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# Fighting Secrecy in Civil Litigation

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Washington, DC  
February 2022



# What Secrecy?

- Blanket designations of discovery documents pursuant to stipulated protective orders
- Unwarranted sealing of “judicial records” on the court’s docket, esp. those involving public health and safety
- Confidential settlement agreements, especially those with gag clauses



# Why Should I Care?

“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (Burger, C.J.).

- Excessive secrecy in civil litigation harms the integrity of the legal system and the public.
- Public courts exist for a public airing of disputes.
- Lawyers as public advocates – limitations on publicity can harm the cause, close off other avenues for relief.
- It's inefficient! Shouldn't have to fight for documents a party has already produced in other cases.
- Excess confidentiality and unwarranted sealing can result in needless injury and death.

# Prevalence of Court Secrecy: 2019 Reuters Study



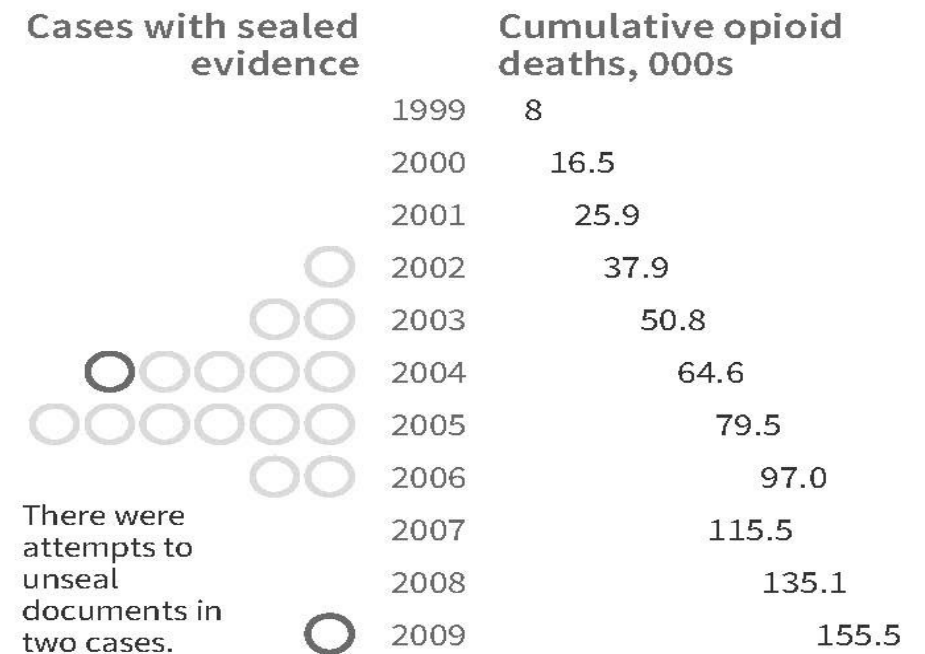
- Over last 20 years, judges sealed evidence relevant to public health/safety in half of the 115 biggest defective product MDLs
- In 85% of those cases, judges provided *no explanation* for secrecy
- In 45 of those cases, broadly worded protective orders gave parties power to mark almost anything confidential

# How Secrecy Enabled the Opioid Crisis

- **2001**: Judge Stephens seals thousands of pages of evidence in West Virginia's suit against OxyContin-maker Purdue Pharma
- **Twelve years and 245,000 overdose deaths later**, that evidence is leaked to a newspaper, revealing that OxyContin is highly addictive and Purdue was pushing bigger, more dangerous doses

## Tragic toll

Opioid-related deaths rose steadily as judge after judge left information about Purdue's conduct under seal.



Sources: The National Institute on Drug Abuse and a Reuters review of court records.

# Fighting Secrecy Can Change the World!

- Ending secrecy allows lawyers and victims access to a record that can help them bring and win other cases and demand change
- Excessive secrecy results in great inefficiency – duplicative discovery and delay
- Secrecy permits corporations to continue to engage in bad behavior, including selling dangerous products, failing to recall dangerous products, and defrauding their customers, all without public scrutiny



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# Federal Standards

- Confidential/Limited Access: demonstrate “good cause” *for each item* per FRCP 26(c)(1); must show a particular harm that would result from disclosure. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).
- Seal: “compelling reason” supported by specific facts needed to overcome “strong presumption” in favor of public access; public interest may override even a “trade secret”
  - *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092 (9th Cir. 2016)
  - *Binh Hoa Le v. Exeter Finance Corp.*, 990 F.3d 410 (5th Cir. 2021) (“judges, not litigants” undertake a case-by-case, ‘document by document,’ ‘line-by-line’ balancing of ‘the public’s common law right of access against the interests favoring nondisclosure.’”)
- Check your local Circuit law and court rules! *E.g.* Arizona Local Rule 2.19 (Sealing or Redacting Court Records)

# State Anti-Secrecy Laws

- Arkansas A.C.A. § 16-55-122
- Florida F.S.A. § 69.081
- Louisiana LSA-C.C.P. Art. 1426
- Montana MCA 2-6-1020 (“Gus Barber Anti-Secrecy Act”)
- Nevada N.R.S. 41.0375
- North Carolina N.C.G.S.A. § 132-1.3
- Oregon O.R.S. § 17.095
- South Carolina S.C. Rule Civ. Pro. 41.1
- Texas R. Civ. Pro. 76a
- Virginia VA Code Ann. § 8.01-420.01
- Washington RCWA 4.24.601, .611

California?



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# Stipulated Protective Orders

- Resist protective orders that confer automatic confidentiality on all documents – violates 26(c).
- Require “good faith” commitment on document-by-document basis, so that blanket designations carry consequences
- Meet and confer to determine what kinds of information opposing party seeks to protect; court needs good cause for a stipulated order
- Encourage redactions or partial designations where feasible
- Check your local laws and rules for guidance
  - D.D.C. Local Rule 5.1(h)
  - N.D. Cal. Local Rule 79-5

# What is “Confidential?”

- Protective order should define “confidential information” *specifically*. What it is and what it isn’t.
- personal and health information – usually not controversial, protects plaintiffs
- trade secrets and other confidential research, development, or commercial information that would significantly undercut a legitimate competitive advantage of the designating party if disclosed.
- Court should NOT take a party’s representation that something is a trade secret at face value! *Baxter Intern., Inc. v. Abbott Labs.*, 297 F.3d 544 (7th Cir. 2002) (Easterbrook, J.).
- Good faith requirement. “Such designation shall constitute a representation to the Court that counsel believes **in good faith** that the information (1) constitutes Confidential Information and (2) that there is good cause pursuant to F.R.C.P. 26(c) for the Confidential Information to be protected from public disclosure.”

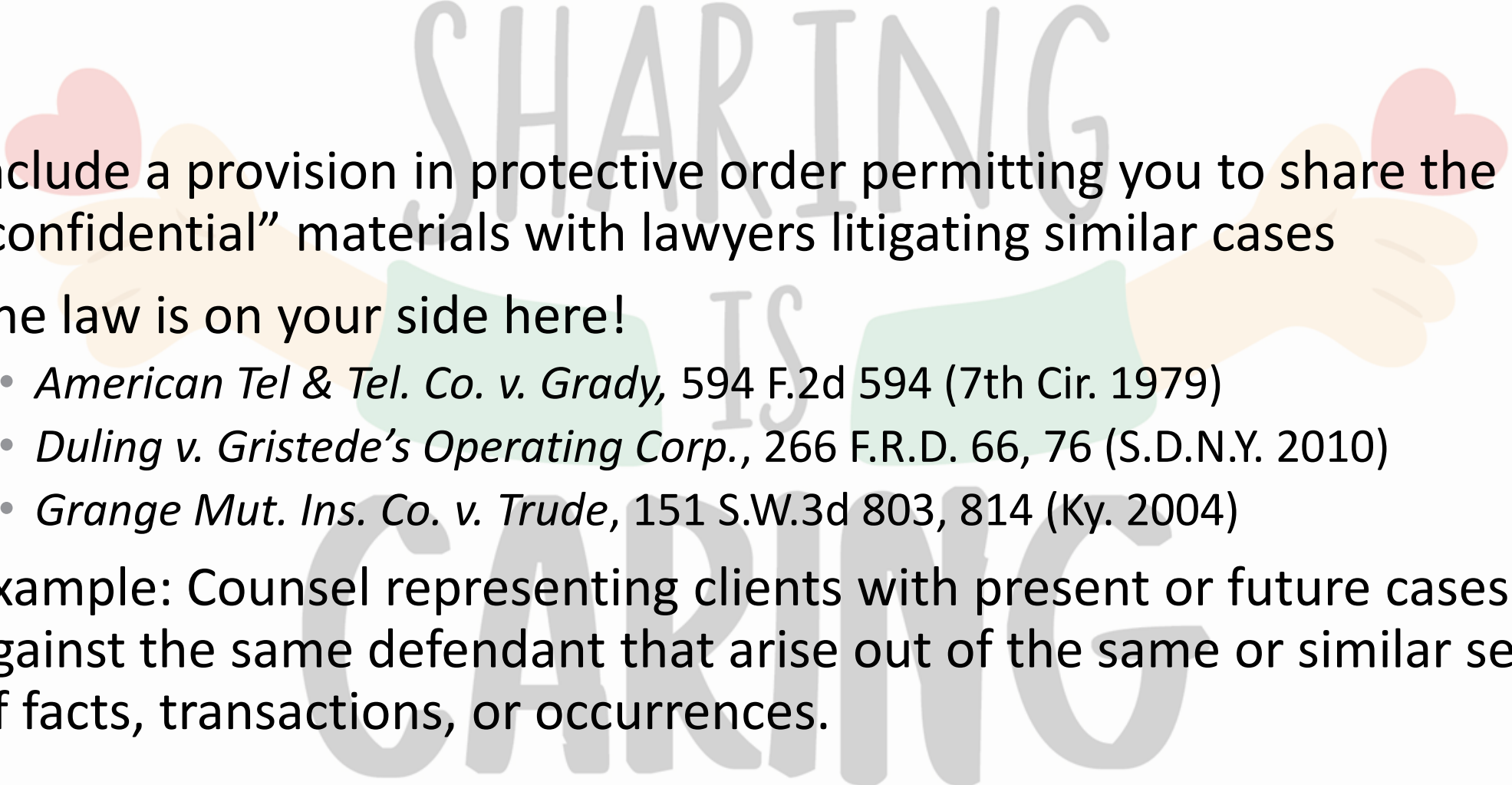
# Challenging and De-designating

- Include a mechanism for challenging “confidential” designations
- keep the burden on the party seeking secrecy to meet and confer and move for protective order; failure to do so cancels designation
- Example: If, after engaging in the meet and confer process, a Challenging Party still contends that a confidentiality designation was not proper, the Challenging Party may at any time give written notice by way of a letter to the Designating Party stating its objection to the confidentiality designation. The Designating Party has twenty (20) days from receipt of such written notice to apply to the Court for an order specifically designating the Disclosure or Discovery Material at issue as confidential. The Party seeking such an order has the burden of establishing good cause for the Disclosure or Discovery Material to be treated as confidential.



# Designating ≠ Sealing

- **Order should explicitly state that confidential designation ≠ file under seal.** These are two different legal standards; the test is much more stringent for filing documents under seal
- Equating designating with sealing standards is a “conflation error” (Binh Hoa)
- Example: This Order does not seal court records in this case or apply to the disclosure of Protected Material at trial. It is only intended to facilitate the prompt production of Discovery Materials. A Party that seeks to file under seal any Protected Material, seal the court record, or close trial proceedings must comply with applicable law. The fact that Discovery Material has been designated as “Confidential” shall not be admissible as evidence that the Material in fact contains confidential information entitled to protection from disclosure under the law.

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- Include a provision in protective order permitting you to share the “confidential” materials with lawyers litigating similar cases
  - The law is on your side here!
    - *American Tel & Tel. Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979)
    - *Duling v. Gristede’s Operating Corp.*, 266 F.R.D. 66, 76 (S.D.N.Y. 2010)
    - *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004)
  - Example: Counsel representing clients with present or future cases against the same defendant that arise out of the same or similar set of facts, transactions, or occurrences.

# Document Return/Destruction?

- Model Rule 1.16 – obligation to provide client with file when representation ends. Check applicable ethics rules. E.g. retain documents for time consistent with statute of limitations for malpractice. *Butler v. Daimler Trucks*, 2020 WL 128052
- Rule 5.6 – restrictions on a lawyer's right to practice
- Good faith work product exception. You shouldn't have to completely destroy work product that incorporates confidential information



# Document Sealing – A High Bar

- **STRONG presumption of public access.** “The public’s right of access to judicial records is a fundamental element of the rule of law.” *In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1123 (D.C. Cir. 2020).
- **Common law:** the public has a presumptive common law right to “inspect and copy . . . judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) Openness of trial is “one of the essential qualities of a court of justice,” *Dabney v. Cooper*, 10 B. & C. 237, 240, 109 Eng.Rep. 438, 440 (K.B. 1829)
- **First Amendment:** the public’s right to access court records can only be overcome by demonstrating that “the denial is necessitated by a compelling interest, and is narrowly tailored to serve that interest.” *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606–07 (1982).

# Filing Sealed Materials



- Provide for a procedure for filing materials that a party believes should be filed under seal
- Party seeking to seal filing must seek court permission to do so and must explain why the specific information satisfies the “compelling reason” test
- Provide a procedure for when one party seeks to file information that another party believes should be sealed that keeps the burden on the party seeking to seal
- Example: N.D. Cal. Local Rule 79-5



# What is a “compelling reason” for sealing?

- Only certain interests recognized as (potentially) compelling:
  - A defendant’s right to a fair trial before an impartial jury
  - Privacy rights of trial participants such as victims or witnesses

Risks to national security

Trade secret information

Information covered by a recognized privilege

*Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014)



# Sealing: Highly Fact-Specific Inquiry

Cannot just assert it's a trade secret or an important privacy right.

Party seeking to seal must present “credible EVIDENCE” that disclosure of the specific information at issue would likely harm a compelling interest. *Doe*, 749 F.3d at 270.

Judge must make “specific factual findings”—not “conclusory assertions.” *Doe*, 962 F.3d at 147; *Va. Dep't of State Police*, 386 F.3d at 575.

# Sealing Caveats

- Appellate courts may refuse to maintain confidentiality if they can't independently determine grounds for sealing. *Baxter Int'l Inc. v. Abbott Labs.*, 297 F.3d 544 (7th Cir. 2002) (stipulated protected order is not a sufficient grounds for sealing)
- Motion to Seal and court's sealing order must set out grounds; boilerplate motions insufficient
- **Class actions.** Even bigger problem! the sealing standard must be applied "with particular strictness" in class actions because members of the public can be putative members of the asserted classes in the case. These class members have an even greater interest in full access to the relevant case documents. *Shane Grp. v. Blue Cross*, 825 F.3d 299 (6th Cir. 2016) (reversing class action settlement because of excessive sealing of documents).

# Confidential Settlement Agreements

- In many notable cases, attorneys have agreed to secrecy that has cost lives
- State sunshine laws may forbid sealing of information concerning public health and safety
- Brockport v. Calandra, 745 N.Y.S. 2d 662 (2002) ("where a confidentiality clause subverts public policy, it is unenforceable").
- RPC 3.6 Trial Publicity, comment: "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct consequence in debate and deliberation over questions of public policy."



# Is Fighting Secrecy in my Client's Best Interests?

- CON:
  - Fighting blanket designations and sealing motions takes time; can slow things down; annoy judge who doesn't care or is overloaded.
  - Point out appellate decisions in your jurisdiction that take trial judges to task (e.g. *Binh Hoa*)
- PRO:
  - Fighting secrecy can STRENGTHEN your case. “[E]ven a weak claim may create a strong settlement position, if its prosecution will require the other side to reveal commercially valuable documents.” *Baxter Intern., Inc. v. Abbott Labs.*, 297 F.3d 544 (7th Cir. 2002).
  - Fighting confidentiality preserves your client's day in court and in the court of public opinion

# Document Unsealing

- **Sealing is not forever.** Once there is no longer a valid basis for secrecy, “the default posture of public access prevails” and the court should immediately release improperly-sealed court records back into the public domain. *Kamakana*, 447 F.3d at 1181–82.
- No presumption that a sealed record should remain so
- NDCal Local Rule 79-5
- Appellate court or trial court may order unsealing sua sponte, or require a new showing.

# Third Party Intervention – FRCP 24(b)

- Courts recognize standing of third parties to access discovery and unseal records
- Common intervenors: news media; professors; researchers; nonparties with similar lawsuits
- Every circuit recognizes permissive intervention as the proper method to modify a protective order. Wright & Miller, § 2044.1
- Factors court may consider: timeliness, prejudice to parties
- Most courts do not require intervenor to demonstrate Article III standing; court is exercising power over docket it undoubtedly has

# Public Justice Intervenor Cases

- **Remington rifles.** Successful intervention to unseal information about defective rifles that misfired
- **Prempro.** PJ intervenes to unseal discovery that show Pharma ghostwriting
- **Essure.** PJ intervenes to unseal evidence that shows birth control device causes organ perforation and miscarriages
- **Cooper Tires.** Center for Auto Safety intervenes, prevents sealing of trial transcript in jury verdict against Cooper for tire defect.



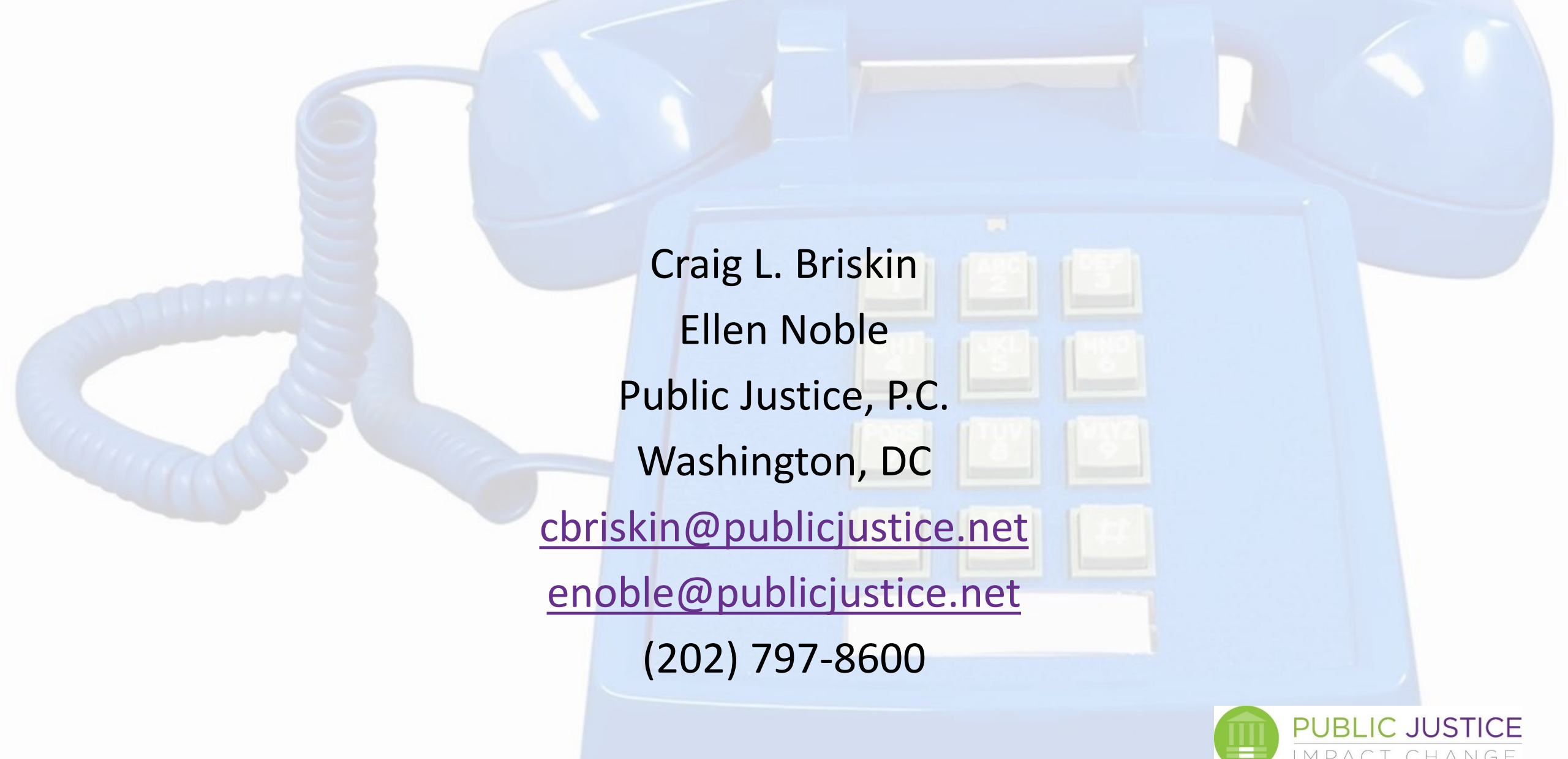




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