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I'm in the most embarrassing, impossible situation for a commentator—namely, agreeing fundamentally with what the principal speaker said. In fact, I wrote an article against secret settlements in the GEORGETOWN LAW JOURNAL in 1995.[1] If Monroe Freedman were here, he would explain to us that progress in ideas comes from contention and the testing of hypotheses by marshalling the strongest arguments against them. Since he's not, I will nevertheless take that as my charge. Despite the fact that I agree with Richard on the ethical drawbacks of secret settlements, I'd like to begin by talking about what I think are the strongest arguments on behalf of secret settlements and against a sunshine-in-litigation regime.

It seems to me that there are three basic arguments. One is simply a kind of right to privacy argument. Those of you who read the cover story in the ABA JOURNAL about secret settlements will discover that almost all of the litigation to unseal court files is brought by the mass media. At least a substantial proportion of those cases have nothing to do with health and safety. What they have to do with are things like finding out all of the dirt that is in the file about Clint Eastwood's love life, or all of the dirt in the personal life of the Minnesota Vikings' coach. I am one of those who believes that the First Amendment grants no rights to news organizations to gain access to whatever sells newspapers or stops a channel-surfing viewer from switching the stations. It seems to me that there is a real worry about mere gossip, "infotainment" that comes from prying around in files; and worry about embarrassment is a genuine one.

It's not just a worry about defendants being embarrassed. It can be a worry that plaintiffs face as well. Those of you who are familiar with the Dalkon Shield litigation will remember that A.H. Robbins' lawyers tried to intimidate women, to prevent them from pursuing their Dalkon

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1. This comment is a lightly-edited transcript of oral remarks. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO L.J. 2619 (1995).

Shield lawsuits by asking them what the lawyers nicknamed "the dirty questions" at their depositions. Questions were asked about the names and addresses of all their sexual partners, about their sexual habits, about their hygienic habits. The clear implication was that this was information that would enter the public domain if they went forward with their law suits, and it seems to me that it's quite appropriate in those cases to worry about privacy.

Defendants have a particular worry about privacy because, unlike the plaintiff, they are dragged into the court. In a sunshine-in-litigation regime, they must either concede the lawsuit, or tolerate their files getting open. And I think that's one of the complaints that critics of open settlements make.

In response to such worries, it seems to me crucial that Richard's proposed rule concerns only health and safety information, not personal information. I assume that he would agree that if the purpose of open settlements is merely to dig out dirt and gossip, there is really no place for that. So I don't really think this is a criticism of his rule.

As for the fact that defendants might have to make a hard choice between conceding a lawsuit and opening their files, the law *does* confront those whose conduct is not innocent with hard choices. That's a fact of life, and it is not necessarily bad. One hard choice that the law has been perfectly sanguine about is parallel civil and criminal proceedings, where a civil defendant may have to choose between throwing in the towel on a civil lawsuit or defending it and thereby waiving the right against self-incrimination. I think that is an appropriate hard choice for the law to put to defendants and, by analogy, I think that the choice to "throw in the towel or open your files" might be an appropriate one to put to defendants if they are concealing health and safety information.

A second possible objection to Richard Zitrin's rule is an argument having to do with compassion for this particular plaintiff who may be seriously injured, who needs compensation, and who is offered generous compensation at no risk of the anguish and possibility of defeat of trial, if only he will settle. Out of compassion, both his lawyer and the judge might feel a tremendous incentive not to say, "Tough—because there's health and safety information, you have to run the risks of trial." In response to that criticism, I would turn the argument around. It's bad public policy to build law around hard cases—where, of course, the original meaning of "hard cases" was not a difficult case to decide but a case that wrings our heart strings. I think that Richard is right. It's bad public policy to conceal health and safety information so that one person can get

more compensation. We cannot expect the judge or that plaintiff's lawyer to make that decision. That's why a rule is appropriate.

Third (and I think that, jurisprudentially, this is the most interesting argument) is the argument that our courts are really for private dispute resolution. They are not clearing houses of information. To that the response is that the argument misconceives the nature of what the courts are for. Courts are not just there to take cases, process them, and ship them out. Otherwise it would be hard to explain why courts produce written opinions about cases. The point is that the court system is not a system of private justice for dispute resolution purposes alone. It's also a place in which arguments about the meaning of law and constitutional values are ventilated and carried on. Courts themselves are an important part of the life of a deliberative polity like ours, and for that reason I think that the view that courts are just there for the private convenience of the litigants is simply a false idea about courts.

Given all this, one of the questions is, what's the best way of enforcing some kind of sunshine-in-litigation regime? The usual way, exemplified in the Texas statute that Richard Zitrin talked about, or the Florida and Washington statutes, is by enacting a law preventing the secret settlement. Alternatively, I would regard it as an issue of judicial ethics that the judge should not seal the documents and the settlement. If so, it is very important to educate judges so that they don't instinctively say to themselves, "The plaintiff wants the secret settlement; the defendant wants it; I want the matter off my docket, so let's seal the settlement and watch the case go away."

In contrast to these approaches, Richard's suggestion is an ethical rule for lawyers. Although I agree with him on his diagnosis of the problem, I do not agree with him on the proposed solution. I don't think that the ethical rule would be a particularly good idea.

What does it mean to say that the lawyers cannot participate in negotiating a secret settlement? Let's consider the defense lawyer first. Does the rule mean that the defense lawyer should not counsel the client to offer a generous settlement in return for secrecy? That seems like an unjustifiable interference with the lawyer/client relationship and the free speech rights of the defense lawyer. Does it mean that the lawyer has to tell the client, "I can't negotiate this settlement for you"? Does it mean that the lawyer tells the client, "If you want to make that settlement offer, I can't even communicate it to the other side for you"? None of these seems acceptable.

Next let's look at the plaintiff's lawyer. Does the rule mean that the plaintiff's lawyer must tell the client, "I cannot negotiate a secret settle-

ment for you. Ethics forbids it. If the other side makes the offer, I can't even communicate it to you. If you want to accept it, I can't communicate your acceptance back to the other side. And if you ask me whether it's a good idea to accept it, the ethics rules seal my lips"?

Now, it seems to me that all that would happen is at that point, defendants would say, "If my lawyer won't have this settlement conversation with the plaintiff, I'll just have it directly." They would simply make an end run around the lawyers who are now estopped from participating in and negotiating the secret settlement.

This might be good news for the accountants. If lawyers won't do it, the accountants will. Now the defense accountant approaches the plaintiff's accountant and offers a secret settlement, which the plaintiff's accountant accepts. Of course, the state bar declares that this is unauthorized practice of law, and files a lawsuit. But the judge throws it out because the judge says, "According to the ethics rules, this isn't the practice of law at all. Lawyers can't negotiate secret settlements." So this would be a rule that would provide a lot of new professional opportunities for nonlawyers.

Alternatively, lawyers might still be able to negotiate secret settlements because the rule might be easy to game. According to the rule, the lawyer is forbidden from negotiating the settlement once the lawyer reasonably believes that there is a substantial danger to the public health or safety. The lawyer will now try to negotiate the settlement *before* investigating the case far enough to form that reasonable belief. A lawyer on a contingency fee will have a strong incentive to do so, and a lawyer who is immune from financial considerations of a personal nature will still want to settle on behalf of the client because of compassion for the client.

Finally, I think that the rule as stated might be difficult to apply in many cases. This is not an objection in principle to eliminating secret settlements through an ethics rule, but it is an objection to the way Richard's rule is phrased.

Richard's rule is difficult to apply because it is very difficult to know what counts as a "substantial danger" to the public health or safety in a mass exposure context. Suppose I as the lawyer obtain discovery information showing that one of these gas tanks out of 10,000 explodes. Is that a substantial danger, or an insubstantial danger? I think that it is very hard to tell. Similarly, if I know that a pharmaceutical raises the risk of cancer by one percent so that cancer in the exposed population occurs one percent more often than in the baseline population, would I consider that a substantial risk or an insubstantial risk? Here, too, I think that it would be very difficult for anyone to tell.

If I am right about this, the rule probably would not be used much by lawyers in mass exposure or mass accident cases because the lawyer still has client-based and personal incentives to negotiate the secret settlement, which is after all a windfall for that client.

So I think on the whole that the best way to handle the problem of secret settlement is probably not through an ethics rule but through sunshine-in-litigation legislation and through a judiciary that would be much more vigilant than it is now in policing this process, and in not giving a blanket presumption that if the parties want a secret settlement, a secret settlement is a good thing. Not every case that can be settled ought to be settled, and it's the judiciary's job to realize that some settlements are not in the public interest and should not be approved. Thank you.