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TRIAL

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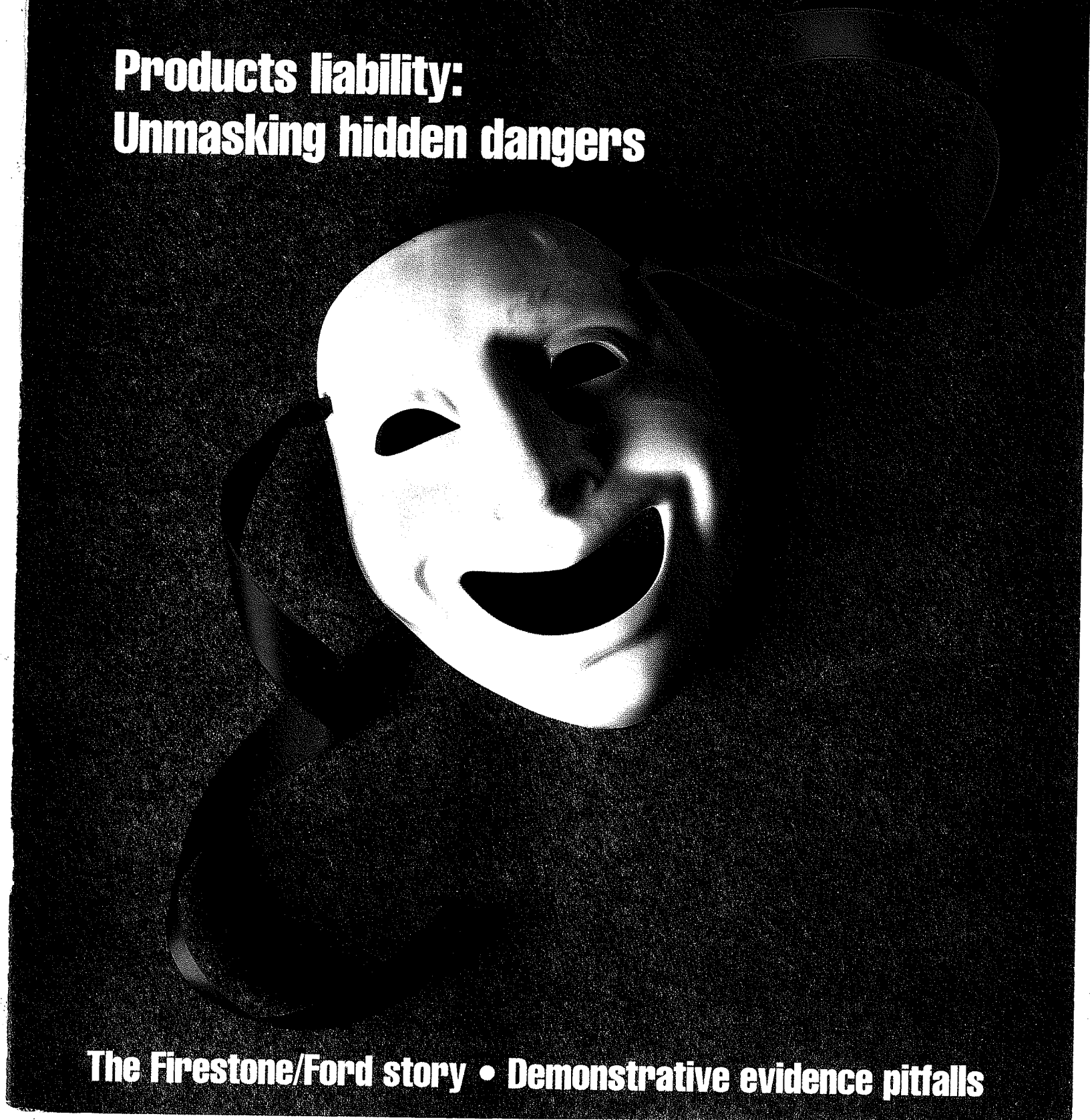
Products liability: Unmasking hidden dangers



The Firestone/Ford story • Demonstrative evidence pitfalls

Overcoming secrecy with judicial power

Richard A. Zitrin

With public health and safety at risk, court records should be open to the public. Here's what judges should do about secrecy in the courts.

Because I intend to be prescriptive, I must confess my biases. First, I believe in "sunshine in litigation" and openness of both court records and discovery. 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."[1] 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. The public nature of the forum is, to me, generally more compelling than what once was the private nature of the dispute.

Second, although I have been a trial lawyer since my bar admission, I come to my point of view not primarily from the perspective of a litigator from either the plaintiffs' or defense side, 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, 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 for 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. Because the rules of ethics generally (with narrow exceptions) require putting the interests of the client ahead of those of society, lawyers are bound to settle cases in ways that serve the needs of specific clients even if they potentially harm 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.

Accordingly, in 1998, I proposed a new ethics rule that would 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. . . ."[2] Such an ethics rule would give counsel an opportunity (and, indeed, require them) to take the high road of openness, notwithstanding

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- Motions to compromise claims where the court's approval is necessary, such as in bankruptcy, probate cases, and settlements involving minors;
- Stipulations regarding any of the above; and
- Stipulations regarding posttrial settlement, including waivers of motions for new trial or appeal and stipulated reversals of judgment.

It is obvious that the extent of judicial resources necessary to deal with any of these matters depends directly on whether the parties come to the court in dispute or in agreement. For the most part, the court's decision, or even a series of decisions, is required where the parties are in dispute. If the parties agree or stipulate, all they seek is the court's ratification.

It is much easier—and far less time consuming and resource intensive—for a judge to sign a stipulation and order than to make a decision on the merits. But while the judicial resources needed to decide the substance of the disputed matter may be vastly greater than the resources needed to ratify a stipulation, the issues concerning secrecy and openness may be identical. A court that elects to make an inquiry about the validity of such a stipulation will usually be engaged in a time-consuming, resource-intensive process that it could have avoided.

When the court is not involved. 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, concerns about the allocation of precious court resources, the effects of technology, and the institution of "meet and confer" requirements and the like have materially diminished courts' record keeping about cases—and issues within cases—that are 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 wants to, is considerably less than it was a generation ago.

Nevertheless, many matters that lie 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 is handled by the parties—interrogatories, deposition testimony, and, perhaps most significant, document production. In order to obtain discovery materials, parties may have to enter into private agreements to return documents after the case is concluded or agree not to disseminate deposition transcripts. In order to secure a settlement, parties may agree to these and other requirements to maintain a veil of silence. If these agreements do not require judicial intervention or even ratification, courts will ordinarily not learn of them.

In discussing what courts can and should do, I have broken down the analysis into three general areas: where the court is involved and the parties disagree; where the court is involved and the parties agree; and where the court is ordinarily not involved at all.

What can courts do?

To an extent, the options that are available to judges will be significantly affected by the laws of the jurisdiction. Generally applicable civil procedure rules and statutes may be as important, or more important, than measures that specifically target secrecy. For example, the standards for protective orders vary significantly among jurisdictions.

Generally, courts have three options when presented with a question of secrecy versus openness: maintain the status quo, affirmatively evaluate the situation, or presume openness.

Maintain the status quo. If the bench is involved and the parties disagree, most judges favoring a hands-off approach will resolve contested issues in relatively traditional ways. For example, they will likely view protective orders broadly as a way to move the process of discovery along in a manner that avoids costly court fights and may enhance the chances of settlement.

If the bench is involved and the parties agree, the traditional view of the courts has been that so long as there is agreement, especially on discovery, they have neither the time nor the inclination to interfere. There are sound public policy reasons for this, most tellingly courts' limited resources and the difficulty (if not impossibility) of reevaluating the merits of matters already agreed on. Judges who take this view are most likely to accept the stipulations offered by counsel, including those that limit access to discovery by people not involved in the litigation.

The only likely significant limitation on a court with a hands-off culture is any sunshine-in-litigation requirement in force in that particular jurisdiction that would limit the court's ability to accept secrecy. Cur-

Roscoe Pound Institute sponsors annual judges' forum

Overcoming Secrecy with Judicial Power, by Richard A. Zitrin, was prepared for the Roscoe Pound Institute's Forum for State Court Judges, presented in Chicago last July immediately before the ATLA Annual Convention.

The annual judges' forum brings judges, legal scholars, and practicing attorneys together to discuss major issues in contemporary jurisprudence. Topics of past forums have included controversies surrounding discovery in the courts, assaults on judicial independence, scientific evidence in the courts, and the American Law Institute's restatement of products liability law.

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rently, only a few jurisdictions have sunshine measures that are strong enough to either preclude courts from ratifying what they choose to or create clear presumptions of openness that can only be overcome by specific showings of necessity.[3]

If the bench is not involved, courts generally do not inquire into private agreements among parties and their counsel respecting limitations on disseminating information. Even in states with the broadest sunshine-in-litigation approaches, there exists no affirmative duty on the part of courts to make inquiries into parties' agreements made outside of court.

Affirmatively evaluate the situation. If the bench is involved and the parties disagree, these courts evaluate the extent to which secrecy is a necessary or appropriate condition of resolution of the dispute. This evaluation could include making active inquiry to the parties through counsel regarding the extent to which secrecy is actually appropriate, rather than merely desired. Courts acting in this way will, for example, tend to regard claims of trade secrets, work product, or other reasons for protective orders with some degree of skepticism.

Courts evaluating the showing made in support of these claims will decide on the merits, rather than granting pro forma acceptance of such orders (or other secrecy devices) as the path of least resistance to resolving contested issues. These courts will also be more inclined to consider remedies for inappropriate efforts at secrecy, including discovery sanctions.

If the bench is involved and the parties agree, some courts are interested in making an independent evaluation of the legitimacy of the proposed agreement, at least to the extent that it "secretizes" information or issues related to the litigation. This means that instead of merely accepting the stipulations of the parties, these courts require an actual showing that the limitations on access or dissemination of information are warranted under the circumstances.

Although stipulations for protective orders may be the most common form of proposed agreement, there are many others—including stipulations regarding

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Even if legal and scientific experts disagree about whether something is truly dangerous, does the public have a right to know the risks and the evidence?

privilege or a privilege log; postjudgment stipulations and stipulated reversals or vacatur; and agreements relating to 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.

If the bench is not involved, many (and likely most) courts, including those that may have a substantial interest in making inquiries about the necessity for secrecy in matters that come before them, will 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, such as standing orders that require counsel to inform them when agreements involving secrecy are entered. In reality, of course, these orders may be problematic: difficult to implement from a procedural point of view and even more difficult to enforce. The principal salutary effect of these standing orders may be to enable counsel from one side to point to the order as the reason why a secrecy agreement must be refused.

Presume openness. If the bench is involved and the parties either agree or disagree, courts can take the "evaluative" process a step further by presuming, as do courts in states with strong sunshine-in-litigation standards, that 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 to all those matters involving the court that are listed above. On the appellate level, the presumption of openness could apply to both stipulated reversals[4] 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.[5] Both standing orders and case-specific orders could be used. Orders, even if broad, would almost certainly be enforceable; almost all courts have recourse to a variety of sanctions—including monetary and issue preclusion sanctions and contempt powers—to enforce their orders.

If the bench is not involved, judges have limited ability to monitor the activities of parties whose secrecy agreements or understandings are never before the court. This is particularly true on a case-by-case, or microcosmic, level. Moreover, even among states with sunshine-in-litigation laws that favor openness, only Texas specifically deals with "discovery, not filed of record,"[6] and only Florida, arguably, has language sufficiently broad to cover discovery and other matters not filed with the court.[7] Accordingly, outside of the possibility of the standing orders referred to above, there is little judges in the vast majority of states can do on a case-by-case basis if they follow the culture of their courts to stay uninvolved.

There is, however, a great deal courts can do, even when a particular case's secrecy issues are not before them, if they choose to look at the larger landscape. Here are some macrocosmic solutions.

Courts can implement court rules, locally and statewide, that actively promote openness. The rules can include a bar on secrecy even for matters, like much discovery, that are part of a case but not filed or lodged with the court.

The courts can adopt a scheme of sanctions or discipline for lawyers who don't abide by court rules. With the cooperation of the state's disciplinary authorities, the courts can develop ethical requirements for attorneys along the lines of my proposed amendment to American Bar Association Model Rule 3.2.[8] [See sidebar accompanying this article on page xx.]

Both trial and appellate courts can adopt policies of openness with respect to their own proceedings. For trial courts, these might include revisiting and revising broad definitions that are currently considered adequate justification for issuing protective orders, sealing documents, and the like.

For appellate courts, policies might 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 not 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,[9] other sanitizations also occur.

What courts should do

Given the perspectives set out in this article, it will surprise no one that I believe courts should do what they can to take a presumption-of-openness approach. The suggested macrocosmic solutions can reach all four corners of civil cases, whether before the courts or not. For the most part they can be implemented only by a cooperative effort among members of the bench, with input from lawyers and other interested parties.

Some practices, like sanitizing or depublishing court opinions, may be within the

power of individual courts to change. The solutions that relate to cases where the court is directly involved are easier to deal with case by case and court by court. But it is apparent that the resources of any court that chooses to be proactive will surely be taxed, particularly where the parties agree and the court declines to accept that agreement without examination.

Why should courts favor openness? In addition to the perspectives with which I began this article, there are three important reasons.

The first relates to the claim of Harvard law professor Arthur Miller and others that there exists only "anecdotal evidence," or what Miller calls "stories," that secrecy has ever prevented the public from learning vital information on issues of health and safety.[10] 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 significant, an examination of specific cases shows that many were far more than mere "anecdotes"—several involved products that were eventually removed from the market.[11] Moreover, even if legal and scientific experts disagree about whether something is truly dangerous, the argument made by Miller and others begs the more fundamental question: Does the public have a right to know what the risks are—and what the evidence is?

Second, while there have been numerous claims that secrecy is necessary for settlement, these claims do not appear to have even strong "anecdotal" support. I know of no studies demonstrating this, nor of any such claims from the states with the strongest antisecrecy laws.

Third, I believe 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 *Potter v. Eli Lilly & Co.*, 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 that there may have been "deception, bad faith conduct, abuse of the judicial process, or perhaps even fraud."[12]

Making a difference

Faced with limited resources and time, no judge can take on the job of "secrecy cop" lightly. Nevertheless, it seems there have increasingly been instances in which a single jurist acted in a way that helped maintain openness in our courts.

For example, in 1995, Kentucky Supreme Court Judge John Potter, suspicious that the lawyers in *Potter* had continued to "try" the case while, in truth, they had settled it, 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 case had indeed been settled, though the judge was never told.[13]

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.[14] 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 continue in California.

The tobacco industry's wall of secrecy crumbled in April 1998 when the U.S. House Commerce Committee opened its files and unsealed 39,000 documents after the U.S. Supreme Court refused to overturn Judge Kenneth Fitzpatrick's broad December 1997 disclosure order in Minnesota's suit against the industry. But much of the information in the most explosive 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 been disclosed in 1992 in a published opinion written by then-U.S. District Court Judge H. Lee Sarokin.[15]

Sarokin's opinion, which overruled many of the tobacco companies' privilege claims, was reversed, and he was removed from the case. But the opinion remained, providing a road map for others, including many state attorneys general, to use in the years that followed.

The architect of Texas Rule 76a, former Texas Supreme Court Justice Lloyd Doggett, who is now a member of Congress, 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."[16] ❐

Notes

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

2. *See* Richard A. Zitrin, *The Case Against Secret Settlements, or What You Don't Know Can Hurt You*, 2 HOFSTRA J. INST. STUD. LEGAL ETHICS 115 (1999).

3. *See, e.g.*, TEX. R. CIV. P. 76(a) (requires not only that the presumption of openness has been overcome, but that there is "no less restrictive means" than allowing secrecy); *see also* FLA. STAT. ch. 69.081 (1999); WASH. REV. CODE §§4.24.601 & 4.24.611 (2000); L.A. COUNTY SUPER. CT. R. 7.19 (1999).

4. *See, e.g.*, Neary v. Regents of Univ. of Cal., 834 P.2d 119 (Cal. 1992).

5. *See, e.g.*, CAL. RULES OF COURT, R. 976-79 (2000); CAL RULES OF COURT, DIV. III R. 976 (2000).

6. TEX. R.C.P. 76a(2)(c) (1999).

7. FLA. STAT. ch. 69.081(4) (1999). Note the contrast with the language of WASH. REV. CODE §4.24.611 (2000), limiting the agreement to those "settling, concluding, or terminating" a relevant claim.

8. Zitrin, *supra* note 2.

9. *See generally* EDWARD HUMES, MEAN JUSTICE (1999).

10. Miller, *supra* note 1.

11. *See, e.g.*, RICHARD A. ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 186-93 (1999); Richard A. Zitrin & Carol M. Langford, *It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements*, 7 VOIR DIRE, Spring 2000, at 12.

12. 926 S.W.2d 449, 454 (Ky. 1996).

13. *See* ZITRIN & LANGFORD, *supra* note 11, at 193-201.

14. Morrow v. Hood Communications, Inc., 69 Cal. Rptr. 2d 489, 491 (Ct. App. 1997) (Kline, J., dissenting) (commenting on *Neary*, 834 P.2d 119).

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

16. Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 689 n. 41 (1991) (quoting State v. Cottman Transmission Sys., Inc., 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988)).