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Montana Trial Lawyers ASSOCIATION

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January 24, 2005

Senator Mike Wheat, Chair
Senate Judiciary Committee

RE: SB 196 Gus Barber Anti Secrecy Act

Senate Judiciary Committee Members:

Since at least the mid-1970s, the disturbing practice of secrecy has taken root in courts across America. Defendants in civil litigation, as a condition to discovery or settlement, have sought to keep private the information emerging from litigation.

Secrecy in litigation takes many forms. "Protective Orders" prohibit parties who receive information in a case from distributing it to others. "Confidentiality Agreements" require that certain matters, once discussed or agreed to by the parties, remain confidential. A confidentiality agreement, for example, may prohibit disclosure of the cause of injury, the terms of settlement, or even the fact that a claim was ever filed. "Sealed Court Files" bar access to any details of a case, including the parties' names. In this instance, the court records are simply titled "Sealed v. Sealed."

Secrecy orders should not be enforced unless they meet stringent standards to protect the public interest.

You may be wondering, if secrecy orders are so bad, why don't trial lawyers just withhold their consent to them or fight them? Well, here's the problem - our allegiances have to be to our clients first and foremost, to do what is best for them individually. If a manufacturer of a defective product comes to us and says "We'll settle the case for the amount you've requested, that should take care of your client's medical and financial problems for the rest of her life, but we'll only settle if you agree to a confidentiality agreement that seals the court file and prevents you and your client from ever talking about what you've learned about our product in this case."

We are obligated to take that offer to our client and give them our opinion. We say "it's all we asked for, we may get less, or even nothing if we proceed to trial. I'd prefer that we go to trial and make this defective product and the harm it is causing and will continue to cause public, but this is a good offer and it will be another year before we even get to trial and the defendants may appeal any judgment we get, delaying the case for another year."

The client, often someone whose life has been devastated with medical problems, being out of work for years already, facing bill collectors on a daily basis, risking losing their home, thinking about how she will ever be able to pay her future medical bills decides that she has to take the offer, even with the confidentiality agreement. We can tell her about the others who will be hurt in the future, we can tell her she'd be doing the public a service by not caving in to the settlement with strings, we can assure her we'll back her all the way - but ultimately we have to abide by the decision the client makes. They are not easy decisions - for us or for clients, but we can't fault a client who needs to do what is best for hem and their families.

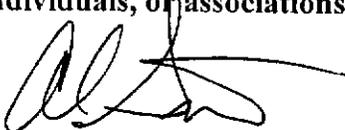
Secrecy keeps vital health and safety information from consumers. Montana consumers have a right to know whether products or services are defective or hazardous. The confidential settlements of early litigation involving the Bjork-Shiley artificial heart valves kept life-threatening defects secret even as more valves were implanted in patients. Hundreds of patients have died as a result of valve failure. In other cases, doctors have avoided disciplinary charges because court files, which would document negligent care, have been sealed. And the manufacturer of a drug that caused internal bleeding secured a secrecy order barring the injured consumer's attorney from disclosing information to any government agency. Even the FDA!

Secrecy creates more litigation. The most effective way to prevent injuries and deaths -- and resulting tort claims -- is to ensure that consumers have adequate information about the safety of products and services. A free flow of information will ensure more awareness about hazards and opportunities to avoid harm, and thus result in fewer injuries and less litigation. Secrecy orders, however, prevent consumers from making informed decisions. Secrecy permits defendants to bury "smoking guns" and limit public debate of real hazards associated with their products. In a series of suits over faulty fuel systems, General Motors obtained protective orders for internal company documents showing that financial considerations outweighed safety concerns. And a manufacturer repeatedly used secrecy to stifle attorneys from revealing dangerous seat belt hazards.

Montana courts are public institutions. Records and materials obtained during civil litigation are generally public information. The courts and what goes on within them are the province of the people. When a private dispute is taken before a city council, state regulatory body or court it is no longer purely private. Taxpayers finance public institutions and have a fundamental right to know how such matters are being resolved. Private litigants should not be allowed to determine what the public will see. Secrecy orders, however, threaten to turn courts into mere deciders of private disputes.

Montana courts operate under a presumption of openness. As public institutions, our courts function under a presumption of openness. This presumption should not be overcome except in extraordinary circumstances and for very limited purposes. Secrecy orders not only restrict the information available to consumers, but also to the media and government regulatory agencies, thereby threatening to obscure injury patterns caused by dangerous products.

SB 196 is simply about protecting Montanans from known public hazards. SB 196 is not about releasing legitimately private information about all civil litigants, nor is it about amassing some 'database' for trial lawyers. **Montana Trial Lawyers urge you to fulfill your constitutional duty under Article XIII, Section 1 and "provide protection and education for the people against harmful and unfair practices by either foreign or domestic corporations, individuals, or associations" by passing SB 196.**



Al Smith, Executive Director