Testimony of

Prof. Richard Zitrin

December 11, 2007

The Need for Sunshine in Litigation

Written Testimony for the United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Tuesday, December 11, 2007

Richard Zitrin

INTRODUCTION

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. 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 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 Firestone and its lawyers would insist on secrecy. Plaintiffs' lawyers who are more interested in making money and moving on to the next case are not likely to focus on the harm done to other mothers and their sons in the future.

But what about our government? Shouldn't our society - embodied as a nation of laws in the highest sense - protect our citizens from unnecessary danger? There seems to be no more unnecessary danger than one that could be avoided by simply shining the light of public scrutiny on information exchanged in litigation. This information is already presumptively public. It remains so unless the parties to a lawsuit engage in a back-room deal to exchange large sums of money for a code of silence - at the expense of the lives of future victims.

Simply put, a strong "sunshine in litigation" law will save lives - hundreds, indeed thousands, of lives. It will prevent car accidents, food poisoning, "adverse incidents" from drugs and prostheses, children maimed by unsafe toys, more. And it will do this at no cost to our government.

Sunshine in litigation means that that information exchanged in the litigation discovery process may not be "secretized" where that action would endanger the public health and safety. It's simple: no settlement agreement, and no stipulation to a protective order, where the goal of the litigants is to allow their own private economic advantage to triumph over public harm.

I. A Personal Perspective

I should begin with a personal perspective. 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." 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.

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 30 years 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 almost without regard to consequences, is both inappropriate and unnecessary to being an excellent lawyer.

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 substantially the interests of society as a whole. Unless counsel are operating in a jurisdiction with a strong "sunshine in litigation" law, 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.

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.

II. "Secret Settlements" Jeopardize the Public Health and Safety

So the terminology I use here is clear, by "secret settlements" I mean those agreements between plaintiffs' and defense lawyers to keep information about a known harm--whether it is a defective product, toxic waste, or a dangerous drug--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 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 ten years, secrecy in settlements has become an increasingly common subject of articles in the popular legal press and more scholarly forums. The general media has 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.

Why this increased scrutiny? Unfortunately, it has been mostly a matter of dead and wounded bodies. The Fall 2000 Times articles, USA Today editorial and 60 Minutes piece all flowed from the allegations in the fall of 2000 about Firestone's shredding tires. More recent articles most often were inspired, so to speak, by events of harm: the policy

of some Catholic church archdioceses of allowing priests who were known pedophiles to be relocated and continue serving in parishes; or the dangers of diabetes and misprescribing that came to light in the Zyprexa disclosures of a year ago. Change comes, but often its cost is high.

In the Firestone matter, 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. Zyprexa has been estimated to cause severe, endangering weight gain in 30 percent of its patient-users. 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. 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 manufacturer, even tried to condition their secret settlements on plaintiffs' lawyers' promises never to take another Dalkon case--a clear ethics violation.

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 23 years later, just before the records were turned over.

III. Our Courts Should Be Instruments of Public Trust and Protection

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 , wills and trusts , and investment prospectuses.

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.

Our most populous states have closely modeled their own codes of judicial conduct to reflect this basic judicial duty. 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.

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." Since the ABA Model Code was revised in 1990,

almost all states have either adopted this tenet or have enacted similar rules either requiring or strongly urging 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 if those settlements are likely to conceal significant harm from the public. In these cases, the public is likely to believe--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.

IV. Responses to Objections to Sunshine Laws

A. NO EVIDENCE?

Four principal arguments have been advanced in opposition to those court limitations on secrecy. The first relates to the claim of Professor Arthur R. Miller 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. Moreover, even if legal and scientific experts argue whether something is truly dangerous, this argument begs the more fundamental question: Does the public have a right to know what the risks are--and what the evidence is?

B. NO SETTLEMENTS?

Second, opponents of openness claim that cases wouldn't 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 that I have privileged to speak on this subject, 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.

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. 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. 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.

Rooks affirms Judge Anderson's sense of things, noting that "Florida's Sunshine in Litigation law has now been in effect for nearly 13 years, and there is no reason not to believe that trial lawyers for both sides have simply accepted it and moved on with business." 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.

A 2003 study by the Federal Judicial Center also confirms this view. The FLJ examined 39,496 civil cases that were filed in eleven federal districts and were terminated in 2001 or early 2002. The study indicated that there were only 140 cases with sealed settlement agreements--only one-third of one percent. While many more cases may have

been settled secretly through unfiled documents, 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 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.

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."

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. Indeed, this seemed to be the position of one of the defense lawyers at the South Carolina conference, Stephen E. Darling. In his remarks, Darling asserted that under anti-secrecy rules defendants would no longer be "willing to pay extra money" 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.

C. NO PRIVACY?

Third, some opponents of secrecy argue the rather anachronistic view that "courts exist to resolve disputes that are brought to them by litigants" ; or that "litigants do not give up their privacy rights, voluntarily or involuntarily, when they walk through the courtroom door." 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 according to substantive law . . . [and that] collateral effects of litigation should not be allowed to supplant this primary purpose."

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. 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. "Our courts are part of the pubic domain," said Professor Abner Mikva, discussing new the South Carolina rules. There is no presumption of privacy; rather "all presumptions should go in the other direction. As for the claim of embarrassment, Mikva submitted that "mere embarrassment" is something most adults must learn to handle. Indeed, no one has documented any recent sightings of corporations, like zebras, blushing red with embarrassment.

D. NO RESOURCES?

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 unpresented discovery. The more likely reality is that this will not be the case, as I discuss 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." This not only results in private secrecy at the costs of public harm, but undermines the very authority of the courts themselves.

V. 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 on line;

* 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 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 in 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 capacity about cases--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 vs. 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 vs. 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.

Hon. 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 15 years ago, "should not be a party to closing off from public scrutiny these agreements." 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." Given the ever-increasing complexity of litigation in the new millennium, there is every reason to agree with Judge Patel's view. South Carolina federal judge Anderson 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, 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 production of documents and is handed the key to the document repository. When the case is over, the documents go back, and the 'need in the haystack' process is repeated....
"The burden on the judiciary is repeated as well. I know of nothing more time consuming than pouring through boxes of documents in an effort to be fair....

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.

Among federal courts, only Carolina Local Rule 5.03 approved in November 2002, addresses requires openness of all documents relating to a settlement agreement filed with the court. I address that rule more fully below.

VI. A Clear Benefit and a Clear Need for Legislation

A. THE OPENNESS PRESUMPTION

This lack of regulation, particularly in our federal courts, shows the clear and the clear need for a strong, mandated presumption of openness - absent 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.

Thus, this presumption of openness would apply broadly to all those matters involving the court, including all settlement agreements and stipulations for protective orders. 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 of information that led to that settlement.

By preventing automatic secrecy stipulations, the requisite justification for protective orders, sealing documents, and the like would be re-examined and narrowed. These issues should be addressed regardless of whether the parties agree to the secrecy in question.

Courts clearly have the power to enforce this openness. 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.

B. THE NEED FOR LEGISLATION

Approximately fifteen to twenty states have made significant strides in attempting to require that discovery information remain public. Nevertheless, their effectiveness is far from uniform. 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 FRCP Rule 5(d), circuits previously required that "all discovery materials must be filed with the district court, unless the court orders otherwise." 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.
Accordingly, outside of the 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 basis.

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. 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. 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. 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 either protective orders or unfiled matters, the rule will necessarily fall well short of its stated goal.

C. THE BENEFITS: 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. 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.

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 in 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." 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 access. 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 Fed. R. Civ. P 26(c)(7), this standard requires a three-part test that combines the general, threshold showing of "good cause" with requirements that the proponent to show also that the information actually is a trade secret or commercial information and that disclosure would cause cognizable harm.

To be effective, courts evaluating the showing made in support of protective orders in any case where substantial danger to the public health or safety is in 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 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. 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 AB 634 provides at least a large portion of a valuable template for dealing with protective orders. Elder abuse legislation, AB 634 inter alia prevents 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. (Emphasis added.)

VII. A Case Study: A Courageous Judge and a Conspiracy of Lawyers

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 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 28-plaintiff case had indeed been settled, though the judge was never told.

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.

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.

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 25 criminal counts of failing to report adverse reactions to Oraflex, including four deaths, to the Food & Drug Administration. Central to the plaintiffs's claims was that Lilly had done the same thing with Prozac. Potter refused to allow the evidence, saying its prejudice outweighed any probative value.

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

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 12, 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.

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 wouldn't 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."

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. Although Kline wrote that he would obey a direct order to 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. 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 states' 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, "To close a court to public scrutiny of the proceedings is to shut off the light of the law."

Conclusion

Until the law is changed to 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.

It is therefore incumbent upon our government to lead the way: to show how the public interest can be protected and the public's confidence in the judiciary system upheld.

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." 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 The United States Senate has the opportunity to help our justice

system to begin to walk down this the "high road," acting consistently with judicial responsibility, protecting the public interest, and safeguarding the public health and safety by letting the light of public scrutiny shine brightly.

BIOGRAPHICAL NOTE ABOUT RICHARD ZITRIN

Richard Zitrin is an Adjunct Professor of Law, University of California, Hastings College of the Law, teaching Legal Ethics, and was the Founding Director of the Center for Applied Legal Ethics at the University of San Francisco School of Law from 2000 to 2004, where he also served as Adjunct Professor of Law, teaching Legal Ethics, from 1977 to 2005. He is also in private practice in San Francisco. He has co authored, as lead author, three books on Legal Ethics, a general-audience book on lawyers and the American legal system, The Moral Compass of the American Lawyer (Ballantine, 1999), a textbook that emphasizes a practical approach to teaching ethics, Legal Ethics in the Practice of Law (3rd edition, LEXISNEXIS, 2007), and an annually-updated book comparing the rules of ethics, Legal Ethics Rules, Statutes and Comparisons (LEXISNEXIS, 2008).

Mr. Zitrin has written approximately 75 articles on legal ethics, including an on-line column "The Moral Compass," for American Lawyer Media, and articles for national periodicals such as the ABA Professional Lawyer, The National Law Journal, Voir Dire, Trial, and Legal Times, and op-ed pieces for publications such as The Los Angeles Times and The San Francisco Chronicle.

Mr. Zitrin has written and spoken often on the issue of "sunshine in litigation," and acknowledges "freely borrowing" for this testimony from academic articles and research he has previously conducted, and from his book The Moral Compass of the American Lawyer. He has also written legislation on the subject, most recently California AB 1700 (2005) for Assemblymember Fran Pavley.

1 "Hush Money?," 60 Minutes II, reported by Dan Rather, CBS Television, October 10, 2000. The recitation that follows is taken from a videotape of that segment.

2 See Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 HARV. L. REV. 427, 433-36 and 467 (1993)

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

4 I am hardly alone in moving in this direction. The last twenty years has seen the American Bar Association substantially broaden ABA 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 disclosing relating to non-injury-related matters - not related to the issues raised in this paper - approved by the ABA House of Delegates just last month, in August 2003. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Rule 1.6.

5 With the notable exception of South Carolina. See infra.

6 My 2003 compilation of some of the work that appeared between 1998 and 2003 includes the following: Laurie Kratky Doré's article, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283 (1999), was a survey of the issue of secrecy from an ethics perspective. Her article appeared about the same time as Richard Zitrin & Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER (Ballantine, 1999), in which Chapter 9 (pages 183 - 208) was devoted to discussing secret settlements. Also of similar vintage is Richard A. pages Zitrin and Carol M. Langford, It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements, 7 VOIR DIRE No. 1, at 12 (ABOTA, Spring 2000); Frances Komoroske, Should You Keep Settlements Secret? 35 TRIAL (June 1999). ; Richard A. Zitrin , The Case Against Secret Settllements (Or, What You Don't Know Can Hurt You), 2 Inst. For Study Legal Ethics 115 (1999); Diana Digges, Confidential Settlements Under Fire in 13 States, Lawyer's Weekly USA (April 30, 2001) at B1; Richard A. Zitrin, Why Lawyers Keep Secrets About Public Harm, THE PROFESSIONAL LAWYER, American Bar Ass'n,

(Summer 2000); and Kevin Livingston, Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists Who Want to Ban Secret Settlements, THE RECORDER 1 (May 8, 2001). More recently there have been articles in the legal press such as Rebecca Womeldorf and William S.D. Cravens, More Sunshine Laws Proposed, Nat'l L.J. (Nov. 12, 2001) at B14; Jill Hertz Blaustein, Sealed But Not Secret, LITIGATION NEWS (July 2002) at 1; Martha Neil, Confidential Settlements Scrutinized, A.B.A. J. (July 2002) at 20, and James E. Rooks, Jr., Let the Sun Shine In, TRIAL (June 2003); and additional survey treatments such as Christine Hughes, Confidential Settlements: A White Paper, New England Legal Foundation, April 2003. Since that time, while I have not done a formal compilation for this testimony, scrutiny of secret settlements has, if anything, increased.

7 My 2003 compilation of some of the work that appeared between 2000 and 2003 includes the following: Lethal Secrets [editorial], LOS ANGELES TIMES; Sep 12, 2000; Davan Mahraraj, Goodyear Tire Fatalities Echo Firestone's Troubles, LOS ANGELES TIMES, Oct 25, 2000, pg. A.1; Sealed court records kept tire problems hidden [editorial], USA TODAY; Sep 19, 2000; Thomas A. Fogarty; Can courts' cloak of secrecy be deadly? Judicial orders protecting companies kept tire case quiet; USA TODAY; Oct 16, 2000; "Hush Money?," 60 Minutes II, supra, note 2; see e.g., James Frimaldi and Carrie Johnson, Factory Linked to Bad Tires, THE WASHINGTON POST, Sept. 28, 2000 at E01. Richmond Eustis, Judge Orders Unsealing of Secret Firestone Documents From Fatal 1997 Crash, FULTON COUNTY DAILY REPORT, Sept. 29, 2000; Ray Shaw, Sunshine in Litigation, Fla. B.J., January, 2000 at 63; Roy Simon, Some Secrets Lawyers Shouldn't Keep, NEWSDAY (Aug. 16 2001) at A39; Richard A. Zitrin, Time to End the Secrecy, SAN FRANCISCO CHRONICLE, August 21, 2001. Eileen McNamara, Courts Must End Secrecy, BOSTON GLOBE B1 (Feb. 27, 2002); Ben Kelly, Secret Court Settlements Prevent Needed Warnings, THE BOSTON HERALD, (Sept. 16, 2002) at 18; Stephen Gillers, Court Sanctioned Secrets Can Kill, LOS ANGELES TIMES (May 14, 2003). I have not done a formal compilation for this testimony, but scrutiny of secret settlements has, if anything, increased. In December 2006 and January 2007, front page articles in THE NEW YORK TIMES highlighted the thousands of cases involving the drug Zyprexa settled secretly between plaintiffs and Eli Lilly Corp. in multi-district litigation in the Eastern District of New York federal court. For my early perspective on this, see Richard Zitrin, Secrecy's Dangerous Side Effects, LOS ANGELES TIMES (February 8, 2007).

8 See, e.g., Thomas G. Plante, Bless Me Father for I Have Sinned : Perspectives on Sexual Abuse Committed by Roman Catholic Priests (Praeger Publishers, 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); Broken Vows, Christopher Sciavone, BOSTON GLOBE, December 8, 2002 (commenting on the Boston Archdiocese's practices: "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 November 9, 2003), Associated Press, Abusive Priests Were Protected, Grand Jury Reports, ORLANDO SENTINEL, Feb. 11, 2003 available at: http://www.orlandosentinel.com/news/nationworld/balet.abuse11feb11,0,5039586.story (last vistited Nov. 8, 2003); Associated Press Chronology of Church Abuse Crisis, posted Dec. 12, 2002 reprinted and available at: http://www. sexcriminals.com/news/13949/ (last visited Nov. 8, 2003); Jonathan Bandler, Priest Got Church Recommendations Despite Sex Allegations, THE JOURNAL NEWS, Feb. 28, 2003 available at: http://www.thejournalnews.com/newsroom/022803/b0128wilson.html (last visited Nov. 8, 2003). See, e.g., New York Times coverage since December 2006, including Alex Berenson, Drug Files Show Maker Promoted Unapproved Use, THE NEW YORK TIMES, December 18, 2006; Editorial: Playing Down the Risks of a Drug, THE NEW YORK TIMES, December 19, 2006; Alex Berenson, Disparity Emerges in Lilly Data on Schizophrenia Drug, THE NEW YORK TIMES, December 21, 2006; Mother Wonders If Psychosis Drug Killed Her Son, THE NEW YORK TIMES, January 4, 2007.

9 NHTSA October 4, 2001 report, at http://www.nhtsa.gov/hot/Firestone/Update.html (last visited November 9, 2003). 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. See DriveUSA.net, Recall Chronology, http://www.driveusa.net/ford_firestone_chronolgy.htm (last visited November 9, 2003). 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, USATODAY, Aug. 14, 2001 (stating that tread separation of Firestone tires had led to 206 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 November 8, 2003). 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." October 4, 2001 report.

10 Alex Berenson, Eli Lilly Said to Play Down Risks of Top Pill, THE NEW YORK TIMES, December 17, 2006.

11 See, among other sources, Lloyd Doggett and Michael Mucchetti, Public Access to Public Courts, 69 TEX. L. REV. 643, (1991); Bob Gibbins, Secrecy Versus Safety: Restoring the Balance, 77 ABA JOURNAL 74 (December 1991); Steven D. Lydenberg, et. al., RATING AMERICA'S CORPORATE CONSCIENCE 234 ffl (Addison-Wesley, 1986), Davis v. McNeilab, Inc., U.S. Dist. Ct., D.C., No. 85-CV-3972; Morton Mintz, AT ANY COST 197-98 (Pantheon, 1985); [Mass.] LAWYER'S WEEKLY, February 20, 1995.

12 See, principally, ABA Model Rule 5.6(b).

13 See transcript of American Judicature Society, Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy? 78 JUDICATURE 304 (1995); Catherine Yang, A Disturbing Trend Toward Secrecy, BUSINESS WEEK (October 2,1995); Stephen Gillers, Court Sanctioned Secrets Can Kill, LOS ANGELES 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 Phillips v. GMC, 126 F. Supp. 1326, 1332 (D. Mont. 2001), vacated and remanded by Phillips v. GMC 289 F.3d 1117, 1124 (9th Cir. 2002), discussing the total amounts of recovery in the GM cases.

14 See e.g.