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THE JUDICIAL FUNCTION: JUSTICE BETWEEN THE PARTIES, OR A BROADER PUBLIC INTEREST?

Richard Zitrin*

*"Here comes the sun. Here comes the sun,
and I say . . . it's all right."*¹

PROLOGUE

On October 10, 2000, *60 Minutes II*, the CBS investigative news program, aired a segment about victims of defective Firestone tires with "belt separation" that caused the tires to shred without warning.² The segment focused on Kim Van Etten, whose son Danny was killed when a Firestone tire separated. Ms. Van Etten accepted a settlement that required that she and her lawyer keep secret not only the amount of the settlement, but all the documents they had obtained during discovery. Van Etten accepted secrecy because her lawyer told her it would take

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1. THE BEATLES, *Here Comes the Sun*, on ABBEY ROAD (EMI/Capital Records 1969).

2. *60 Minutes II: Hush Money?* (CBS television broadcast, Oct. 10, 2000). The recitation that follows is taken from a videotape of that segment.

years to resolve her case publicly, and “it’s so very hard when you’re dealing with the death of your son.”

Van Etten’s lawyer defended secretizing the settlement, while acknowledging others may have died later as a consequence. “You can spend maybe two years litigating over obtaining vital documents, but are you doing what’s best for your client? . . . I’m saying your job as a lawyer is to prosecute and win that case, and that’s where your mind better be and your focus ought to be,” he told Dan Rather.

But Kim Van Etten, in the final analysis, focused on something else—those deaths that came after. She clearly had only a limited understanding of the nature of the documents “secretized” by her agreement. But she knew they went to the heart of the case. “I felt like I killed those people, and in all honesty I do have a hand in it and I’ll have to answer to it at sometime in my life or after my life,” she told Rather. Rather demurred, telling her that “people watching” would almost certainly tell her “‘you don’t have anything to answer for.’” But Van Etten was resolute: “Yes I do. Because even though I didn’t know [the details of the documents], a lot of people died. And if I said ‘no,’ and went those six years [to trial], and got strong instead of crying” those people might be alive.

One might understand why lawyers for Firestone would insist on secrecy. It’s a bit harder to explain why a lawyer truly acting in a plaintiff’s best interest would want to encourage a client to choose money over the client’s later feelings of guilt, though the “M-word,” money, probably plays a large role. But what about the judge? What could he or she have done? If the judge were in a state where no discovery—filed or unfiled—could be “secretized” when that action would endanger the public, where no protective order could “secretize” such information even by stipulation, indeed, where it would be *unethical* for lawyers to act in the manner Ms. Van Etten’s lawyer did, then the judge—and the judge’s court—could and would refuse to permit private agreements to triumph over public harm.

INTRODUCTION

Because I intend to be prescriptive (or, when it comes to the esteemed members of the bench who may be in the audience, “suggestive,” since it is they who wield the gavels while I—as any lawyer appearing before members of the bench—have only words), I must confess some biases before going further. First, I believe in “sunshine in litigation” and openness of both court records and

discovery. I believe that courts are public forums, and that arguments about the privacy of disputes should generally be outweighed by the public's right to know. Some have strongly argued that civil courts exist to serve "private parties bringing a private dispute."³ I believe, however, that even if the dispute began as a private one, once the courts are involved it is at most a private dispute *in a public forum*. Once the disputants go to court, the public nature of the forum trumps the formerly private nature of the dispute.⁴

Second, although I have been a trial lawyer since my bar admission, I come to my position not primarily as a litigator with either a plaintiffs' or defense perspective, but rather from my involvement in the field of legal ethics. Having evaluated what is and what I believe *should be* the ethical behavior of lawyers, and after seeing my views evolve substantially over more than two decades in the field, I have come to believe that the traditional model of the "zealous" advocate, who does everything within the bounds of the law for his or her client with almost no regard to consequences, is both inappropriate and unnecessary to being an excellent lawyer.⁵

Yet, those lawyers—whether for plaintiffs or the defense—who might otherwise agree with this perspective too often feel they have no choice but to accept and even argue for secrecy. The rules of ethics generally (with narrow exceptions) require lawyers to put the interests of the client ahead of those of society, and neither local nor jurisdictional rules of court (including those addressing discovery and protective orders) generally proscribe entering into settlements that permit a society-first perspective. Thus, lawyers feel bound to settle cases in ways that serve the needs of specific clients even if they potentially harm

3. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 431 (1991).

4. Trumping doesn't include disclosing names of innocent victims, such as children who have been molested. This would prevent necessary privacy for those innocents who need protection against harm.

5. I am hardly alone in moving in this direction. When the American Bar Association Model Rules were adopted in 1983, "zealous advocacy" was no longer front and center. Under these Rules, while a lawyer must act with "commitment and dedication" and "zeal in advocacy," the lawyer "is not bound, however, to press for every advantage. . . ." MODEL RULES OF PROF'L CONDUCT R. 1.3. Moreover, the last twenty years have seen the American Bar Association substantially broaden Model Rule 1.6, from narrow permission to disclose a client's "criminal act" likely to lead to "imminent" death or substantial bodily harm (1983) to broad permission to disclose any occurrence, not limited to the client's act nor to its being criminal, likely to result in such harm, whether or not imminent (2002), to further disclosure relating to non-injury-related matters—not related to the issues raised in this paper—approved by the ABA House of Delegates in August 2003. See MODEL RULES OF PROF'L CONDUCT R. 1.6.

substantially the interests of society as a whole. Unless counsel are operating in one of the very few states with strong “sunshine in litigation” laws (and sometimes even then), they may feel that there is little that can be done when the defendant demands, and the plaintiff accepts, secrecy as a condition of obtaining information or resolving a case.

This paper makes three arguments. First, while they have obvious duties to the parties in litigation, courts—and the judges in charge of them—have other duties to a broader public interest, consistent with the highest goals of judicial ethics. Second, judges can and *should* take an active role in protecting the public interest by ensuring that information obtained in connection with a legal dispute that directly concerns a substantial danger to the public health or safety remains available to the public *regardless of the desires of the parties*. Third, although the resources available to most judges are obviously limited, they can nevertheless successfully accomplish such a goal, by (1) modifying the existing court rules governing discovery and case settlement; (2) narrowing the acceptable grounds for protective orders, especially *stipulated* protective orders; (3) modifying the jurisdiction’s ethical rules of professional conduct to prohibit lawyer collaboration in “secretizing” such information; and (4) educating and requiring the trial bench to follow these modifications and rules.

I. THE JUDICIARY’S RESPONSIBILITY TO THE PUBLIC

A. *The Judiciary’s Role in Maintaining the Public Trust*

One can hardly question that there are countless judicial opinions at all levels of our justice system that turn on public policy issues or are decided based on the public interest in the administration of justice. Judicial protection of the interests of non-parties to litigation is required in many situations, from seeking court approval of settlement agreements of class action and shareholder derivative suits, to giving rights to third party beneficiaries to contracts,⁶ wills and trusts,⁷ and investment prospectuses.⁸

6. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 309 cmts. b & c (1981) (stating that third party beneficiaries have equal rights of enforcement to a contract as original party); see also, *Lucas v. Hamm*, 364 P.2d 685, 689-91 (Cal. 1961) (stating that an attorney can be held liable for malpractice by a third party intended beneficiary).

7. See, e.g., *Bucquet v. Livingston*, 128 Cal. Rptr. 743, 750-52 (Cal. Ct. App. 1976) (holding that a lack of privity will not necessarily prevent a third party beneficiary under a will to bring a

A judiciary responsible to protect the interests of the public is central to the concept of our system of justice. While the fundamental aspect of the role of the courts is to administer justice—usually justice between the parties—the ABA Model Code of Judicial Conduct asserts that among the most basic roles of the judiciary is to maintain the integrity of and public confidence in our legal system. The Preamble to the ABA Model Code of Judicial Conduct reads:

The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.⁹

Our most populous states have closely modeled their own codes of judicial conduct to reflect this basic duty.¹⁰ Seeing the court system as a “public trust” means defining a relationship of trust between judges and the public. Such a relationship implies that the judiciary should operate in the best interests of the beneficiaries of that trust.

cause of action); *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993); *Kinney v. Shinholser*, 663 So. 2d 643, 646–47 (Fla. Dist. Ct. App. 1995); *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (reinforcing the notion that intended third parties have the right to bring legal malpractice actions against attorneys).

8. See Security and Exchange Act of 1934, Rule 10b-5, 15 U.S.C. § 78j (protecting the rights of third parties from misrepresentation involving securities).

9. MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

10. See, e.g., CAL. CODE OF JUDICIAL CONDUCT pmbl. (1996) (“The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.”) (emphasis added), available at <http://www.lectlaw.com/files/jud32.htm> (last visited Sept. 9, 2004); FLA. CODE OF JUDICIAL CONDUCT pmbl. (2004) (“Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.”) (emphasis added), available at <http://www.flcourts.org/scu/sctdocs/ethics/preamble.html> (last visited Sept. 9, 2004); ILL. CODE OF JUDICIAL CONDUCT pmbl. (2004) (“The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all provisions of this code are precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.”) (emphasis added); N.Y. CODE OF JUDICIAL CONDUCT preface (1996) (“Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.”) (emphasis added); TEX. CODE OF JUDICIAL CONDUCT pmbl. (2004) (“Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office *as a public trust* and strive to enhance and maintain confidence in our legal system.”) (emphasis added), available at <http://www.courts.state.tx.us/judethics/canons.asp> (last visited Sept. 9, 2004).

Other ABA rules and state codes of judicial conduct support the policy that courts should act in the best interests of the public. Among the most affirmative of these rules is memorialized by the ABA in Canon 2A of its Model Code of Judicial Conduct: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹¹ Since the ABA Model Code was revised in 1990, almost all states have either adopted this tenet or have enacted similar rules either requiring¹² or strongly urging¹³ judges to act in a manner that promotes public confidence in the judiciary. It is fair to say that these rules pose an affirmative duty on the judiciary to instill and maintain public confidence in the court system.

Such confidence is necessarily upset by a judiciary that permits secret settlements to go unchecked even when those settlements are likely to conceal significant harm from the public. In these cases, the public is likely to believe—and rightly so—that the court system is allowing the private resolution of supposedly private disputes in a manner that amounts to a breach of the public trust.

This is easily avoided. Courts can and should act to prevent litigants from entering into settlement agreements, stipulations for protective orders, or agreements to destroy or return discovery *wherever* they arise under a court’s jurisdiction, *whether or not* the agreement is ever presented to the court.

B. *Judicial Activism v. “Judicial Action”*

It is not only ethical but laudable for judges to take active roles to further policies that protect the public health and safety. Such judicial

11. MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1990).

12. See, e.g., CAL. CODE OF JUDICIAL CONDUCT Canon 2A (1996) (“A judge *shall* respect and comply with the law and *shall* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”) (emphasis added); FLA. CODE OF JUDICIAL CONDUCT Canon 2A (2004) (“A judge *shall* respect and comply with the law and *shall* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”) (emphasis added); N.Y. CODE OF JUDICIAL CONDUCT Canon 2A (1996) (“A judge *shall* respect and comply with the law and *shall* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”) (emphasis added).

13. See, e.g., ILL. CODE OF JUDICIAL CONDUCT Canon 2A (2004) (“A judge *should* respect and comply with the law and *should* conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”) (emphasis added); TEX. CODE OF JUDICIAL CONDUCT Canon 2A (2004) (“A judge shall comply with the law and *should* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”) (emphasis added).

action is consistent with the ultimate responsibility of the judiciary,¹⁴ and it is consistent with the affirmative duties to protect the confidence of the public that is vital to our system of justice.¹⁵ What I am advocating is not judicial “activism” but judicial “action.”

It is important to draw a distinction between judicial activism and what I have termed “judicial action.” “Judicial activism” is most frequently used to describe a court that engages in prospective decisionmaking—some would say legislating from the bench. Judicial activism has both defenders and critics. Those who defend the process see it as method of “augment[ing] the power of the courts to contribute to the growth of the law in keeping with the demands of society.”¹⁶ Subsequent cases are subject to changing interpretation of precedent that reflects changing attitudes in society—or on the bench. Its supporters commend the process as a “deliberate and conscious technique of judicial lawmaking”¹⁷ that “facilitat[es] more effective and defensible judicial lawmaking.”¹⁸ Critics of judicial activism find that it “smacks of the legislative process,”¹⁹ and that the doctrine “tends to cut [courts] loose from the force of precedent, allowing [them] to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis*.”²⁰

By “judicial action,” I mean a court’s creation of administrative policies and rules of court in order to facilitate justice. While judicial activism is considered a controversial and politicized issue, “judicial action” has to do with how the court administers justice to enhance the public trust in the justice system. This includes implementing local rules,

14. See, e.g., Richard Zitrin & Carol M. Langford, *Hide and Secrets in Louisville*, at <http://www.judicialaccountability.org/articles/hideandseek.htm> (last visited Sept. 9, 2004) (describing how a judge saw fit to file his own motion to change his post-trial order from a dismissal after verdict to “dismissal as settled” when he suspected a secret agreement between the parties that might be detrimental to the public health) (extracted from RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 193-201 (1999)).

15. See MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990) (stating that the role of the judiciary is partly to “strive to enhance and maintain confidence in our legal system.”)

16. Jonathan Mallamud, *Prospective Limitation and the Rights of the Accused*, 56 IOWA L. REV. 321, 359 (1970-71).

17. Beryl H. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 6 (1960-61).

18. *Id.* at 28.

19. Paul J. Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 65 (1965-66).

20. Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (“[T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy [a] sense of justice very well.”).

standing orders, minute orders, rules of ethics, and other policies in the interest of the just administration of the law. Courts taking judicial action to protect the public need not interpret case law. Such action requires only the strength of the bench to apply a standard that represents “justice for all”—not merely “justice for the parties.”

Judicial action is often necessary to fulfill the judiciary’s ethical and moral responsibility to the public. A court that engages in judicial action to promote the health and safety of the public is serving the public trust in a manner consistent with the codes of judicial conduct. A court that does not so act is in danger of harming that public trust.

II. WHY “SECRET SETTLEMENTS” FALL WITHIN THE PURVIEW OF JUDICIAL RESPONSIBILITY

A. *Secret Settlements Jeopardize the Public Health and Safety*

So that the terminology I use here is clear, by “secret settlements” I mean those agreements between plaintiff’s and defense lawyers to keep information about a known harm—whether it is a defective product, toxic waste, or a molesting soccer coach—from the public. The plaintiff gets a large (sealed) settlement; the defendant gets silence; the public gets shortchanged. I am not talking about keeping secret the *amount* of the settlement; there are valid reasons for doing this. I am not talking about keeping secret the names of innocent parties, such as molested children; there are important reasons for doing this. Rather, my concern is with those settlements in which the very information about the claimed harm, usually obtained through the process of open discovery, is “secretized” by private agreement of the parties.

In the last five years, secrecy in settlements has become an increasingly common subject of articles in the popular legal press and more scholarly forums.²¹ In the last three years, the general media has

21. See, e.g., Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (surveying the issue of secrecy from an ethics perspective); RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 183-208 (1999) (devoting all of Chapter 9 to a discussion of secret settlements); Richard A. Zitrin & Carol M. Langford, *It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements*, 7 VOIR DIRE No. 1, 12 (2000); Frances Komoroske, *Should You Keep Settlements Secret?*, TRIAL, June 1999, at 55; Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don’t Know Can Hurt You)*, 2 INST. FOR STUD. OF LEGAL ETHICS 115 (1999); Diana Digges, *Confidential Settlements Under Fire in 13 States*, LAW. WKLY., Apr. 30, 2001 at B1; Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, 12 A.B.A. PROF. LAW. 1 (2001); Kevin Livingston, *Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists*

increasingly addressed the issue: in 2000, a front page article and editorial in the *Los Angeles Times*, an editorial and feature article in *USA Today*, the piece on *60 Minutes* cited in the introduction to this article, in 2001, and numerous other articles.²²

Why this increased scrutiny? Unfortunately, it has been mostly a matter of dead and wounded bodies. The *Times* article, *USA Today* editorial and *60 Minutes* piece all flowed from the allegations in the Fall of 2000 about Firestone's shredding tires. The more recent articles most often were inspired, so to speak, by the policy of some Catholic church archdioceses of allowing priests who were known pedophiles to be relocated and continue serving in parishes.²³ Change comes, but often the cost is high.

Who Want to Ban Secret Settlements, RECORDER, May 8, 2001, at 1; Rebecca A. Womeldorf & William S. D. Cravens, *More Sunshine Laws Proposed*, NAT'L L.J., Nov. 12, 2001, at B14; Jill Hertz Blaustein, *Sealed But Not Secret*, LITIG. NEWS, July 2002, at 1; Martha Neil, *Confidential Settlements Scrutinized: Recent Events Bolster Proponents of Limiting Secret Case Resolutions*, 88 A.B.A. J. 20 (2002); James E. Rooks, Jr., *Let the Sun Shine In*, TRIAL, June 2003, at 18; Christine Hughes, *Confidential Settlements: A White Paper*, NEW ENG. LEGAL FOUND., Apr. 2003.

22. See, e.g., Editorial, *Lethal Secrets*, L.A. TIMES, Sept. 12, 2000, at B8; Davan Maharaj, *Goodyear Tire Fatalities Echo Firestone's Troubles*, L.A. TIMES, Oct. 25, 2000, at A1; Editorial, *Sealed Court Records Kept Tire Problems Hidden*, USA TODAY, Sept. 19, 2000, at 16A; Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly? Judicial Orders Protecting Companies Kept Tire Case Quiet*, USA TODAY, Oct. 16, 2000, at B1; *60 Minutes II: Hush Money?*, supra note 2; James Grimaldi & Carrie Johnson, *Factory Linked to Bad Tires*, WASH. POST, Sept. 28, 2000, at E1; Richmond Eustis, *Firestone Fails to Keep Ga. Wreck File Sealed*, FULTON COUNTY DAILY REP., Sept. 29, 2000, at 1; Ray Shaw, *Sunshine in Litigation*, 74 FLA. B.J. 63 (2000); Roy Simon, *Some Secrets Lawyers Shouldn't Keep*, NEWSDAY, Aug. 16 2001, at A39; Richard A. Zitrin, *Time to End the Secrecy*, S.F. CHRON., Aug. 21, 2001; Eileen McNamara, *Courts Must End Secrecy*, BOSTON GLOBE Feb. 27, 2002, at B1; Ben Kelley, *As You Were Saying . . . Secret Court Settlements Prevent Needed Warnings*, BOSTON HERALD, Sept. 28, 2002, at 18; Stephen Gillers, *Court Sanctioned Secrets Can Kill: Settlements That Muffle Plaintiffs Should Be Drastically Curtailed*, L.A. TIMES, May 14, 2003, at B13.

23. See, e.g., BLESS ME FATHER FOR I HAVE SINNED: PERSPECTIVES ON SEXUAL ABUSE COMMITTED BY ROMAN CATHOLIC PRIESTS (Thomas G. Plante ed. 1999); Michael Paulson, *Lessons Unlearned*, BOSTON GLOBE, June 12, 2002, available at http://www.boston.com/globe/spotlight/abuse/stories2/061202_louisiana.htm (last visited Nov. 9, 2003); Christopher Schiavone, *Broken Vows: A Former Catholic Priest Speaks Out About Secrecy, Scandal, and Being Gay in the Church*, BOSTON GLOBE, Dec. 8, 2002, at 10 (commenting on the practices of the Boston Archdiocese: "John Geoghan was repeatedly reassigned; Paul Shanley was recommended for alternative ministries elsewhere; and Joseph Birmingham and others were moved about the diocese as 'squirrels'—clerical jargon for priests hidden away in rectories."), available at http://www.boston.com/globe/spotlight/abuse/stories3/120802_schiavone_entire.htm (last visited Nov. 9, 2003); *Abusive Priests Were Protected, Grand Jury Reports*, ASSOCIATED PRESS, Feb. 11, 2003, available at <http://www.newsday.com/news/nationworld/wire/balte.abuse11feb11,0,1430663> (last visited Aug. 21, 2004); *Chronology of Major Events in Abuse Crisis*, ASSOCIATED PRESS, Dec. 13, 2002, available at <http://www.newsday.com/news/nationworld/wire/sns-law-chronology,0,6948578> (last visited Aug. 31, 2004); Jonathan Bandler, *Priest Got Church Recommendations Despite Sex Allegations*, J. NEWS, Feb. 28, 2003, available at

By October 2001, the National Highway Traffic Safety Administration (NHTSA) had determined that Firestone shredding tires had caused at least 271 fatalities, most of which involved cases settled secretly.²⁴ The number of Catholic priests against whom abuse cases were settled and who were moved to other venues is hard to estimate, but based on the histories now known, it seems fair to put the number at several hundred.²⁵ This news has become just the latest in a series of horror stories involving secrecy, though these stories may have had better timing than others in bringing the issue to the front pages, and thus to a broader American audience.

Before Firestone there were the prescription drugs Zomax and Halcion, the Shiley heart valve, and the Dalkon Shield intrauterine device, all taken off the market as too dangerous, but not until years—and hundreds of secret settlements—had come and gone.²⁶ The public was left in the dark long after the products' defects were well known to those involved in litigation.

An English investigation provided the proof against Halcion. Disclosures about Zomax came only after a scientist experienced a potentially fatal allergic reaction and decided to investigate. By the time Zomax was taken off the market, it was reportedly responsible for a dozen deaths and over 400 severe allergic reactions, almost all of which were kept quiet through secret settlements worked out by McNeil, the drug's manufacturer. Attorneys for A. H. Robins, the Dalkon Shield's

<http://www.thejournalnews.com/newsroom/022803/b0128wilson.html> (last visited Aug. 31, 2004).

24. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., OFFICE OF DEFECTS INVESTIGATION, ENGINEERING ANALYSIS EA00-23 (2001), available at <http://www.nhtsa.gov/hot/Firestone/Update.html> (last visited Aug. 21, 2004) [hereinafter NHTSA Rep.]. The NHTSA's first estimate was under 100 fatalities; the agency periodically raised its estimate during late 2000 to late 2001 from 88 to 119 to 148, and 174; *Tire Recall Chronology*, DRIVEUSA.NET, at http://www.driveusa.net/ford_firestone_chronolgy.htm (last visited Aug. 31, 2004). The accuracy of this information is borne out by news reports and reports on NHTSA's own site. See, e.g., Earle Eldridge, *Firestone Attorney Says Tiremaker Not at Fault*, USA TODAY, Aug. 14, 2001 (stating that tread separation of Firestone tires had led to 203 deaths and over 700 injuries and noting that Bridgestone/Firestone has settled more than 200 of these lawsuits before trial) available at <http://www.usatoday.com/money/autos/2001-08-12-firestone-trial-full.htm> (last visited Aug. 21, 2004). NHTSA itself recognized that the "additional reported fatalities were not the subject of new complaints; rather, they were added after ODI obtained additional information about pre-existing complaints." NHTSA Rep., *supra*.

25. *The Boston Globe*, which has reported the abuse cases as thoroughly as any media source, has suggested numbers as high as 1,500 molesting priests. See Paulson, *supra* note 23.

26. See, e.g., Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 649-50 (1990-91); Bob Gibbins, *Secrecy Versus Safety: Restoring the Balance*, 77 A.B.A. J. 74 (1991); STEVEN D. LYDENBERG, ET. AL., *RATING AMERICA'S CORPORATE CONSCIENCE* 234 (1986), *Nichols v. McNeilab, Inc.*, 850 F. Supp. 562, 569 (E.D. Mich. 1990); MORTON MINTZ, *AT ANY COST* 197-98 (1985).

manufacturer, even tried to condition their secret settlements on plaintiffs' lawyers' promises never to take another Dalkon case—a clear ethics violation.²⁷

In the case of General Motors pickup trucks with side-mounted gas tanks, GM took the offensive when in 1993, GM's lawyers sued Ralph Nader and the Center for Auto Safety for defamation. But other GM lawyers had been quietly settling exploding side-mounted gas tank cases with startling frequency for years. In 1996, lawyers for the Nader defendants obtained GM's own records of those cases in discovery. They showed approximately 245 individual gas tank pickup cases, almost all settled, and almost all requiring the plaintiffs to keep the information they discovered secret. The earliest cases marked "closed" were filed in 1973, the latest were filed 23 years later, just before the records were turned over.²⁸

Before the Catholic Church scandals, a home for the mentally disabled secretly settled a case accusing the home's administrator of sexually abusing a resident with Down syndrome; the administrator privately admitted molesting over a dozen others.²⁹ The recent church exposures are not the first. In 1993, the Catholic Church's Chicago archdiocese secretly settled a molestation case, ostensibly to protect the child. An investigation by *Chicago Lawyer* discovered an estimated 400 lawsuits that had been settled by the Catholic Church in the previous decade—almost all of them secretly.³⁰

B. Why Courts Should Favor Openness

This exhaustive history leaves no reason why courts should not favor openness over secrecy in settlements. Openness will foster greater public confidence in the courts and will allow attorneys to perform their

27. See MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2002) ("A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

28. See, e.g., *Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?*; An edited transcript of a panel discussion at the American Judicature Society's 1995 midyear meeting, 78 JUDICATURE 304 (1995); Catherine Yang, *A Disturbing Trend Toward Secrecy*, BUS. WEEK, Oct. 2, 1995; Gillers, *supra* note 22; *Court Sanctioned Secrets Can Kill*, L.A. TIMES, May 14, 2003. Documentation of cases alleging GM truck fires was provided to the author by Clarence Ditlow, director of the Center for Auto Safety. See also *Phillips v. GMC*, 126 F. Supp. 1328, 1332-33 (D. Mont. 2001), *vacated by Phillips v. GMC*, 289 F.3d 1117, 1124 (9th Cir. 2002) (discussing the total amounts of recovery in the GM cases).

29. See *Home for Disabled to Pay Undisclosed Settlement in Abuse Case*, LEGAL INTELLIGENCER, June 10, 1994, at 7.

30. See Harvey Berkman, *Boy Says Abuse; Priest, Ex-Nun Say Slander*, CHI. LAW., Jan. 1994, at 1.

advocacy with greater respect for their profession, knowing that they will not be bound by secret settlements regarding matters that concern the public safety and welfare. However, openness cannot be limited to settlement agreements alone. Many settlement agreements themselves will not contain the information that is meant to be kept secret. That information is usually obtained in the discovery that prompted the secret settlement.

Four principal arguments have been advanced in opposition to those court limitations on secrecy. The first relates to the claim of Professor Arthur R. Miller³¹ and others that there exists only “anecdotal evidence,” or what Miller calls “stories,” that secrecy has indeed prevented the public from learning vital information on issues of health and safety. It is true, of course, that allegations in a lawsuit—even an occasional jury verdict—don’t prove anything. But there is no evidence that openness actually encourages frivolous lawsuits. More significantly, an examination of specific cases, among them those discussed above, shows that far more than mere “anecdotes” are involved, including several products that were eventually removed from the market.³² Moreover, even if legal and scientific experts are arguing about whether something is truly dangerous, they are overlooking a more fundamental question: Does the public have a right to know what the risks are—and what the evidence is?

Second, opponents of openness claim that cases would not settle without secrecy, and thus would increase the caseload of an already overburdened judiciary. There is no evidence for this proposition. Indeed, these claims do not appear to have even strong “anecdotal” support. There have been no studies demonstrating this supposition to be true, nor any such claims from the states with the strongest anti-secrecy laws.

In fact, at three judicial seminars at which I have been privileged to speak on this subject,³³ I spoke informally and in workshops with many judges; *none* could recall a case he or she believed would not have settled had secrecy been forbidden. I did not find a single judge who believed cases would *not* settle in the absence of secrecy.

31. See Miller, *supra* note 3, at 480.

32. See *supra* text accompanying note 26. Among the examples of products removed from the market are the drugs Halcion and Zomax, the Shiley heart valve, the Dalkon Shield intrauterine device, and General Motors side-mounted gas tanks.

33. See Richard Zitrin, Address at the Roscoe Pound Institute Annual Forum for State Court Judges (July 2000); Richard Zitrin, Address at the American Bar Association Annual Continuing Education Conference for State Appellate Judges (July 2001); Richard Zitrin, Address at the Louisiana Judicial College (Dec. 2001).

James E. Rooks, Jr., who has compiled a wealth of data on secrecy in litigation, recently wrote that in his substantial experience talking with judges at such conferences, he too has never heard a judge cite such a case.³⁴ Chief Judge Joseph Anderson of the federal district court for the District of South Carolina agrees with this conclusion, and notes that since his court approved the first significant district court openness rule in November 2002, filings in his court have gone up, but trials have gone down.³⁵ Not only did Judge Anderson challenge the assertion that cases would not settle, he was joined in that view by Professor (and former federal court of appeals judge) Abner Mikva and *both* of the defense counsel who spoke.³⁶

Rooks affirms Judge Anderson's sense of things, noting that "Florida's sunshine law has now been in effect for nearly 13 years. Trial lawyers for both sides appear to have simply accepted it and moved on with business."³⁷ Rooks concludes that *speculation* about openness' chilling effect on settlements was merely a "prediction" before state regulation that never came to pass and for which there is no evidence.³⁸

A recent study by the Federal Judicial Center also confirms this view. The Center examined 39,496 civil cases that were filed in eleven federal districts and were terminated in 2001 or early 2002.³⁹ The study indicated that there were only 140 cases with sealed settlement agreements—only one-third of one percent.⁴⁰ While many more cases may have been settled secretly through *unfiled* documents,⁴¹ there is little if any anecdotal or empirical evidence that these cases would have gone to trial. Indeed, there is a marked dearth of cases that have actually gone to verdict. The reason is obvious: Those few cases often make front-page

34. See James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859 (elaborating on Rooks, *supra* note 21, at 23).

35. See Chief Judge Joseph Anderson, Remarks at the "Court Enforced Secrecy: Formation, Debate and Application of South Carolina's New Secrecy Rules" Conference (Oct. 24, 2003) [hereinafter *The South Carolina Conference*]. The rule in question is discussed *infra*.

36. See Stephen E. Darling & Steve Morrison, Remarks at the South Carolina Conference, *id.*

37. Rooks, *supra* note 21, at 22.

38. *Id.* at 23.

39. See TIM REAGAN, ET. AL., FED. JUDICIAL CENTER, SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT—MAY 2003 PROGRESS REPORT 6 (2003) [hereinafter *PROGRESS REPORT*]. Note, however, that because this portion of the study only monitors filed settlement agreements, it is impossible to know how many agreements to "secretize" information were made but not filed. See discussion *infra* Part IV.A.

40. See *id.* at 7.

41. This is, in truth, the most serious aspect of the secrecy problem. See discussion *infra* Part IV.A.

headlines when they do go to verdict, such as the one General Motors side-impact gas tank case that *was* tried, in Atlanta, in 1994.⁴²

As Chief Judge Anderson put it at the South Carolina conference, parties wishing secrecy are most unlikely to “opt to go forward with the most public of resolutions—a trial. . . . It’s usually the cases that *matter* where secrecy is asked for—in cases where it shouldn’t be permitted.”⁴³

What is more plausible than the claim that cases won’t settle is that the *amount* of settlement ultimately might be lower, but only because no premium is paid for the plaintiff’s silence.⁴⁴ Indeed, this seemed to be the position of one of the defense lawyers at the South Carolina conference, Stephen E. Darling.⁴⁵ In his remarks, Darling asserted that under anti-secrecy rules defendants would no longer be “*willing to pay extra money*”⁴⁶ to settle secretly. Without secrecy, “defendants will not pay more” and plaintiffs would have to settle “for a lesser amount.” This remarkable statement is tantamount to an admission that defendants pay, and plaintiffs accept, more money than a case is worth simply to ensure secrecy—or, put more bluntly, that secrecy is indeed bought and sold.

As one court aptly put it:

[S]ettlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial matters.⁴⁷

Third, some opponents of secrecy argue the rather anachronistic view that “courts exist to resolve disputes that are brought to them by litigants”;⁴⁸ or that “litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door.”⁴⁹ It is not surprising that those who favor continuing secrecy in discovery and settlement agreements believe the court’s primary function—if not its exclusive function—“is to decide cases

42. See, e.g., *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994).

43. See South Carolina Conference, *supra* note 35.

44. See Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1, available at <http://www.nytimes.com/2002/09/02/national/02JUDG.html> (last visited Sept. 10, 2004).

45. See Stephen E. Darling, Remarks at the South Carolina Conference, *supra* note 35.

46. *Id.* (emphasis added).

47. *United States v. Ky. Utils. Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989), *rev’d*, 927 F.2d 252 (6th Cir. 1991).

48. Richard L. Marcus, *Symposium in Honor of Edward W. Cleary: Evidence and Procedure for the Future: The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 468 (1991).

49. Miller, *supra* note 3, at 466.

according to substantive law . . . [and that] collateral effects of litigation should not be allowed to supplant this primary purpose.”⁵⁰

One of these “collateral effects,” however, is the disclosure of information to the public that would not have been available in the absence of the litigation—information concerning a public danger.⁵¹ At the least, when such information reveals the danger of a public hazard or threat, the courts have an obligation to the public they serve to disclose this information, and the danger must trump any claim of privacy.

A court, after all, is a publicly-funded institution; its main function should be to serve the broader interests of the public.⁵² “Our courts are part of the public domain,” said Professor Abner Mikva, discussing the new South Carolina rules.⁵³ There is no presumption of privacy; rather “all presumptions should go in the other direction.”⁵⁴ As for the claim of embarrassment, Mikva submitted that “mere embarrassment” is something most adults must learn to handle.⁵⁵ Indeed, no one has documented any recent sightings of corporations, like zebras,⁵⁶ blushing red with embarrassment.

Fourth and finally, opponents claim that openness will cause court workloads to seriously increase, as judges are required to scrutinize hitherto uncontested motions and stipulations or unrepresented discovery. The more likely reality is that this will *not* be the case, as I discuss in Part III.B below.

I have become persuaded that one of the natural consequences of permitting secrecy is to foster the art of lying to or misleading the court. Perhaps the best example of this is the *Fentress* case, in which the Kentucky Supreme Court found that lawyers who engaged in an ongoing trial after a secret settlement had already been reached showed “a serious lack of candor with the trial court, and there may have been deception, bad faith conduct, abuse of the judicial process or perhaps even fraud.”⁵⁷ This not only results in private secrecy at the cost of public harm, but

50. See Marcus, *supra* note 48, at 470.

51. See *id.* at 469–70.

52. See Doré, *supra*, note 21, at 296.

53. South Carolina Conference, *supra* note 35.

54. *Id.*

55. *Id.* Chief Justice Jean Hoefer Toal of the South Carolina Supreme Court chimed in on support at the afternoon question and answer session to the effect that if she had been deterred by embarrassment, her career would long ago have been over.

56. I refer to one version of the famous child’s riddle, “What’s black and white and red all over?” and its answer, “An embarrassed zebra.”

57. *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449, 454 (Ky. 1996). For a full description of this case, see discussion *infra* Part IV.D.

undermines the very authority of the courts themselves. Courts can act to prevent this. The rest of this paper suggests how.

III. TO WHAT EXTENT ARE COURTS EQUIPPED TO TAKE JUDICIAL ACTION TO PROTECT THE PUBLIC?

A. Practical Limitations on What Courts Are Able to Do

It would be foolish to comment on courts' abilities to act on this issue without recognizing the limitations some—perhaps most—judges face in dealing with anything beyond the everyday business on their dockets. Resources available to courts in general and trial courts in particular vary widely from state to state, even from venue to venue within states. Among these variations (there are undoubtedly many others) are:

- * the availability of research attorneys and/or law students and the extent to which research can be done online;
- * the extent to which the court can utilize magistrates, commissioners, special masters, or “private judges”;
- * the extent of both system-wide and individual case and calendar management problems, including the extent of overall court backlog and length of each court’s docket; and
- * whether courts are segregated into issue-specific departments (such as probate, family law, and complex litigation) or at least have separate criminal and civil departments.

These limits on resources present a particular problem to courts concerned with openness and secrecy. Since much of what affects openness happens outside the court’s ordinary purview, and since many matters *within* the purview of the court system are not directly presented because they are resolved prior to contested hearing, the courts are often marginally or not at all involved in the substantive issue being disputed among the parties and counsel. Taking the time to examine such cases almost certainly means extra time and work for both the judge and his or her staff beyond the ordinary functions of the court. Given the press of ordinary court business, this can be a daunting, even impossible obstacle. Moreover, most judges are ordinarily loath to interfere with agreements made by counsel, particularly those that occur beyond their sight.

B. *The Limitations Facing Individual Trial Courts*

At the trial court level, one can divide issues of openness and secrecy into two broad, general categories: those that involve lawyers interacting with the bench, and those that do not. This is undoubtedly an oversimplification, but one that is useful to look at this issue from the point of view of the judge. There will be a considerable difference in the allocation of judicial resources depending on whether or not the judge is already involved in the substantive issue.

Jurisdictions vary in the extent to which they require, or even permit, lawyers to make the court aware of their progress in litigation, both procedurally and substantively. In the last generation, the interests of judicial economy, the allocation of precious court resources, the effect of technology, and the institution of “meet and confer” requirements have all materially diminished a courts’ record-keeping responsibilities for—and issues within cases—resolved outside the courthouse corridors. To the extent that document production requests, for example, are no longer even filed with a court unless there is a dispute, a court’s ability to acquaint itself with a particular case, even if it wanted to, is considerably less than it was a generation ago.

Nevertheless, many matters beyond the court’s purview or knowledge may have an important impact on the question of openness versus secrecy. Most of these relate to how discovery—interrogatories, deposition testimony, and perhaps most significantly, document production—is handled by the parties. In exchange for discovery, there may be private agreements to return documents or not disseminate deposition transcripts. In exchange for *settlement*, there may be these and other requirements to maintain a veil of silence. If these agreements do not require judicial intervention or even ratification, courts will ordinarily never learn of them.

Among others, the following matters that commonly require court involvement may raise the issue of openness versus secrecy:

- * motions to compel discovery and for sanctions for discovery failures;
- * protective orders;
- * rulings about privilege, including attorney-client and work product;
- * requests or motions to seal documents or testimony;
- * motions *in limine* and other motions affecting trial evidence;
- * motions to compromise claims where the court’s approval is necessary (e.g., minors, bankruptcy, probate, class actions, etc.);

- * stipulations regarding any of the above;
- * stipulations regarding post-trial settlement (including waivers of motions for new trial or appeal, stipulated reversals of judgment, etc.)

When these matters actually come before a trial court for hearing, the judge has a relatively easy opportunity to make an informed, substantive decision about how to deal with the issue of openness. But when these matters result in stipulations or unfiled agreements, one can hardly expect courts to be able to take affirmative case-by-case action to ensure the public's right to know.

Nevertheless, I have come to believe that judges have several viable, practical, options to protect the public's right to information. This is more easily done on a systemic, jurisdiction-wide level rather than by individual courts, due to the difficulty involved in a case-by-case effort. Supported by strong systemic rules, however, the additional workload of trial courts will be modest and only brief in duration.

Judge Marilyn Hall Patel of the Northern District of California has long refused to allow the vast majority of secret settlements presented to her. "The court, which is a public forum," she told a reporter fifteen years ago, "should not be a party to closing off from public scrutiny these agreements."⁵⁸ Patel noted then that "[s]ecrecy is costly to the system, because it means that somebody else is going to have to start all over from scratch. It just smacks of anti-competitive activity."⁵⁹ Given the ever-increasing complexity of litigation in the new millennium, there is every reason to agree with Judge Patel's view. Chief Judge Anderson of the District of South Carolina agrees, opining that openness actually fosters judicial economy by not requiring every new piece of litigation over a circumstance dangerous to the public to be started over again. Indeed, at the South Carolina conference, on October 24, 2003, Judge Anderson made this point several times. The draft of his paper distributed at the conference states that "duplicative discovery," as he terms it:

means that in any future litigation involving the same issue . . . the litigants will bear the cost of duplicative discovery. Nowhere is this more true than in cases where litigants (principally defendants) have established 'document repositories,' entire buildings where documents produced over the years are stored. The litigant in the first case seeks

58. B.J. Palermo, *Secrecy in the Courts: Plaintiffs' Lawyers Weigh the Benefits and Harm of Confidential Settlements*, CAL. LAW., July 1989, at 33.

59. *Id.*

production of documents and is handed the key to the document repository. When the case is over, the documents go back, and the 'needle in the haystack' process is repeated. . . . The burden on the judiciary is repeated as well. I know of nothing more time consuming than poring through boxes of documents in an effort to be fair. . . .⁶⁰

Discovery, once disclosed in one case, remains available for future cases. And if the issue is dealt with on a systemic, jurisdiction-wide level rather than by individual courts, it becomes "policy," and much of the difficulty involved in a case-by-case review is obviated.

C. Courts Can, and Should, Take Judicial Action to Ensure Openness

Even among states with sunshine in litigation laws that favor openness⁶¹ only Texas specifically deals with "discovery, not filed of record,"⁶² and only Florida and Louisiana, arguably, have language sufficiently broad to cover discovery and other matters not filed with the court.⁶³ Among federal courts, only the recently-approved South Carolina Local Rule 5.03 approved in November 2002, addresses all documents relating to a settlement agreement, but only if those agreements are filed with the court.⁶⁴ Accordingly, outside of the

60. South Carolina Conference, *supra* note 35. In his oral remarks, Judge Anderson likened this duplicative discovery to the Indiana Jones movie "Raiders of the Lost Ark." The audience watches Indiana Jones who, after great time and effort (not to mention close encounters with death) recovers the Ark of the Covenant, only to learn in the movie's last scene that the ark is buried in a crate in a gigantic storage facility containing thousands of seemingly identical crates. Anderson made it clear that courts should only have to find the "ark" once, and that courts should not be parties to burying it again.

61. While it is beyond the scope of this paper, it is worth noting briefly that some of the measures described as "favoring openness" or "anti-secrecy" may actually foster secrecy, either by ratifying exceptions to openness such as the traditional broad definition of what is appropriate for protective orders (including "annoyance," and "embarrassment"). *See, e.g.*, N.J. CT. R. 4-10.3; N.Y. C.P.L.R. 3103(a) (Consol. 2004) (considering protective orders to prevent "annoyance, embarrassment, oppression, or undue burden or expense"); *see also* MASS. R. IMPOUNDMENT P. 1 (seeming to favor a presumption of secrecy with regard to "papers, documents, or exhibits").

62. TEX. R. CIV. P. 76a(2)(c).

63. *Compare* FLA. STAT. ch. 69.081(4) (2003) ("[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard . . . may not be enforced."), *and* LA. CODE CIV. PROC. ANN. art 1426(D) (West 2004) (containing the same phrase as the Florida statute), *with* WASH. REV. CODE § 4.24.611 (2004) (limiting the agreement to those "settling, concluding, or terminating" a relevant claim).

64. *Compare* D. S.C. LOCAL CIV. R. 5.03(E) (2004) which states:

Filing Documents under Seal. Absent a requirement to seal in the governing rule, statute or order, any party seeking to file documents under seal shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request or attempt to seal filed documents. Nothing in

possibility of standing orders, which only a few daring judges, like Judge Patel in California, have even approached, in the vast majority of jurisdictions there is little judges can do on a case-by-case level.

Despite practical problems at the trial court level, courts can, as do those states with strong “sunshine in litigation” standards, require that, at least *in their county or district*, openness will be the order of the day unless there is a specific, particularized showing of the necessity for secrecy. In addition to skepticism about the reasons for secrecy, this presumption would generally be based in part on a public policy perspective that information likely to materially affect the public welfare should be available to the general public. If this “openness presumption” were uniformly applied, it would operate for all matters involving the courts, whether the parties were in dispute or evinced agreement.

This presumption of openness could apply broadly to all those matters involving the court, including those set forth in Part III.B, above, all settlement agreements, and, on the appellate level, both stipulated reversals,⁶⁵ and the somewhat counterintuitive process in a few states of “depublishing” opinions—particularly controversial and potentially erroneous ones—to avoid having them stand as precedent.⁶⁶ Orders, even if broad, would almost certainly be enforceable; almost all courts have recourse to a variety of sanctions, including monetary and issue sanctions and contempt powers, to enforce their orders.

IV. HOW COURTS CAN SERVE THE PUBLIC TRUST ON SECRET SETTLEMENTS: THREE SYMBIOTIC SOLUTIONS, AND SOME PRACTICAL HELP FROM TRIAL JUDGES

There are three principal means of administrative regulation—judicial “action” rather than judicial activism—by which courts can protect the public trust by preventing harm caused by secretizing information relating to substantial dangers to the public health and safety. First, courts have the power to implement court rules, locally and

this Rule limits the ability of the parties, by agreement, to restrict access to documents that are not filed with the Court.

with D. S.C. LOCAL CIV. R. 26.08 (2003) (stating that protective orders and agreement shall comply with District of South Carolina Local Civil Rule 5.03 which states that, “[n]o settlement agreement files with the Court shall be sealed pursuant to the terms of this Rule”), *available at* <http://www.scd.uscourts.gov/rules/dec2000/allrules.pdf> (last visited Oct. 7, 2004).

65. See, e.g., *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119 (Cal. 1992) (permitting, as a matter of policy, stipulated reversals).

66. See, e.g., CAL. R. CT. 976–979 (articulating in Rule 979 the procedure for requesting the “depublication of public opinions”), *available at* <http://www.courtinfo.ca.gov/rules/titlethree/titlethree.pdf>.

jurisdiction-wide, that actively promote openness of their own proceedings and of matters within their jurisdiction. Such rules can include a bar on secrecy even for those matters, like much discovery, that are part of a case but not filed or lodged with the court.

Second, courts have the power at both the jurisdictional and the trial court level to redefine the presumptions and standards relating to protective orders and other similar “secretization” orders. Most significantly, at the trial court level, the requisite justification for protective orders, sealing documents, and the like should be reexamined and narrowed. These issues should be addressed *regardless* of whether the parties agree to the secrecy in question. For appellate courts, these rules also include reexamining and revising the rules on unpublished opinions, partial publication, and depublication. Appellate courts could also examine the informal or semi-formal practice in many states of avoiding mentioning the names of certain offending attorneys or others when a written opinion is issued. Although this practice appears most common in opinions about prosecutors found to have committed misconduct,⁶⁷ other sanitizations also occur.

Finally, the courts in most states and, to some extent, in federal districts, have the power to adopt a scheme of sanctions or discipline for those lawyers who do not abide by such court rules. Most significantly, with the cooperation of the jurisdiction’s disciplinary authorities, these courts can develop ethical requirements for attorneys along the lines of the proposed rule suggested in Appendix A.

A. Preventing the “Secretization” of Filed and Unfiled Discovery

Many (and likely most) courts, even those that have a substantial interest in making inquiries about the necessity for secrecy in matters that come before them, will nevertheless be unlikely to inquire into matters resolved by the parties and counsel outside their purview. In federal court, or where state and local judicial rules permit, courts may have options available such as standing orders that require counsel to inform them when agreements involving secrecy are entered.⁶⁸

It is important for courts to address the issue of secrecy and to prevent not merely the “secretization” of the settlement, but of the *discovery* that led to that settlement. However, courts are hesitant to

67. See, e.g., EDWARD HUMES, MEAN JUSTICE (1999) (undertaking an informal survey of this issue).

68. I have become aware anecdotally of such orders, but to my knowledge, no study of such orders has been conducted.

make standing orders that such information may not be sealed without uniform jurisdictional court rules.

Approximately fifteen to twenty states have made significant strides in attempting to require that discovery information remain public.⁶⁹ Unfortunately, however, not one state has yet been proven to be able to enforce a rule that prevents secretizing information in *unfiled* discovery, even where that information reveals a potential public health or safety hazard.⁷⁰ Moreover, of those states that have attempted to address the issue of secret settlements through their legislatures, *none* directly dealt with unfiled discovery. This may change, but the political process of legislatures may serve to retard the speed of these changes.⁷¹

69. Some states have made their significant strides through legislation or by court rules. *See, e.g.*, ARK. CODE ANN. § 16-55-122 (Michie 2003) (voiding provisions restricting the disclosure of environmental hazards in Arkansas); FLA. STAT. ANN. § 69.081 (West 2004) (prohibiting the concealment of public hazards in Florida); LA. CODE CIV. PROC. ANN. art. 1426(D) (West 2004) (prohibiting the concealment of public hazards, with the exception of trade secrets, in Louisiana); MICH. ADMIN. CODE r. 8.119(F) (2004) (specifying the few circumstances in which a Michigan court may enter into an order that seals the courts records); TEX. R. CIV. PROC. CODE ANN. r. 76a (Vernon 2003) (prohibiting the sealing of court records in Texas in all but extreme circumstances); WASH. REV. CODE § 4.24.611 (2004) (prohibiting the concealment of public hazards in Washington). However, other states have only made significant strides in their “attempts” to implement legislation or court rules. For a current overview of the many states that have addressed this issue see Hughes, *supra* note 21, at 21–42 (discussing the attempts made by Arizona, California, Connecticut, Illinois, Massachusetts and Rhode Island) and Rooks, *supra* note 21, at 24 n.6 (listing twenty-one states that have provisions that appear to directed toward the “secrecy phenomenon”).

70. No Florida appellate case has held that the “agreement” referred to in that statute includes one that secretizes unfiled discovery. There have been no appellate opinions in Louisiana on the subject.

71. In Massachusetts, Senate Bill 1021, introduced on January 1, 2003, would regulate secrecy in litigation and appear to include unfiled discovery. There has not yet been further action on the bill since it was introduced. S. 1021, 183rd Gen. Ct., 2003 Reg. Sess. (Mass. 2003). In California, Senate Bill 466 was also introduced during a 2003 session. This bill also has not reached the floor of the legislature. S. 466, 2003-2004 Leg., Reg. Sess. (Cal. 2003).

In 2000, Senator Martha Escutia introduced Senate Bill 11, while Assembly Member Darrell Steinberg introduced similar legislation in the form of Assembly Bill 36. These bills, both of which would have covered unfiled discovery, met with more success: Each passed their respective houses, but did not reach an Assembly/Senate bill reconciliation committee due to the fact that the Escutia bill included financial frauds in its openness language while the Steinberg bill did not, and the Assembly Speaker exercised his discretion not to attempt reconciliation. *See* S. 11, 2001-2002 Leg., Reg. Sess. (Cal. 2000); A. 36, 2001-2002 Leg., Reg. Sess. (Cal. 2000); *see also* Members of Assembly Member Steinberg’s Staff, *Conversations with Author*; Gene Wong, Chief Counsel, California Senate Judiciary Committee. It seems that progress in California is slow, in that as long ago as 1991, Senate Bill 711, introduced by Assembly Member Bill Lockyer, which would apparently have included unfiled discovery, passed both houses of the California legislature but was vetoed by then-governor Pete Wilson. But this bill was less than precisely drafted, making its breadth, had it been passed, rather speculative. *See* S. 711, 1991-1992 Leg., Reg. Sess. (Cal. 1992). However, in 2003, Assembly Bill 634, also authored by Mr. Steinberg, was signed into law and marks the first instance known to me in which unfiled discovery is prevented from being made

Of all the states regulating this issue, only the Texas Supreme Court, in amending its rules of civil procedure in 1991, has directly dealt with this issue. Section (2)(c) of Rule 76a includes in its definition of court records: “discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.”⁷²

But what the Texas Supreme Court giveth, it also taketh away. In *General Tire v. Kepple*,⁷³ the lower court had agreed with the plaintiffs that information that was obtained through discovery regarding tread separation of the tire that caused the plaintiff’s injury was a “court record” subject to Rule 76a in that it had an adverse effect upon the general public health or safety.⁷⁴ The appellant-defendant General Tire appealed the lower court’s decision in order to maintain a protective order issued by the trial court regarding the designated “confidential” information that was exchanged during discovery.⁷⁵ Citing various commentators, the Texas Supreme Court acknowledged that the provision in Rule 76a regarding “unfiled discovery is one of the rule’s most controversial aspects.”⁷⁶ The court then concluded that the unfiled discovery was *not* within Rule 76a’s definition of “court records” requiring the full notice and hearing procedures of the rule.⁷⁷

In addition to the states’ lack of rules regarding unfiled discovery, federal rule changes regarding the filing of discovery have also been less than helpful in creating more openness in discovery. Under the former version of Rule 5(d) of the Federal Rules of Civil Procedure, circuits

secret. See S. 634, 2003-2004 Leg., Reg. Sess. (Cal. 2003) enacted as CAL. CIV. CODE § 2031.1-2 (2003). That bill, expressly limited to elder abuse cases, is more fully discussed *infra* at Part IV. B.

72. TEX. R. CIV. PROC. CODE ANN. r. 76a (Vernon 2003).

73. 970 S.W.2d 520 (Tex. 1998).

74. See *id.* at 522.

75. See *id.* at 523.

76. See *id.* at 523 n.16. (citing Doggett & Mucchetti, *supra* note 26; Robert C. Nissen, Note, *Open Court Records in Products Liability Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931, 936, 958-59 (1994)).

77. See *id.* at 526 (“We therefore hold that documents do not lose their character as unfiled discovery merely because there are submitted to the trial court for *in camera* inspection in the context of a Rule 76a hearing.”); see also *In re Cont’l Gen. Tire*, 979 S.W.2d 609, 614 (Tex. 1998). It is of at least passing interest that both these cases involved tire companies. However, in 1999, in a case where the underlying facts concerned inadequacy of care given by Kaiser Foundation Health Plan, and a news agency sought to intervene under Rule 76a, a *per curiam* opinion was accompanied by three separate opinions from a Texas Supreme Court now fractured on the issue of whether unfiled discovery should be construed to be a “court record.” The result was a remand to the appeals court. See *In re Dallas Morning News, Inc.*, 10 S.W.3d 298, 298-307 (Tex. 1999).

previously required that “all discovery materials must be filed with the district court, unless the court orders otherwise.”⁷⁸ However the current version of the rule, amended in 2000, states:

All papers . . . must be filed with the court . . . but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses *must not be filed* until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.⁷⁹

Most recently, in November 2002, the federal district court in South Carolina amended its Local Rule 5.03 to preclude settlement agreements filed with the court from being put under seal.⁸⁰ However, this rule does *not* pertain to settlement agreements *not* filed with the court—or, for that matter, to protective orders or other parts of the discovery process.⁸¹ The intent of this laudable rule is materially undermined by the change to Rule 26(a) on filing discovery.

Upon approval of this rule, its sponsor, Judge Anderson, stated in a letter to his colleagues on the federal bench: “Here is a rare opportunity for our court to do the right thing . . . and take the lead nationally in a time when the Arthur Anderson/Enron/Catholic priest controversies are undermining the public confidence in our institutions and causing a growing suspicion of things kept secret by public bodies.”⁸² But the court’s local rule only applies where the court’s *direct* imprimatur is sought. Under the rule, private secretization agreements continue with the court’s tacit acceptance. Judge Anderson’s vision will not be fulfilled to any significant extent until it can address the specific means that foment that “growing suspicion.” Because it does not apply to unfiled matters, the rule will necessarily fall well short of its stated goal.⁸³

As described above,⁸⁴ both the California legislature, on three

78. *In re Agent Orange Liab. Litig.*, 821 F.2d 139, 146 (2d Cir. 1987).

79. FED. R. CIV. P. 5(d) (emphasis added); *see also*, *New York v. Microsoft Corp.*, 206 F.R.D. 19, 24 (2002), *rev’d in part on other grounds*, 373 F.3d 1199 (D.C. Cir. 2004).

80. *See* D. S.C. LOCAL CIV. R. 5.03, *supra* note 64.

81. The South Carolina Supreme Court adopted South Carolina Rule of Civil Procedure 41.1 on May 5, 2003. For a far more extensive analysis of these rules, *see* Richard A. Zitrin, *The Laudable South Carolina Court Rules Must be Broadened*, 55 S.C. L. REV. 883 (2004) [hereinafter *Laudable South Carolina Court Rules*]. Other papers given in connection with the South Carolina conference of October 24, 2003, *supra* note 35, including those from Chief Judge Anderson and South Carolina Chief Justice Jean Hoefer Toal, were also published in that volume.

82. Liptak, *supra* note 44.

83. *See id.*

84. *See supra* text accompanying note 71.

occasions, and the Massachusetts legislature, currently, have put forward bills that would prevent secrecy *and* include unfiled discovery. The Massachusetts legislation states in part:

Section 3. Notwithstanding any other provision of law to the contrary, in actions alleging personal injury, wrongful death or monetary or property damages allegedly caused by a public hazard or financial fraud, information concerning the public hazard or financial fraud in settlement agreements and information acquired through discovery concerning the public hazard or financial fraud shall be presumed to be public information and may not be kept confidential pursuant to an agreement of the parties.⁸⁵

As strong as this language appears, even the Massachusetts statute still runs the risk of interpretation by subsequent litigation. The proposed bill does not *directly* state that unfiled discovery is subject to its reach. Moreover, it would not explicitly include the actions of the Catholic Church's Boston archdiocese in allowing molesting priests to continue to serve.

Since none of the California bills were signed into law, it is impossible to speculate how they might have affected unfiled discovery once interpreted by the court. But Assembly Bill 634, which became law on January 1, 2004, while limited in scope to elder abuse cases, may demonstrate how courts could deal with the issue of unfiled discovery—by preventing its secretization by stipulated protective order.⁸⁶

Nevertheless, creating legislation is, like making sausages, a process no one wants to witness.⁸⁷ Thus far, at least, politicizing the issue of secrecy has resulted in little success. Legislatures have the problems attendant to any political institution—deal-making, compromise, special interest appeasement, and so on. But the courts are uniquely exempt from most, or at least many, of these pressures. It would not be inordinately difficult for courts to develop rules of court that are better, more uniform, and more appropriately drafted—and better able to deal with the practical realities of court cases, such as unfiled documentation and protective orders, discussed immediately below—than legislation.

85. See S. 1021, 183d Gen. Ct., Reg. Sess. (Mass. 2003); see also *infra* Part IV(B).

86. See S. 634, 2003-2004 Leg., Reg. Sess. (Cal. 2003), enacted as CAL. CIV. CODE § 2031.1-2 (2003).

87. This aphorism is most often attributed to Otto von Bismarck.

B. *Protective Orders and Presumptions of Openness*

One of the most common court-sanctioned procedures used to hide potential dangers to the public is the protective order. Defendants in cases dealing with alleged physical harm to plaintiffs will commonly seek protective orders as being necessary to protect a “trade secret” or “commercial advantage.” But protective orders may also be used as a means of concealing “smoking guns” and other inflammatory discovery and not merely to protect trade secrets. Opponents of “sunshine” rules posit that these rules will operate to vitiate the presumption that trade secrets should be protected.⁸⁸ This is simply not the case. Proprietary information *will* be protected unless it kills or maims someone. However, there is no legitimate need to protect a product or service that hurts people. If it is a defective product, there is no trade secret to protect—*no one* is going to copy that design.⁸⁹

Some states and local court jurisdictions have begun tightening the standards required for protective orders to promote openness in litigation where the public interest is at issue. While there are strong public policies to protect information such as trade secrets, commercial processes, or the identities of minors, there are at least as strong public policies to protect the health and safety interests of the public from known harms. Only a presumption of openness in the issuance of protective orders will balance these interests.

However, there is still much to be done. Most states, concerned with constitutional standards and Supreme Court precedent, “have protective order rules patterned on the good cause standard of the federal rules.”⁹⁰ Federal courts are generally recognized to have three levels of standards for protective orders, depending on the purpose for which the order is sought and the reasons for the general presumption in favor of

88. See Livingston, *supra* note 21, at 1.

89. See *60 Minutes II: Hush Money?*, *supra* note 2. The 60 Minutes II piece included a video clip of Firestone Executive Vice President Gary Kreiger stating, at a Congressional hearing, that “confidentiality orders applied only to trade secrets and formulations, . . . and of course the judge had to agree that those were trade secrets. . . .” *Id.* Kreiger thus makes two unsupportable claims: first, that anyone would claim that tires with separation defects had a technology that someone else would want to adopt, and second, that the existence of a stipulated protective order rubber-stamped by the judge constitutes the judge’s agreement that there were legitimate trade secrets. As to the first issue, the segment presented in counterpoint a video clip of former NHTSA head and Public Citizen spokesperson, Joan Claybrook, calling such protective orders “unethical.”

90. *Laudable South Carolina Court Rules*, *supra* note 81, at 902 n.85; see also Doré, *supra* note 21.

access.⁹¹ Only the highest of these standards goes significantly beyond a generalized notion of “good cause.”

This highest standard, by far the most stringent, should be the one used in considering all protective orders within the scope of this article. When the proponent claims that the protective order is necessary to protect a trade secret or confidential commercial information pursuant to Federal Rule of Civil Procedure 26(c)(7), this standard requires a three-part test that combines the general, threshold showing of “good cause”⁹² with requirements that the proponent show also that the information actually is a trade secret or commercial information *and* that disclosure would cause cognizable harm.⁹³

To be effective, courts evaluating the showing made in support of protective orders in any case where a substantial danger to the public health or safety is at issue must create rules that (1) set a presumption of openness *and* a high standard for proof of *legitimate* trade secret issues; and also, significantly, (2) require a decision on the merits; and (3) deny *pro forma* acceptance of such orders—even when stipulated—as the path of least resistance to resolving contested issues. Such courts should also be more inclined to consider remedies for inappropriate efforts at secrecy, including discovery sanctions.

This means more work for trial courts at least temporarily, since instead of merely accepting stipulations of the parties, these courts would *require an actual showing* that the limitations on access or dissemination of information are objectively warranted under the circumstances. However, through a strong presumption in a well-drafted rule, a court will not only mitigate the harm posed by secrecy in litigation and thereby maintain the public’s confidence in its judicial system, but in short order will see workloads return to normal as litigants learn of the futility of seeking improper protective orders—and the possibility of sanctions for requesting such orders in bad faith.

Although stipulations for protective orders may be the most common form of proposed agreement, there are many others, including stipulations regarding privilege or a privilege log, post-judgment stipulations including stipulated reversals or vacatur, and various

91. For a more thorough discussion of federal standards for protective orders and supporting case law, see *Laudable South Carolina Court Rules*, *supra* note 81, at 902 n.85; see also Doré, *supra* note 21.

92. FED. R. CIV. P. 26(c); see also *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987), *cert denied*, 484 U.S. 953 (1987).

93. See *Hasbrouch v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981).

agreements relating to case settlement, from filings under seal where court approval is necessary to stipulations to change the name of the parties so that they would be unrecognizable to anyone going to the court file to examine the case.⁹⁴ Courts proscribing limitations on agreements that harm the public must do so sufficiently inclusively so that such agreements themselves may also be barred.

Although it is legislation and not a court rule, California's newly passed Assembly Bill 634 provides at least a large portion of a valuable template for dealing with protective orders.⁹⁵ Elder abuse legislation, Assembly Bill 634 prevents *inter alia* secretizing information in elder abuse cases that relate to harm to elders. Section 2 states, in pertinent part:

2031.2. (a) In any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code), *any information that is acquired through discovery and is protected from disclosure by a stipulated protective order shall remain subject to the protective order, except for information that is evidence of abuse of an elder or dependent adult* as described in Sections 15610.30, 15610.57, and 15610.63 of the Welfare and Institutions Code.⁹⁶

In effect, this Civil Code section will allow stipulated protective orders, but will except from that allowance any such orders that would secretize evidence of physical abuse. While I would prefer a more wide-sweeping change in the presumption affecting stipulated protective orders, this might have been simply asking too much of the legislative process. A blanket presumption might well be easier for an independent

94. I know of no reported cases directly addressing the propriety of such name change stipulations, but during the South Carolina conference, *supra* note 35, Judge Anderson referred to a dozen cases in the District of Columbia that had been changed to "Sealed v. Sealed" so that no one would know the identities of the actual parties. While researching Chapter 9 of *The Moral Compass of the American Lawyer*, *supra* note 14, I learned anecdotally of several such circumstances involving professionals who did not want their names sullied by being found in the court record and conditioned settlement on such "sanitization." Two of these instances are personally known to me, though the attendant umbrella of secrecy makes it impossible to cite to them. Indeed, the very nature of the attendant secrecy makes such name-change situations extremely difficult to uncover, as anyone connected with the matter who disclosed information would be breaching a "confidentiality" order or agreement.

95. See S. 634, 2003-2004 Leg., Reg. Sess. (Cal. 2003) enacted as CAL. CIV. CODE § 2031.1-2 (2003). Assembly Bill 634 was signed into law by Governor Gray Davis on January 1, 2004. See *supra* note 86.

96. CAL. CIV. CODE § 2031.2(a) (2003) (emphasis added).

court to implement. The California legislature has taken a large step in the right direction. Courts are invited to follow.

C. *Strengthening the Rules of Professional Ethics*

As good as they can be, rules of court and statutes will be limited in their reach and should be supplemented by stronger rules of professional ethics imposed on attorneys. There are several reasons for this. First, as difficult as ethics rules are to draft, drafting legislation—if not fashioning court rules—is more difficult. The process is overtly political, with the ultimate language too often determined by political compromise and expediency, rather than what outcome is best. Second, legislatures rarely have the best information about what is actually happening in our court system. Even appellate courts are frequently out of touch with what occurs in litigation on a daily basis. In my discussions with appellate judges at the Pound Institute Forum,⁹⁷ which occurred before the Firestone story broke, many were surprised to hear that the problem of secret settlements harmful to the public at large even existed. They soon realized that secrecy, usually lawyer-driven and not requiring court approval, was simply flying below their radar.

Indeed, *trial courts* only become aware of secretization intermittently, such as when they are presented stipulations for protective orders, motions to compel production of documents, or motions to compromise minors' claims. As I have noted, the vast majority of information exchanged in litigation is in the form of *unfiled* discovery outside the view of the court. When the settlement of a case includes the secretizing of this discovery, the courts—which see neither the settlement agreement and release nor the secrecy provision—will never know what happened.

A third reason why legislation and court rules provide inadequate public protection is that out of necessity, they will include exceptions—to protect, for example, the names of young victims of serial molesters. These exceptions *should* be there; there are appropriate exceptions to the best rules. But these exceptions play right into the weakness of our ethics rules themselves—the historical emphasis on placing the duty to the individual client first. Lawyers react to a rule with exceptions by arguing that *their case* is that exception.

Thus, even with solid public laws prohibiting secretizing information about dangers to the public health and safety, the current

97. The Roscoe Pound Institute Annual Forum for State Court Judges, *supra* note 33.

ethics rules, instead of discouraging lawyers from engaging in secret deals, actually *encourage* it. Lawyers who go before courts to argue, jointly, that the statute or court rule in question does not apply in their situation stand an excellent chance of gaining acceptance from a judge with a crowded docket.

Where there is no protection from the general laws of a state, attorneys believing it to be in their client's economic interests to enter into a secrecy agreement will simply do so; their perceived duty of advocacy will trump any possibility of disclosing, even if a lawyer believes disclosure is permitted under Model Rule 1.6. So long as such agreements are "ethical," they will be entered into regardless of any danger to the public, on the theory that the client's interests (read *financial* interests) must come first.

A simple and appropriate change to the ethics rules will make these rules part of the solution instead of part of the problem. Accordingly, I drafted proposed Rule 3.2(B) in 1998. The rule proposed to prohibit lawyers from "prevent[ing] or restrict[ing] the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety."⁹⁸ Such an ethics rule gives counsel an opportunity (and, indeed, *requires* them) to take the high road of openness, notwithstanding the needs of individual clients.

Instead of lawyers feeling, as they do under the current rules, the chilling effect on their duties to the client should they refuse to secretize information, they will feel the chilling effect of the prohibition against putting the public in danger where the damages to the individual client are minimal. As Touro law professor Marjorie Silver, who gave support to proposed Rule 3.2(B), later wrote me: "I believe the most compelling response to [those who say this is not an issue for ethics rules] is that the lawyer would be able to point to an ethical rule that says [we] may not participate in such agreements. . . . Thus, we as a profession might lead rather than follow in setting a higher ethical standard of behavior."⁹⁹

I am frankly offended, even appalled, by the role lawyers have taken in secrecy agreements. Lawyers—those on *both* sides—lead the secrecy parade. Silently sitting on the sidelines would be bad enough. But lawyers not only allow themselves to participate in these dangerous

98. Richard A. Zitrin, *Legal Ethics: The Case Against Secret Settlements (or What you don't know can hurt you)*, 2 J. INST. STUD. LEG. ETH. 115, 116 (1999). This proposed rule was originally presented at Hofstra University's Symposium on Legal Ethics: Access to Justice (published above). The text of the proposed rule is attached hereto as Appendix A.

99. E-mail from Marjorie Silver, Professor of Law, Touro Law Center, to Richard Zitrin (copy on file with author) (used with permission).

subterfuges, they do far worse: they create the agreements, actively participating in the cover-up of information which if known might save lives.

These secret cover-ups are wrong. But lawyers, knowing full well the consequences, justify the secrecy in the name of “zealous advocacy”—exactly what they have been taught to do from the law school cradle. Given the stakes, this view is not only outmoded, it’s archaic.

Compare this perspective to the current status of the ethical rules on confidentiality. We have reached the point where client confidentiality has been significantly limited in most states—and by most rules-makers—in a number of ways. According to the Attorney Liability Assurance Association’s 2001 survey on client confidences,¹⁰⁰ every jurisdiction but California allows disclosure where a client intends to commit a crime likely to result in death or great bodily injury.¹⁰¹ Perhaps more tellingly, forty-one jurisdictions allow the revelation of criminal financial fraud, thirty allow the revelation of any crime, and forty-seven jurisdictions—over ninety percent—allow the lawyer to take *remedial measures* in the event of a client’s ongoing crime or fraud. Both the American Law Institute’s *Restatement of the Law Governing Lawyers*¹⁰² and the ABA Ethics 2000 Commission’s report to the ABA House of Delegates¹⁰³ have substantially liberalized the ability to reveal confidences. Most recently, the ABA further broadened the exceptions to Rule 1.6 to include instances that result in financial fraud but no physical harm.¹⁰⁴

I am not substantively addressing these liberalizations here, much less expressing or even implying my agreement with them. But it is both important and relevant that in recent years those who determine lawyers’ ethical rules have closely focused on the balance between lawyers’ abilities to act to protect society and their duties to protect their client’s confidences. Moreover, in focusing on this balance, rules-makers have moved the fulcrum substantially in the direction of allowing lawyers to

100. ATTORNEYS’ LIABILITY ASSURANCE SOCIETY, INC., CHART ON ETHICS RULES ON CLIENT CONFIDENCES (2001).

101. California joined the rest of the country in 2004, with the passage of Assembly Bill 1101 by the legislature and the approval of California Rule of Professional Conduct 3-100 by the California Supreme Court.

102. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 59–67 (2000).

103. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2003).

104. Center for Professional Responsibility, *Summary of House of Delegates Action on Ethics 2000 Commission Report*, R. 1.6 (2003), at <http://www.abanet.org>. This event was widely reported in both the legal and popular media.

disclose, affirmatively abrogating confidences in order to protect the interests of third parties.

Given this history, what could be more appropriate than for ethics rules-makers to develop a standard of disclosure that does not involve any limitation to confidentiality at all,¹⁰⁵ but merely ensures that lawyers cannot contract away their ability to disclose *known, discovered* dangers to the public so that one sole client may benefit?¹⁰⁶

In most jurisdictions, the real powers in determining the rules of ethics are our highest courts. These courts *are* our ultimate rule-makers. While they often act at the behest of the state bars that serve them, they have the power to request, even instruct, these bars to draft rules as they deem necessary. Most have the power to draft these rules themselves. Thus, the courts themselves, in behaving in the highest tradition of judicial ethics by protecting the public trust, can—and I submit *should*—develop ethical rules for lawyers that require them to act in the highest tradition of lawyer ethics.

D. *One Judge Can Make a Difference*

Faced with limited resources and time, no judge can take on the job of “secrecy cop” alone. Nevertheless, in order for jurisdiction-wide court action to be effective, it will need support from individual judges—mostly at the trial level—who are willing to ensure these rules are enforced. Fortunately, the bench will be up to the task. Indeed, it seems there have been an increasing number of instances in which a single jurist took the initiative in a way that helped maintain openness in our courts—even where there was no clear guidance from a set of “sunshine in litigation” court rules.

In early 1995, Kentucky Judge John Potter, suspicious of the actions of the lawyers in the aforementioned *Fentress* case, changed his

105. Let's not get sidetracked by the use of the term “confidential” as sometimes applied to these secrecy agreements. There is nothing confidential—at least the confidentiality we know as a term of legal ethics—as embodied in Model Rule 1.6—about this process. The agreements occur only after one side manages to get discoverable—and thus non-confidential—information from the other side. Thus these agreements are properly “secret settlements,” not “confidential settlements.” See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

106. Some have asked about the rights of the client to contract to resolve a case. Would enacting such an ethics rule prevent the lawyer from acting in a way the client is permitted to act? In a word, “yes,” or, more accurately, “yes, but so what?” Model Rule 5.6(B), which prevents a lawyer from participating in offering or assisting in an agreement to restrict the lawyer's right to practice, has done the same thing for years. In effect, so does Model Rule 1.6. Just because a client can take a particular action doesn't mean a lawyer should be able to do the same thing. See *id.*; MODEL RULES OF PROF'L CONDUCT R. 5.6(B) (2002).

minute order on his own motion from recording a dismissal after verdict to “dismissed as settled.” This act set off a controversy that resulted in the discovery that the twenty-eight-plaintiff case had indeed been settled, though the judge was never told.¹⁰⁷

It started in September 1989, when Joseph Wesbecker armed himself with an AK-47, walked into the Louisville printing plant where he had worked, and started shooting. He killed eight people, wounded twelve more, and finished matters by blowing his own brains out. One month before, Wesbecker had begun taking Prozac. The lawyers for the shooting victims soon focused on the drug as the cause for Wesbecker’s extraordinary violence, and they targeted Eli Lilly, Prozac’s manufacturer.¹⁰⁸

The *Fentress* case, named for one of Wesbecker’s victims, was the first of 160 cases pending against Prozac to go to trial. The circumstances made *Fentress* a tough plaintiffs’ case: The lawyers would have to prove that the drug had affected not *their own clients’* behavior, but Wesbecker’s. Still, Lilly and its lawyers were determined to defend Prozac with everything they had.

By the time *Fentress* went to trial in the Fall of 1994, Prozac had become the aspirin of anti-depressants—the wonder drug everyone was talking about and millions were using. Prozac represented almost one-third of all Lilly sales in 1994—\$1.7 billion. A great deal was at stake: If Lilly lost, other plaintiffs waiting in the wings would gain strength and resolve. But a defense verdict might make those plaintiffs reconsider.¹⁰⁹

Throughout the case, plaintiffs’ attorneys pushed Judge Potter to allow evidence about another Lilly product, the anti-inflammatory drug Oraflex, which had been taken off the market in 1982 as too dangerous. In 1985, Lilly had pled guilty to twenty-five criminal counts of failing to report adverse reactions to Oraflex, including four deaths, to the Food & Drug Administration. Central to the plaintiffs’ claims was that Lilly had done the same thing with Prozac. Potter refused to allow the evidence, saying its prejudice outweighed any probative value.¹¹⁰

But when Lilly executives testified that the company had an excellent reputation for reporting problem incidents—what they

107. *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449, 451 (Ky. 1996). The description set forth here is closely adopted from Richard Zitrin & Carol M. Langford, *Hide and Secrets in Louisville*, *supra* note 14 (analyzing the *Fentress* case). See also RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER*, *supra* note 21, at ch. 9 (providing a more complete recounting of the *Fentress* case and additional sources for the narrative set forth herein).

108. See *Potter*, 926 S.W.2d at 451.

109. Nicholas Varchaver, *Lilly’s Phantom Verdict*, AM. LAW., Sept. 1995, at 75.

110. *Id.* at 77.

euphemistically called “adverse events”—plaintiffs’ counsel immediately renewed their request to bring in the Oraflex evidence. Potter agreed, noting that “Lilly has injected the issue into the trial.”

Potter’s ruling set off a flurry of activity around his courtroom. The lawyers jointly asked for a recess, and then asked to adjourn for a day. By mid-afternoon, a strong scent of settlement was in the air. But when court reconvened the next day, chief plaintiffs’ counsel, Paul Smith, announced that the plaintiffs would rest without presenting the Oraflex evidence unless the trial went to its second phase, on damages. That, of course, would occur *only* if the jury first decided Lilly was liable. The strategy puzzled Judge Potter enough for him to ask the lawyers whether they had reached a settlement. He was told unequivocally that they had not.¹¹¹

While the jury was deliberating, a juror came forward and told Judge Potter that she had overheard settlement negotiations going on in the hallway. She repeated this in chambers with the lawyers present and was then excused. Potter turned to the lawyers and said, “Does anybody have anything they want to say?” A moment later, he asked again, “Does anybody have the slightest clue?”

“No,” said Smith.

“I can’t imagine,” said one of the defense lawyers.

In other chambers meetings, lawyers from both sides emphasized their plans for Phase Two of the trial, on damages, including engaging in settlement discussions if the plaintiffs won Phase One.

On December twelfth, only three court days after Potter’s ruling allowing the Oraflex evidence, the jury returned a defense verdict. In January 1995, Judge Potter formally entered his order in *Fentress v. Eli Lilly*, dismissing the case after verdict by jury. As soon as the verdict was in, Lilly and its lawyers trumpeted their victory across the country. “We were able, finally,” said one of Lilly’s lead attorneys, “to get people head to head in a courtroom and say ‘Put up or shut up.’ . . . [T]his is a complete vindication of the medicine.”

Had John Potter not been the judge, the *Fentress* case might have ended there. Despite the lawyers’ denials and their references to a damages phase, Potter suspected that a deal had been made before closing argument. When the plaintiffs didn’t file a notice of appeal, Potter called in the lawyers from both sides. They continued to deny that a settlement had been reached.

111. See *id.* at 452.

Although Potter was more suspicious than ever, he had no jurisdiction, except as to his own order of dismissal. So in April 1995, stating “it is more likely than not that the case was settled,” Potter filed an unusual document: On his own motion, he changed his post-trial order from a dismissal after verdict to “dismissed as settled.” He set a hearing for May.

Quickly, the lawyers on both sides joined forces to file an objection with Kentucky’s Appeals Court to prevent Judge Potter’s hearing anything about what they considered a closed case. Paul Smith stated flatly that “there was no secret settlement. . . . This was a hard fought case.” Potter, meanwhile, found himself in need of counsel.

After Potter’s changed order had become public, Richard Hay, then President of the Kentucky Academy of Trial Attorneys, told reporters that if money had been traded for evidence, the trial was “a sham,” like “taking a dive in a boxing match.” Potter read Hay’s comments, called him, and asked how outraged Hay was about the case. “Enough to represent you,” Hay replied. Together, Hay and Potter filed a brief that emphasized a “public silence [that] has been bought and paid for,” robbing millions who “want the truth.”

In June 1995, the appeals court ruled against Potter, saying he no longer had jurisdiction over the case. Potter appealed to the Kentucky Supreme Court. Before the fall Supreme Court hearing, lawyers for both sides finally acknowledged that they had indeed settled all money issues and had agreed to go through only the liability phase of the trial no matter what the result. Still, they refused to disclose specifics. Meanwhile, in Indianapolis, Lilly’s hometown, Paul Smith suddenly withdrew as lead counsel in a series of consolidated Prozac cases in federal court. He would not say whether he had settled his Indianapolis cases as part of the *Fentress* settlement, and the judge refused to ask.

In their appeal to the Supreme Court, Potter and Hay de-emphasized the importance of public disclosure, and focused instead on the lawyers’ failure to be candid with the judge. On May 23, 1996, the Kentucky Supreme Court decided the case of *Hon. John W. Potter v. Eli Lilly* unanimously in Judge Potter’s favor, citing the lawyers’ “serious lack of candor” and evidence of bad faith, abuse of process, even fraud. Although the court said that “the only result” of exposing the secret *Fentress* agreement “is that the truth will be revealed,” the decision was less a victory for open settlements, and more a demand that the judge be included in the secret.

Judge Potter, though, still saw the larger issue. Armed with Supreme Court authority to conduct an investigation and hold a hearing,

Potter asked Deputy State Attorney General Ann Sheadel to investigate, giving her the power to subpoena documents and question witnesses under oath. Sheadel's March 1997 report uncovered new twists to the story. A complex agreement did exist between Lilly and the plaintiffs, one so secret that it was never fully reduced to writing. All Sheadel could find was a written *summary* of the verbal agreement. No lawyer would admit preparing it, and no plaintiff was allowed to have it.

In exchange for the plaintiffs agreeing not to present the evidence of Lilly's criminal conduct with Oraflex, Lilly had agreed to pay all plaintiffs, win or lose. Part of the agreement was that *all* of chief plaintiffs' counsel Smith's Prozac cases, including those in Indianapolis, were settled, and half his overall expenses paid by Lilly.

Judge Potter set a hearing to take sworn testimony on March 27, 1997. The hearing never happened. On March 24, in a surprise move, attorneys for Lilly and the plaintiffs presented Judge Potter with a new stipulation and order in *Fentress* showing that the case was dismissed as "settled," exactly what Potter had insisted on two years before. The judge signed the order. Three days later, Lilly's attorney went before the appeals court to argue that any further proceedings would be moot. He also claimed that Potter had violated judicial ethics and was on a "vendetta" against Lilly. Potter recused himself, saying "the spotlight should be on what . . . is under the log, not the person trying to roll it over."

The judge had succeeded in uncovering the collusive settlement. But of the approximately 160 active Prozac cases in December 1994, less than half remained. Inexplicably, *Fentress* had received almost no attention in the national media, and the Kentucky Court of Appeal closed any further hearings to the public. Plaintiffs' attorney, Paul Smith, was still practicing law in Dallas. And the only thing that anyone ever learned about the amount of the settlement was the comment of a Louisville lawyer who represented one of the *Fentress* plaintiffs in a divorce. The amount, he said, was "tremendous."

Two other courageous judges are worthy of mention here. In December 1997, California Appeals Court Justice J. Anthony Kline filed a dissent in which he said that "as a matter of conscience," he would refuse to follow the California Supreme Court's decision allowing stipulated reversals of court judgments as a condition of case settlement.¹¹² Although Kline wrote that he would obey a direct order to

112. *Morrow v. Hood Communications, Inc.*, 59 Cal. App. 4th 924, 927 (Cal Ct. App. 1997) (Kline, J., dissenting). Kline was commenting on the *Neary* case. See *Neary v. Regents of the*

implement a stipulated reversal, he nevertheless was accused by the state's Commission on Judicial Performance of "willful misconduct in office [and] conduct prejudicial to the administration of justice." The case created a political firestorm as well as front page news and lead editorials. A year and a half later, the charges against Kline were dismissed, but stipulated reversals remain.

In April 1998, the tobacco industry's wall of secrecy crumbled when the House Commerce Committee opened its files and unsealed 39,000 documents after the Supreme Court refused to overturn Judge Kenneth J. Fitzpatrick's broad December 1997 disclosure order in Minnesota's suit against the industry. But much of the most explosive and shocking documents, including evidence of the Council for Tobacco Research's so-called "special projects" unit, supervised and run by lawyers in order to use the attorney-client privilege, had already been disclosed in 1992 in a published opinion written by Federal Judge H. Lee Sarokin.¹¹³ Sarokin's opinion, overruling many of the tobacco companies' privilege claims, was reversed and he himself was removed from the case. But the opinion remained, providing the outlines of a road map for those, including many state attorneys general, to use in the years that followed.

The architect of Texas Rule 76a, Texas Supreme Court Justice Lloyd Doggett, now a congressman, is another judge who made a difference. As he put it, "[t]o close a court to public scrutiny of the proceedings is to shut off the light of the law."¹¹⁴

V. CONCLUSION

Until rules—both court rules and ethics rules—prevent the practice, attorneys believing it to be in their client's best interest to enter into a secrecy agreement that conditions the return of the "smoking gun" to the defendant will simply do so. The attorney's perceived duty of "zealous advocacy" will trump any possibility of disclosure. So long as such agreements are within bounds of the rules, they will be entered into regardless of any danger to the public, on the theory that the client's best interest (read *financial* interest) must come first.

University of California, 834 P.2d 199 (Cal. 1992). His interesting defense of his dissent can be found in *California Lawyer*, Sept. 1998, at 25.

113. Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992), *rev'd* 975 F.2d 81 (3d Cir. 1992).

114. Doggett & Mucchetti, *supra* note 26, at 653 (quoting State v. Cottman Transmission Systems, Inc., 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988)).

It is therefore incumbent upon our courts to lead the way: to show how the public interest can be protected and the public's confidence in the judicial system upheld. The codes of judicial conduct in every jurisdiction support this goal, and the time to act is now.

One commentator recently noted that "[l]awyers, no less than clerics, and judges, no less than cardinals, must choose openness over concealment if the courts are to avoid the loss of confidence now plaguing the church."¹¹⁵ Indeed, secrecy needs to be purged from our halls of justice in order that the confidence in the court system to which both the public and our courts are entitled to remains firm and strong. I believe that our trust in our judiciary is well placed. Our courts are the best institutions to refuse to lawyers or litigants to use (or abuse) the court processes to conceal known dangers from an innocent public. This is the "high road," acting consistently with the judiciary's responsibility, and protecting the public interest.

APPENDIX A¹¹⁶

PROPOSED RULE 3.2(B):

A lawyer shall not participate in offering or making an agreement among parties to a dispute, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that [the lawyer reasonably believes] [a reasonable lawyer would believe] directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s).

Comment to Proposed Rule 3.2(B):

Some settlements have been facilitated by agreements to limit the public's access to information obtained both by investigation and through the discovery process. However, the public's interest in being free from substantial dangers to health and safety requires that no agreement that prevents disclosure to the public of information that directly affects that health and safety may be permitted. This includes

115. McNamara, *supra* note 22.

116. This rule is slightly altered from the rule I proposed at Hofstra in 1998. First, having given my students at the University of San Francisco and UC Hastings the opportunity to criticize the rule as one of their options for a final paper, I found that several came up with valuable suggestions. One in particular, to clarify something I had assumed, was to add the language "among parties to a dispute." The first bracketed portion about reasonable belief is my original language; the second bracketed portion reflects a suggestion by Professor Robert Cochran of Pepperdine, one of those who gave his name in support of the rule. This objective test was also suggested by several of my students. I am comfortable with either bracketed portion.

agreements or stipulations to protective orders that would prevent the disclosure of such information. It also precludes a lawyer seeking discovery from concurring in efforts to seek such orders where the discovery sought is reasonably likely to include information covered by subsection (B) of the rule. However, in the event a court enters a lawful and final protective order without the parties' agreement thereto, Subsection (B) shall not require the disclosure of the information subject to that order.

Subsection (B) does not require the disclosure of the amount of any settlement. Further, in the event of a danger to any particular individual(s) under subsection (B), the rule is intended to require only that the availability of information about the danger not be restricted from any persons reasonably likely to be affected, and from any governmental regulatory or oversight agencies that would have a substantial interest in that danger. In such instances, the rule is not intended to limit disclosure to persons not affected by the dangers.
