

## hearsay

### Dr. Death Doesn't Get Life

6 You had the audacity to go on national television, show the world what you did and dare the legal system to stop you. Well, sir, consider yourself stopped.'

— Michigan state Judge Jessica Cooper, in *The Associated Press*, as she sentenced Jack Kevorkian to 10 to 25 years for his videotaped killing of a terminally ill patient

### The Naked Truth

6 We do get our topless sunbathers. Most of them are tourists from Europe, which is known for being immoral: Europeans openly smoke cigarettes; they think nothing of toplessness.'

— Dave Barry, in the *Miami Herald*, responds to a letter from a minister complaining about nude sunbathing on Miami Beach

### Soft on Competition?

6 In the software industry, this is sort of like the Christian Coalition declaring that it's "thinking with great interest" about endorsing homosexuality.'

— Scott Rosenberg, in *Salon*, on remarks by a Microsoft executive that the company may adopt open-source licensing of the code for Windows

# Hide and Secrets

## Confidential settlements threaten public health and safety

By RICHARD ZITRIN and CAROL M. LANGFORD

**E**ight years ago this month, Bill Lockyer, then the powerful chairman of the state Senate Judiciary Committee, introduced a "sunshine in litigation" bill. The legislation provided "as a matter of public policy" that, with rare exceptions, no case involving allegations of defective products, environmental hazards or financial fraud could be settled in secrecy, and no evidence supporting these allegations could be kept from public disclosure. Lawyers who entered into secret settlements in violation of the act could be disciplined. In 1993 Lockyer won approval from both houses of the California legislature for what would have been the broadest such law in the country. But Gov. Pete Wilson vetoed it.

This January brought a new governor to California, and Lockyer is now the state attorney general. Perhaps next time, this bill will become law. But, as of now, only three states — Florida, Texas and Washington — have strong prohibitions against

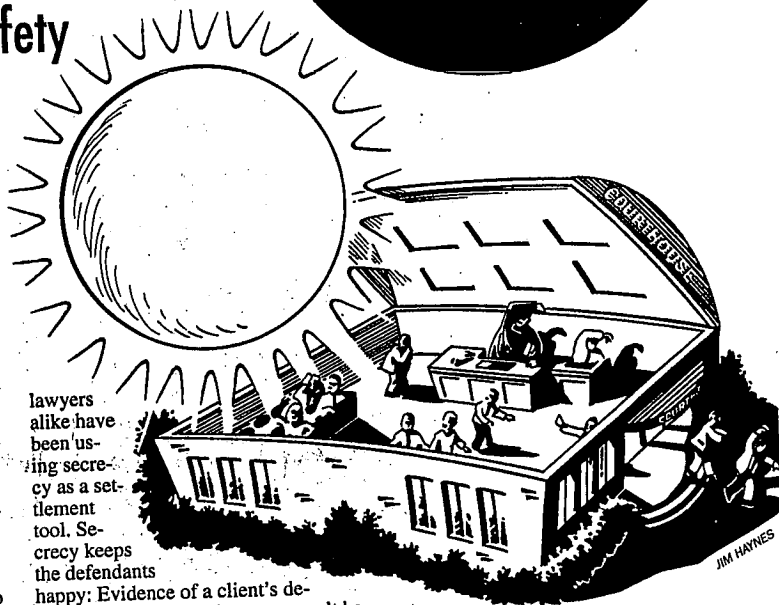
Zomax was removed from the market after a dozen deaths and more than 400 severe allergic reactions, almost all of which were kept quiet through confidential settlements.

secrecy in litigation. And, although these states have clear language creating presumptions of openness for filed court documents and discovery, not even these more progressive regimes include relevant impositions of discipline for offending counsel, as the California legislation proposed to do.

#### THE SECRECY TOOL

For years, plaintiffs' and defense

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lawyers alike have been using secrecy as a settlement tool. Secrecy keeps the defendants

happy: Evidence of a client's defective product or toxic waste won't be broadcast to the world at large. And plaintiffs' lawyers find that secrecy is often part of an offer they can't refuse — their clients will be paid the fair value of the case, but only if they agree to keep everything they've learned, including discovery materials, confidential. Given the choice, most plaintiffs' lawyers feel ethically bound to recommend a settlement that is in the best interests of their individual clients (not to mention their own pocket-books), even when they know secrecy might hurt other victims down the road.

But the longstanding precept of our adversarial system that an individual client's interests come first, ahead of everything else, should give way when secret settlements hide serious and substantial dangers from the public.

Harvard Law School professor Arthur Miller, a strong proponent of confidential settlements, claims that evidence suggesting that such secrecy has been widely used to conceal the dangers of defective products has been "anecdotal," at best. But Miller's argument simply doesn't hold up. Long before the prescription drugs Zomax and Halcion, the Bjork-Shiley heart valve and the Dalkon Shield intrauterine device were taken off the market, numerous secret settlements kept the public in the dark about the dangers of these products.

A British investigation provided the proof against Halcion. Disclosures about Zomax came only after a scientist experienced a near-fatal allergic reaction and decided to investigate; by the time Zomax was removed from the market, it was reportedly responsible for a dozen deaths and more than 400 severe allergic reactions, almost all of which were kept quiet through confidential settlements worked out by McNeil Laboratories, the drug's manufacturer. Attorneys for A. H. Robins, maker of the Dalkon Shield, even tried to condition their secret settlements on plaintiffs' lawyers' promises never to take an-

other Dalkon case — a clear violation of the ethics rules of almost every state.

#### GM'S SLAPP AT NADER

No product with a suspicious track record has been more thoroughly defended by more lawyers on more fronts than General Motors' pickup trucks with side-mounted gas tanks. In 1993 GM's lawyers went on the offensive by suing consumer advocate Ralph Nader and the Center for Auto Safety for defamation. Meanwhile, however, other GM lawyers were quietly settling lawsuits over the exploding pickups with amazing frequency. In 1996 Nader lawyers obtained GM's own records of those cases in discovery, revealing some 240 individual gas tank pickup cases — almost all settled and almost all requiring the plaintiffs to keep the information they discovered confidential. The earliest cases marked "closed" were filed in 1973, the latest 23 years later, just before the records were turned over.

We're not just talking about dangerous products. A home for the mentally disabled secretly settled a case accusing the home's administrator of sexually abusing someone with Down syndrome; the administrator privately admitted to molesting more than a dozen others. The Catholic Church's Chicago archdiocese secretly settled a child molestation case, ostensibly to protect the identity of the child; an investigation by *Chicago Lawyer* later estimated that 400 lawsuits had been settled nationwide by the Catholic Church in the previous decade — almost all of them secretly.

Allegations in a lawsuit, of course, don't prove anything. Some cases are filed for publicity, others to reach into deep pockets. Still others, although filed in good faith, may not have merit. Just because a car has defective brakes doesn't

# Comment

## ZITRIN: Secrets

*Continued from page 4.*

mean the brakes caused the accident in every case; perhaps the driver was drunk or inattentive. Even if the brake defect played a role, other factors might have contributed. A settlement may signal nothing more than a defendant's desire to

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avoid having its name linked with accusations of a defective product, whether true or false. It may be smarter to settle, particularly if all evidence of the defect remains secret.

Still, it's hard to conclude that the secret settlements of hundreds of lawsuits involving dangerous drugs, exploding gas tanks and child molestations result merely from unsupported individual claims. At some point, "anecdotal evidence" begins to take 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 question how our legal system can afford to allow secrecy.

### UNEVEN PLAYING FIELD

Suppressing evidence not only denies information to the public, it unbalances the scales between plaintiff and defendant. Plaintiffs lawyers have to start each case from scratch, with no evidence from previous cases and without being able to share either information or strategies. Meanwhile, defense attorneys are aware of the entire history of litigation over a product. They're able to learn from experience, raising new and higher hurdles for plaintiffs' lawyers to leap over in order to get information that others already obtained but have promised not to reveal.

What about the concern expressed by lawyers from both sides that without secrecy cases will no longer settle, at least not for their "true" value? So far, no evidence supports this. In those states that have a "sunshine in litigation" law, cases continue to settle, and no one has yet shown that they settle for less than before the law went into effect.

Currently, nothing in the ethics rules prevents lawyers from settling cases secretly and keeping the public in the dark. Even the strong Florida, Texas and Washington laws have exceptions. Plaintiffs' and defense lawyers in those states can work together in the name of "zealous advocacy" to convince a judge that their case is the rare one where secrecy is needed. (And too often, judges are more focused on clearing their dockets than on larger issues.) For these reasons, we believe that lawyers should be prevented from advocating secrecy for a settlement where a substantial danger to the public health and safety exists. As U.S. Rep. Lloyd Doggett, architect of Texas' groundbreaking legislation, put it: "To close a court to public scrutiny of the proceedings is to shut off the light of the law." ■