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Federal Appellate Judge: Too Many Sealed Documents

OPINION: A federal appeals court judge calls for limits on the procedure, because the public deserves better.

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UNCOVERED: “Spotlight,” starring Rachel McAdams, Michael Keaton and Mark Ruffalo, shows how Boston Globe journalists overcame hurdles to open records about sexual abuse by Catholic priests.

The Oscar-nominated film "Spotlight" tells the story of Boston Globe reporters who exposed the Catholic Archdiocese of Boston's cover-up of sexual abuse committed by some of its priests. For all the reporters' hard work interviewing victims and other witnesses, the turning point in breaking the story came when they obtained access to previously sealed court documents. The "smoking gun" documents had been sitting for years in the court files of a lawsuit filed against

the archdiocese. If not for the newspaper's efforts to unseal the documents, who knows if the truth the reporters eventually revealed would be known even today.

This unjustified sealing of court records happens all too often. The problem was on display last year not just at the movie theater, but also in news stories about the unsealing of Bill Cosby's deposition testimony and disputes over sealed videos of police shootings.

The law says it shouldn't be this way. The U.S. Supreme Court has recognized a long-standing public right to access court records that results in a presumption that anything filed with a court should be available to the public. Only limited categories of documents — such as those revealing trade secrets or other proprietary information or involving topics protected by privacy laws such as information about juveniles or medical history — can overcome the default rule of public access.

So why do court filings often remain sealed until a news organization files suit? As is often the case, what the law books say is one thing; how the law is enforced is another. Having served as both a federal trial and appellate judge in recent years, I have seen how litigation practices impede the public right of access at both levels of our court system.

ROOT OF THE PROBLEM

A main culprit is the protective order. Originally issued to protect a party from an unwarranted request for discovery, these court orders are now routinely filed as agreed orders at the outset of a case. They are useful in setting procedures that govern the entire discovery process.

But one common aspect of these orders is the root of the oversealing problem. Protective orders typically allow parties to designate documents that are exchanged in discovery as "confidential" or "highly confidential." Those designations determine whether the documents can be disclosed outside the litigation and who among the attorneys and parties can view the documents. No problem there. The right of public access applies to documents filed with the court, not those merely exchanged during discovery.

The problem is with what typically comes next: a requirement that any document that has been given a certain confidentiality designation must be filed under seal when presented to the court. When courts approve such protective orders, the cycle of concealment from the public is set in motion. There is usually little incentive for the opposing party to challenge a confidentiality designation. It typically wants the documents only for purposes of the case and also hopes to conceal its own "bad" documents.

Compounding the problem is the practice of filing an entire motion or appellate brief under seal because it cites to a few "confidential" documents. I have seen a party attempt to seal all of a 50-plus page brief in a health care fraud case because of a single reference to a Social Security number.

Why shouldn't the parties' agreement to file confidential documents under seal not control? The access right belongs to the public that funds the court system, not the parties. Such an agreement also gets the presumption on sealed documents backwards.

As "Spotlight" showed, a newspaper can still file a motion to unseal a document and the parties' designation of confidentiality won't control the court's ruling. But the presumption of access means the party seeking to seal a filing should have to justify that concealment in the first instance. With automatic sealing, the public may never know a document has been filed that might be of interest.

VIGILANCE REQUIRED

What should judges be doing? They should only enter protective orders that require the filing of a motion to seal whenever a party wants to prevent the public from accessing a court record. Courts also should be vigilant when a party seeks to seal an entire motion because it refers to a few sealed exhibits. As happened with the "Spotlight" documents that were ultimately unsealed, the proper procedure is to redact references to the protected information and maintain public access to what remains.

Even better, rules should be adopted that address the problem of oversealing. Some jurisdictions have done so. The Northern District of California has a local rule requiring the filing of a motion to seal. A Texas Rule of Civil Procedure goes further in also requiring that a public hearing be held on any request to seal.

But even where such rules exist, lawyers often ignore them and judges do not always enforce them. The problem comes down to priorities. Courts face a deluge of contested motions. It's a relief to see one that isn't hotly disputed, so agreed protected orders are readily signed.

PROMOTING TRANSPARENCY

The impact of the unsealing in "Spotlight" thus serves as a much-needed reminder of the importance of the public right to access. It also serves as a rejoinder to those who say that the right of public access should be curtailed as it is a reason for the trend toward arbitration. "Spotlight" is about the importance of holding powerful institutions accountable. By promoting transparency for judicial decision-making, the public right of access serves that same interest for our court system.

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