”).

prohibitions against confidentiality would deter attorneys from bringing groundless motions for protective orders where no “good cause” exists.³⁶² But, even a tightening of rules of professional conduct is meaningless unless the applicable reprimands or sanctions are carried out when the rules are violated. The new and improved Florida Judicial Rule of Administration 2.420, for example, provides that a party bringing a motion to seal a court document may be sanctioned if the motion was not made in good faith.³⁶³ To date, despite evidence that the rule has not been followed properly in some cases, there have been no reports of sanction imposition.

Finally, in crafting these rules, legislatures and courts alike should be realistic in considering the feasibility of applying the rules on a consistent basis. Critics of reforms to curtail confidentiality in litigation often note that such provisions unnecessarily add to already overcrowded dockets and growing administrative costs.³⁶⁴ While it is true that such reforms might initially impinge on judicial economy by, for example, requiring judges take a closer look at motions for protective orders and make informed determinations as to whether certain documents should in fact be confidential, several notable scholars recognized such increases in judicial workloads would be only temporary.³⁶⁵ Once the changes brought about by these reforms become systemic and routine in litigation, litigants will be less inclined to invest their resources to seek secrecy when they know secrecy is not likely to be allowed.³⁶⁶

³⁶² *Id.*

³⁶³ FLA. R. JUD. ADMIN. 2.420(d)(6) (2004) (“If the court determines that a motion made under subdivision (d)(1) was not made in good faith and supported by a sound legal and factual basis, the court may impose sanctions upon the movant.”).

³⁶⁴ *The Laudable South Carolina*, *supra* note 6, at 897-98.

³⁶⁵ *Id.* at 903 (“This means more work for trial courts, at least temporarily, because instead of merely accepting stipulations of the parties, these courts would require an actual showing that the limitations on access or dissemination of information are objectively warranted under the circumstances.”).

³⁶⁶ *Id.* (“[T]he jurisdiction will . . . see workloads return to normal—or even decrease—as litigants learn of the futility of seeking improper protective orders and the possibility of sanctions for requesting such orders in bad faith.”).