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## The fault lies in the ethics rules

By Richard Zitrin SPECIAL TO THE NATIONAL LAW JOURNAL

**I**T NEVER seems to end: Another Firestone story, this time the lead in the June 24 edition of the *New York Times*: "S.U.V. Tire Defects Were Known in '96 But Not Reported." To those of us in the law, the subheads screamed louder: "190 Died in Next 4 Years"—then, "Lawyers and Safety Consultant Opted to Protect Victims' Suits Against Firestone."

The *Times* focused on plaintiffs' lawyers, who, according to the story, had "identified a pattern of failures" in Firestone tires, but "did not disclose the pattern to government safety regulators for four years, out of concern that private lawsuits would be compromised." Dr. Ricardo Martinez, a

trauma physician who served as head of the National Highway Traffic Safety Administration, called this "outrageous," akin to his remaining silent about something killing his patients "because that would reduce the demand for my services." That, concluded Dr. Martinez, "would be clearly unethical."

The *Times* also cited Geoffrey C. Hazard Jr., a legal ethics professor (and long an NLJ columnist), who said the lawyers had broken no laws or ethical codes: They "had a civic responsibility...but they didn't have a legal duty" to say anything.

Perhaps it's true that the lawyers owed no duty to the public. But they should.

The Firestone story has welded the words "secrecy" and "lawyers" together. Who is at fault? A greedy plaintiffs' bar, like the lawyer who told *60 Minutes*' Dan Rather last October that, when it came to public safety, his job was "doing what's best for your client"? Or is it a defense bar that forces agreements sealing discovery down the throats of underfunded plaintiffs' lawyers in order to protect their own clients' dirty secrets?

I am frankly offended, even appalled, by the roles of all these lawyers in "secretizing" information that affects the public health and safety. Silently sitting on the sidelines is bad enough. But lawyers who create secrecy agreements actively participate in the cover-up of information that, if known, might save lives.

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Knowing full well the consequences, lawyers justify secrecy in the name of "zealous advocacy." This view is not only outmoded, it's just plain wrong.

So who's at fault? I don't want to let anyone off the hook. But I know the organized plaintiffs' bar has actively fought for "sunshine in litigation" laws such as the one that just passed both houses of the California Legislature. I know that many defense lawyers and in-house counsel would like nothing better than to say, "I can't help you hide the truth about a killer." But lawyers are doing exactly what they've been taught to do from the law school cradle: Put the client first, last and always, and the public be damned.

A fair share of the blame lies with current ethics rules that not only encourage this behavior but, in the view of many lawyers, even require it. And make no mistake: Our ethics rules do exactly that. As long as keeping

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### New rule needed

There is an easy fix: a proposed ethics rule that would prevent lawyers from "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...." While I authored this language, many other ethics professors, including Stanford's Deborah Rhode, former Hofstra Dean Monroe Freedman and *Law of Lawyering* co-author W. William Hodes, have signed on in support. But the American Bar Association commission revising the rules wasn't interested. Its members did not see it as their problem: This proposal would set policy, so a court rule or statute would be better. Among the most vocal opponents was commission member Prof. Hazard.

Why do our ethics rule-makers want to dodge what seems like such a no-brainer? What is the purpose of ethics rules if not to set policy when appropriate, especially when lives are at stake? Isn't this what "civic responsibility" is all about?

The days of secrecy are numbered. Protecting the public is too worthy a goal. I only hope it's accomplished without needing new scandals—and new deaths—to spur legislatures, judges or ethics commissions to do the right thing. ■