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# Balancing Access to Government-Controlled Information

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# BALANCING ACCESS TO GOVERNMENT-CONTROLLED INFORMATION

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## INTRODUCTION

It is a pleasure to be able to address a group of judges on a topic of importance and not to be peppered with questions as generally occurs in a courtroom. For most of my career, I have been a practicing lawyer and a part-time law professor and now the reverse is true. I have always tried to impress upon my students the importance of facts and to make it clear that facts do not come wrapped in neat packages, as one might assume from judicial opinions. Rather, they must be gathered through discovery from other parties and from other sources.

Fact-finding depends on access. The focus of this essay is on laws and practices that affect access to scientific information that is in the possession or control of some branch of government. Private companies or individuals may have originally submitted this information to the government, for example as part of a request to have a product approved for marketing, but it is no longer exclusively under private control. There may be litigation uses for some of the information being sought, but the theory of access does not depend on the information being used in a courtroom. Although I will largely address scientific information, the balancing principles that I discuss apply to other kinds of information as well.

This essay will examine some instances in which judges,

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legislators, and executive branch officials carry out their balancing tasks. Most of these examples are from federal law, but in many cases there are state law analogs. Some of these laws and practices increase access, while others reduce it. To some observers, that may suggest that these rules are in tension, but my thesis is that the governmental decision to grant or deny access to various types of information, in various contexts, is ultimately one of balancing the respective interests, whether framed expressly in those terms or not. Whenever balancing takes place, circumstances matter, and the results can be seen as less than perfectly consistent, as perhaps they are. What does not change is that in all of these situations there are no absolutes, and the balances struck are in constant need of reconsideration and sometimes adjustment.

## I. BALANCING BY THE LEGISLATIVE AND EXECUTIVE BRANCHES

### *A. The Freedom of Information Act*

The Freedom of Information Act (FOIA) was enacted in 1966.[1] It applies only to federal agencies, which excludes Congress, the judiciary, and the President and his closest advisers.[2] Prior to its passage, with the exception of information that was classified or otherwise restricted from disclosure by statute, these agencies were free to make public whatever information was in their possession, and they often did so, when it suited their purposes. The applicable law, the Administrative Procedure Act, specifically directed the agencies to disclose information if the requester was "properly and directly concerned" with the records sought.[3] However, perhaps unsurprisingly, agencies rarely found that the concern was proper, and the law did not provide any means of redress for a person

[1] 5 U.S.C. § 552 (1966). FOIA has been amended several times, and some of those amendments reflect the striking of a different balance than the courts found in the original act.

[2] *Id*. § 552(f).

[3] Administrative Procedure Act of 1946, § 3(c), Pub. L. No. 79-404, 60 Stat. 238 (1946) (formerly codified at 5 U.S.C. § 1005).

whose request was denied.

FOIA changed this practice in a number of significant ways. First, a requester's purpose in seeking the information became irrelevant; any person had the same rights as anyone else to a document. Second, the agencies no longer possessed the discretionary power to deny disclosures; rather, Congress created nine specific exemptions that entitle the agencies to withhold records. Third, and perhaps most significant of all, requesters were given the right to sue agencies in United States District Court, where federal judges are empowered to make *de novo* determinations as to whether an agency has properly relied on an exemption in a given case. Moreover, this process differs from the typical review process of federal agencies' decisions in that plaintiffs are entitled to discovery and to make a full record in the district court where the decision will be rendered.

The change in law, however, was not accompanied by a change in attitude by most government officials. The agencies continued to resist disclosure, in effect forcing requesters to hire a lawyer to go to court, which was out of the question for many requesters. In 1974, Congress recognized the imbalance and added a provision allowing prevailing parties in FOIA cases to obtain reasonable attorneys' fees from the government,[4] although a recent Supreme Court decision has made it much more difficult to obtain such fees.[5] One Attorney General, Griffin Bell, attempted to change the presumption from withholding information to disclosure by warning agencies that the Department of Justice would not defend them against FOIA litigation unless they focused on whether there was a good policy reason to withhold documents, rather than whether an exemption might be available. Whether this admonition ever had any impact is not clear. In any event, the policy did not last beyond the Carter Administration, and the current

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[4] 5 U.S.C. § 552(a)(4)(E) (1974).

[5] Buckhannon Bd. & Home Care, Inc. v. W. Va. Dep't of Health & Human Servs., 532 U.S. 598 (2001) (holding that fees are available only if a plaintiff obtains court-ordered relief, which in the FOIA context means that the Government can fight for years and then "voluntarily disclose" the requested records before a judge rules against it, and thereby avoid paying any fees).

administration plainly has not followed it, especially post-September 11th.

Why do government officials routinely deny requests for documents? Moreover, why do they refuse to voluntarily disclose information of interest to the public at large and the scientific community in particular? In some of the worst cases, officials are actually hiding something, either a violation of law or a practice that the public would not find acceptable on moral grounds or because it shows waste or inefficiency. But that is only part of the story; most withholding is based on the agency official's different assessment of the benefits and risks of disclosure as opposed to the assessment of those seeking the information and perhaps those who wrote the law. Some of the impetus for withholding is a matter of self protection; no government official ever received a promotion or a medal for releasing a document to the public. The operating principal is simple: let someone else decide that the request must be honored or that the documents should be declassified, but not me.

Let us consider, for example, the exemption that covers trade secrets and confidential commercial information obtained by the government from private parties. The law protects such information when it might cause substantial competitive harm to the person whose information is being sought. For instance, the Food and Drug Administration (FDA) routinely protects information that is submitted to support applications for new drugs or medical devices, such as studies that show the results of the use of the product on animals and human beings. Given the recent disclosures about the drugs Vioxx, Celebrex, and Bextra, whose manufacturers may have withheld data about adverse test results from the public, there is an obvious need for such information to be available so that both experts and lay persons alike can decide whether to prescribe or take such medicines. While these pharmaceutical companies' claims of competitive harm are by no means frivolous, the real issue is how those claims should be balanced against the public's need to know. The pharmaceutical industry has recently announced that it would voluntarily publish a complete registry of drug trials, but to those who have sought to

use such data, the results so far have been less than encouraging. Moreover, there have been no new laws mandating additional disclosure nor has the FDA changed its disclosure policies. It is not that the standard for withholding is ill-advised but that its implementation almost always favors non-disclosure, not only for records for which a specific request is made, but the countless records that agencies generate every day in which the public in general, and the scientific community in particular, have a genuine interest. For almost all of the requests for information, the balance is being struck in favor of secrecy, and there is no practical way that this wholesale rejection practice can be challenged.

A slightly different balancing can be seen regarding information about the safety of nuclear power plants (including their ability to resist terrorist attacks) or about the systems at airports that are designed to thwart terrorists. It can hardly be doubted that experts outside the government could usefully evaluate the effectiveness of those measures and perhaps make important suggestions for improvements. The problem is that making at least some of that information public could assist terrorists in evading these efforts, and under the current climate, all of the risk of uncertainty cuts against disclosure. And when government officials are asked to release information that seems benign on its face, the answer that is almost always forthcoming is that it is all part of a "mosaic" and that every little piece helps our enemies. Again, these claims are not wholly without merit, but they do represent a balance heavily tipped in favor of secrecy, which makes it much harder for the people to find out what our government is doing and on what basis it is doing it. There is a heavy dose of policy in many government decisions, but to the extent that the policy is supported by scientific evidence, we run a substantial risk of ill-advised decisions where the science is not subject to outside scrutiny.[6]

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[6] One recent change in FOIA law has struck a different balance on access, prompted largely by industry criticism of the use by agencies of certain scientific evidence to which they did not have access. The Environmental Protection Agency (EPA) issued a controversial air pollution rule that was based in significant part on a study performed under a grant from the National Institute

States, and in some cases localities, have their own FOIA and open meetings laws where similar balances are struck. Because the federal government is primarily responsible for most regulation of industries and for the decisions regarding the protection of our national security, states do not typically make these types of balancing decisions. In cases based on state laws, arguments often turn on claims that premature disclosure of information will make it more difficult to carry out a governmental decision, and, conversely, that disclosure restrictions make it more difficult for the public to have input into the decision and to highlight problems beforehand. Although often not explicit, decisions under state law regarding access are also made by balancing the risks and benefits of disclosure in light of the inevitable uncertainties that exist whenever a choice between disclosure and withholding must be made.

### *B. Restricting Disclosure through Privacy and "Data Quality" Laws*

Following the increase in FOIA requests and the revelation of the misuse of tax returns of individuals targeted by the Nixon Administration, Congress recognized the need to place some limits on what agencies could do with information about individuals, and so it enacted the Privacy Act of 1974.[7] The Act places limits on what information about an individual the government may disclose

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of Health to Harvard University. The study was published, but the data was not made available to the public and the EPA did not have it either, although it had a right to obtain the data. FOIA did not apply to such data because the agency did not have the records in its possession, but Congress, at the urging of industry, eliminated that barrier, but only for government grants, not government contracts. The provision, known as the Shelby Amendment, was part of the Omnibus Appropriations Act for Fiscal Year 1999, Pub. L. 105-277 (Oct. 21, 1998). The law required Office of Management and Budget to issue changes to Circular A-110, which governs such grants. Those changes can be found at 64 Fed. Reg. 43786-91 (Aug. 11, 1999). *See* Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 HARV. J. ON LEGIS. 369 (2000).

[7] 5 U.S.C. § 552a (2004).

both to other parts of the government and to the outside world. Existing statutes, such as those dealing with tax returns and census data,[8] already forbade the public release of much of this information, and agencies generally resisted FOIA requests for almost any information about individuals, whether they worked for the government or not. But if an agency chose to release damaging personal information, there was no remedy, and so the Privacy Act also provided that individuals whose rights are violated may sue the offending agency and, depending on the circumstances, may obtain injunctive relief and/or money damages. In doing so, Congress re-balanced the respective interests of privacy on one side and government efficiency and public disclosure on the other, coming down more on the side of protecting individual privacy.

The other new balance struck in the Privacy Act controls what an agency with possession of records covered by the Act must do before it may share those records with other agencies. In general, Congress did not tie the hands of agencies wishing to share information with other parts of the executive branch but instead required them to establish and make public what are called "routine uses" of records and to preclude all other inter-agency uses.[9] However, because non-routine uses are not often made known to the person whose privacy is affected, policing these disclosure prohibitions is difficult. Moreover, as the Privacy Act has been interpreted, the ability of individuals to obtain monetary relief has been curtailed,[10] and the safeguards of the Act have not kept up with the revolution in electronic recordkeeping. The fact that the Act is in need of revision does not alter its fundamental purpose of re-balancing the federal government's right to efficiency and the citizen's right to privacy.

The second of these controlled disclosure statutes is the Data Quality Act of 2000.[11] Like the Shelby Amendment described in note 6, the Act was passed as a small rider to an appropriations

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[8] 26 U.S.C. § 6103 (2005); 13 U.S.C. §§ 8(b) (1976), 9(a) (1997).

[9] 5 U.S.C. § 552a(b)(3), (e)(4)(D) (2004).

[10] Doe v. Chao, 540 U.S. 614 (2004).

[11] Section 515, Treasury & General Government Appropriations Act for Fiscal Year 2001, Pub. L. 106-554 (2000).

bill, with almost no public notice. Like Shelby, there were no hearings, committee reports, or floor debates. Despite its brief gestation period, the Data Quality Act's purpose is clear—to impose certain procedures on federal agencies to ensure the accuracy of scientific information prior to public dissemination. The premise of the Act is that the dissemination of information, even without any regulatory action accompanying it, can have very serious consequences. For example, when an agency issues warnings about a widely used drug or pesticide, consumers may stop buying the product and the stock price of the company may fall. Furthermore, the ability of an agency to post a report on its Website, and thereby obtain instantaneous worldwide dissemination at virtually no cost, has increased the risks to non-government parties if the information turns out to be incorrect.

On one level, the goal of disseminating only accurate information could hardly be opposed. After all, who is in favor of the government disseminating erroneous information? No federal agency should announce to the world that two plus two equals five, but that is not the kind of problem that prompted the passage of the Act. Rather, it was designed to control information about topics like the role of the automobile and other emission sources in causing climate change, or the safety of specific products already on the market. To achieve its goals, Congress required the Office of Management and Budget (OMB) to issue guidelines to agencies. In turn, agencies had to issue their own guidelines outlining the necessary steps before dissemination and the proper agency response to any claim that certain disseminated information is incorrect.

For the purposes of this essay, the details of what agencies must do to ensure accuracy are of no great significance. What is significant is that they must do more to guard against the possibility of inaccuracy and to correct it if it is discovered. Indeed, this kind of reform will impose additional costs on agencies and, in at least some cases, delay the dissemination of very important information. Again, this re-balancing of the interests in controlling information dissemination versus assuring that the public receives information in a timely and complete

fashion is not necessarily right or wrong but represents a policy choice involving competing interests. Given the importance of the Data Quality Act, it would have been preferable if the congressional re-balancing had taken place in the open, subject to full debate, but that failure does not make the Act any less the law of the land.

Fortunately, the guidelines issued by OMB are quite reasonable, and the agencies have generally responded appropriately in issuing their own guidelines. To date, there have been far fewer requests for corrections than had been anticipated and only a handful of attempts to take agencies to court over the agencies' responses to those requests. Significantly, unlike FOIA and the Privacy Act, there is no specific right to sue under the Data Quality Act. The government takes the position that there is no right to obtain judicial review even under the general provisions of the Administrative Procedure Act, and the few court decisions on the issue support that view.[12] Even if the courts do entertain suits over agency failures to make a correction, they are likely to adopt a hands-off attitude except in the most egregious cases. Thus, in the end, the Data Quality Act will have some impact on agency operations, but it is not likely to cause fundamental changes in the way that agencies decide when information should be disseminated.

## II. CONTROL OF LITIGATION INFORMATION

This section deals with two areas where judges, both federal and state, routinely control access to information. In the first area–whether to allow an expert to testify—the court controls what information the jury hears and does not hear but not whether the information is available to the public at large. In the second area–to what extent protective orders should limit public access to

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[12] *Developments in Administrative Law and Regulatory Practice,* 2004 A.B.A. SEC. ADMIN. L. 128-30. For further discussion of both the Shelby Amendment and the Data Quality Act, see Wendy Wagner, *The Perils of Relying on Interested Parties to Evaluate Scientific Quality*, 95 AM. J. PUBLIC HEALTH, S99-S106 (2005).

litigation-related information–the court does not preclude a party from obtaining information to litigate a case (unlike information protected by the attorney-client privilege) but does limit to whom that information may be disseminated. In both areas, the inquiry is the same as in the two previous sections: the extent to which potentially useful information should be kept from some people because of the risk of some harm resulting from its dissemination. The contexts are different, but the balancing principles remain the same.

*A. Expert Witnesses*

Under the rules of evidence in both state and federal courts, expert witnesses are allowed to offer their opinions only when the court deems them qualified to speak on the subject. The federal courts follow the *Daubert* test,[13] which some states follow, while other states follow *Frye*.[14] There are differences between the two tests and variations within each category, but for the purpose of this discussion, it is only necessary to know that both tests seek to achieve the same end: to keep away from the jury those opinions of experts whose lack of relevant credentials are seen to outweigh any benefit that the jury might receive from hearing their expert opinions in their capacities as jurors. Notice, however, that if the expert witness publishes his or her opinions, jurors would be free to read them once their jury duty had been completed. Thus, the risk that withholding of information seeks to prevent here is different in kind than when an agency decides to classify a document or hold up dissemination of a report until additional

[13] Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). The *Daubert* test requires the trial judge to consider several factors relating to the evidence before admitting it: (1) whether the expert's technique or theory is testable; (2) whether it has been subject to peer review and publication; (3) the known or potential rate of error when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the relevant scientific field. *Id.* at 592-94.

[14] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *Frye* renders expert evidence inadmissible unless it is rooted in methodologies generally accepted in the relevant field. *Id.* at 1014.

review can take place. Thus, the judge does not have the power to completely suppress the expert's opinions, but she does have the power to determine whether those opinions may be given to the jury. The expert witness rule can be seen as a specific application of the more general principle that otherwise admissible evidence may be excluded if its potential prejudice outweighs its utility, with the prejudice here being the possibility of undue influence of the jury by a witness whose expertise on a subject is open to serious question.

The balances struck by *Daubert* and *Frye* are different, and they use different techniques for what the Supreme Court has called the "gatekeeper role" of judges in deciding whether an expert should be allowed to testify.[15] There is considerable controversy over the merits of both tests and in the manner in which they have been and/or should be applied. I do not intend to enter those controversies. Instead, I want to make five points regarding the balances that each test strikes, which will suggest some possibilities for reconsidering how they are applied.

### *1. Does the Process in* Daubert *Actually Reflect What Real World Scientists Would Do?*

The explicit justification for *Daubert*, and the implicit justification for *Frye*, is that judges should approach scientific questions the way that scientists do, and that juries should consider evidence that scientists would consider but not evidence that they would reject. For the last several years, I have been privileged to be a member of the Science, Technology and Law Program of the National Academies of Science, where we have spent a considerable amount of time discussing *Daubert* and in particular the question of whether its approach is, in fact, one that scientists would embrace.

From what scientists have related, there are substantial doubts that, at least in some of its applications to some kinds of evidence, *Daubert* replicates what real world scientists would do. If they are

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[15] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997).

correct, it would hardly be surprising since *Daubert* was not the product of a process, like agency rulemaking, where scientists and others are invited to comment on specific proposals and offer evidence to support one rule rather than another. That absence of process suggests that *Daubert* should not be seen as the final word and that studies need to be undertaken to determine whether the conclusions that judges have reached in actual cases, regarding the kinds of evidence that scientists in the relevant discipline would and would not hear, are in line with what those who practice in that field would do when confronted with similar problems.

In the interim, judges should consider appointing experts, not to offer opinions on the questions to be tried, but to offer guidance on what kind of evidence a competent scientist would and would not consider in a similar situation. The specific questions in *Daubert* are not exclusive and can be supplemented or supplanted when there is a basis for doing so. Among the areas in which the courts seem to be straying from the scientific world is that of synthesis analysis. To simplify, suppose that there are five studies, each of which has some flaws that would preclude a scientist from relying on it to demonstrate the proposition at issue. But because all of them reach similar conclusions, scientists would be comfortable in some situations in relying on their collective wisdom. Judges do not always follow that approach, instead examining each basis for the expert's opinion on its own, either accepting or rejecting it without regard to other studies that reach the same or a similar conclusion. In situations like that, judges would be well-advised to obtain outside experts to advise them as to whether it is or is not appropriate to treat the whole as no better than the sum of its individual parts, in that discipline, under those circumstances. It will almost always be possible to find some flaw in a study, and the question should be whether, in striking the appropriate balance, inevitable flaws in studies will create unreasonable standards for admissibility and prevent one party, generally the plaintiff, from ever getting his complete case to the jury.

### *2.* Daubert *in Criminal Versus Civil Cases*

The rules of evidence in this area do not differentiate between civil and criminal cases, but there is a fair amount of anecdotal evidence that *Daubert* has been applied far more to keep out plaintiffs' experts in civil cases than it has been to keep out prosecutors' experts in criminal cases. Prosecutors are routinely able to admit expert testimony regarding fingerprints, tire tracks, shoeprints, and bite marks, as well as other more esoteric kinds of opinions, whereas comparable kinds of expert testimony have been excluded in civil cases. Part of the reason for the difference in outcomes is that defense counsel in criminal cases are often court-appointed lawyers, with little or no budget to hire their own experts, who are generally needed to show that the prosecutor's expert did not meet the standards of *Daubert*. In contrast, for most defendants in civil products liability cases, money and available experts are no problem.

Moreover, some expert testimony, such as fingerprint evidence, has been admitted for so long that defense counsel do not even think to challenge it, especially when it is the FBI's evidence. Furthermore, courts often fail to properly classify some types of testimony as expert. For instance, police testimony regarding an eye-witness identification at a lineup should be seen as a form of expert testimony because it reports on the results of an experiment conducted and arranged by the police, designed to show that the defendant has been reasonably identified by the eye-witness. Such testimony is often admitted during trial, despite the substantial body of scholarship questioning the accuracy—meaning the scientific reliability—of lineups and hence the admissibility of their results.

To the extent that research would confirm that more expert testimony from plaintiffs in civil cases is excluded than is testimony from experts for the prosecutors in criminal cases, that result would seem to run counter to the basic norm of the two systems. In a civil case, if the jury hears evidence that "should" be excluded, the defendant will have to pay a judgment, perhaps even a substantial one. But if that same mistake is made in a criminal

case, the defendant could spend a lengthy time in prison or receive the death penalty. Surely, a conscious risk-benefit analysis would take those differences into account, but the one-size-fits-all version of the evidence rule on expert witnesses does not.

### *3.* Daubert *in Bench Versus Jury Trials*

The rule on expert witnesses also applies to cases in which a judge, not a jury, is the fact finder. The general rule excluding unusually prejudicial evidence would take that difference into account and so should rules on expert witnesses. Surely, judges, who regularly hear experts testify when juries decide cases, are at far less risk of being unduly swayed by a seemingly credentialed witness whose story is not well grounded. Thus, there is far less reason to preclude a judge from hearing testimony that might properly be kept from a jury. Moreover, such a rule might persuade plaintiffs to agree to a bench trial in order to avoid a possible dismissal on summary judgment when a needed expert may not pass the *Daubert* test.

### *4. The Procedural and Substantive Effect of* Daubert

A further question about the rules on expert testimony in civil cases is whether they are substantive or procedural. This is not principally an *Erie* question or a problem under the Rules Enabling Act[16] because Congress has specifically approved the Rules of Evidence that include Rule 702 on expert witnesses. But, unlike many procedural rules, Rule 702 does not merely dictate the manner in which something must be done or describe what a brief or pleading shall contain. Instead, the rule on expert testimony sets forth a protocol for judges who are uncertain whether the testimony offered in a specific case, on a specific issue, is sufficiently reliable to go to the jury when there is no better available evidence. In effect, by raising or lowering the barrier for experts, and making it either harder or easier to admit less than

[16] 28 U.S.C. § 2072 (1990).

perfectly probative evidence, the rule changes which side will bear the risk of uncertainty.

To look at it another way, in cases where the expert testimony has less than ideal probative value, should the law favor a plaintiff seeking to recover damages for admitted injuries or the defendant who may not have been legally responsible for them? Is that a question that should be decided by judge-made rules of evidence or by the elected legislative branch of government? As I see it, this is the kind of decision that should be made by legislatures because the question is whether it is better to require a defendant who is not responsible for an injury to compensate the victim, than it is to deny compensation to a victim from a wrongdoing defendant because the necessary evidence to establish liability is not available.

An analogous issue arises on questions of burdens of proof, which range from preponderance in ordinary civil cases, to clear and convincing evidence on issues of fraud and punitive damages in some types of civil lawsuits, to beyond a reasonable doubt for criminal cases. Those different burdens reflect society's different concerns, when different kinds of liability are imposed that bring with them different consequences. Thus, it is a perfectly legitimate function for a legislature to decide how certain a judge must be that the testimony of an expert is reliable before permitting the jury to hear it. Indeed, for federal courts in diversity cases, if Rule 702 operates in a way that keeps certain evidence from a jury in a federal court that would have been admitted in state court on the same state law based claim, that would raise separate federalism issues, in addition to the legislative-judicial issues discussed above. For all these reasons, judges in general, and federal judges in particular, should recognize that *Daubert* or *Frye* rulings are often outcome-determinative and that they effectively allocate to one side or the other the burden of uncertainty, which directly impacts the substantive rights of the parties.

### *5. The Impact of* Daubert *on Administrative Agencies*

The issue of what to do in the face of uncertainty is not limited

to the litigation context and is not answered the same way outside the courtroom. Federal regulatory agencies that are charged by law with acting to protect the public are frequently forced to decide whether to act when the evidence before them is inconclusive. *Daubert* does not, and should not, apply to them because their mission is protection, and if they had to await evidence that would satisfy *Daubert* before they could issue a rule, decide whether to take a product off the market, or require additional warnings, they would be paralyzed, or close to it. Acting when there is less than complete proof is referred to as the "precautionary principle" because its goal is to avert harms before they occur, in contrast to the laws governing actions to recover damages for injuries that have already happened, which require higher standards of proof.

For example, an agency could properly issue a rule that makes it unlawful to market a certain product based on evidence that would not have reached the jury if presented by a plaintiff injured by that product. That difference cannot be justified by the relative economic impacts because the overall effect of the regulatory ruling is almost certain to be greater. Rather, tort judgments implicitly, if not explicitly, contain a finding of fault or blameworthiness, which is not the case with most regulatory decisions.

Whether the differences in the required evidentiary bases for a tort judgment and an agency rule on the same product are sensible is not the important point. What is important is that the government makes decisions with broad impacts based on evidence that would not satisfy *Daubert*. That raises the question, therefore, of whether the *Daubert* barrier is too high and thereby deprives injured persons an opportunity to take their case to a jury. No one disagrees that at some point the risk of jury error through unqualified experts is so substantial that the jury should not be permitted to hear their testimony. The issue is whether the balance between the risk of error disadvantaging the plaintiff and one disadvantaging the defendant has been struck in the proper place by *Daubert*, and if not, how *Daubert* should be adjusted. And on that point, the use of the precautionary principle in the regulatory context shows that the balance struck by *Daubert* is not a universal

one, even under federal law.

*B. Protective Orders*

In almost every lawsuit involving a large business entity, a protective order is entered to enable discovery to proceed without having everything that is exchanged immediately made available to the public. Such orders are entered to prevent the public dissemination of confidential business information (some arguably trade secrets, others not) of the party that produces it, while recognizing that the demands of litigation override the protections ordinarily afforded such information. Everyone is aware that, if there is a trial, some of this information may be produced in open court, but since so few cases are tried, that problem can be safely postponed or, if the case is settled, avoided entirely.[17] In most cases, the judge is presented with a protective order, prepared by counsel for defendant and agreed to (perhaps reluctantly) by the plaintiff's counsel, and it is signed without discussion or objection by any third party or the judge.

As set forth below, I conclude that the balance between secrecy and openness that is now the norm for protective orders tilts too far in favor of the former and against the latter. But the problem is not caused by judges unthinkingly signing protective orders instead of insisting that the parties comply with Rule 26(c) of the Federal Rules of Civil Procedure that requires a showing of "good cause" before a protective order can be entered. In fact, parties generally favor these orders. Entering a protective order at the start of a case speeds up discovery and reduces the cost of gathering the necessary information. Moreover, before documents are produced, it is almost impossible to know whether claims of confidentiality should be sustained, both because the nature and contents of the document will not be known nor will there be any basis for assessing how important it is to the case. Furthermore, plaintiffs

[17] Protective orders also maintain the medical privacy of the plaintiff. However, there is ordinarily very little interest in that type of information by the general public or by regulators, and thus there is no apparent justification for making individuals' medical records public.

will often agree to a protective order to move the case ahead and perhaps even to gain access to information that will increase their bargaining position precisely because it is not yet public, and there will be no one to oppose the order. Texas has tried a rule that requires the court to notify the Attorney General of a proposed protective order, but it is hardly surprising that overworked and understaffed government lawyers almost never object, especially when they have no idea whether the discovery will turn up anything of interest. In short, whatever flaws there are at the front end of the protective order process, there are no obvious and workable remedies to cure them.[18]

The main problem is that in many cases with protective orders, the subject of the lawsuit is a product that is still on the market, and the agencies that regulate the product, not to mention consumers who may use it, do not have access to information produced in discovery that might cause the agency to conclude that the product should no longer be sold or that additional warnings should be required. In some cases, the company has submitted the information to the agency as part of its regular reporting duties, but the information, or more likely its significance, was not recognized by those who physically received it and perhaps even read it. Moreover, reporting requirements are not always as complete as they might be, and not all companies comply with their letter, let alone their spirit. Agencies are overworked, and it would be impossible for their staffs to review every report with a fine-tooth comb and follow up on every potential lead. But if someone, most likely counsel for the plaintiff, were to call the attention of regulators to specific documents produced in discovery and to explain their significance, that would greatly simplify the proverbial needle in a haystack problem for the agency.

Unfortunately, the incentives are all wrong under current law

[18] One problem that seems to have been substantially reduced, if not eliminated entirely, is the ability of one lawyer to share discovery with another in cases against the same defendant raising common issues. Requiring the receiving attorney to sign a protective order seems to work in most cases, and where there are mass torts, central document depositories have been established on which all counsel for parties may draw.

for that to happen. The defendant could have already taken those steps but did not and almost certainly will not, unless it appears that others might do so first. In theory, the lawyer for the plaintiff might perform the function of protecting the public, but his primary obligation is to maximize the value of the case for the benefit of his client. Thus, it is likely that the lawyer will determine that the defendant will pay more if no one else has the information. Besides, there is a protective order and counsel for the plaintiff is likely to conclude that it will help his client more to leave the order in place, rather than making a motion to lift it for certain documents. And, of course, the judge is of no help in solving this problem, mainly because the judge never sees the bulk of what is produced in discovery. And even if some of it is submitted to the court, perhaps on a motion for summary judgment, it is filed under seal, with no one asking that it be made public. The judge may or may not understand the regulatory significance of a document, but it is not the judge's job, nor should it be, to act as a policeman, rather than a neutral decision-maker.

With respect to a relatively small subset of documents that have regulatory or law-enforcement significance (think pedophile priests and the massive cover-up in tobacco cases), the rules on protective orders should be changed in two ways and a different balance struck. First, while a case is still pending, the rules should be changed to permit (I would prefer require but would settle for permit for now) any lawyer in a case who discovers a document of substantial regulatory or law enforcement significance, to make that document and others needed to understand its context available to any regulatory agency with jurisdiction over the product or service. Where there is no such agency but there is an apparent violation of the criminal law, the submission should be made to the appropriate law enforcement official. If none of those recipients are appropriate, the attorney may transmit the documents to the appropriate legislative body or committee with apparent jurisdiction to take action. The party that produced the document would have to be promptly advised of any such transmission, preferably before but at least immediately afterwards, except in a case in which notice might interfere with the detection of an

ongoing crime or apprehension of a felon.

This right would override any protective order, even one that is explicitly to the contrary, much as a lawyer's general duty to represent a client's interest zealously is overridden by a number of the rules of ethics.[19] As noted above, I would prefer to see the rule made mandatory, both so that defense counsel would be covered and so counsel for the plaintiff would not be tempted to try to increase the settlement value of a case in exchange for not going to the regulatory agency or delaying doing so. But either way, it would strike a new balance on information dissemination between the obligations that a lawyer has to her clients and the obligations that she has to protect the general public. To the extent that a particular client will be less well served by this change, that will be more than offset by benefits to the general public by this new balance.

The second change is one that can be made now, without any change in the rules. In a number of cases, once there has been a settlement, a third party, such as the press or a consumer group, files a motion to intervene in order to access documents produced in discovery and filed (under seal) with the court pursuant to a protective order.[20] Under the rules, a protective order requires good cause to support it at all times. Once the case is over, and there is no need to ease the burdens of discovery, that justification no longer applies. Similarly, the uncertainty as to what documents will be produced has been removed, and any disclosure order will apply only to the documents that have been filed in court, not all those produced in discovery. And if there is a third party seeking access, there is no lack of an adversary proceeding or the need for the judge to be other than a neutral decision-maker. Nonetheless, defendants almost always argue that "a deal is a deal," that the

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[19] Alan B. Morrison, *Must the Interests of the Client Always Come First?*, 53 MAINE L. REV. 471 (2001).

[20] This discussion does not pertain to secret settlements where the amount to be paid is specified and the settlement agreement is filed, often because the plaintiff is a minor or incompetent, and, hence, the settlement must be approved by the court. The interests regarding disclosure and secrecy in such situations are very different from those discussed in the text.

judge has already approved it and that the protective order continues to protect all of the documents produced under it, even those filed in connection with a motion in court.

If the concern at the time that a protective order is sought is the appropriate balance between the tradition of open courts, in which all discovery is presumed to be publicly available, and the need to manage litigation, in which there will be some justified claims of entitlements to secrecy for certain information, that balance is not the same once discovery is concluded and the case has settled. That does not mean that the entire order should be discarded and everything made public. Rather, the interest in openness requires that the party seeking to keep the documents secret must show that there is a good cause to maintain confidentiality—presumably because the records contain trade secrets or confidential business information—but the blanket protective order, which was entered to simplify and expedite discovery, should no longer determine the outcome. The entry of the protective order should be treated as an administrative matter, which it was, and not a prior adjudication entitled to respect, which it was not. And in that connection, the lawyer for the plaintiff, who has seen the documents, should be permitted—I would say encouraged by the judge—to comment on the need for disclosure. If necessary, the judge should examine at least a sample of the documents *in camera*, as is done under FOIA. That will add to the judicial burden in some cases, but the interest in disclosure of important health and safety information more than amply justifies it.

Defendants will say, as they have in the past, that if a protective order does not assure them secrecy forever, they will not produce documents in discovery. Those kinds of arguments should be taken with more than a grain of salt since counsel for the plaintiffs and the judges before whom those cases are pending are likely to have a different view of what will happen, as may the clients who have to pay counsel for all the additional motion practice that will ensue. And there are always discovery sanctions if a defendant resists too much. But even if there is additional friction because of these limitations, the ability to protect the public from unsafe products or from other unlawful activity is

worth the cost of striking a different balance.[21]

## CONCLUSION

In deciding whether to allow greater or lesser information dissemination, courts and legislators attempt, either explicitly or implicitly, to strike what they consider to be the appropriate balance in each situation. In each of the examples I have discussed, the competing interests have similarities and differences, and in some cases the fact that a balance is being struck is more obvious and more clearly part of the decisional process than in other situations. Different people will strike different balances, but until we recognize that what is happening is a balancing of competing interests, and until all of those interests are clearly on the table, society will still achieve less than ideal outcomes.

[21] Most protective orders require plaintiff's counsel to destroy or return all confidential documents in their possession at the close of the case. Efforts to make those documents public (before destruction or return occurs) have been less successful and are subject to an additional argument that the documents may have no relevance to the case, unlike those that have been filed in court. The observation is accurate, and although I do not find it persuasive, it has been to some courts. Accordingly, the approach advanced in the text would not necessarily apply to unfiled documents, although I believe that it should.