"BUT WE ALL AGREED TO CONFIDENTIALITY? PRESERVING CONFIDENTIALITY OF A SETTLEMENT AGREEMENT"

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INTRODUCTION

Congratulations! You are on the verge of successfully finalizing a negotiated settlement on behalf of your client. Investigation is complete. Documents have been subpoenaed. Witnesses have been deposed and discovery is closed. Your client is pleased that you are going to be able to negotiate a favorable settlement on their behalf and save them time, stress and money of needing to conduct a trial on the merits.

The client's requests at this point are simple, right? Finalize the settlement and make sure to include certain material terms and conditions, namely, confidentiality of the settlement amount. You speak with the other party's counsel and she agrees – confidentiality will be a material term of the release. All is well. But wait, the settlement will be approved in a hearing in open court. In this open court proceeding, the court must be presented with, among other things, the terms and amount of the settlement. If it is in open court, the terms and amount will be part of the judicial record. They will no longer be confidential absent specific court order. A material term of the settlement requested by your client will be effectively eviscerated.

You speak to the opposing party's counsel and they will not agree to seal the record during the hearing. *Is this right? Is this fair? Is this just? What will the Court do? How do you advise your client?* These are all questions that may be running through your head. Your job is to work as hard as you can to maintain the best interests of your client.

As simple as the concept may seem, the law essentially is unsettled when it comes to determining whether the parties' contractual settlement, including confidentiality, should not be made publicly available when it becomes a part of the judicial record. In fact, it may very well simply depend on the jurisdiction where your case presides. However, you may also be able to creatively develop a strategy and solution that will meet the needs of all involved.

THE RIGHT OF THE PUBLIC TO ACCESS COURT RECORDS

"The right of the public to inspect and copy judicial records antedates the Constitution."[1] "The right of public access to court documents derives from two separate sources: the common law and the First Amendment. The common law right affords presumptive access to all judicial records and documents."[2] "[T]he public is entitled to attend open court proceedings, as well as the right to inspect and copy judicial records, which include transcripts of civil proceedings."[3] "These rights promote public confidence in the judicial system,"[4] because "[p]ublicity of [court]... records...is necessary in the long run so that the public can judge the product of the courts in a given case."[5]

"The First Amendment right of access has a more limited scope than the common law right, having only 'been extended ... to particular judicial records and documents.'"[6] "The First Amendment right of access, however, provides much greater protection to the public's right to know than the common law right." [7]

The seminal case regarding the public's right of access to judicial materials is the United States Supreme Court opinion in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In *Nixon*, a number of broadcasters, including Warner Communications, Inc., sought access to approximately twenty-two (22) hours of taped conversations made during United States President Richard Nixon's time in office. The Watergate Special Prosecutor subpoenaed the tapes, and they were admitted in the criminal trial of several individuals for obstructing justice during the investigation of the burglary of the Democratic National Committee headquarters.[8] A Special District Court, appointed solely to hear the issue of access of the tapes, held that "a common-law privilege of public access to judicial records permitted [the broadcasters] to obtain copies of exhibits in the custody of the clerk, including the tapes in question."[9] However, the trial judge denied immediate access to the tapes given the right to appeal of several of those convicted and in light of the passage of the Presidential Recordings and Materials Preservation Act, which would ultimately make the tapes available to the public.[10] The Court of Appeals reversed the trial court and stressed the common-law privilege to inspect and copy judicial records.[11] The U. S. Supreme Court granted *certiorari* and generally held

that the common law right of access did not authorize release of the tapes, and that the Presidential Recordings and Materials Preservation Act precluded a need for the Court to balance the various interests of the parties.[12]

Thus, "... the right of [public] access [to judicial records] is not absolute."[13] Rather, "the decision to whether to permit access is best left to the sound discretion of the trial court," which should be "exercised in light of the relevant facts and circumstances of [a] particular case."[14]

FACTORS MUST BE WEIGHED TO OVERCOME THE RIGHT OF ACCESS

"When determining access to judicial records, 'the strong common law presumption of access must be balanced against the factors militating against access.'"[15] As part of the balancing test, a Court may consider the following non-exhaustive factors: 1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for legitimate purpose or for improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought for information according to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.[16]

In particular, with respect to a confidentiality order, a court should also consider "the reliance by the original parties on the confidentiality order."[17] However, "[r] eliance on [confidentiality][orders] will not insulate those orders from subsequent modification or vacating if the orders were improvidently granted *ab initio* ... Improvidence in the granting of a protective order is [a] justification for lifting or modifying the order.[18] At the end of the day, wide discretion is left to the court to evaluate the "competing considerations in light of the facts of the individual cases."[19]

"To overcome the common law right of access to judicial materials, 'the parties seeking closure of a hearing or the sealing of part of the judicial record bear the burden of showing that the material is the kind of information that the courts will protect and that disclosure will work a clearly defined and serious injury to the parties seeking closure.'"[20] "Accordingly, the court may deny access to judicial records, for example, where they are sources of business information that might harm a litigant's competitive standing, or when disclosure might violate some other important privacy interests."[21]

ONLY JUDICIAL RECORDS ARE SUBJECT TO PUBLIC ACCESS

As attorneys, we often seek, among other things, finality and court approval. Finality obviously brings the matter to its just end. Court approval oftentimes is the security blanket we crave to solidify the finality of our course of action. While neither finality, nor court approval, are inherently bad goals, in the context of maintaining confidentiality, they can work as much against our position as they do in favor of it. Thus, it is important to be aware of the potential consequences when approaching the court about a settlement.

As a practical matter, "settlements, by definition, require party agreement and ultimately are a matter of private contract."[22] If all the parties agree to the settlement, including confidentiality, and the settlement does not require court approval, then we should be careful not to make our job harder by arguably placing the settlement, its terms or its amount in the judicial record. As the above body of law makes clear, the right to public access of judicial records extends, not only to documents, but to transcriptions of proceedings as well. Thus, while the settlement agreement may not be a part of the court record, any mention of the settlement in a transcribed proceeding is a part of the record and may very well erode the confidentiality that we worked so hard to obtain.

Likewise, despite all parties' agreeing to confidentiality of the settlement and sealing of the court record, it is still the court that must make a bona fide determination about whether the record should actually be shielded from the general public. Again, the law is unequivocal that the court is the master of its own docket and may make any order that it believes is required regardless whether the parties agree or not. The following cases are particularly instructive on these points and can serve as reliable guideposts for what the practitioner should be aware of when attempting to maintain confidentiality of a settlement.

In *Leap Systems, Inc. v. Moneytrax, Inc.*, 2010 WL 2232715 (2010) (unpublished opinion), the United States District Court of New Jersey denied in part and granted in part a petitioner's motion to intervene to unseal the Court record regarding a settlement. *Leap* filed suit against one of its former affiliates for

misappropriating proprietary information from Leap to Moneytrax.[23] Leap reached two settlement agreements with both the former affiliate and Moneytrax respectively during a Court conducted settlement conference.[24] At that time, the affiliate's attorney "urged the Court to record the settlement so as to memorialize the terms of the settlement and the parties' assent to those terms."[25] Leap then moved to seal the Court transcript due to it containing the terms of the settlement and the parties' agreement to confidentiality of the settlement.[26] Neither the affiliate, nor Moneytrax, opposed Leap's motion to seal.[27] The Court granted the Motion to Seal, but only after finding that "Leap had a significant interest in keeping the terms of the settlement confidential (1) to protect Leap from competitors using the materials and information contained therein to unfairly compete against Leap; and (2) because disclosure would put Leap at a severe tactical disadvantage in enforcing and litigating its rights by having its litigation strategies, negotiation tactics, and business information made public."[28]

Upon concluding the action involving the former affiliate and Moneytrax, Leap subsequently filed a separate state court action against another individual (the second affiliate) and various entities alleging that these defendants had also misappropriated certain proprietary information of Leap.[29] The second affiliate then moved to intervene in the Moneytrax action and asked the Court to unseal the transcript of the recorded settlement between Leap, the first affiliate and Moneytrax.[30] The second affiliate asserted his "common law right of access to all the records of the [Moneytrax] proceedings" so as to "establish his defense" in the state action filed against him.[31] The Magistrate entered an order denying the motion to unseal the record and the second affiliate appealed to the District Court.[32] The District Court ultimately affirmed the Magistrate's order with slight modification.[33]

The District Court first looked to whether the transcript constituted a judicial record recognizing that, in the Third Circuit, "a settlement agreement that is not filed with the Court, is not a 'judicial record' for purposes of the right of access doctrine.'"[34] The District Court ultimately concluded that the transcribed proceeding was, in fact, part of the judicial record.[35] However, the District Court also recognized that, in its order to seal and during the settlement conference, the parties' agreement to confidentiality was reiterated and reinforced to the parties, and that this was an important factor to consider.[36]

The District Court then conducted the second part of the analysis to determine if the record should remain sealed. In this regard, the Court noted that it was only after conducting a mandated settlement conference that the parties agreed to specific terms of the settlement and those terms were placed on the record, including the confidentiality to protect Leap's proprietary information.[37] It also recognized that at the time of sealing the transcript, it made specific findings of fact, including that "Leap [had] a privacy interest in keeping [the] information from becoming public record [because] it [contained] sensitive business information of a private agreement between the parties."[38] The Court further reasoned that Leap met its burden because "the parties [had] a legitimate interest in maintaining the confidentiality of the materials in order to protect themselves from their competitors who could use the materials and the information contained therein to unfairly compete with the parties and that would put Leap at a severe tactical disadvantage in enforcing and litigating its rights."[39] Thus, the Court "was satisfied that 'Leap [had] shown that public disclosure of the materials would result in clearly defined and serious injury to the parties, and that this threat [was] imminent as demonstrated by requests already made seeking the material.'"[40] The Court, therefore, ruled that the "terms of the settlement agreement placed on the record, reflect in the transcript, [would] remain confidential."[41]

In stark contrast to *Leap*, perhaps one of the harsher opinions related to maintaining confidentiality of settlement terms and amount is *Hill v. Kenworth Truck Co.*, 2008 WL 4058426 (2008) (unpublished opinion). In *Hill* the Defendants filed an unopposed motion to maintain the confidentiality of the settlement amount in that case.[42] The Defendants' unopposed motion followed a petition by the Plaintiff "seeking court approval of the settlement of [the] wrongful death action in which a minor [was] a beneficiary."[43] Although the Plaintiff's petition and the Defendants' unopposed motion indicated that settlement was confidential and that neither document disclosed the amount of the settlement, and that consent and authorization forms were submitted by the beneficiaries of the estate consenting to the settlement, the District Court ultimately held that the record would not be sealed.[44] Conducting the analysis set forth by *Nixon, supra.*, and its progeny, the Court noted that the Defendants, in its unopposed motion, stated that "confidentiality settlement amount was an essential term of the parties

settlement; it would be in the best interest of the beneficiaries to maintain the confidentiality of the settlement amount; and maintaining confidentiality of settlement amounts generally encourages parties in reaching settlements and permits Defendants to make higher settlement offers; and disclosure of the settlement amount would serve no public interest."[45] The District Court specifically stated that the public's right of access "may be abrogated *only in unusual circumstances.*"[46] The Court further held that "the amount of the settlement [was] not a tangential matter with respect to the Plaintiff's petition, but rather [went] to the heart of the petition as much as the Court [was] being asked to approve the amount of the settlement and the distribution thereof. Without access to this information, ***the public has no means of judging the product of the Court in this case.***"[47] Based on this analysis, the District Court found that "the Defendants [failed] . . . to set forth significant competing interests sufficient to heavily outweigh the public's right of access and overcome the presumption of access to all judicial records and documents under the common law."[48]

Using *Leap* and *Hill* as guideposts, two important concepts are presented to the practitioner. *First*, if the settlement does not need to be court approved, we should not make our, or the Court's job more difficult by submitting the settlement agreement, terms or amount for court approval if such is unnecessary. If the agreement, terms and amount are not submitted to the court, they will, therefore, not be a part of the judicial record, and, thus, are not subject to the right of judicial access. Understanding our desire for finality and court approval, a practical way to avoid this pitfall is to simply submit a joint stipulation of dismissal by the parties to the Court that recognizes the parties have settled the case, but does not set forth the terms or amount of the agreement.

Second, in the event that the settlement does have to be submitted for court approval, such as in the circumstance of a *pro ami* setting, it is very important that the proponent of sealing the settlement agreement, terms and amount, enumerate specific reasons and circumstances to justify the sealing of the record. Providing these reasons, such as in *Leap*, allows the court to make specific findings of fact in favor of the proponent who moved to seal the record and to satisfy the court's burden of establishing that preventing the public's right to access this information is warranted.

ALABAMA'S TREATMENT OF THE PUBLIC'S RIGHT OF ACCESS

In *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993), the Supreme Court of Alabama essentially adopted many of the tenets of *Nixon* and its progeny with respect to the public's right to access judicial records. In *Holland*, the trial court entered an order to seal "the entire court file, including notes and tapes of the court reporter" following a post-verdict settlement by the parties, the Eads (plaintiffs) and Sutherlin Toyota, Inc. (defendant).[49] Approximately two years later, the Holland plaintiffs sought to intervene in the prior trial between Eads and Sutherlin "for the purpose of obtaining the [prior] trial transcript for use in a similar case against one of the [prior] defendants ..."[50] The trial court denied the motion to intervene, and the Hollands appealed.[51]

At the outset, the Supreme Court reiterated that, "[g]enerally, trials are open to the public. However, public access must be balanced with the effect on the parties."[52] The Court also noted, citing *Nixon, supra.*, that access to court records is within the trial court's discretion, but "that the trial court's discretion should [not] be unfettered..."[53] "[R]ather, [the trial court's discretion] should be governed by legal rules and standards."[54] However, the Supreme Court also recognized that neither it, nor the Alabama legislature, had ever "set out comprehensive rules or standards concerning the sealing of court records or the 'enforcement of covenants of silence [which] [were] becoming increasingly common practices in the settlement of civil lawsuits.'"[55]

Examining the law of Alabama and "the different approaches used in other jurisdictions," the Court held that, "if a motion to seal is filed, then the trial court shall conduct a hearing."[56] Further, a trial court "shall not seal court records except upon a written finding that the moving party has proved by clear and convincing evidence that the information ... sought to be sealed:

(1) constitutes a trade secret or other confidential commercial research or information;

(2) is a matter of national security;

(3) promotes scandal or defamation; or

(4) pertains wholly to private family matters, such as divorce, child custody or adoption; or

(5) poses a serious threat of harassment, exploitation, physical intrusion, or other particularized harm to the parties to the action; or

(6) poses the potential for harm to third persons not parties to the litigation.[57]

Conducting this balancing test, the Supreme Court ultimately affirmed the trial court's denial of the Holland's motion to intervene. Importantly, the Court recognized the trial court's findings that the original action was lengthy and expensive involving over two years of discovery and trial, and that the prior case also involved trade secrets.[58] Likewise, the Holland plaintiffs had no "inherent stake or common interest in the documents or records of the [original trial] and that they now [had] their own case through which they [could] obtain much, if not all, of the same material presented in the [original trial] through the discovery processes."[59]

Thus, while Alabama precedent recognizes many of the same tenets set forth in *Nixon* and its progeny, the Supreme Court of Alabama also attempted to reconcile some of the inconsistencies prevalent in these prior jurisdictions. At the end of the day, it really comes down to a balancing of the particular prejudices that will be suffered by the parties with respect to any given motion to seal.

THE MODERN PUSH FOR SETTLEMENT

Although the right of public access to judicial records and proceedings carries with it a strong presumption, in modern times there is an equally strong precedent being set to promote the settlement and/or alternative resolution of cases. Both Alabama and Federal Rule of Civil Procedure 1 provide for the "just, speedy and inexpensive determination of every action."[60] The "procedural rules thus promote private settlement from the outset of the civil lawsuit through its appeal."[61] In addition, numerous other civil procedure rules promote and facilitate settlement as an objective. Rule 16 of both the Alabama and Federal Rules of Civil Procedure specifically states that one objective of the court is to facilitate "the settlement of the case."[62] Likewise, Federal Rule of Civil Procedure 26(f) requires parties to, in part, confer and consider "the possibilities for properly settling or resolving the case."[63] Further, in both Alabama State Courts and Federal Courts, a defending party can make an "offer of judgment." In Federal Court, this offer can be made up until ten (10) days before trial. Finally, even after trial, many procedural rules now authorize appellate courts to order parties to discuss settlement at appeal conferences and to enter orders necessary for "implementing any settlement agreement."[64]

The bottom line is that, as noted by author, Laurie Kratky Doré, "[S]ettlement ... conserves scarce judicial resources and relieves a court's crowded dockets - - weighty objectives in a world characterized by too few judges, too many lawyers, and an overflow of disputes. Settlement arguably spares the litigants the time, expense and perhaps, most importantly the risk of an unpredictable adjudication."[65] In light of the more recent push for settlement, many courts do recognize the importance of upholding the parties' agreement for confidentiality and recognize that, in many instances, confidentiality "facilitates the settlement process."[66]

PRACTICAL WAY TO APPROACH THE SETTLEMENT CONFIDENTIALITY

The big question of course, is, *what can we do when approaching a situation where a settlement may become part of the judicial record*?

(1) Advise the client

If there is anything a client hates worse, it is surprises. Therefore, it is very important for us to be upfront and to advise the client of all potential possibilities and outcomes when approaching court approved confidentiality of a settlement. Do not be afraid to let the client know that, while the parties agree to confidentiality, the issue will need to be submitted to the court. Tell the client it is not a given that the terms and amount of the settlement will be maintained confidential by the court. Rather, it is important for the client to understand the analysis that the court will need to undertake to maintain confidentiality of the settlement in contravention to the public's right of access to judicial records.

(2) Do not make your job harder

If the settlement does not need to be court approved, do not make your job or the court's job more difficult by submitting it to the court. If it is not submitted the court, then it is not a judicial record, and is not subject to the public's right of access. Rather, as stated above, the parties can simply submit a joint stipulation of dismissal advising the court that the matter is settled on terms that are reasonably agreeable to the parties and propose a simple order dismissing the case with prejudice.

(3) Agree with the opposing party upfront to join in the settlement confidentiality

Although, as seen in *Hill*, agreement of the parties to seal the record is not an absolute guarantee, it certainly

will go a long way in assisting the court's determination of whether to maintain confidentiality of the settlement. However, absent agreement of the opposing party it is nearly impossible to maintain confidentiality of the settlement. If an agreement is in place, develop a plan for presenting the settlement to the court in a way that will not submit the terms or amount into the judicial record. For instance, you may submit affidavits of the opposing party that they agree to the settlement, that the settlement is reasonable, that they agree to confidentiality of the settlement, and that they are in agreement to sealing the record as a settlement. In the alternative, during the hearing with the court, perhaps similar testimony can be taken of the opposing party. When submitting the agreement, terms and amount to the court, do so for *in camera* review. This can be done at the hearing and does not require a submission of the agreement, terms or amount into the judicial record.

(4) Seek an order prior to submitting the settlement to the court

Before anything related to the settlement, including the terms and amount, are submitted to the court and, potentially, into the judicial record, file a preemptive motion to seal the record. Have the court conduct the analysis and issue its order prior to submitting the terms and amount to the court to allow you and your client to know and understand ahead of time whether the settlement agreement will be part of the judicial record. Again, this avoids any surprise to your client, and allows you and the client to develop an advanced strategy for approaching the situation.

(5) Be wary that a transcribed proceeding is part of the judicial record

If you conduct a settlement with the court, or a hearing to approve the settlement agreement, be mindful, that even if the settlement agreement is not submitted to the court, any transcribed proceedings are also part of the judicial record. In this regard, any disclosure of the terms and amount of the agreement in the transcribed proceeding will be part of the judicial record and subject to the public's right of access. Therefore, even though the agreement itself may not be available to the public, any confidentiality of the agreement may be abrogated due to the material terms and amount being part of the transcribed proceeding.

CONCLUSION

By its very definition, a settlement is a bargained for contract with all material terms and conditions being accepted by all parties to the agreement. In many circumstances, a primary bargained for condition is that the terms and amount of the settlement will remain completely confidential and known only to the parties to the agreement and their tax or financial advisors. However, some courts have decided that the public's right to access documents in the judicial record outweighs the parties' bargained for confidentiality. These courts base their decisions primarily on the premise that open disclosure of court records increases the public's confidence in the legal justice system. Other courts, which favor the sacrosanctity of the ability to contract, choose to respect and preserve the agreement of the parties. This article attempts to explore in more detail the arguments on both sides of the issue, and offer practical ways that an attorney can best insure his/her client's desire that confidentiality of a settlement agreement be maintained even in a court approved situation.

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[1] *Leap Systems, Inc., v. Moneytrax, Inc.*, 2010 WL 2232715, *5; *United States v. Criden*, 648 F. 2d 814, 819(3d Cir. 1981).

[2] *Hill v. Kenworth Truck Co.*, 2008 WL 4058426,*1; *citing Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 597 (1978).

[3] *Leap Systems, Inc. v. Moneytrax, Inc.*, 2010 WL 2232715,*5

[4] *Id.*

[5] *Id.; citing, Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir.2000)

[6] *Id.; quoting, Stone v. University of MD. Medical Sys. Corp.*, 855 F. 2d 178,180 (4th Cir.1988).

[7] *Id.*

[8] *Nixon* at 591-94.

[9] *Id.* at 595.

[10] *Id.* at 595-96.

[11] *Id.*

[12] *Id.* at 589-90.

[13] *Id.* at 589-90.

[14] *Id.*

[15] *Id.; citing Littlejohn v. VIC Corp.*, 851 F. 2d 673, 678 (3d Cir. 1988).

[16] *Id.; citing Shingara v. Skiles*, 420 F. 3d 301, 306 (3d Cir. 2005).

[17] *Id.; Pansy v. Burrough of Stroudusberg*, 23 F. 3d 772, 790 (3d Cir. 1994).

[18] *Id.*

[19] *Id.; citing, Pansy* at *789.*

[20] *Id.; quoting, In re Cendant*, 260 F. 3d 183,194 (3d Cir. 2001).

[21] *Id.*at *8.

[22] *Id.* at *385.

[23] *Leap* at *1.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at *10.

[34] *Id.* at *4; *citing Enprotech Corp. v. Renda*, 983 F. 2d 17, 20-21 (3d Cir. 1993); *Pansy, supra.*, 23 F.3d at 781.

[35] *Id.* at *6-7.

[36] *Id.* at *4-5.

[37] *Id.* at *8.

[38] *Id.* at *9.

[39] *Id.*

[40] *Id.*

[41] *Id.* at *8.

[42] *Hill* at *1.

[43] *Id.*

[44] *See e.g. Id.*

[45] *Id* at *1.

[46] *Id.* at *2. *(emphasis in original).*

[47] *Id. at *4. (emphasis supplied).*

[48] *Id.* at *3.

[49] *Holland* at 1013.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1013-14; *quoting Ex parte Balogun*, 516 So. 2d 606, 610 (Ala. 1987).

[53] *Id.* at 1014; *citing*, in part, *Nixon, supra,* at 598.

[54] *Id.* at 1014.

[55] *Id.*; *quoting*, in part, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?* 66 Notre Dame L.Rev. 117 (1990).

[56] *Id.* at 1016.

[57] *Id.* (citations omitted).

[58] *Id.* at 1017.

[59] *Id.*

[60] Ala. R.Civ.P. 1 *see also,* Fed.R. Civ.P. 1.

[61] Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 Notre Dame L. Rev. 283 at*290 (January 1999).

[62] Ala. R.Civ.P. 16. *See also,* Fed. R. Civ. P. 16

[63] Fed. Civ.P. 26(f).

[64] Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, Notre Dame L. Rev (January 1999) at*291.

[65] *Id.*at *292.

[66] *Id.* at *384.

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