By Carolyn Raffensperger

Protective Orders And Right-To-Know

Within the context of environmental law, the democratic notion of right-to-know is generally seen as a matter for regulatory agencies. The Emergency Planning and Community Right-to-Know Act of 1986 was born out of the 1986 Superfund Amendments and Reauthorization Act, which in turn amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. EPCRA has two purposes: to encourage emergency planning efforts at the state and local levels and to provide the public with information about chemical hazards present in their community.

EPCRA mandates the provision of information. Open and available information — the right-to-know — is the bedrock of democracy. However, the right-to-know must now be extended from the administrative agencies to the judicial system. The current use of protective orders to seal court records undermines the right-to-know, forecloses opportunities for plaintiffs and the public to hold tortfeasors accountable, and vastly increases the costs of litigation.

Scientific evidence that has been submitted to the court is a public record, since a judicial proceeding is a public governmental activity. Protective orders that seal the entire body of material obtained through discovery and other pretrial activities prevent the public and future plaintiffs from using that information. This is particularly true in lawsuits that are settled before a verdict is reached. Since 90 percent of lawsuits are settled, and protective orders are issued in the majority of those cases, the public is denied access to information that may prevent further harm or bring justice in other cases. Plaintiffs' lawyers rarely challenge protective orders because they are often included as a condition for settlement, and lawyers are subject only to the interests of their clients.

Protective orders are discretionary actions taken by trial judges upon stipulation by the parties. These orders are governed by Federal Rule of Civil Procedure 26(c): "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters [and] . . . (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way."

Protective orders are designed to balance the liberal right of discovery afforded under modern court proceedings. Plaintiffs and defendants have wide latitude in compelling the production of all information relevant to the cause of action. However, there may be other interested parties besides the plaintiffs and defendants in question, specifically the public and plaintiffs with similar causes of action. No party to the proceeding explicitly represents the public's interest since the judge's role is primarily to settle the dispute between the two parties.

Some cases involve a massive volume of documents. It is common in these circumstances for the judge to issue a blanket or umbrella protective order so that the producing lawyer does not have to show good cause to protect each document. According to John W. Cowden, author of *Protective Orders: Ten Commandments for the Defense,* this type of order is recommended in the *Manual for Complex Litigation, Third.* Cowden comments, "Under this procedure the party producing the documents may designate information as confidential. The receiving party has the burden of challenging any such designations. If the receiving party challenges a document as not being properly subject to protection, the burden is upon the producing party to show 'good cause' why the document should be protected."

Protective orders undermine the legitimate public interests embodied in court proceedings. Matters of public health and the environment, particularly toxic torts, are different from more narrowly construed torts and personal injury cases. Recognizing this, some states, Florida and Texas, for instance, have passed sunshine laws that prohibit protective orders from concealing documents that relate to public health and safety. Florida passed its Public Records Law in 1909 and went so far as to amend its constitution in 1992 to include access to government records of the legislative branch and the judiciary.

This standard should be expanded to the federal courts. Cowden describes the 1986 case *Anderson v. Cryovac, Inc.,* in which a newspaper intervened, challenging the district court's refusal to provide documents submitted by plaintiffs who had been sued for contaminating drinking water by discharging toxic chemicals into the ground. "In affirming the trial court's approval of a protective order denying the newspaper company access to information, the First Circuit held (1) there is no presumptive First Amendment public right of access to documents submitted to a court in connection with discovery motions and (2) discovery is fundamentally different from those proceedings for which a public right of access has been recognized and there is no tradition of public access to discovery."

This ruling denies the public's legitimate interest in having access to public court records intimately connected to public health and safety. The Federal Rules of Civil Procedures and judges in all federal and state courts should require evidence, even in settled cases, to be publicly available in such cases. Defendants should not be privileged because they might be embarrassed by public disclosure of wrongdoing. It is a matter of the public's right-to-know.

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