

The Erosion of Secrecy in Air Disaster Litigation

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Introduction

The nature and legal consequences of wrongful conduct should be publicly known. This serves one of the fundamental purposes of our justice system. Nevertheless, air disaster litigation has long been shrouded in secrecy.

* Mr. Rapoport, founding partner of Rapoport Law Offices, P.C. and a full-time trial attorney since 1981, has extensive experience both settling and trying air crash cases for plaintiffs. He has served in leadership positions on numerous plaintiffs' steering committees in air disaster cases and, especially pertinent to this paper, he was the lead trial attorney and a member of the PSC in *In re Air Disaster at Charlotte, North Carolina on July 2, 1994*, a member of the PSC in *In re Air Disaster at Little Rock, Arkansas on June 1, 1999*, and lead counsel and lead trial lawyer in the only case tried out of *In re Air Crash at Lexington, Kentucky on August 27, 2006*. David Rapoport holds the rank of associate of the American Board of Trial Advocacy and is a fellow of the ABOTA Foundation. He is recognized as an Illinois Super Lawyer and holds an AV® rating from Martindale-Hubbell Law Directory. Mr. Rapoport has been actively involved in legal specialty board certification for lawyers for many years and currently serves as the National Vice President and Illinois State Coordinator for the National Board of Trial Advocacy, the first lawyer board certification program to be accredited by the American Bar Association and largest national certifier in trial advocacy. In *The Lost Art: An Advocate's Guide to Effective Closing Arguments*, Judge Joseph Anderson, who presided over the USAir flight 1016 trial, published an excerpt of Mr. Rapoport's closing argument to the jury in that case as an example of attacking an opponent's case "in the right way." An outspoken opponent of court secrecy, Mr. Rapoport played leading roles in several of the stories told in this paper including arguing the secrecy issues with the help of the plaintiffs' steering committee in the *Lexington* case, which is discussed extensively in the second half of this paper.

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While the National Transportation Safety Board [hereinafter NTSB] publicly investigates air disasters, determines probable causes and makes safety recommendations, many people do not realize that pertinent facts are still often *first* discovered in *adversarial* pretrial discovery in air disaster litigation. This may at first seem controversial but it is not. The NTSB “does not determine liability, nor does it attempt to do so.”¹ In other words, at NTSB hearings questions directed to issues of fault and liability are not even permitted.² Accordingly, NTSB hearing officers are required to state at the outset of public hearings: “This inquiry is not being held to determine the rights or liability of private parties, and matters dealing with such rights or liability will be excluded from these proceedings.”³

In air disaster cases, the facts first discovered in *adversarial* pretrial discovery and the amounts paid to settle these cases are often hidden from public view. However, the proper role of secrecy in these cases is not settled, as illustrated by the most recent air disaster lawsuit to be fully resolved in the United States, *In re Air Crash at Lexington, Kentucky on August 27, 2006*.⁴ In *Lexington*, the airline designated virtually all of the documents it produced in discovery “confidential” and argued almost all of the deposition transcripts were confidential as well. While this strategy ultimately failed, it succeeded for a long period of time and took a federal court ruling rebuking it to shine public light on important new evidence that was first revealed in pretrial discovery. Moreover, the aggregate amount paid in this case is now public information⁵ notwithstanding court approved confidentiality agreements settling all but the one case that was tried and decided in public.⁶ *Lexington* and other recent developments dis-

¹ NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATION MANUAL – MAJOR TEAM INVESTIGATIONS App. N, at 3–4 (2002) [hereinafter NTSB INVESTIGATION MANUAL], available at <http://www.nts.gov/Aviation/Manuals/MajorInvestigationsManualApp.pdf>.

² *Id.*

³ *Id.* at O-2.

⁴ *In re Air Crash at Lexington, Kentucky on August 27, 2006*, No. 5:06-CV-316 (E.D. Ky.).

⁵ Voreacos and Hughes, *U.S. Helped Delta Insurers Pay \$264 Million Crash Settlements*, BLOOMBERG (Dec. 23, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOkG3OyIq1FO>.

⁶ *Id.* This case resulted in a \$7.1 million judgment in favor of the family of a 39-year-old man killed in the crash. This paper is dedicated to the memory of this wonderful family man, Bryan Keith Woodward, and to the loved ones he left behind.

cussed in this paper show the tide favoring secrecy in air disaster litigation is rightfully changing.

Justice Cannot Survive Behind Walls of Silence

Writing for the Supreme Court of the United States in 1966, Justice Clark observed: "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" More broadly, President John F. Kennedy once explained:

The very word "secrecy" is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.⁷

Notwithstanding general acceptance of the idea that justice cannot survive behind walls of silence, it is at least arguable that when it comes to air disaster litigation, a society of air disaster lawyers has formed consisting of members on both sides of the litigation aisle who know too many secrets. This state of affairs is rarely discussed in public forums and not only conflicts with the open access principles described by President Kennedy and Justice Clark, but also with the common law and a growing number of statutes and court rules:

- The common law favors open access to court records and "presumes a right of public access to inspect and copy all judicial records and documents,"⁸ and
- "Forty-one jurisdictions have now adopted some type of anti-secrecy measure, whether by legislation or court rule. More importantly, judges,

⁷ President John F. Kennedy, Address to the American Newspaper Publishers Association: The President and the Press (Apr. 27, 1961).

⁸ Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 740 (2004). See also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

who in the past were willing to 'sign an order that stipulated that the moon was made out of cheese' if it would settle a case, are now much more circumspect about court-ordered secrecy."⁹

Strong policies supported by regulations also set the anti-secrecy tone for the federal government. For example, one United States Department of Justice regulation states: "Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted."¹⁰

Air disaster litigation has been impacted by the strong open access movement in recent years. This will be addressed in detail, but first it is appropriate to briefly review the broader debate over court-ordered secrecy that has been taking place in America for the last quarter century.

The Debate

Since the mid-1980s there has been a vigorous debate over court-ordered or government-enforced secrecy.¹¹ A number of articles have been published either summarizing or advocating positions in this debate.¹² In 2004, United States District Court Judge Joseph F. Anderson, Jr., who in 2002 proposed a local rule in the District of South Carolina favoring public access to judicial records that indirectly triggered a maelstrom of commentary, summarized the differing opinions:

Over the past twenty years, as civil litigation has mushroomed in the courts of the United States, the

⁹ Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 825 (2008).

¹⁰ 28 C.F.R. § 50.9 (1991).

¹¹ Anderson, *supra* note 9, at 813–20.

¹² See, e.g., Anderson, *supra* note 9; Laurie Kratky Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 290, 300 (1999); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUD. OF LEGAL ETHICS 115, 117–22 (1999). Compare Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 501–02 (1991), with David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807, 808 (2003).

question of the proper role of the judiciary in sanctioning confidentiality requested, or in many cases, insisted upon by the parties, has been the subject of extensive scholarly debate.

Professor Laurie Kratky Doré divides the opposing camps into what she calls “confidentiality proponents” and “public access advocates.” Confidentiality proponents, according to Professor Doré, “highly value the use of confidentiality” and believe that existing rules (which essentially provide for trial court discretion) “adequately accommodate the competing interests that arise when secrecy issues emerge during the course of a lawsuit.” Professor Arthur Miller of Harvard Law School, one such proponent, suggests that reformers have exaggerated the extent of the problems with the current system and argues that judicial discretion to order confidentiality is a necessary response to the abuse of liberal discovery rules. Those who favor the status quo suggest that when a case settles under a “confidentiality agreement,” the only thing that is generally kept from the public is the amount of the settlement.

Public access advocates, on the other hand, argue that courts are “publicly funded government institutions that serve interests broader than those of the immediate parties.” Because they “play a role beyond the resolution of the case at hand,” courts should oppose “attempts by litigants to shield information or documents that are of public interest or that are relevant to public health and safety.” University of San Francisco Law School ethics professor Richard Zitrin, for example, suggests that “even private disputes take on a quasi-public character when brought [in] a public forum like a court.” Zitrin contends “there are enough examples of dangerous products and other threats to safety that have been hidden behind secrecy agreements to warrant a general policy of openness.”¹³

¹³ Anderson, *supra* note 8, at 714–15 (footnotes and citations omitted).

According to Judge Anderson, by 2008 the debate reached a “tipping point” favoring public access:

The confidentiality debate will surely rage on and a consensus may never be reached. I believe, however, that we are at the tipping point. Secrecy’s dark side has been exposed to, and appreciated by, policymakers in both the judicial and legislative branch, thereby enlightening them to the importance of transparency in our courts.¹⁴

Secrecy in Air Disaster Cases

With United States-based air carriers transporting more than 700 million passengers per year,¹⁵ the public interest in safety of the aviation system could not be clearer. Commercial air travel is highly regulated and significant public and private resources are appropriately spent on accident prevention, including investigation of accidents and incidents for the purpose of ensuring lessons are learned and mistakes are not repeated. In this context, the free flow of information plays an important role in enhancing public safety.

Thus many people are surprised by the extent of secrecy in air disaster litigation. It is common for protective orders to be entered at the outset of discovery in air disaster cases. Typically one or more defendants insist a protective order be in place before any documents are produced. Rarely do these protective orders stem solely from a need to protect trade secrets or confidential commercial information that would put the defendant airline at a competitive disadvantage.

Protective orders are authorized by Rule 26(c) of the Federal Rules of Civil Procedure, which permits “a party or any person from whom discovery is sought” to “move for a protective order” and empowers judges “for good cause” to “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”¹⁶ The rule grants courts broad powers to control discovery through protective orders and

¹⁴ Anderson, *supra* note 9, at 825–28.

¹⁵ Research & Innovative Tech. Admin., Bureau of Transp. Statistics, TransStats: Passengers – All Carriers – All Airports, http://www.transtats.bts.gov/Data_Elements.aspx?Data=1.

¹⁶ FED. R. CIV. P. 26(c).

in appropriate cases to limit public access to materials developed during discovery. For example, under sub-paragraph (G) of the rule, courts may require “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.”¹⁷

Protective orders in air disaster cases typically allow the producing party to designate which documents are “confidential.” While the designating party is not the ultimate arbiter of what is appropriately “confidential” under the law and what is not, unless designations are challenged by someone, judicial review of these designations does not occur. Since the focus of plaintiffs’ steering committees in air disaster litigation is typically on the merits and many air disaster cases are settled without trials, not all improper “confidential” designations are challenged and few published rulings exist in this murky area of the law.

There are many examples of court-enforced secrecy in air disaster cases. These are typically long stories that are difficult to tell without violating a protective order. One tale of secrecy that can be told without violating any protective order involves two major air disaster cases that had a connection: *In re Air Disaster at Charlotte, North Carolina on July 2, 1994* and *In re Air Disaster at Little Rock, Arkansas on June 1, 1999*.

On July 2, 1994 a USAir DC-9 flew from Columbia, South Carolina to Charlotte, North Carolina and then crashed during a go-around after the pilots aborted a final approach in a thunderstorm.¹⁸ The NTSB determined the probable causes of the crash included “the flight crew’s decision to continue an approach into severe convective activity that was conducive to a microburst . . . which led to an encounter with and the failure to escape from a microburst-induced wind shear that was produced by a rapidly developing thunderstorm located at the approach end of runway 18R.”¹⁹ Thirty-seven people lost their lives and twenty others were injured in the crash.

On June 1, 1999 an American Airlines MD-82 flew from Dallas, Texas to Little Rock, Arkansas. After landing in a thunderstorm the crew lost control of the aircraft which overran the end of runway 4R and crashed into fixed structures.²⁰ The National

¹⁷ FED. R. CIV. P. 26(c)(1)(G).

¹⁸ NTSB Factual Report – Aviation, No. DCA94MA065 (Nov. 15, 1995).

¹⁹ NTSB Probable Cause Report, No. DCA94MA065 (Jan. 19, 1996).

²⁰ NTSB Factual Report – Aviation, No. DCA99MA060 (Jun. 23, 1999).

Transportation Safety Board determined one of the probable causes of the crash was "the flight crew's failure to discontinue the approach when severe thunderstorms and their associated hazards to flight operations had moved into the airport area" ²¹ Eleven people, including the captain, lost their lives in or as a result of the crash, and 108 others were injured. ²²

Focusing first on the *Charlotte* case, multiple lawsuits were filed in several different federal courts and the Judicial Panel on Multidistrict Litigation consolidated the cases for coordinated pretrial proceedings in the District of South Carolina and assigned the case to Judge Joseph F. Anderson, Jr. ²³ Early on, Judge Anderson entered agreed protective orders.

USAir's thunderstorm avoidance criteria in effect on the day of the crash stated: "Flights shall not takeoff, approach, or land during or immediately prior to anticipated moderate to severe thunderstorms and turbulent conditions." ²⁴

For comparison purposes, the plaintiffs' steering committee in the *Charlotte* case requested production of other airlines' thunderstorm avoidance procedures and the government produced the thunderstorm avoidance criteria in effect at United Airlines, American Airlines, Continental Airlines, TWA, Delta, American Eagle, CCAIR, Inc., and Horizon Air. However, the United States designated these documents as "proprietary" pursuant to a procedure set forth in a protective order. ²⁵

As a result of the protective order these documents did not enter the public domain in the *Charlotte* case. To understand the significance of this and how it relates to the *Little Rock* case and the public safety interest it is necessary to review some background safety information.

In the 1970s and early 1980s wind shear was a major cause of commercial air disasters, resulting in almost one crash per year on average, ²⁶ whereas there were no air disasters from this cause be-

²¹ NTSB Probable Cause Report, No. DCA99MA060 (May 28, 2002).

²² NTSB Factual Report – Aviation, No. DCA99MA060 (Jun. 23, 1999).

²³ This is the same district court judge who later proposed an anti-secrecy rule in his district.

²⁴ USAIR FOM 11-20-1 (Aug. 5, 1988) (admitted into evidence at the Charlotte air disaster trial).

²⁵ U.S. District Court, Eastern District of Arkansas (Little Rock), Civil Docket for Case No. 4:99-cv-01308-GTE, DE 115.

²⁶ See NTSB Safety Recommendations A-90-83 through A-90-85 and associated final accident reports.

tween the crash of a Delta Air Lines L-1011 at Dallas-Fort Worth, Texas on August 2, 1985 and the crash of USAir flight 1016 at Charlotte approximately nine years later. The improvement in these grim statistics coincides with formation of a government and industry consensus for wind shear avoidance and escape that was published in 1987 as the *Windshear Training Aid*. An abstract offered by the Society of Automotive Engineers describes this watershed work:

Severe microburst wind shear has been identified as a significant cause of airline accidents during the takeoff and landing phases of flight. In 1985 the Federal Aviation Administration contracted with an industry team (manufacturers, airline training departments, meteorological experts, pilots groups, and other interested parties) to develop a wind shear training program for transport pilots. This paper treats the organizational structure used to develop industry consensus on the pilot training issues as well as reports on the principal elements of the training program developed by this industry team. The paper discusses the tools available to flight crews to recognize and avoid microburst wind shear, and failing that, how to recover from an inadvertent encounter.²⁷

The two main action items in the *Windshear Training Aid* are techniques for avoiding dangerous wind shear in the first place, and training for pilots in the microburst wind shear escape maneuver. A central safety principle articulated in the *Windshear Training Aid* stated: "In the terminal area [meaning airport area], avoid thunderstorms by no less than 3 nautical miles. From accident statistics, it seems that some pilots fail to take these precautions."²⁸

An interesting question, to which the litigants in the *Charlotte* case know the answer but the public does not is whether, like USAir, all airlines failed to incorporate the three-mile avoidance criteria from the *Windshear Training Aid* into their manuals or

²⁷ SAE Int'l, *Technical Papers: Aerospace Technology – Windshear, FAA-Boeing Windshear Training Aid Program, Abstract*, available at <http://papers.sae.org/872441/>.

²⁸ 2 WINDSHEAR TRAINING AID § 4.2.2.3 (1987) (emphasis added) (admitted into evidence at the Charlotte air disaster trial).

whether only some of the airlines failed in this particular. It is hard to imagine why this answer should be a secret or what could be legitimately confidential about comparing airlines' thunderstorm avoidance criteria. At the same time the public safety interest in this answer is great, as it not only implicates airline safety but also the quality of FAA oversight in the context of one of the biggest killers of commercial aircraft ever known.

The airline thunderstorm avoidance criteria produced during discovery in the *Charlotte* case became an issue in multi-district litigation that grew out of the crash of American Airlines flight 1420 at Little Rock, Arkansas on June 1, 1999. As mentioned, in that case the National Transportation Safety Board determined one of the probable causes of the crash was "the flight crew's failure to discontinue the approach when severe thunderstorms and their associated hazards to flight operations had moved into the airport area . . ."²⁹ Like USAir, after this tragedy it was revealed that American Airlines' thunderstorm avoidance criteria did not contain the three-mile avoidance principle set forth in the *Windshear Training Aid* even though the *Windshear Training Aid* was published a dozen years before the crash, and the crash occurred nearly five years after the Charlotte crash. Instead, American Airlines airport area thunderstorm avoidance criteria stated: "Do not enter or depart terminal areas when such areas are blanketed by thunderstorms except where known thunderstorm-free routes exist and are followed."³⁰

On October 25, 2000, a member of the plaintiffs' steering committees in both the *Charlotte* and *Little Rock* cases filed a motion to lift the protective order in the *Charlotte* case so the thunderstorm avoidance criteria could be made available to the parties in the *Little Rock* case.³¹ The defendants in *Charlotte* objected³² and in light of a "return or destroy" provision in what the court noted was an *agreed* protective order, on December 14, 2000 the court ordered the documents returned to the government while

29 NTSB, AIRCRAFT ACCIDENT REPORT, RUNWAY OVERRUN DURING LANDING, AMERICAN AIRLINES FLIGHT 1420, MCDONNELL DOUGLAS MD-82, N215AA, LITTLE ROCK, ARKANSAS, June 1, 1999 (2001), available at <http://www.ntsb.gov/publictn/2001/AAR0102.pdf>.

30 AMERICAN AIRLINES AFM § 12, at 12 (Nov. 30, 1998).

31 U.S. District Court, District of South Carolina (Columbia), Civil Docket for Case No. 3:95-cv-01041-JFA, DE 497-98. This member was David E. Rapoport, one of the authors of this paper.

32 *Id.* at DE 499-502.

ordering the government “to retain the documents until such time as the issue of production may be brought before the presiding judge in MDL 1308 [the *Little Rock* case] who may consider the relevancy of the documents, the status of discovery in those consolidated actions, and any other factors militating for or against production.”³³ Thereafter the *Little Rock* plaintiffs’ steering committee moved for leave to subpoena the documents from the government in the *Little Rock* case.³⁴ This motion was unopposed and while the public docket does not reflect this, the documents were produced under an agreement that kept them under a protective order and the motion was later denied as moot.³⁵

The story of the thunderstorm avoidance criteria in the *Charlotte* and *Little Rock* cases illustrates some of the problems with court ordered secrecy in air disaster litigation. The thunderstorm avoidance criteria contained no trade secrets or proprietary information. The public record shows that *at least* two airlines failed to include the published three-mile thunderstorm avoidance criteria set forth in the *Windshear Training Aid* in their manuals. The public record also establishes that each of these airlines suffered a thunderstorm-related crash. The effect of the agreed protective orders in the *Charlotte* and *Little Rock* cases was to deprive the public from knowing whether all airlines were guilty of the same failure, whether it was only these two, or whether it was something in between.

It is ironic that there is easy public access to on-time performance statistics for the airlines, but no access to fundamental safety information like thunderstorm avoidance criteria in use by airlines. It is reasonable to assume that if the public knew of the three-mile criteria for takeoff and landing operations it would have insisted on this being in *every* airline’s manuals. Why the public’s representative (the Federal Aviation Administration) did not insist on this has never been told. The public safety interest in dissemination of this type of information is compelling and any party’s desire to keep such information secret is most likely to avoid embarrassment from poor decisions.

³³ *Id.* at DE 503.

³⁴ U.S. District Court, Eastern District of Arkansas (Little Rock), Civil Docket for Case No. 4:99-cv-01308-GTE, DE 114.

³⁵ *Id.* at DE 149.

Eroding Secrecy in Air Disaster Cases

The defendants in some air disaster cases have designated most if not all of the documents produced in discovery “confidential” and claim most if not all of the deposition transcripts must also be hidden from public view. This occurred in *In re Air Crash at Lexington, Kentucky on August 27, 2006*, the most recent air disaster litigation to be fully concluded in the United States.³⁶

Before dawn on August 27, 2006, a regional jet with 47 passengers and a crew of three crashed in Lexington, Kentucky after its pilots attempted to take off in violation of their take-off clearance on a runway that was too short for the aircraft. As a result, 49 of the 50 people on board lost their lives; only the first officer survived, and he suffered severe injuries. Lawsuits were filed alleging negligence against the air carrier that operated the regional jet, the United States, the airport authority, and a chart publisher.

In federal court the lawsuits were consolidated and assigned to United States Senior District Judge Karl S. Forester, who entered a protective order on January 22, 2007 which he later described as “carefully drafted to protect the public’s right of access to court records while providing an opportunity for protection of confidential information pursuant to Fed. R. Civ. P. 26.”³⁷ Under this order documents and deposition transcripts could be properly designated as “confidential” only if the designating party had a “good faith belief” the material was subject to “protection from disclosure under Fed. R. Civ. P. 26(c) and applicable case law.”

As “carefully drafted” as this order was, the airline managed nevertheless to mark more than 190,000 pages of documents as “confidential” and assert all deposition transcripts in the case were “confidential” as well. Judge Forester firmly rejected these arguments:

The Protective Order did not delegate to Comair the sole authority to determine what was confidential. Instead, each party was required to act in good faith compliance with Rule 26(c) and applicable case law. Certainly, Comair could not have had

³⁶ The final order disposing of the last case was entered on February 10, 2011.

³⁷ *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, CIV A 506-CV-316-KSF, 2009 WL 1683629 (E.D. Ky. June 16, 2009).

a good faith belief that every line and every page of every single deposition was legally entitled to protection under Rule 26(c)

Comair's claim of confidentiality for every document produced and, thereby, for every deposition transcript in which a witness is questioned about Comair's documents, likewise cannot be considered good faith compliance with the Protective Order.³⁸

Judge Forester understood clearly his role in protecting the public interest in this private litigation: "As the primary representative of the public interest in the judicial process, this Court must be the decision-maker regarding sealing any portion of the record from public disclosure."³⁹ He also explained the burden of proving confidentiality is legally appropriate rests with the proponent of secrecy; and that the analysis must involve "each item" claimed to be confidential.⁴⁰ "Conclusory statements will not suffice" and "showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records."⁴¹

These conclusions were built on a very solid legal foundation:

In *Nixon v. Warner Communications, Inc.*, the Supreme Court recognized a common law right to view court documents. ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). The right of access is not absolute, however. In *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, the court considered an agreement among the parties to seal FTC documents in the court record. It began the discussion with the following background:

Throughout our history, the open courtroom has been a fundamental feature of the Ameri-

³⁸ *Id.* (emphasis added).

³⁹ *Id.* (internal quotes omitted quoting *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir.1999)).

⁴⁰ *Id.*

⁴¹ *Id.*

can judicial system. Basic principles have emerged to guide judicial discretion respecting public access to judicial proceedings. These principles apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, sometimes the only, bases or explanations for a court's decision.

With respect to civil cases, the court said: "The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases." The Sixth Circuit recognized certain content-based exceptions to the right of access, such as "certain privacy rights of participants or third parties, trade secrets and national security." However, it was quick to point out that "[s]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Id.* The court quoted with approval from *Joy v. North*:

[A] naked conclusory statement that publication of the report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal. The Report is no longer a private document. It is part of a court record. *Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny. The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. This is hardly a trade secret.*

Joy. To place the quoted material in context, the Sixth Circuit said:

The Second Circuit was responding in the case above to the natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public. This desire, however, cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, *common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know. In such cases, a court should not seal records unless public access would reveal legitimate trade secrets, a recognized exception to the right of public access to judicial records.*

Brown & Williamson. Regarding the FTC documents, the Sixth Circuit held there was no trade secret issue; therefore, the district court order sealing the records was vacated.⁴²

Notably, Judge Forester concluded by bringing the issue full circle:

Finally, Comair concludes that “the public’s interest in gaining access to the subject materials is minimal at best.” To the contrary, the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety. “The public has an interest in ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its] decisions.” *Brown & Williamson*, 710 F.2d at 1181. “Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny.”⁴³

This published opinion is not the end of the story, because the court provided Comair another opportunity to obtain legal protection for legitimately confidential documents under the announced legal standard. Remarkably, Comair once again over-designated, drawing a strong rebuke from the court:

⁴² *Id.* (citations omitted) (emphasis added).

⁴³ *Id.* (citations omitted).

Comair was warned by Court order regarding its abuse of the Protective Order in this case through excessive designation of material as confidential. While a motion for protective order was allowed, the Court noted the “unnecessary burden already imposed on this Court and the parties by Comair’s pattern of over-designation of confidentiality.” Comair was also reminded that it had the burden to show good cause for a protective order for each item and that “conclusory statements will not suffice.”

...

*Comair’s further abuse of the Protective Order is readily apparent. This Court will not allow one litigant to consume an exorbitant amount of the Court’s scarce resources by requiring individual review of hundreds of improper requests for a protective order, particularly after Comair was warned to be selective. Comair had the burden to show good cause for a protective order for each item and to provide particular factual demonstration of the potential harm. Instead, Comair relied on conclusory statements which are not sufficient.*⁴⁴

The upshot of Comair’s attempt to shield 190,000 pages of documents and more than 130 deposition transcripts from public view is the court rejected secrecy of almost all of this evidence.⁴⁵

The Impact of Erosion of Secrecy in Air Disaster Cases

In *In re Air Crash at Lexington, Kentucky on August 27, 2006*, since so many of the documents the airline claimed were “confidential” were ultimately declared not to be, a fair question is what difference this made. After all, the National Transportation Safety Board investigated the Lexington crash and opened a large docket of public information. This is typically the case in a major

⁴⁴ *Hebert v. Comair*, No. 5:07-CV-320, DE 332 (E.D. Ky. 2010) (emphasis added).

⁴⁵ *Id.* The court placed 109 exhibits and small portions of 16 depositions under the protective order, a total of approximately 22 pages out of thousands of pages of transcript; and a tiny fraction of the 190,000 pages Comair sought to protect.

air disaster in the United States and those favoring maximum secrecy in air disaster litigation may argue there is little harm in secreting information developed in discovery in litigation involving the same crash.

While this argument has some superficial appeal, it does not withstand careful scrutiny, as most well-qualified air disaster lawyers would readily concede. NTSB public hearings constitute the “administrative fact-finding portion of the investigation. *There are no adverse parties or interests. There are no formal pleadings. The Board does not determine liability, nor does it attempt to do so.*”⁴⁶

Given the non-adversarial design of the National Transportation Safety Board investigation and the fact the Board does not determine either fault or liability, there is almost always evidence that *first* comes to light during pretrial discovery in air disaster cases. The Lexington crash case is no exception. For example, documents and testimony obtained in the Lexington crash litigation revealed a rash of prior runway incursions by Comair and the largely futile efforts by those concerned with aviation safety to convince the airline to implement necessary changes to address the problem.

On January 2, 2003 at 1:00 p.m. Comair Flight 5758 prepared to take off from Corpus Christi International Airport in Corpus Christi, Texas for a flight to Dallas/Fort Worth. The airport at Corpus Christi had two runways, 17-35 and 13-31. The tower cleared the aircraft to taxi to runway 31. The pilot proceeded to line up in the intersection of runways 31 and 35 with the aircraft perpendicular to runway 31. The tower then cleared the aircraft to depart from runway 35. The pilot taxied onto and took off from runway 31 in violation of the clearance. Luckily the traffic conditions were favorable and the error did not lead to an accident.

This account of the Corpus Christi incident comes from an Irregularity Report prepared by the captain of Flight 5758 and submitted to Comair twelve days after the incident. The Irregularity Report was later turned over by Comair in response to a discovery request issued by the plaintiffs in the *Lexington* litigation. The report, and the incident it describes, probably would not

⁴⁶ NTSB INVESTIGATION MANUAL, *supra* note 1, App. N, at 3–4 (emphasis added).

have entered the public domain but for Judge Forster's rejection of Comair's secrecy arguments.

Following the runway incursion in Corpus Christi the FAA issued Advisory Circular No. 120-74A, the purpose of which is to provide "guidelines for the development and implementation of standard operating procedures (SOP) for conducting safe aircraft operations during taxiing."⁴⁷ AC 120-74A recommends the pilot confirm proper runway selection using the horizontal situation indicator prior to takeoff as part of standard operating procedures.⁴⁸

Simple and sensible as this recommendation may be, it was not implemented by Comair by the time of the crash at Lexington three years later, a fact uncovered through discovery in the Lexington crash litigation. During the litigation, attorneys for the plaintiffs' steering committee took the deposition of a Comair captain who was also Chairman of the Central Air Safety Committee of the Air Line Pilots Association. This pilot testified that before the crash of Flight 5191 ALPA brought to the attention of Comair management the need to address sterile cockpit practices and situational awareness yet these remained ongoing problems at Comair. He testified that AC 120-74A supported ALPA's stance regarding the need to implement changes to avoid runway incursions, including the need to add the checklist item the FAA recommended:

Q. Did you ever talk to the company in discussing this advisory circular regarding adding a checklist item requiring a runway verification check prior to following up to commence the roll?

A. I believe so.

Q. Did you recommend that that should be implemented?

A. Yes.

Q. And did the company comply?

A. No.⁴⁹

⁴⁷ FAA Advisory Circular No. 120-74A, at 1 (2003), available at [http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/8ce3f88c034ae31a85256981007848e7/331ca20530e3d4b086256dc000565d82/\\$FILE/AC120-74A.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/8ce3f88c034ae31a85256981007848e7/331ca20530e3d4b086256dc000565d82/$FILE/AC120-74A.pdf).

⁴⁸ *Id.*, App. 4, at 4.

⁴⁹ Transcript of Deposition at 100-101, In re Air Crash at Lexington, Kentucky on August 27, 2006, 5:06-CV-316-KSF (June 13, 2008).

The public would likely be very surprised to learn that before the runway incursion and resulting crash in Lexington both the FAA and the pilots' union had recommended simple procedural changes which, had they been implemented by Comair, might have prevented this tragedy. Other disclosures made during this deposition make Comair's decision not to implement this change even more striking. The pilot testified that the Corpus Christi incident was not the only runway incursion by a Comair flight in recent years; in fact he described a "rash" of ground incursions. Yet despite these events and prodding of the airline by ALPA to address the problem the pilot testified that the airline made no changes to its procedures and offered its pilots no additional training.

The point is not to single out Comair for its failures leading up to the Lexington crash, but rather to emphasize that important information regarding issues of public safety often comes to light through the adversarial discovery process. It must be noted that the Irregularity Report and deposition testimony mentioned in this article were designated confidential by Comair and would have remained hidden from public view had Judge Forester taken an expansive view of the role of court-ordered secrecy.

Conclusion

In the debate over the proper role of court-ordered or government-enforced secrecy air disaster litigation is an important battleground. These are high-profile cases usually involving important public safety issues. The new safety information discovered in air crash cases should be available to other members of the industry and the public, yet historically and surprisingly these cases have been shrouded in great secrecy. Judge Forester's rulings in the *Lexington* case firmly rejecting the airline's efforts to hush the matter are well-grounded in law and consistent with the modern trend away from the overuse of secrecy. While the tipping point favoring public access has probably been reached in the court secrecy debate overall, much work remains in air disaster litigation. The new appreciation for the public's right to know is having a positive effect, and the tide favoring secrecy in air disaster litigation is rightfully changing.

