Discovering the Rest of the Story

The Power of Document Disclosure

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By now you've probably read books or watched films about the horrors of the opioid crisis in the U.S. – a still unfolding tragedy of misuse of prescription and street drugs that has led to over half a million deaths and many more struggling with addiction. And you may be aware of lawsuits against opioid manufacturers (most famously, Purdue Pharma), distributors, pharmacies, and others that have played a role in the opioid crisis. This litigation has in some cases led to compensation for victims of the opioid crisis or funding for opioid treatment programs. But when public-interest litigation is resolved, the public can gain more than just financial compensation.

Publicly accessible versions of documents filed in court as part of a lawsuit are usually redacted to keep proprietary information confidential. But there are even more documents generated as part of litigation which rarely become public but which can be equally if not more valuable than the court record. Before the parties even go to trial, there is a common-law procedure called *discovery* during which each party can obtain potential evidence from the other party. Each side requests records from other that might strengthen their case, and they choose the strongest documents to bring to trial as evidence. Unfortunately, most of what is exchanged never sees the light of day and is simply destroyed at the conclusion of litigation.

Many lawsuits are settled before reaching a verdict in court. These settlements often include confidentiality clauses by which damaging information is to be kept secret. However, there have been a few cases where documents shared through discovery are publicly disclosed as part of a court-approved settlement. This was pioneered in the case of litigation against the tobacco industry and has continued more recently with litigation against opioid manufacturers and consultants that have worked with them and most recently with litigation against chemical manufacturers. Attorneys for plaintiffs made the case that the alleged public harm caused by the corporate defendants justified these internal documents becoming public in order to avoid similar harms in the future. Many of these previously internal corporate documents are made available through the Industry Documents Library (https://www.industrydocuments.ucsf.edu/), hosted by the University of California, San Francisco, including the fast-growing Opioid Industry Documents Library (https://www.industrydocuments.ucsf.edu/opioids/), which is being collaboratively developed in partnership with Johns Hopkins University. Others are found on the Toxic Docs (https://www.toxicdocs.org/) website.

Even for litigation that goes to trial, these documents include many untold stories that are never presented in the courtroom or in other documents filed with the court. For example, while thousands of lawsuits were filed by state and local governments, Native American tribes, and individuals against Mallinckrodt Pharmaceuticals, the company's court-approved bankruptcy agreement included a provision to make 1.4 million documents publicly available in the Opioid

Industry Documents Archive, which revealed allowed researchers to study Mallinckrodt's plan for capturing the opioid market, called "Operation Change Agent," that included targeting specific prescribers and strategies for opposing prescriber resistance (Klein et al., 2024). Other research has revealed contracts between the opioid industry and medical communication organizations to help the companies influence medical science and opinion (Bernisson and Sismondo, 2024). It's critical that these previously internal documents be made available for researchers and the public to enable this kind of research to understand the role that these companies played in creating these public-health crises.

What does all of this have to do with lawsuits in the publishing industry and library community? No matter what your view on who is right in these suits, we could learn a lot by having access to the documents which are exchanged by the parties through discovery. To take as an example *Hachette v. Internet Archive* – in which four major publishers alleged copyright infringement by the Internet Archive through its National Emergency Library – the community of librarians and publisher could be having a more informed discussion of market effects from controlled digital lending if the documents exchanged through discovery in this case had been made publicly available. I encourage those involved in current and future litigation relating to publishers and libraries to include in any proposed settlement a provision for document disclosure, with resources dedicated in the settlement to support public access to the documents through a trusted repository, to bring greater transparency to the circumstances around the litigation.

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