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THE CASE AGAINST SECRET SETTLEMENTS (OR, WHAT YOU DON'T KNOW CAN HURT YOU)

*Richard A. Zitrin**

I. THE THESIS AND THE RULE

Plaintiffs' lawyers, at least the best ones, are believers in their causes. They're convinced that part of their job is to expose cars that don't steer right or blow up under certain conditions, drugs with dangerous side effects, or clergymen and scoutmasters who molest kids. Defense lawyers, at least the best ones, are dedicated to bringing justice to their clients. They're committed to beating back frivolous claims and plaintiffs with victim complexes, but when legitimate cases come along, they try to settle them quickly and fairly—and in a way that won't create more innocent victims.

Unfortunately, the laws in the vast majority of states combine with the ethics rules in *every* state to prevent lawyers on both sides from achieving these goals. Because the rules of ethics generally require putting the interests of the client ahead of those of society, lawyers are bound to settle cases in ways which serve the needs of the specific clients while potentially harming the interests of society as a whole. Unless counsel is operating in one of the very few states with strong "sunshine in litigation" laws¹, there is little that can be done when the defendant demands, and the plaintiff accepts, secrecy as a condition of resolving a case.

It is for this reason that I propose that American Bar Association Model Rule of Professional Conduct 3.2 be amended to add section (B), as follows (new portions of the rule are italicized):

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1. Among such laws or rules—not all of which can be seen as either strong or effective—are the following: DEL. CODE ANN. tit. 17 §5(g); FLA. CODE ANN. §69.081(West 1998); LA. CODE CIV. PROC. art. 1426(1998); Mich. Ct. Rule 8.105; N.J. Ct. Rules §1:2-1 & § 4:10-3; N.C. GEN. STAT. §132-1.3; ORE. STAT. §30.4; TEX. RULES CIV. PROC. ANN. §76(a); VA. CODE ANN. §8.01-420.1; and Wash. State House Bill 1866 "Public Right to Know Bill" (1993).

RULE 3.2 EXPEDITING LITIGATION AND LIMITATIONS

(A) A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

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

Comment

1. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.
2. *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 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.*
3. *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 permit disclosure to persons not affected by the dangers.*

Drafter's (Author's) Note:

The language in the first phrase of part (B) is taken from that used in Rule 5.6, on restricting a lawyer's practice. The language "reasonably believes" parallels that used in Rule 1.6. The use of the phrase "substantial danger to the public health or safety," rather than the more restrictive language of Rule 1.6 ("imminent death or substantial bodily harm") is used here because the matters disclosed in the discovery process are not ordinarily protected by confidentiality under Rule 1.6, and also because the use of the term "imminent" is not consistent with the practical exigencies of dangers which may be inevitable but have a longer than imminent incubation period.

This is the first published draft of this rule. My intention here is neither to defend the exact wording of the draft, nor to suggest that this is the only way, or even the best way, to craft a rule. Rather, it is my hope that this draft might serve as a starting point for discussion. The purpose of this paper — and the presentation I gave at Hofstra—is to make three points: first, that secrecy in settlements is an important problem that carries with it a significant potential of danger to the public; second, that regulatory intervention is necessary to prevent this harm; and third, that "sunshine" legislation, while undoubtedly a step in the right direction, is not an adequate remedy to protect legitimate public interests.

II. SECRET SETTLEMENTS ARE DANGEROUS

A. *Professor Miller and the Arguments in Favor of Secrecy*

There are many lawyers, plaintiffs' and defense counsel alike, who simply believe that secrecy is necessary to the way civil litigation is practiced in this country—without the ability to settle in a way that keeps damaging information from public scrutiny, the incentive to settle would be lost.² Others, significant among them Professor Arthur R. Miller of Harvard, consider the courts to be places which serve "private parties bringing a private dispute."³ "Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through

2. See, e.g., the discussions in Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 486-7 (1991); and Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 958-9 (1988). In addition, there are a large number of informal discussions, essays, forums, and "op-ed" pieces which have raised this issue. Most recently, at the American Bar Association's Center for Professional Responsibility's annual conference in May 1998, two of four members of a plenary panel I moderated on this issue (Lewis Goldfarb of Chrysler Corp. and David W. Rudy, a mediator based in San Francisco and Colorado Springs, CO) strongly advocated for the need to preserve secrecy in order to facilitate the settlement process.

3. Miller, *supra* note 2, at 464-6.

the courthouse door,” argues Miller. No plaintiff, just by paying a court filing fee, should be able to force a defendant to disclose “intensely personal and confidential information.”⁴ This focus on privacy rights is generally coupled with a broad view of the use of protective orders, one which encompasses, in the words of the federal rule, avoiding “annoyance” and “embarrassment,” as well as undue burden or expense.⁵

Proponents see a third reason for advancing secrecy in court proceedings. Parties, especially large corporations targeted for their “deep pockets,” should not be subject to frivolous lawsuits based on other frivolous lawsuits and the stories that grow out of them. Again, Professor Miller states:

“Is it true that protective orders and court seals keep information regarding public health and safety hidden? Thus far, assertions to that effect have been supported primarily by anecdotal evidence; research or statistical data is completely nonexistent. An examination of several of the stories that have surfaced during the debate demonstrates that they are of questionable content. . . .”⁶

B. *Debunking the Need for Secrecy*

Superficially, all these reasons seem logical. It makes intuitive sense that it will be more difficult for a plaintiff to settle a case with a defendant if the defendant knows that it is no longer allowed to protect the dangerous practice it engages in behind a secret veil. But there are no empirical studies or even “anecdotal” evidence indicating that it is actually harder to attain a settlement when secrecy is not permitted. In those states that have developed the strongest anti-secrecy regulations⁷, there has been no indication of a resulting court logjam, or even that settlement rates have gone down. Therefore, it is reasonable to speculate that the *amount* of settlement may decrease somewhat when there is no premium paid for secrecy. But settlements, secret or not, rarely involve admissions of wrongdoing. Parties who don’t want their conduct exposed still have substantial incentive to settle before the heightened scrutiny of a trial.

4. *Id.* at 466.

5. Fed. R. Civ. Proc. 26(c).

6. Miller, *supra* note 2, at 479.

7. I consider these to be Texas, Washington, and Florida (see discussion *infra*).

While Professor Miller and others see courts as fora for the resolution of private disputes,⁸ the contrary view, expressed here by Ralph Nader, makes more sense: "America's courts are public, not private, institutions. Secrecy agreements undermine the public's right to know."⁹ Texas Congressman Lloyd Doggett, who while a state Supreme Court judge was the architect of Texas Rule 76(a), one of the strongest anti-secrecy regulations, put it this way: "To close a court to public scrutiny of the proceedings is to shut off the light of the law."¹⁰ Moreover, personifying corporations by ascribing to them "intensely personal" feelings—including annoyance and embarrassment—stretches credulity.

To a significant extent, the debate about secrecy in the courts has been more of a philosophical and political issue than a matter of legal ethics. The third claim raised by Miller—that there is inadequate information on which to base a need for openness—seems to be both the most politicized and the least supportable.

It's true, of course, that "anecdotes" and "stories" don't, in and of themselves, prove anything, any more than do mere allegations in a lawsuit. Nor does an isolated settlement, which a company may enter into in order to protect itself from the publicity of going to trial. Even an occasional jury verdict doesn't prove a product is defective in every case, only in that particular one. But neither Professor Miller nor the Product Liability Defense Council, whose members are companies sued for defective products and whose foundation helped finance Miller's work, are able to point to any evidence of their own that open settlements actually encourage frivolous lawsuits.

More significantly, an examination of some "stories" about dangerous conditions reveals far more than mere "anecdotes." These few examples are by no means intended as an exhaustive list:

- *Zomax*. Public disclosure came only after a scientist experienced a potentially fatal allergic reaction and decided to investigate. The drug was eventually taken off the market, but by that time, 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.¹¹

8. Prof. Miller is not alone. Mediators are generally trained to see disputes as private, a view strongly expressed by Mr. Rudy at the ABA Center for Professional Responsibility Conference referred to *supra* note 2.

9. Nader quoted in Robert Costello, *What You Don't Know Can Hurt You*, MASS. LAW WKLY., Feb. 20, 1995.

10. Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts*, 69 TEX. L. REV. 643, 653 (1991).

11. See *McNeilab, Inc., v. HHS*, No. 84-1617 (D.D.C. June 5, 1985). See also *supra* note 10.

- *Dalkon Shield*: This product was taken off the American market, but only after numerous secret settlements which left the public in the dark long after the dangers of the product were known to those involved in the litigation. Indeed, attorneys for A.H. Robbins, the Shield's manufacturer, even tried to condition settlements on the plaintiffs' lawyers' promises never to take another Dalkon case.¹²
- *Halcion, Shiley Heart Valve*: Both products were removed from the American market after cases were secretly settled, but only with the help of outside sources — in Halcion's case, evidence from England, in the valve's case, a Congressional investigative committee.¹³
- *General Motors pick-ups with side-mounted gas tanks*: These tanks were the subject of much litigation, including a suit by GM's lawyers against Ralph Nader and the Center for Auto Safety. Discovery in that suit produced GM records showing 245 cases filed nationwide alleging a dangerous defect. The actual number settled is difficult to determine because of secrecy agreements, but estimates of the number of settled cases range from 50 to over 200; almost all required that the information be kept secret from anyone not a party to a specific case.¹⁴

It is difficult to believe that the settlement of hundreds of lawsuits involving dangerous drugs or gas tanks causing fires result merely from unsupported individual claims. There is a point beyond which "anecdotal evidence" takes on a clear pattern. Where that pattern points to the existence of a danger to the public health and safety—or even the serious *possibility* of such a danger—it is time to ask whether our legal system can afford to allow such secrecy. Not only does suppressing evidence deny information to the public, but it unbalances the scales between plaintiffs and defendants. Only by exploring the evidence for themselves can both plaintiffs and government regulators fairly assess how those possibilities affect them.

12. MORTON MINTZ, *AT ANY COST* 197-8 (1985).

13. See, e.g., Bob Gibbins, *Secrecy Versus Safety: Restoring the Balance*, 77 ABA J. 74 (1991) and STEVEN D. LYDENBERG ET. AL., *RATING AMERICA'S CORPORATE CONSCIENCE: A PROVOCATIVE GUIDE TO THE COMPANIES BEHIND THE PRODUCTS YOU BUY EVERYDAY* 234 (1986).

14. Author correspondence and interviews with Clarence Ditlow, Director of Center for Auto Safety, especially June 23, 1997; see Transcript of American Judicature Society, "Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?" reported in 78 JUDICATURE 304, and especially at 311 (1995); Catherine Yang, *A Disturbing Trend Toward Secrecy*, BUS. WK., October 2, 1995, at 60. Discovery of GM incident lists obtained from the Center for Auto Safety lists 245 closed cases.

One highly publicized matter, the breast implant case of Maria Stern,¹⁵ whose settlement included a promise to keep key documents secret, has aroused a great deal of controversy. Many believe that silicone breast implants cause various connective tissue and other such diseases. Others clearly do not.¹⁶ But the more important issue is that members of the public, and, indeed, even the Food & Drug Administration, were unable to decide this issue for themselves. Even Dr. Marcia Angell, whose book strongly criticized those who argued that implants were dangerous, could only say that the “secret documents” discovered by Stern’s lawyers, “revealing as they were, did not yield a smoking gun.”¹⁷ The failure to reveal a smoking gun is hardly a justification for keeping the information secret.

C. *Beyond Mere Secrecy*

Unfortunately, courthouse secrecy doesn’t stop with protective orders, sealing discovery, or returning it to the other side. The centerpiece of my presentation at Hofstra was the *Fentress* case, tried in Louisville in late 1994. Although the case went to a jury, the verdict was tainted, if not completely fraudulent, because of an agreement between plaintiffs’ and defense counsel that the plaintiffs would withhold certain evidence in return for what was described as “tremendous” sums of money.¹⁸ I personally have been involved, as an expert witness, in a case where the name of the law firm was deleted from the record upon settlement so no one would be able to tell from docket and court files what particular law firm and attorneys had been sued. I, too, am bound by secrecy, though not of my own choosing and, thus, can’t cite the case name here.

In California, litigants on appeal can agree to “de-publish” court opinions, a stipulation that often comes about as a condition of a post-trial settlement. Even worse is the practice, not permitted in federal courts, of allowing parties to agree to a “stipulated reversal.” The appellate court reverses an adverse trial judgment, when asked to do so, by

15. *Stern v. Dow Corning Corp.*, 1987 U.S. App. LEXIS 6517 (9th Cir. 1987); see, e.g., discussions in RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* ch. 9 (1999); RALPH NADER & WESLEY J. SMITH, *NO CONTEST* (1996).

16. See Marcia Angell, M.D., *SCIENCE ON TRIAL* (1996). Dr. Angell was executive editor of *The New England Journal of Medicine*.

17. *Id.* at 60.

18. See ZITRIN AND LANGFORD *supra* note 15, at 193-203. The *Fentress* case was the subject of an extensive series of articles in the Louisville *COURIER-JOURNAL* by reporter Leslie Scanlon, as well as being reported by the New Jersey *LAW JOURNAL* and the Indianapolis *STAR*, although the story was otherwise largely ignored by the press.

stipulation of the parties, making it appear that the adverse finding had been set aside when it really was settled out of existence.¹⁹ One California appellate court justice, J. Anthony Kline, was so offended by this technique that he wrote a dissent stating his refusal to follow this rule.²⁰

All of these matters go beyond mere secrecy by overtly misleading the public. They are, or rather should be, intolerable. Yet there are pressures, including from clients who reap substantial rewards, to engage in these deceptions. It is here, with these deceptions and the stipulated efforts of opposing counsel, that legislative and court-imposed solutions fail. But they could succeed if coupled with a new ethics rule.

III. COURT, LEGISLATIVE, AND ETHICAL SOLUTIONS

Since 1990, about a dozen states have adopted some prohibition on keeping secrets from the public. Some states' laws are limited and weak, but a few have real teeth. One is Florida's 1990 Sunshine in Litigation Act, which directly prevents secret settlements and secrecy orders that conceal information about "public hazards," a phrase the legislature defined broadly. In 1993, Washington State passed a similar law, the "Public Right to Know Bill."

In Texas, Congressman Doggett's efforts led to Texas Rule 76(a), passed by the court in 1990 by a 4-3 vote, which broadly prohibits secret agreements. The rule starts with a presumption that all court records must be open. No judge may seal something from public view, *even if* the lawyers for both sides agree, unless the judge finds that a "specific, serious and substantial interest" needs protection, and that secrecy is the only way to accomplish it.

Texas's rule has three other important components. First, it covers not just the usual court records and proceedings, but *all* documents, whether filed with the court or merely given to the other side during discovery. Second, court orders and opinions can *never* be sealed, so the names can never be changed, or the decision "depublished." Third, secrecy orders can be challenged not just by the parties but by anyone, including the press and consumer groups. But while both the Texas rule and the Florida and Washington laws have great strengths, they also have significant weaknesses. Most significantly, they still must depend on

19. *Neary v. Regents of Univ. of California*, 3 Cal. 4th 273 (1992).

20. *Morrow v. Hood Communications, Inc.*, 59 Cal. App. 4th 924 (1997). Kline was charged with violating judicial ethics for writing his dissent, though he said he would obey a specific order of his state's Supreme Court if told to do so. The matter is pending before the state's judicial performance commission at this article's deadline.

individual judges willing to take strong stands. Many judges, focused on encouraging settlement, see secrecy as being the easiest path to that goal.

More important, neither Texas, Florida nor Washington directly addressed the behavior of lawyers. Nothing prevents Texas plaintiffs' and defense counsel from working together to convince a judge that *their* case is that rare one where secrecy is needed. Florida prohibits secrecy agreements between attorneys, but has no specific penalties. Parties who enter into secrecy agreements in Washington are liable for violating consumer protection laws, but it still doesn't directly punish the *lawyers*. This puts lawyers from both sides right where they have always been — in the position of vigorously representing their clients while putting aside the needs of the public.

In 1991, the California legislature considered Senate Bill 711,²¹ a far-reaching proposal that would have made secrecy orders and agreements illegal in cases concerning defective products, environmental hazards, and financial frauds. The bill passed both houses of the legislature, but was vetoed by Governor Pete Wilson. California Senate Bill 711 included a provision that would actually have disciplined lawyers who engaged in secret settlements.

This statute had the right idea. If an ethical rule required that attorneys could no longer put their clients' interests ahead of the public health and safety in specific kinds of cases, lawyers would be less likely to stipulate their way around "sunshine" laws. Until then, many will insist that it is their affirmative ethical duty to do this, even where the public is at risk. And innocent people will suffer as a result.

21. Calif. S.B. 711 (Lockyer), 1991.

