the PROFESSIONAL LAWYER

American Bar Association Center for Professional Responsibility · Standing Committee on Professionalism

Summer 2001
Volume 12
Issue Number 4

Why Lawyers Keep Secrets About Public Harm

Richard Zitrin

Prologue

On the day—the *very* day—I was sending this article in for publication, all proofed and spell-checked, I opened the *New York Times* and read the following lead-story headline: "S.U.V. Tire Defects Were Known in '96 But Not Reported." The subheads read: "190 Died in Next 4 Years" and "Lawyers and Safety Consultant Opted to Protect Victims' Suits Against Firestone."[1] Here is the first paragraph from that story:

> A group of personal-injury lawyers and one of the nation's top traffic-safety consultants identified a pattern of failures of Firestone ATX tires on Ford Explorer sport utility vehicles in 1996. But they 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 physician who served as head of the National Highway Traffic Safety Commission during the late 1990s, was quoted as calling this behavior "outrageous." He compared it to his remaining silent about what was killing his patients "because that would reduce the demand for my services," and "would be clearly unethical." But Geoffrey C. Hazard, Jr., "a leading expert on legal ethics," was described as saying the lawyers had broken no laws or ethical codes. The *Times* quoted Prof. Hazard as saying that the attorneys "had a civic responsibility . . . but they didn't have a legal duty" to say anything.

Perhaps that's true. Perhaps counsel had neither a legal nor an ethical duty. *But they should.*

Introduction

In the Spring of 1998, at Hofstra's second legal ethics conference[2], I proposed a rule of professional conduct that would make it unethical for a lawyer to "participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s)."[3] When first presented with the text of the proposed rule, the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") was, frankly, underwhelmed.

At that time, that reaction seemed understandable. Few lawyers were talking about secrecy of court settlements as an important legal issue.[4] Far fewer considered it to be a significant *ethical* issue.[5] Only three states had strong anti-secrecy rules then: Texas, Florida, and Washington.[6]

So the terminology I use here is clear, by "secret settlements" I mean those agreements between plaintiff's and defense lawyers to keep information about a known harm—whether it be a defective product, toxic waste, or molesting soccer coach—from the public. The plaintiff gets a large (sealed) settlement, the defendant gets silence, while the public gets shortchanged. I'm not talking about keeping the *amount* of the settlement secret; there are valid reasons for doing this. Rather, my concern is 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.

This secrecy can be implemented in many ways, none very nice or, in my view, particularly honorable:

> Stipulations for protective orders, rubber-stamped by judges with crowded calendars, even when the ordinary requirements of these orders, such as of trade secret protection, have not been shown.
>
> Agreements to return unfiled discovery from plaintiff to defendant, with no one to pass the information on; these have the advantage of never coming before the court's field of vision, making it difficult for a court to step in even if it wanted to.
>
> Most insidiously, stipulated changes of case

Continued on page 18

Richard Zitrin is the Director of the Center for Applied Legal Ethics at the University of San Francisco School of Law and a partner in Zitrin and Mastromonaco, LLP.

Secrets, continued from page 1

names, depublication of published opinions, pre-adjudicated (some would say "fixed") trials, and stipulated reversals, the last of which I'll return to in a moment.

Change is Coming

As I write today, three years after the Hofstra conference, in some ways it appears that not much has changed. Texas, Florida, and Washington continue to stand alone. There has been no change in the ethics rules. Secret settlements are still an everyday occurrence in most of our courts. But they won't be for long. The times are a-changin', and the days of secret settlements, at least from the perspective of this admittedly biased observer, are numbered.

The reason for this change is that just under the surface, the evils of secret settlements are now widely understood. More lawyers and more members of the general public now appreciate the serious threat to the public health and safety that secrecy can have. One important change is the nature and quality of the debate, in legislatures and in the courts, among attorneys in general, and among those lawyers who pay close attention to legal ethics issues.

On the political front, Illinois Assemblyman James Brosnahan has drafted legislation similar to the Florida statute, though to date it languishes in committee. In California, despite determined opposition from big businesses and the high-tech industry, strong anti-secrecy legislation passed both the state Senate and Assembly in the late Spring of 2001.[7] As of this writing, the bills were in a joint conference committee to reconcile their differences.

[T]he evils of secret settlements are now widely understood.

Among the judiciary, both the July 2000 Pound Forum for Appellate Judges and the ethics segment of the ABA's Summer 2001 appellate judicial conference[8] focused on the courts' involvement in preventing secret settlements. I was privileged to be the person presenting these issues at both venues.[9] The appellate judges were particularly interested by the highly publicized fallout from California appellate judge Anthony Kline's dissent in *Morrow v. Hood Communications, Inc.*, 59 Cal.App.4th 924, 69 Cal.Rptr. 489, 490 (1997). That story is worth telling briefly here.

In 1992, the California Supreme Court, in *Neary v. Regents of University of California*, 3 Cal.4th 273, 834 P.2d 119 (1992), held that during the pendency of appeal parties could settle a case by agreeing to stipulate to reverse the trial court's judgment. The result of this "stipulated reversal" is to make gold from dross: The trial court records show that the party that has actually won has "lost," (albeit after being handsomely paid for "losing"), while the party that had actually lost is deemed the winner. The *Neary* decision ordered all courts of appeal to grant stipulated reversals except in extraordinary circumstances.

Judge Kline quickly understood the implications of the *Neary* rule. It was the ultimate in secret settlements: By literally buying a change in the judgment, a defendant found liable for wrongdoing—no matter how serious or dangerous—could turn the case into what appeared to be an exoneration. In this respect, stipulated reversals were similar to the 1994 Kentucky case of *Fentress v. Eli Lilly*, in which Lilly, rather than risking losing, paid 28 plaintiffs arguing the dangers of Prozac "tremendous" sums in order to get the plaintiffs to rest their case without presenting their strongest evidence.[10]

When *Morrow* came along, Kline saw an opportunity to express his outrage. In dissent, he stated he would refuse to enter a stipulated reversal that came before him unless specifically ordered to do so by the state Supreme Court. This dissent was enough to cause a complaint to be filed with the California Commission on Judicial Performance alleging that Kline's dissent was tantamount to a refusal to abide by precedent, an offense warranting discipline.

Kline's defense, not surprisingly, was that he was *writing a dissent*. Ultimately, in 2000, the complaint against him was dismissed by an overwhelming majority of the commission. But the damage to judicial independence had been done, and those judges who learned of the case became aware of a further aspect of the dangers of secrecy in the courthouse.

Secrecy in settlements has also become an increasingly common subject of articles in the popular legal press and more scholarly forums.[11] When in February 2001 the Ethics 2000 Commission more seriously considered the rule I had proposed, it was presented with the support of 35 ethics professors, a varied group that included, among many others, Stanford's Deborah Rhode and William Simon, former Hofstra dean Monroe Freedman, *Law of Lawyering* co-author W. William Hodes, and clinician/ethicist Peter Joy. This time the commission was . . . well, if not exactly overwhelmed, at least moved to consider the proposal seriously and engage in vigorous debate. Then the commission rejected the proposal again.

Finally, the general media took up the cause and gave the issue increased scrutiny: front page article in the Los Angeles *Times*, editorial in *USA Today*, hit piece on *60 Minutes*.

Dead Bodies and History

Why these changes? Unfortunately, it was mostly a matter of dead bodies. The *Times* article, *USA Today* editorial and *60 Minutes* piece all flowed from the allegations in the Fall of 2000 about Firestone's shredding tires. Change comes, but often its cost is high.

Most reports estimated that shredding tires had caused the deaths of over 100 innocent victims, resulting in scores of cases settled secretly. Firestone became just the latest in a series of horror stories involving secrecy, though the story 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.[12] 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.[13]

It's not, of course, just a matter of 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 molesting over a dozen others. The Catholic Church's Chicago archdiocese secretly settled a molestation case, ostensibly to protect the child; an investigation by *Chicago Lawyer* discovered an estimated 400 lawsuits that had been settled by the Catholic Church in the previous decade—almost all of them secretly.[14]

Is This an Ethics Issue?

Okay, let's assume that all this is true, and that we've moved well beyond Arthur Miller's claim in 1991 that there was only "anecdotal evidence" that the public has ever been denied information relating to safety.[15] What should the remedy be? And why is it an issue of legal *ethics*?

Let me answer the second question first. I am frankly offended, even appalled, by the role lawyers have taken in secrecy agreements. Lawyers-those on *both* sides-lead the secrecy parade. Silently sitting on the sidelines would be bad enough. But lawyers not only allow themselves to participate in these dangerous subterfuges, they do far worse: They create the agreements, actively participating in the cover-up of information which if known might save lives.

These secret cover-ups are wrong. But lawyers, knowing full well the consequences, justify the secrecy in the name of "zealous advocacy"—exactly what they have been taught to do from the law school cradle. Given the stakes, this view is not only outmoded, it's archaic.

Compare this perspective to the current status of the ethical rules on confidentiality. We have reached the point where client confidentiality has been significantly limited in most states—and by most rules-makers—in a number of ways. According to A.L.A.S.'s 2001 survey on client confidences[16], every jurisdiction but California allows disclosure where a client intends to commit a crime likely to result in death or great bodily injury. Perhaps more tellingly, 41 jurisdictions allow the revelation of a client's intention to commit a criminal financial fraud, while 30 allow the revelation of any crime. Both the American Law Institute's *Restatement of the Law Governing Lawyers*[17] and the ABA Ethics 2000 Commission's report to the ABA House of Delegates[18] have substantially liberalized the ability to reveal confidences.

I am not substantively addressing these liberalizations here, much less expressing or even implying my agreement with them. But it is both important and relevant that in recent years those who decide lawyers' ethical rules have closely focused on the balance between lawyers' abilities to act to protect society and their duties to protect their client's confidences. Moreover, in focusing on this balance, rules-makers have moved the fulcrum substantially in the direction of allowing lawyers to disclose, affirmatively abrogating confidences in order to protect the interests of third parties.

Just because a client can take a particular action doesn't mean a lawyer should be able to do the same thing.

Given this history, what could be more appropriate than for ethics rules-makers to develop a standard of disclosure that doesn't involve any limitation to confidentiality at all[19], but merely ensures that lawyers can't contract away their ability to disclose *known, discovered* dangers to the public so that one sole client may benefit?

What about the rights of the client to contract to resolve a case? Would enacting such an ethics rule prevent the lawyer from acting in a way the client is permitted to act? In a word, "yes," or, more accurately, "yes, but so what?" Model Rule 5.6(B), which prevents a lawyer from participating in offering or assisting in an agreement to restrict the lawyer's right to practice, has done the same thing for years. In effect, so does MR 1.6. Just because a client can take a particular action doesn't mean a lawyer should be able to do the same thing.

Statutes and Court Rules Are Fine, But an Ethics Rule is Better

In February 2001, I presented proposed rule 3.2(B) to the Ethics 2000 Commission, which, as I've said, considered and rejected the idea after a lively discussion and debate. The most common concern given by Commission members and staff for not wanting such a rule was that a policy issue like this was better dealt with by court rules or legislation. With all due respect to the Commission's excellent work, this reasoning simply makes no sense. The idea that the Commission should avoid policy-making lasts just as long as it takes to read the widespread reforms it proposed in Model Rule 1.6. So why shy away here from sound public policy?

Both court rules and legislation, if they are strong enough, are important public protections against secrecy in

the courts. That's why I've taken time to speak at appellate judges' conferences and to work with the judiciary committees of both houses of the California legislature. But court rules and legislation are neither enough in and of themselves, nor the best fix for an important problem.

There are several reasons for this. First, as difficult as ethics rules are to draft, drafting legislation—even fashioning court rules—is more difficult. The process is overtly political, with the ultimate language too often determined by political compromise and expediency, rather than what outcome is best. Second, legislatures rarely have the best information about what is actually happening in our court system. Even appellate courts are frequently out of touch with what occurs in litigation on a daily basis. In my discussions with appellate judges at the Pound Institute Forum, which occurred before the Firestone story broke, many were surprised to hear that the problem Professor Doré had thoroughly described even existed. They soon realized that secrecy, usually lawyer-driven and not requiring court approval, was simply flying below their radar.

Indeed, *trial courts* only become aware of secretization intermittently, such as when they are presented stipulations for protective orders, motions to compel production of documents, or motions to compromise minors' claims. The vast majority of information exchanged in litigation is in the form of *unfiled* discovery—discovery that is handled entirely by the lawyers outside the view of the court. When the settlement of a case includes the secretizing of this discovery, the courts—which see neither the settlement agreement and release nor the secrecy provision—will never know what happened.

Lawyers react to a rule with exceptions by arguing that their case is that exception.

It is not surprising, therefore, that of the dozen or so states that have attempted to address the issue of secret settlements through the legislature, *none* directly deal with unfiled discovery. Among the courts, only Texas Supreme Court Rule 76(a) directly deals with this issue: Section (2), defining court records, includes subsection (2)(c): "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights."[20] But what the Texas Supreme Court giveth, it also taketh away. In 1998 that court chose to interpret Rule 76a as *not* including unfiled discovery within the definition of "court records."[21]

A third reason why legislation and court rules provide inadequate public protection is that out of necessity, they will include exceptions—to protect, for example, the names of young victims of serial molesters. These exceptions *should* be there; there are appropriate exceptions to the best rules. But these exceptions play right into the weakness of our ethics rules themselves—the historic emphasis on placing the duty to the individual client first. Lawyers react to a rule with exceptions by arguing that *their case* is that exception.

Thus, even with solid public laws prohibiting secretizing information about dangers to the public health and safety, the current ethics rules, instead of discouraging lawyers from engaging in secret deals, actually *encourage* it. Lawyers who go before courts to argue, jointly, that the statute or court rule in question doesn't apply in their situation stand an excellent change of gaining acceptance from a judge with a crowded docket.

Where there is no protection from the general laws of a state, attorneys believing it to be in their client's economic interests to enter into a secrecy agreement will simply do so; their perceived duty of advocacy will trump any possibility of disclosing, even if a lawyer believes disclosure is permitted under Model Rule 1.6. So long as such agreements are "ethical," they will be entered into regardless of any danger to the public, on the theory that the client's interests (read *financial* interests) must come first.

A simple and appropriate change to the ethics rules will make these rules part of the solution instead of part of the problem. Instead of lawyers feeling, as they do under the current rules, the chilling effect on their duties to the client should they refuse to secretize information, they will feel the chilling effect of the prohibition against putting the public in danger where the damages to the individual client are minimal.[22] As Tuoro law professor Marjorie Silver, another who gave support to proposed Rule 3.2(B), later wrote me: "I believe the most compelling response to [the Commission's position] is that the lawyer would be able to point to an ethical rule that says [we] may not participate in such agreements.... Thus, we as a profession might lead rather than follow in setting a higher ethical standard of behavior."

Exactly right.

Appendix A[23]

PROPOSED RULE 3.2 (B)

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

Comment

Some settlements have been facilitated by agreements to limit the public's access to information obtained both by investigation and through the discovery process. However, the public's interest in being free from substantial dangers to health and safety requires that no agreement that prevents disclosure to the public of information that directly affects that health and safety may be permitted. This includes agreements or stipulations to protective orders that would prevent the disclosure of such information. It also precludes a lawyer

seeking discovery from concurring in efforts to seek such orders where the discovery sought is reasonably likely to include information covered by subsection (B) of the rule. However, in the event a court enters a lawful and final protective order without the parties' agreement thereto, subsection (B) shall not require the disclosure of the information subject to that order.

Subsection (B) does not require the disclosure of the amount of any settlement. Further, in the event of a danger to any particular individual(s) under Subsection (B), the rule is intended to require only that the availability of information about the danger not be restricted from any persons reasonably likely to be affected, and from any governmental regulatory or oversight agencies that would have a substantial interest in that danger. In such instances, the rule is not intended to limit disclosure to persons not affected by the dangers.

ENDNOTES

1. NEW YORK TIMES, page 1, article by Keith Bradsher, June 24, 2001.
2. Hofstra University School of Law Conference on Legal Ethics: Access to Justice.
3. *The Case Against Secret Settlements (Or What You Don't Know* Can *Hurt You)*, 2 HOFSTRA J. INST. FOR STUDY OF LEGAL ETHICS 115 (1999). The full text of the rule, and its comments, in current form, appears below as Appendix A to this article.
4. Two articles by leaders from opposing sides, Texas Supreme Court judge (now Congressman) Lloyd Doggett and Harvard law professor Arthur R. Miller, were written in the early 1990s. They are Doggett's (with Michael J. Mucchetti), *Public Access to Public Courts: Discouraging Secrecy In the Public Interest*, 69 TEX. L. REV. 643 (1991), and Miller's *Confidentiality, Protective Orders, and Public Access To the Courts*, 105 HARV. L. REV. 427 (1991).
5. David Luban had written *Settlements and the Erosion of the Public Realm*, at 83 GEO. L.J. 2619 (1995), at that time the only article of note of which I am aware that seriously evaluated the ethics of secret settlements. Maja Ramsey, a San Francisco lawyer, has been talking and writing about the ethics of secret settlements for at least a dozen years. Her most recent article on the subject is Maja Ramsey, Justine Durrell, and Timothy W. Ahearn, *Keeping Secrets With Confidentiality Agreements*, 34 TRIAL 38 (Aug. 1998).
6. Florida Statutes Sec. 69.081, Texas Rule of Civil Procedure Sec. 76(a), Washington Revised Code Secs. 4.24.601, 4.24.611.
7. SB 11 (Escutia) and AB 36 (Steinberg).
8. Spencer-Grimes Appellate Judges Seminar Series.
9. Joined by Professor Laurie Kratky Doré at the Pound Forum.
10. See Leslie Scanlon's contemporaneous series of articles in THE [LOUISVILLE] COURIER-JOURNAL, especially April 20, 1995, May 7, 1995, May 28, 1995, June 1, 1995, September 13, 1996, December 13, 1996, March 12, 1997, March 25, 1997, and March 28, 1997; a similar series by Maureen Castellano, in NEW JERSEY LAW JOURNAL, including May 3, 1995, May 15, 1995, and June 12, 1995; Nicholas Varchaver, *Lilly's Phantom Verdict*, THE AMERICAN LAWYER, September 1995; and Richard Zitrin & Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER (Ballantine, 1999), pages 193-201.
11. Professor 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. This article appeared about the same time as THE MORAL COMPASS OF THE AMERICAN LAWYER, *supra* note 10, in which Chapter 9 was devoted to discussing secret settlements. Also of recent vintage: Richard A. 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) and Frances Komoroske, *Should You Keep Settlements Secret?*, 35 TRIAL, June 1999. Prof. Doré's and my papers at the Pound Forum appeared in the October and November 2000 issues of TRIAL.
12. *See*, among other sources, Doggett & Mucchetti, *supra*, note 4; Bob Gibbins, *Secrecy Versus Safety: Restoring the Balance*, 77 ABA JOURNAL 74 (December 1991); Steven D. Lydenberg, et. al., RATING AMERICA'S CORPORATE CONSCIENCE (Addison-Wesley, 1986), pp. 234 ffl; Davis v. McNeilab, Inc., U.S. Dist. Ct., D.C., No. 85-CV-3972; Morton Mintz, AT ANY COST (Pantheon, 1985) pp. 197-8; [Mass.] LAWYER'S WEEKLY, February 20, 1995.
13. *See* transcript of American Judicature Society, *Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?*, reported in 78 JUDICATURE 304 (1995); Catherine Yang, *A Disturbing Trend Toward Secrecy*, BUSINESS WEEK, October 2,1995. Documentation of cases alleging GM truck fires was provided to the author by Clarence Ditlow, director of the Center for Auto Safety.
14. *See* LEGAL INTELLIGENCER, June 10, 1994; CHICAGO LAWYER, January 1994; NATIONAL LAW JOURNAL, March 6, 1995.
15. Miller, *supra*, note 4.
16. Attorneys' Liability Assurance Society, Inc., "Chart on Ethics Rules on Client Confidences," 2001.
17. *See especially* sections 59 - 67 and 120.
18. *See* proposed rule 1.6, posted at http://www.abanet.org/cpr/e2k-rule16.html (May 2001).
19. Let's not get sidetracked by the use of the term "confidential" as sometimes applied to these secrecy agreements. There is nothing confidential—at least the confidentiality we know as a term of legal ethics, as embodied in Model Rule 1.6—about this process. The agreements occur only after one side manages to get discoverable—and thus *non-confidential*—information from the other side. Thus these agreements are properly "secret settlements," not "confidential settlements."
20. Texas Rule of Court 76a.
21. General Tire, Inc. v. Kepple, 41 Tex. Sup. J. 895, 970 S.W.2d 520 (1998). *See also In re* Continental Gen. Tire, 979 S.W.2d 609 (Tex. Sup. 1998). It is of at least passing interest that both these cases involved tire companies. However, in 1999, in a case where the underlying facts concerned inadequacy of care given by Kaiser health care facility, and a news agency sought to intervene under Rule 76a, a *per curiam* opinion was accompanied by three separate opinions from a Texas Supreme Court now fractured on the issue of whether unfiled discovery should be construed to be a "court record." The result was a remand to the appeals court. *In re* the Dallas Morning News, Inc., Relator, 43 Tex. Sup. J. 192, 10 S.W.3d 298 (1999).

Continued on page 23