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Settlements and Secrets: Is the Sunshine Chilly

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SETTLEMENTS AND SECRETS: IS THE SUNSHINE CHILLY?

JAMES E. ROOKS JR. *

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I. OPEN COURTS, CLOSED FILES

American lawyers recognize that the openness of the courts, and the public nature of their proceedings and records, are hallmarks of our system of justice. Yet few lawyers who represent consumers in United States courts can be unaware of the national public policy debate on the frequent use and abuse of secrecy in our civil justice system.

"Secrecy," in this debate, refers collectively to a number of legal mechanisms that may be used to conceal litigation information from the public, from government regulators, from attorneys handling similar cases, and in some cases even from other courts. This information may include, but is not limited to, discovery material, records of the results of the litigation, the legal community's own understanding of such litigation, and sometimes even the existence of the litigation.¹

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1. Judge Richard Posner of the Seventh Circuit Court of Appeals has aptly described the "default setting" of openness in the judicial system:

The general rule is that the record of a judicial proceeding is public Not only do such records often concern issues in which the public has an interest, in which

These secrecy mechanisms include negotiated agreements or court orders to: (1) keep the content of discovery material secret, return it to the producing party, seal it, or destroy it; (2) keep secret one or more aspects of the case, including the result, the amount of any compensation paid, and perhaps even the fact that the litigation ever occurred; (3) seal court files; (4) create or alter court records to make it difficult or impossible to tell what a case was about, to identify the parties, to determine the disposition of a case, and in some cases to expunge from court records all references to the case—in effect, making it “disappear” from the courthouse; (5) vacate a previously entered judgment or other court order; and/or (6) depublish a previously published court decision. While the means may vary considerably, the result, and the obvious intention, are the same. In this Article, any and all of these mechanisms are referred to by their common denominator: “secrecy.”

There will always be instances in which confidentiality of certain aspects of litigation is justified, or even vital, and technically speaking, these secrecy mechanisms are usually entirely legal. However, secrecy can also lead to results that are undesirable as a matter of public policy. Such results include instances in which secrecy hides information that is critical to public health and safety from government regulators and from the scientific community, removes substantial matters of public concern from the scrutiny of the publicly funded justice system, and multiplies the cost to parties and the court system by requiring repeated litigation of the same factual matters. Recent real-world examples of these ill effects of secrecy involve litigation concerning sexual abuse by clergy,² Firestone

event concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment, but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret. . . . These considerations, however, support a strong presumption rather than an absolute rule. When there is a compelling interest in secrecy, as in the case of trade secrets, the identity of informers, and the privacy of children, portions and in extreme cases the entirety of a trial record can be sealed. . . . The interest in secrecy is weighed against the competing interests case by case.

Jessup v. Luther, 277 F.3d 926, 927–28 (7th Cir. 2002) (citations omitted).

2. See, e.g., Daniel J. Wakin, *Secrecy Over Abusive Priests Comes Back to Haunt Church*, N.Y. TIMES, March 12, 2002, at A1 (noting that the Catholic Church’s policy of secrecy over the last twenty years is plaguing many dioceses that must admit the presence of priests accused of abuse); Michael Paulson & Thomas Farragher, *US Bishops to Propose Ousting Abusive Priests*, BOSTON GLOBE, June 4, 2002, at A1 (quoting U.S. CONFERENCE OF CATHOLIC BISHOPS, DRAFT CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (June 4, 2002) (stating in Article 3 “[i]n the past, secrecy has created an atmosphere that has inhibited the healing process, and in some cases enabled sexually abusive behavior to be repeated. Dioceses will not enter into confidentiality agreements except for grave and substantial reasons brought forward by the victim.”)). The final version of the charter deleted the first sentence of the article and added “and noted in the text of the agreement” at the end of the second sentence. U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (2002), available at <http://www.usccb.org/bishops/charter.htm> (last visited Apr. 2, 2004).

In an article on the initiative of the federal judges in South Carolina to ban secret settlements, The

automobile tire failure,³ and dangerous baby products.⁴ Secrecy can also be abused through sheer excessive use—with the “exception” of secrecy swallowing the “rule” of openness—which can degrade the public nature of the legal system and lessen the public’s confidence in it as the proper means of dispute resolution.

Any of the secrecy mechanisms described above may be proposed as an element of a settlement agreement, and they often are.⁵ The considerable financial leverage of many defendants and their insurers makes a mockery of any notion that plaintiffs’ agreement to secrecy is often secured “voluntarily.” For many years, consumer lawyers have complained that ethical and moral conflicts arise when their clients are presented with demands for secrecy during settlement negotiations.⁶

II. JUDICIAL AND LEGISLATIVE EFFORTS TO DEAL WITH OVERUSE AND ABUSE OF SECRECY

In response to the emerging understanding of the pitfalls of secret case resolution, numerous court systems and state legislatures have sought to restrict litigants’ opportunities to keep their litigation transactions secret, either through prohibiting some secrecy arrangements outright or by prescribing narrowly the

New York Times quoted a lawyer who had represented abuse victims in claims against the Catholic Church in Boston: “Jeffrey A. Newman, a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, . . . said he regretted having participated in secret settlements in some early abuse cases. ‘It was a terrible mistake,’ he said, ‘and I think people were harmed by it.’” Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N. Y. TIMES, Sept. 2, 2002, at A1.

3. See, e.g., Richmond Eustis, *Judge Orders Unsealing of Secret Firestone Documents From Fatal 1997 Crash*, FULTON COUNTY DAILY REP., Sept. 29, 2000 (reporting that data sealed under a settlement agreement showed an unusual pattern of defects in tires manufactured at a particular Firestone plant between 1990 and 1995; Firestone opposed a suit brought by news organizations to unseal the data on the grounds it constituted “trade secrets”); James V. Grimaldi & Carrie Johnson, *Factory Linked To Bad Tires*, WASH. POST, Sept. 28, 2000, at E1 (discussing data involving the safety of Firestone tires that was unsealed after a lawsuit was filed by the media).

4. See, e.g., E. Marla Felcher, *Safety Secrets Keep Consumers in the Dark*, TRIAL, April 2001 at 40, 49 (observing that “[c]onfidential settlements have become the norm in industries like juvenile products, where a company’s financial health rests heavily on its ability to project a nurturing, caring safety-conscious public image.”). See also E. MARLA FELCHER, IT’S NO ACCIDENT: HOW CORPORATIONS SELL DANGEROUS BABY PRODUCTS (Common Courage Press 2001).

5. This Article does not purport to suggest to attorneys what they can and should do when and if a settlement is offered with an attached secrecy “string.” Ample advice on appropriate attorney responses has been offered in ATLA’s *Trial* magazine and other publications. See, e.g., James L. Gilbert et al., *Negotiation and Settlement: The Price of Silence*, TRIAL, June 1994, at 17; Francis H. Hare, Jr. & James L. Gilbert, *Products Liability: Resisting Confidentiality Orders*, TRIAL, Oct. 1990, at 50; Frances Komoroske, *Should You Keep Settlements Secret?*, TRIAL, June 1999, at 55; James A. Lowe, *How To Fight Protective Orders: Strategies and Sources of Support*, TRIAL, Apr. 1990, at 76; Maja Ramsey et al., *Keeping Secrets With Confidentiality Agreements*, TRIAL, Aug. 1998, at 38.

6. The Association of Trial Lawyers of America (ATLA) long ago took a position against abuses of secrecy in litigation. See Russ Herman, *No More Dirty Secrets in the Courts*, ATLA ADVOCATE, Oct. 1989, at 4; App. A, *Resolution on Protective Orders*, Association of Trial Lawyers of America, Board of Governors, May 6, 1989; SOCIETY OF PROFESSIONAL JOURNALISTS & ASSOCIATION OF TRIAL LAWYERS OF AMERICA, KEEPING SECRETS: JUSTICE ON TRIAL (Conference Report, 1990).

circumstances under which they will be permitted. Legislative attempts along these lines have often been unsuccessful, but efforts of the courts themselves to regulate the process through court rules have often succeeded.⁷ Each year, more court systems consider the question of whether there is too much secrecy in litigation and what might be done about it. Judicial understanding of the problem of secrecy has increased, and support of the news media has solidified.⁸ At least one legal ethics board has considered secrecy-related issues.⁹

The approaches taken in different jurisdictions have varied, often depending on the particular secrecy mechanism to be addressed, but their thrust is usually to require greater judicial scrutiny of secrecy requests rather than to ban secrecy altogether. Some examples include: declaring a presumption of openness for all court records in the jurisdiction; limiting circumstances in which protective orders may be entered for discovery material; requiring a showing of good cause before approving secrecy, with the burden on the secrecy proponent; requiring public hearings before granting secrecy orders; allowing intervention in secrecy proceedings by interested nonparties (including news organizations or consumer protection organizations); and specifying certain matters that may *not* be kept secret.

The latest developments in this effort have been in the state court systems of Arizona,¹⁰ South Carolina,¹¹ and the United States District Court for the District of South Carolina.¹²

7. Commentators differ as to what constitutes a measure intended to restrict secrecy in litigation, but at the present time at least the following twenty-two states have provisions that appear to be directed toward the secrecy phenomenon: Arkansas, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Oregon, South Carolina, Texas, Virginia, and Washington.

8. Editorial support for recent court rule amendments directed at secrecy practices has been strong. See Editorial, *Attacking Legal Secrecy*, CHI. TRIB., Sept. 29, 2002, at 10; Editorial, *Don't Keep Public in Dark*, USA TODAY, Sept. 19, 2002; Editorial, *Ending Legal Secrecy*, N.Y. TIMES, Sept. 5, 2002, at 22; Editorial, *Kudos to Judges*, THE STATE (Columbia, S.C.), Aug. 5, 2002, at A6; Editorial, *Making Settlements Public*, ARIZ. DAILY STAR, Nov. 18, 2002, at B4. Media organizations have joined in lawsuits to open sealed court files or have sued on their own. See *supra* note 3.

9. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 730 (July 27, 2000) (finding that an attorney may not enter into a settlement agreement that restricts the attorney's right to practice law by prohibiting future representation of clients in cases where the attorney might use information not protected as a confidence or secret but nevertheless is covered by terms of a settlement agreement).

10. ARIZ. R. CIV. P. 26(c)(2) ("General Provisions Governing Discovery: Protective Orders") (effective Dec. 1, 2002).

11. S.C. R. CIV. P. 41.1 ("Sealing Documents and Settlement Agreements"). A note accompanying the rule states that "Rule 41.1 was enacted to set forth with clarity the fact that the courts of this State are presumed to be open and to set forth with particularity when documents and settlement agreements, submitted to a court for approval, may be sealed." *Id.*

12. See discussion *infra* Part IV.

III. THE "CHILLED SETTLEMENTS" ARGUMENT

A number of arguments for and against secrecy have been advanced in legislative debates, in testimony at hearings, and in written comments to courts contemplating rule amendments. The principal arguments are well-known, have been analyzed in detail, and need not all be reiterated here, with the exception of what might be called the "chilled settlements" argument. Professor Laurie Doré of Drake Law School, a nationally recognized authority on court secrecy, has defined the two sides of the chilled settlements argument as follows:

[C]onfidentiality proponents believe that restrictions on litigation secrecy will significantly impede the settlement process and unduly burden an already oversubscribed judicial system.

Public access advocates, in contrast, question how critical confidentiality really is to the compromise of most cases when trial represents a lengthy, expensive, and risky alternative.

. . . Many public access advocates doubt whether restricting confidentiality would have any effect upon the frequency or amount of settlement.¹³

Those who contemplate using their authority to restrict the uses of secrecy mechanisms in litigation must do so in a manner that is consistent with the policy of promoting settlement of disputes—"a long-established public policy aimed at preserving the autonomy of litigants to resolve their own disputes as they wish and at conserving both public and private resources by avoiding trial."¹⁴ Professor Doré points out that that policy underlies Federal Rule of Evidence 408 and its analogues, which hold evidence of a settlement or an offer to settle inadmissible in some situations. She notes, however, that "[s]hifts in the American procedural landscape and in our overall vision of civil litigation . . . have called these rationales into question and have suggested that, at least in some cases, party autonomy and the preference for settlement should yield to some greater interest supporting public access."¹⁵ The tension between the policies of maintaining open courts and records

13. See Laurie Kratky Doré, *Secrecy by Consent: The Use And Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 304–05 & n. 93 (1999) [hereinafter *Secrecy by Consent*]; Laurie Kratky Doré, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation* (Roscoe Pound Institute, 2000) (paper presented to 2000 Roscoe Pound Institute Forum for State Court Judges), available at <http://www.roscoepound.org/new/00kratky.pdf> (last visited Apr. 9, 2004); Laurie Kratky Doré, *The Confidentiality Debate*, TRIAL, Oct. 2000, at 18. Professor Doré has described and analyzed the arguments on all sides of the secrecy question exhaustively and impartially. The compendium of course materials for the 2000 Judges Forum, which includes a substantial bibliography and a collection of secrecy-related measures adopted by various states (current as of 2000), is also available at http://www.atlanet.org/secrecy/data/mat_sec.pdf (last visited Apr. 2, 2004).

14. *Secrecy by Consent*, *supra* note 13, at 286.

15. *Id.*

and encouraging settlement can be seen in the decisions of a number of courts considering requests for secrecy, which have acknowledged the pro-settlement policy but have concluded that circumstances specific to the case can outweigh it.¹⁶

Early in the debate on secrecy, the Product Liability Advisory Council Foundation provided a grant to Professor Arthur Miller of Harvard Law School to write a substantial law review article supporting the corporate litigation interest in keeping secrecy liberally available. Throughout the article, Miller cites concerns for litigants' privacy and confidentiality of business information, and urges reliance on judicial discretion, not regulation via legislation or court rule.¹⁷ He also suggests that restrictions on the use of secrecy mechanisms could interfere with the settlement process, leaving already overburdened courts with additional cases to try:

[P]romoting increased public access to information by restricting the discretion of the courts to protect confidential information is ill-advised. These restrictions run counter to important procedural trends designed to enhance judicial power to control discovery, improve efficiency, and promote settlement in the hope of reducing cost and delay.¹⁸

16. See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) ("District courts should not rely on the general interest in encouraging settlement, and should require a particularized showing of the need for confidentiality in reaching a settlement. . . . Even when a particularized need for confidentiality is put forth by the parties, the interest in furthering settlement should only be one factor in the district court's determination."); *Bank of America Nat'l Trust v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986) ("Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."); *U.S. v. Ky. Utils. Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989), *rev'd*, 927 F.2d 252 (6th Cir. 1991) ("[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.L. v. Edson*, 409 N.W.2d 417, 423 (Wis. Ct. App. 1987) ("[T]he parties contend that . . . making these settlements public will have a chilling effect on future litigants and will counteract the public interest in encouraging settlements. These arguments are speculative. In addition, they are unpersuasive in light of the trial court's specific remedy. . . . The parties have failed to show that the public's interest in encouraging settlements overcomes the strong presumption favoring disclosure of court documents."); *cf. Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 n.4 (11th Cir. 1985) ("There is no question that courts should encourage settlements. However, the payment of money to an injured party is simply not 'a compelling governmental interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record. We feel certain that many parties to lawsuits would be willing to bargain (with the adverse party and the court) for the sealing of records after listening to or observing damaging testimony and evidence. Such suppression of public records cannot be authorized.").

17. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991). In his article, Professor Miller asserts (inaccurately) that ATLA organized a nationwide campaign to induce courts and legislatures to ban many forms of secrecy and made such a ban its highest priority. *Id.* at 441-45.

18. *Id.* at 431-32.

....

... [W]hatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement. Settlement not only reduces the need for further governmental involvement, but also reduces the cost of dispute resolution to the litigants and helps free valuable judicial resources and thereby promotes more efficient operation of the courts. Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved.¹⁹

Professor Miller's article, and especially his "chilled settlements" argument, immediately became a staple of the corporate side of the court secrecy debate. The argument is routinely raised in testimony at hearings, in written comments on proposed secrecy restrictions, and in news media interviews with pro-secrecy advocates.²⁰ An excellent recent example of its employment can be found in the proceedings surrounding the principled initiative in the United States District Court for the District of South Carolina to ban sealed settlements.

IV. FEDERAL JUDGES CONFRONT SECRET SETTLEMENTS

Chief District Judge Joseph F. Anderson Jr. began the effort to take on secret settlements in district court in 2002. As a *New York Times* reporter described it,

Judge Anderson was most concerned with the selling of secrecy as a commodity, he said in an interview. He recalled being told by a plaintiff's lawyer that the lawyer had obtained additional money for his client in exchange for the promise of secrecy.

"That's what really lit my fuse," the judge said. "It meant that secrecy was something bought and sold right under a judge's

19. *Id.* at 486 (footnotes omitted). A detailed critique of Professor Miller's article may be found in David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2652-59 (1995).

20. See Diana Digges, *Confidential Settlements Under Fire in 13 States*, LAWS. WKLY. USA, Apr. 30, 2001 at B1, available at <http://www.atlanet.org/secrecy/data/confid.pdf> (last visited Apr. 2, 2004).

Defense attorneys . . . argue that the anti-secrecy bills would have a chilling effect on settlements, making litigation both more common and more contentious

....

... The defense bar admits there's no hard evidence of a chilling effect, but they insist it's a logical outcome if corporations feel "under siege." And, they say, their clients are giving them an earful.

Id.

nose.”²¹

Anderson began with a letter to his colleagues urging them to take collective action:

Here is a rare opportunity for our court to do the right thing, . . . and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies Some of the early Firestone tire cases were settled with court-ordered secrecy agreements that kept the Firestone tire problem from coming to light until many years later Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems.²²

Under Judge Anderson’s leadership, the ten active judges of the district settled on a simple one-sentence rule that would ban outright the sealing of any settlement agreement filed with the court. The judges solicited comments from the bar and the public, and posted the comments on their public website.²³

An examination of the affiliations of the comment writers and the arguments is instructive. The court received thirty-one letters.²⁴ The writers of fourteen of the letters stated that they supported the rule change; thirteen wrote that they opposed it; and four expressed a preference for alternative approaches (other than the status quo) that they considered likely to be more effective. The writers included the court’s advisory committee, which was asked to review the judges’ draft proposal; seven lawyers who mentioned no affiliation; three who wrote on behalf of plaintiff- or consumer-oriented legal organizations; six who wrote on behalf of, or mentioned affiliations with, defense-oriented legal organizations; three who wrote on behalf of insurance organizations; six who are legal academics; and five who wrote for nominally non-partisan legal organizations or for non-legal academic or professional organizations. All six academics and the advisory committee favored either the proposed amendment or an alternative method of restricting secrecy. All three consumer-oriented legal organizations supported the rule amendment, while

21. Liptak, *supra* note 2.

22. *Id.*

23. The amendment added a new subsection (C) to the court’s Local Rule 5.03 (“Filing Documents under Seal”), providing that “[n]o settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule.”

The comments are available *in toto* at <http://www.scd.uscourts.gov/notices/COMLR503.pdf> (last visited Apr. 2, 2004) [hereinafter Record]. The document in which the comments are collected is 173 pages long. All pages cited in the following footnotes are to pages of the pdf document as a whole, not to pages of individual letters.

24. For purposes of counting pro and con comments, two or more letters from the same person or entity are treated as a single comment.

all six defense-affiliated writers and all three insurance organizations opposed it. Four letters to the court specifically cited Professor Miller's 1991 article.²⁵

Not surprisingly, all three insurance organizations and four of the lawyers affiliated with defense organizations made the "chilled settlements" argument:

- "[If the rule amendment is adopted] it will as a practical matter be more difficult to counsel clients to compromise and settle disputed cases."²⁶
- "[C]onfidentiality of settlements is often an important factor for the plaintiff as well as the defendant in negotiating the settlement of a case The absence of confidentiality would impede settlement of some cases."²⁷
- "Defendants will more likely submit to trial rather than settle claims if settlement agreements could no longer be subject to a protective order. This in turn would further burden already overcrowded court dockets."²⁸
- "Such a rule . . . would also deter many settlements, which is contrary to the interests of the parties, the courts, and the public."²⁹
- "[B]y eliminating the continued use of confidential settlement agreements, the Court . . . may also, in instances where an insured has the power to reject a settlement, make the difference in whether the case is settled or proceeds to trial."³⁰
- "[T]he proposed rule would likely discourage parties from settling litigation if the parties desire that the terms of the agreement

25. In addition to the published comments, the *New York Times* stated that "[o]pponents of the proposal argue that secrecy encourages settlements, which they say are desirable given limited court resources," and quoted Professor Miller as stating:

"The judges of South Carolina, God bless them, have not evaluated the costs of what they are proposing," said Arthur Miller, a law professor at Harvard and an expert in civil procedure. He said the ban on secret settlements would discourage people from filing suits and settling them, and threaten personal privacy and trade secrets.

Liptak, *supra* note 2.

26. Record, *supra* note 23, at 32–33 (letter from David E. Dukes, Esq., a member of the Board of Directors of the Defense Research Institute (July 24, 2002)).

27. *Id.* at 126–27 (letter from Henry B. Smythe, Jr., Esq. (July 24, 2002)) ("[A]s a member of Products Liability Advisory Council . . . I have also represented Firestone in the federal and state courts of South Carolina for about twenty-five years.").

28. *Id.* at 96–97 (letter from Joyce E. Kraeger, Esq., writing for the Alliance of American Insurers (Sept. 12, 2002)).

29. *Id.* at 112–13 (letter from Gregory LaCost, Esq., writing for the National Association of Independent Insurers (Sept. 30, 2002)).

30. *Id.* at 172–73 (letter from J. Donal Tierney, writing for American International Companies (Sept. 30, 2002)).

should remain confidential”³¹

The president of the South Carolina Defense Trial Attorneys’ Association made the broadest predictions of all:

- “[T]he proposed amendment . . . may ultimately result in a chilling effect on settlements of civil disputes.”³²
- “[A]n elimination of confidential settlement agreements will serve as a disincentive for settlement *in a majority of civil cases*.”³³

Four of the writers who supported restricting secrecy mentioned the “chilled settlements” argument but rejected it outright or questioned its premise:

- “Claims that secret settlement promote increased settlements is [sic] speculative at best If parties enter into secret settlements to avoid publicity, these same parties will again seek to settle cases to avoid the publicity surrounding a lengthy trial. This ‘general interest in encouraging settlement’ is not enough to overcome the presumption of openness.”³⁴
- “Opponents of openness claim that cases wouldn’t settle without secrecy. There is no evidence for this proposition The *amount* of settlement may be lower, but only because no premium is paid for silence.”³⁵
- “I do not believe that secrecy provisions are make-or-break

31. *Id.* at 169–71 (letter from Daniel J. Popeo, General Counsel & Paul D. Kamenar, Senior Executive Counsel, Washington Legal Foundation (Sept. 30, 2002)).

32. Record, *supra* note 23, at 89–91 (letter from H. Mills Gallivan, Esq., President, South Carolina Defense Trial Attorneys Association (Sept. 26, 2002)).

33. *Id.* at 92–95 (letter from H. Mills Gallivan, Esq. (July 23, 2002)) (emphasis added). Stephen Darling, Esq., Gallivan’s successor as President of the South Carolina Defense Trial Attorneys’ Association, made the same assertion in the paper he submitted for the Secret Settlements Symposium using Gallivan’s language essentially verbatim. Stephen E. Darling, *Confidential Settlements: The Defense Perspective*, 55 S.C. L. REV. 785, 787 (2004).

34. Record, *supra* note 23, at 38–50 (letter from Lucy Dalglish et al., on behalf of The Reporters Committee for Freedom of the Press, the National Press Club, The Radio-Television News Directors Association, and the Society of Professional Journalists (Sept. 27, 2002) (citations omitted)).

35. *Id.* at 51–64 (letter from Richard A. Zitrin, Director, Center for Applied Legal Ethics, University of San Francisco School of Law (Sept. 26, 2002)). Zitrin is a prominent critic of secrecy in litigation and has written widely about it. See, e.g., Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don’t Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115 (1999) (urging adoption of an ethics rule against secret settlements). See also Richard A. Zitrin, *What Judges Can and Should Do About Secrecy in the Courts* (Roscoe Pound Institute, 2000) (paper presented to 2000 Roscoe Pound Institute Forum for State Court Judges, available at <http://www.roscoepound.org/new/00zitrin.pdf> (last visited Apr. 2, 2004)); Richard A. Zitrin, *Overcoming Secrecy with Judicial Power*, TRIAL, Nov. 2000 at 74 (“Arguments about the privacy of disputes should generally be outweighed by the public’s right to know.”).

settlement components. Cases that can settle will settle without them. I say this because I know from experience what happens when defendants come sniffing around, requesting what are, in essence compounding agreements. When told to go fly a kite they always come back with the money and settle anyhow.”³⁶

- “Can anyone demonstrate factually that, in states with limits on secrecy in litigation, the settlement rate per capita has decreased significantly since the limits were implemented? . . . Can anyone demonstrate factually that, in states with limits on secrecy in litigation, the trial rate per capita has increased significantly since the limits were implemented?”³⁷

In the end, the judges of the District of South Carolina adopted their one-sentence rule. They were evidently unswayed by the dire predictions of chilled settlements. Judge Anderson had expressed his doubts about the threat of chilled settlements early on:

Judge Anderson told his colleagues that their court, at least, had available capacity. He wrote that the court had disposed of 3,856 civil cases in the previous 12 months, which included only 35 cases tried to a verdict.

“If the rule change I propose were enacted and it did result in two or three more jury trials per judge per year (which is far from certain),” Judge Anderson wrote, “I think we could handle the increased workload with little problem.”³⁸

36. Record, *supra* note 23, at 132–38 (letter from Professor John P. Freeman, University of South Carolina School of Law (July 11, 2002)). Professor Freeman made an interesting argument that some secret settlements involve conduct that is criminal to some degree. *Id.* at 133. Such settlements may constitute “compounding” agreements—agreements to conceal or not to prosecute conduct which is criminal, thereby “compounding” the criminal offense. South Carolina and a number of other states make compounding a discrete criminal offense. S.C. CODE ANN. § 16-9-370 (Law. Co-op. 1976) (“Taking money or reward to compound or conceal offense”) (making such conduct a Class C misdemeanor, punishable by not more than one year imprisonment).

Secret settlements that fit the definition of compounding are, Professor Freeman argued, illegal and unenforceable, and by analogy, many agreements that would conceal material matters of public safety are against public policy and are similarly unenforceable. Record, *supra* note 23, at 135–36. Thus, he asserted, the often-cited rule that the plaintiff is entitled to accept any settlement offered is limited. *Id.* at 137. A plaintiff is *not* entitled to accept a settlement that includes an agreement to keep illegal conduct secret, thus “compounding” the offense. *Id.* at 137–38. See also John Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. REV. 829 (2004).

37. Record, *supra* note 23, at 14–20 (letter from Mary E. Alexander, J.D., M.P.H., President, Association of Trial Lawyers of America (Sept. 24, 2002)).

38. Liptak, *supra* note 2. Judge Anderson’s case-counting discussion exposes a logical flaw in the chilled settlement argument that goes to the significance of a denial of a secrecy request: even a wholesale failure of settlement in the presumably *small* number of cases in which secrecy is sought but denied cannot logically lead to a *large* number of extra trials. Indeed, Professor Miller intimated that

V. DOES SECRECY PROMOTE SETTLEMENT? DOES SUNSHINE “CHILL” SETTLEMENTS?

Despite the fervor of the corporate-side arguments that “sunshine” provisions adopted by courts and legislatures to restrict secrecy will chill settlements, some evidence is emerging from publicly collected and maintained court statistics that undercuts claims that restrictions on secrecy discourage settlement. The evidence can make no claim to scientific rigor, but it strongly suggests that the “chilled-settlements” argument is a red herring used to stem the trend toward greater judicial scrutiny of secrecy requests. One state, Florida, offers an opportunity to test the “chilled-settlement” hypothesis against the actual experience of the courts.

In 1990 the Florida legislature passed the state’s Sunshine in Litigation Act, requiring courts to scrutinize the subject matter of secrecy requests for any hidden “public hazards.”³⁹ If a change in Florida’s regime for handling requests for secrecy would undermine the policy of encouraging settlement, increase the workload of the courts and deprive litigants of resolution of their cases short of trial, that impact should be observable after twelve years *if* reliable data on case filings and resolutions exist. Fortunately, the State of Florida collects, audits, and publishes detailed caseload data for its trial courts.

A look at the statistics collected by the Florida courts through their Summary Reporting System (SRS) suggests several trends that are relevant to the secrecy issue. The trends are observable in Charts A–E, which display filing and disposition data for tort cases⁴⁰ per 1,000 residents⁴¹ of Florida, along with general

the number of secrecy orders granted is small. See Miller, *supra* note 17, at 442 n.69 (citing John F. Rooney, *Issue of Sealed Files, Secrecy in the Courts Won’t Be Swept Under the Rug*, CHI. DAILY L. BULL., Apr. 20, 1991, at 1 (reporting that judges feel that comparatively few sealing orders are issued)).

39. Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West 1987 & Supp. 2004) (prohibiting the concealment of public hazards). For an analysis of how the statute works, see Ray Shaw, *Sunshine in Litigation*, 74 FLA. B. J. 63 (2000).

40. Raw data are provided for tort filings in Table 1 and for tort dispositions in Table 2. See App. C. The office of the State Courts Administrator provided the data on filing and dispositions from the Florida Supreme Court’s Summary Reporting System (SRS) in March 2003. The data is on file with the author. The SRS was developed by the Florida Supreme Court to provide a uniform means of reporting categories of cases, time required in the disposition of cases, and the manner of disposition of cases. The most recent data are available online at the Florida Courts Internet site: <http://www.flcourts.org/pubinfo/highprofile/DelphiFullReport.pdf> (last visited Apr. 2, 2004).

Needless to say, this data does not include cases that are settled without ever being filed in a court, or cases subjected to arbitration or other alternative dispute resolution mechanisms. However, cases filed in court are the only matters to which court-sanctioned secrecy can apply, and whose failure to settle could conceivably increase court caseloads.

41. The per capita calculation is used to correct for changes in population and to put increases in the raw number of tort cases in perspective. For instance, an increase in case filings by 20% over a given period of time might be considered significant by observers. However, if the population of the jurisdiction increases by 25% in the same time period, the *rate* of case filings is actually declining.

tort litigation and population data.⁴²

Chart A shows the gross trend in Florida per capita tort filings and dispositions from July 1987 through June 2000.⁴³ Although the numbers for each year vary, they reflect a clear downward trend beginning well before the enactment of Florida's Sunshine in Litigation Act in 1990 and extending into 2000. Per capita filings declined substantially, from 2.76 per 1,000 residents to 2.23. Dispositions exceeded filings in some years and not in others, but were always close to the number of filings, and show a similar trend from 3.01 to 2.16 per 1,000 residents. (These data also refute dramatically the arguments that a "litigation explosion" in Florida necessitated the adoption of broad tort "reform" measures by the Florida legislature in 1999.⁴⁴)

Of course, per capita case filings were higher for some types of litigation than for others, and the incidence of requests for secrecy are also likely to vary by subject matter, depending on the stakes involved. Charts B through E show the comparable relationships for each of the four case categories used by the SRS to calculate the "All Torts" data in Chart A.⁴⁵ Chart B shows the trends in filings (1.61 to 1.09) and dispositions (1.80 to 1.16) for auto negligence cases, which closely track the trends in All Torts.⁴⁶ In Chart C, "Other Negligence," both trends are flatter (0.93 to 0.79 for filings, 1.07 to 0.79 for dispositions), but both are still noticeably downward. The trends in Chart D, Professional Malpractice, are flatter still (0.15 to 0.14 for filings, 0.08 to 0.11 for dispositions).⁴⁷ In Chart E, the per capita rates for products liability cases fluctuated more over the fourteen-year period represented than did those for the other categories.⁴⁸ Still, product liability cases accounted for only 6.25% of all tort filings over the entire period.⁴⁹

Florida's Sunshine in Litigation Act has been in effect for nearly thirteen years, and there is reason to believe that trial lawyers for both sides have simply accepted it and moved on with business.⁵⁰

42. U.S. CENSUS BUREAU STATISTICAL ABSTRACT OF THE U.S., available at www.census.gov/prod/2001pubs/statab/sec01.pdf (last visited Apr. 2, 2004) (reporting the estimated Florida population on July 1st each year). Florida population data for 1987–2000 is provided in App. C, Table 3.

43. The SRS data from Florida trial courts include four tort categories: professional malpractice, products liability, auto negligence, and "other negligence." When added together, the data should include substantially all tort cases filed and disposed of in a given year. The sums of the four categories are shown in Chart A as "All Torts." See App. B.

44. 1999 Fla. Laws ch. 99–225. For an analysis of the weak justification for the Florida omnibus tort "reform" statute provided by its proponents, see Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397 (2000).

45. See App. B.

46. See App. B.

47. See App. B.

48. See App. B.

49. The calculation is shown on Table 4. See App. C.

50. See Shaw, *supra* note 39, at 63 (observing that "[e]ither Florida's Sunshine in Litigation Statute . . . is not widely known, or it is so clear in its intent and meaning that the courts never get much of an opportunity to interpret it"). See also Dan Christensen, *Federal Judges [in Florida] Ponder*

VI. WHERE ARE THE CHILLED SETTLEMENTS?

Lawyers who support courts and judicial records that are open to the public, and want to keep them that way, need to move beyond hypotheses and partial court statistics to assist policymakers in future decisions on whether to restrict the use of secrecy in the courts. The bar needs to ask—and get answers to—a very straightforward question: *Where are the settlements that have been “chilled” by restrictions on secrecy?* Who knows of a case in which a settlement was offered on condition of the execution of a secrecy agreement of one sort or another, but was withdrawn when either a party or the court rejected the secrecy?

I believe there are far too few such cases to justify maintaining the widespread use of secrecy in court proceedings. Increasingly, lawyers who oppose secret settlements have found opportunities to test this theory directly with judges and practitioners:

- Both in his letter to the federal judges in South Carolina and in his paper for this Symposium, Richard Zitrin, who directs the Center for Applied Legal Ethics at the University of San Francisco School of Law, wrote, “At three judicial seminars at which I have been privileged to speak on this subject . . . I did not find a single judge who believed cases would not settle.”⁵¹
- I had a similar opportunity for inquiry on January 31, 2003, while observing an educational program for the Hawaii judiciary presented by the Roscoe Pound Institute. The audience included over fifty of the state’s seventy-odd judges. After hearing a presentation by Professor Doré and comments by several lawyers and judges,⁵² I asked the assembled judges if they could recall *even one* case in which a defendant requested secrecy but either the plaintiff or the court rejected the request, and as a result of that denial, the case had to go to trial. No judge in the audience

Future of Secret Settlements, MIAMI DAILY BUS. REV., Sept. 12, 2002 (quoting Larry Stewart, a prominent Florida litigator and a former president of ATLA, that he has heard of no settlements that were not achieved because of the effect of Florida’s law: “This is not a big deal anymore.”). Cf. Digges, *supra* note 20:

Even some defense attorneys are a bit philosophical about the trend. “Whether you’re talking about corporate and executive earnings or information derived from lawsuits, we are a much more open society today,” says [Texas Association of Defense Counsel president Tom] Bishop. “And in all candor, what happens is that after a law or regulation is in effect for a period of time, people just start dealing with it.”

51. Richard A. Zitrin, *Why the Laudable South Carolina Court Rules Must be Broadened*, 55 S.C. L. REV. 883, 899 (2004).

52. Among the panelists for the Hawaii program were Chief Judge Joseph F. Anderson Jr. of the United States District Court for the District of South Carolina, and H. Mills Gallivan, President of the South Carolina Defense Trial Attorneys Association.

(which represented hundreds of years of judicial experience) acknowledged having seen *even one* such case.

- I had a similar opportunity for inquiry on July 21, 2003, while speaking at a Continuing Legal Education (CLE) session at the annual convention of the Association of Trial Lawyers of America. The audience consisted of about eighty lawyers of varying degrees of experience. I asked for a show of hands of everyone who had “ever been offered a settlement that was conditioned on agreeing to secrecy.” Approximately seventy hands were raised. I then asked those who had accepted the settlement to lower their hands, but those who had rejected it to keep their hands up. About twenty hands remained up. I then asked, “if you were able to settle the case anyway, please put your hand down. If you couldn’t settle it without secrecy and had to go to trial, please keep your hand up.” Four lawyers (about 5% of the audience) kept their hands up. Because of time constraints, there was no opportunity to inquire further about any other factors that might have played a role in keeping the case from settling.
- During the panel discussion at the end of this Symposium, Stephen G. Morrison, Esq., a defense lawyer in Columbia, South Carolina, and a former president of both the South Carolina Defense Trial Attorneys Association and the national Defense Research Institute, observed that rejections of secrecy demands tied to settlements were increasing. When that happened, he stated, defense lawyers might handle the case differently, for instance paying less compensation in settlement or taking the case to trial. At the question-and-answer session following the panel discussion, I asked him if he had personally handled any cases in which secrecy demands were rejected, and if so, if he had eventually settled the cases despite the rejection. He acknowledged that he had such cases and that he eventually settled them.
- Probably the most valuable source of all on this question, at least as it applies to South Carolina, is Judge Anderson. In his Article for this Symposium, Judge Anderson stated that case statistics for his court, “compiled since the implementation of Local Rule 5.03(c) easily refute” the argument that restrictions on secrecy will be a deterrent to settlements.⁵³ Judges in his court, he wrote, tried two *fewer* cases in the year following implementation of Local Rule 5.03(c) than they had in the previous twelve months, and

53. Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government Enforced Secrecy*, 55 S.C. L. REV. 711, 726 (2004).

new case filings, far from being discouraged (as argued by Professor Miller⁵⁴), had increased by 384 cases over the preceding year.⁵⁵ Judge Anderson also cited a particularly complex case over which he presided in which he was asked to approve a settlement and order the parties not to disclose its terms. He stated that he “declined and the case settled in any event.”⁵⁶

I ask any attorney or judge who knows of a case in which settlement was “chilled” to contact me with details of the litigation.⁵⁷ For obvious reasons, responses from defense-side trial lawyers are welcome, and especially important.⁵⁸ This is the opportunity for lawyers of goodwill from both the plaintiff and defense bar to communicate and resolve this interesting but obstructive question.

VII. FROM SPECULATION TO SOPHISTRY

The lawyers and tort “reform” publicists who have made the “chilled settlements” argument for over a dozen years have cited no empirical evidence to support it, and the empirical evidence that does exist appears to contradict it. I claim that the “chilled settlements” shibboleth is, at bottom, a make-weight argument intended to frighten judges away from restricting secrecy in their courts by appealing to legitimate concerns over caseloads.

In the early 1990s, when the movement to restrict secrecy began and courts were beginning to reconsider the routine granting of secrecy requests, no evidence existed of what would happen in the courts when they did so. The “chilled settlements” argument was essentially a prediction, and had some plausibility. As such, it could be neither proved nor disproved, either by its proponents or its opponents. However, the argument has been used now for over twelve years in attacking sunshine proposals. For the same period of time, at least a few courts

54. Miller, *supra* note 17, at 431–32.

55. Anderson, *supra* note 53, at 726.

56. *Id.* at 718 (citations omitted).

57. I posed the same question when an earlier version of this Article was published in TRIAL magazine in June 2003. That issue of TRIAL was mailed to over 54,000 addresses. To date I have heard from no lawyer or other reader with information about the kind of case I define.

Responses should be written. I will need, at a minimum, the name and telephone number of an attorney or judge involved in the case who will be willing to provide additional information such as the case caption, the court in which it was filed, the docket number, and the date of the last court action. I can be reached by email at jim.rooks@cclfirm.com, or by mail at Center for Constitutional Litigation, P.C., 1050 - 31st Street, N.W., Washington DC 20007.

58. These examples will, to be sure, constitute “anecdotal” evidence of the validity *vel non* of the “chilled settlements” argument. However, federal court rulemakers in recent years have taken note of anecdotal evidence of various litigation phenomena when considering changes to court rules. And, anecdotal evidence produced as a result of this invitation will differ from the anecdotal evidence offered by tort “reform” advocates in that it will include all verifiable anecdotes reported, no matter what their impact on the hypothesis.

have operated under the very regime opposed by business interests. Thus, the “chilled settlements” argument is no longer a mere prediction. It is, impliedly, a statement about both the past and the present. As the years have passed, it has become clearer that there has never been a solid basis for it, if any. In this sense, the “chilled settlements” argument is consistent with numerous other arguments that continue to be made by business entities in support of tort “reform” measures of one sort or another.⁵⁹

Given the hallmark presumption that American courts are open to the public, and the conclusion of several courts that the policy of encouraging settlements is not the end of discussion but is rather one element to consider, it is fair to place the burden of proof of the “chilled settlements” argument on the opponents of sunshine. The corporate side knows whether sunshine measures have chilled settlements, because such agreements are *their* settlements. After more than a decade of argument and observation of numerous antisecrecy measures adopted by court systems and state legislatures, the defense side and its clients have yet to satisfy their burden of proof. I do not believe they ever will.

59. Two of the country’s preeminent social scientists studying jury verdicts wrote the following about tort “reform” rhetoric related to the jury:

Underlying [the tort reformers’] promise for legal reform are the familiar refrains of a litigation explosion, a lawsuit crisis, a liability crisis, an insurance crisis, skyrocketing jury awards, unscrupulous lawyers, and on, and on. This legal system run amok is blamed for everything from the unavailability of essential health care and medicines, the loss of business competitiveness in the world economy and the concomitant effects on economic well-being and jobs, to the closing of public parks and the demise of high school football. These costs and others are presented as a justification for immediate, fundamental reform in the civil justice system.

....

We are skeptical of the efficacy of many proposed and enacted reforms, and we are concerned about the consequences of those measures. Beyond the self-interest of those groups lobbying for reform, we can see little reason for endorsing this reform agenda. We come to this position after spending a number of years collecting and analyzing data on civil jury verdicts from different parts of the country. We—and others—do not find empirical evidence of a system run amok with skyrocketing awards, and so on. Or, we find little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system.

STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* ix–x (Northwestern University Press 1995).

APPENDIX A**ASSOCIATION OF TRIAL LAWYERS OF AMERICA****BOARD OF GOVERNORS****MAY 6, 1989****TAMPA, FLORIDA****RESOLUTION ON PROTECTIVE ORDERS**

WHEREAS, current judicial interpretation often deviates prejudicially from the mandate of the established Rule FRCP 26(c) impeding an efficient, just, and speedy resolution of disputes; and,

WHEREAS, defendants in personal injury actions, as a condition to discovery or settlement, often demand the execution of an agreement ("Secrecy Agreement") or the entrance of an order ("Secrecy Order") which includes provisions, inter alia, (i) prohibiting the dissemination of discovery materials; (ii) precluding the disclosure of the contents of pleadings, motions and discovery requests; (iii) forbidding any communication concerning the terms of the ultimate resolution of a claim; (iv) enjoining plaintiff's counsel's participation in other similar cases; (v) insisting on the return and/or destruction not only of discovery materials but counsel's personal notes; and,

WHEREAS, Secrecy Agreements and Secrecy Orders which ignore the interest of individual victims, the courts and the public have harmful effects including: (i) they make it difficult if not impossible for plaintiff's counsel to fairly and properly prepare the victim's case; (ii) they guarantee an unfair advantage to defense counsel who retain full access to their collaborative mechanism; (iii) they inject collateral issues totally unrelated to the merits of the case; (iv) they greatly increase the time, effort and transactional costs associated with the preparation and presentation of a civil action; (v) they diminish the likelihood that the civil justice system will operate so as to secure the just, speedy and inexpensive determination of every action; (vi) they encourage the suppression and destruction of relevant documents by unscrupulous defendants and other discovery materials; (vii) they have a chilling effect on the right of persons to resort to the courts for redress of their grievances; and,

WHEREAS, the strong policy favoring openness in discovery, and public access to the materials which affect the decisions and the conduct of the civil justice system is based on recognition that the free flow of information is vital to the safety, health and general welfare of the public and to exposing unsafe products and activities for investigation and to the proper operation of the civil justice system, the

governmental regulatory system, and the professional disciplinary system;

NOW, THEREFORE, BE IT RESOLVED that The Association of Trial Lawyers of America:

1) Encourages courts to refuse to enter any Secrecy Order and/or refuse to enforce any Secrecy Agreement in the absence of a finding based on a good cause showing supported by a particularized proof of the following: (a) that the proponent of the Agreement or Order possesses a cognizable legal interest entitled to the protection of secrecy; (b) that the subject materials meet the rigorous legal criteria applicable to the trade secrets or privileged information or otherwise justify the court in exercising its judicial power to restrict the openness of discovery or public access to information; (c) that disclosure of the materials is, in fact, likely to result in a clearly defined and very serious harm.

2) Encourages courts in those rare instances in which a good cause showing supported by particularized proof would seem to justify the entrance of a Secrecy Order, to insist on the adoption of and the enforcement of such specific terms as are necessary and appropriate to protect such competing interests as the public's right to know, the rights of claimants involved in other similar actions, the public's concern for judicial economy, including: (a) provision for limited disclosure to counsel representing plaintiffs in similar cases, to government agencies or to professional disciplinary bodies who agree to be bound by appropriate agreements or court orders against broader dissemination; (b) stringent safeguards surrounding any ordered return or destruction of documents to ensure that full and accurate copies of all documents will be available to the appropriate agencies or to other litigants in the future; (c) stringent safeguards that no Secrecy Agreement or Secrecy Order should prohibit an attorney from representing any other claimant in a similar action against the defendant or others; (d) stringent safeguards to the effect that no Secrecy Agreement or Secrecy Order should prohibit reporting to a governmental agency those facts reasonably necessary to prevent injuries to others.

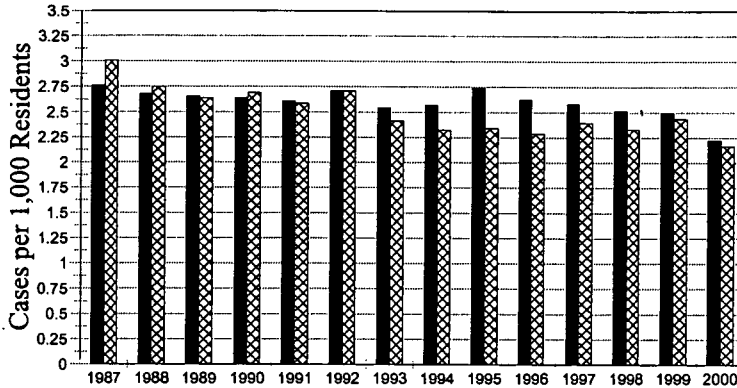
3) Encourages courts to look favorably on and/or to freely grant petitions for modification which seek relief from Secrecy Agreements and/or Secrecy Orders which were entered into or obtained by a procedure which did not conform to the criteria stated in Resolution (1) above and/or which do not contain provisions similar to those contained in Resolution (2) above.

4) Discourages attorneys from agreeing to Secrecy Agreements and encourages attorneys to resist entry of Secrecy Orders that prevent disclosure of documents obtained during discovery to fellow attorneys handling similar cases, or to public agencies charged with enforcing safety.

APPENDIX B

Chart A

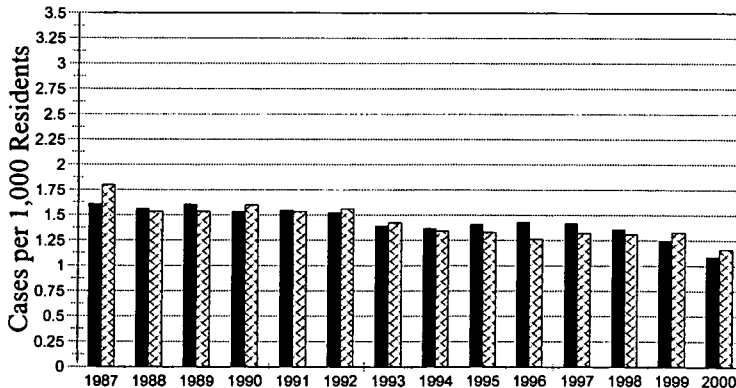
Florida: All Torts



Solid bars are case filings; cross-hatched bars are dispositions.

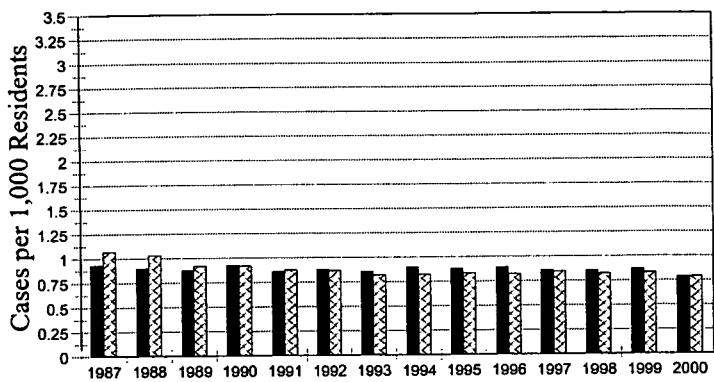
Chart B

Florida: Auto Negligence



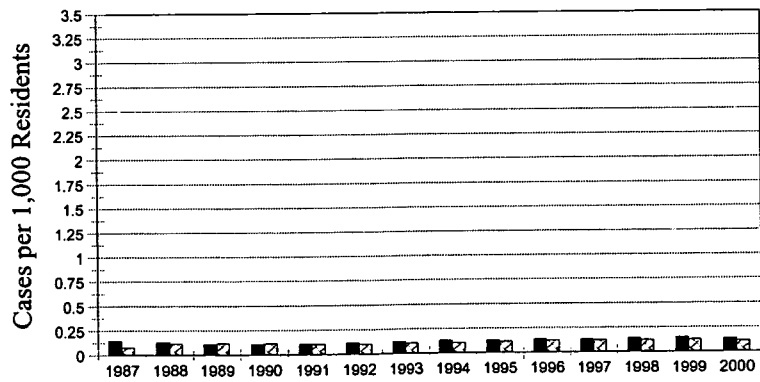
Solid bars are case filings; cross-hatched bars are dispositions

Chart C
Florida: Other Negligence



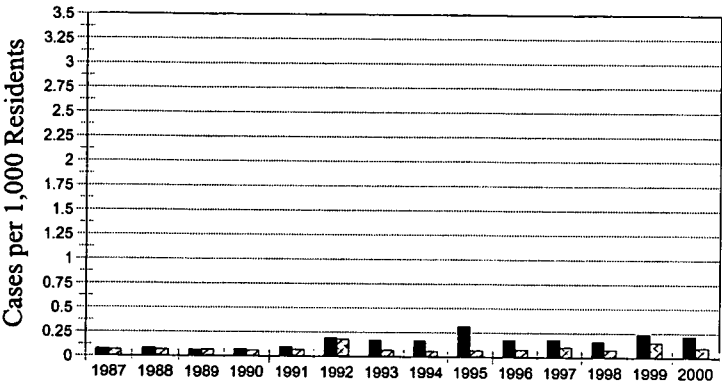
Solid bars are case filings; cross-hatched bars are dispositions.

Chart D
Florida: Professional Malpractice



Solid bars are case filings; cross-hatched bars are dispositions

Chart E
Florida: Products Liability



Solid bars are case filings; cross-hatched bars are dispositions.

APPENDIX C

TABLE 1: TORT CASES FILED IN FLORIDA CIRCUIT COURTS

Year	Professional Malpractice	Products Liability	Auto Negligence	Other Negligence	Totals = "All Torts"
1987	1768	906	19285	11168	33127
1988	1615	1045	19232	11061	32953
1989	1380	856	20277	11057	33570
1990	1400	952	19851	11942	34145
1991	1452	1263	20527	11408	34650
1992	1579	2577	20555	11864	36575
1993	1652	2300	19107	11750	34809
1994	1828	2332	19112	12601	35873
1995	1873	4507	19991	12494	38865
1996	1931	2526	20625	12828	37910
1997	1916	2614	20799	12611	37940
1998	2098	2435	20243	12720	37496
1999	2248	3556	18793	13137	37734
2000	2166	3468	17362	12610	35606

TABLE 2: TORT CASES CONCLUDED IN FLORIDA CIRCUIT COURTS

Year	Professional Malpractice	Products Liability	Auto Negligence	Other Negligence	Totals = "All Torts"
1987	906	770	21580	12803	36059
1988	1398	813	18915	12701	33827
1989	1495	815	19395	11614	33319
1990	1495	756	20669	11883	34803
1991	1405	950	20364	11630	34349
1992	1380	2384	21074	11729	36567
1993	1467	913	19553	11196	33129
1994	1491	768	18713	11483	32455
1995	1631	971	18852	11778	33232
1996	1767	1103	18218	11892	32980
1997	1796	1492	19431	12399	35118
1998	1836	1123	19518	12268	34745
1999	1889	2290	20054	12576	36809
2000	1790	1584	18581	12600	34555

TABLE 3: FLORIDA POPULATION

YEAR	POPULATION
1987	11,997,000
1988	12,306,000
1989	12,638,000
1990	12,938,000
1991	13,289,000
1992	13,505,000
1993	13,714,000
1994	13,962,000
1995	14,185,000
1996	14,427,000
1997	14,683,000
1998	14,908,000
1999	15,111,000
2000	15,982,000

NOTE: Population figures represent the Florida population on July 1 of each year, as published in the Statistical Abstract of the United States, published by the U.S. Census Bureau, www.census.gov/prod/www/statistical-abstract-us.html.

TABLE 4: FILED PRODUCTS CASES AS PERCENTAGE OF ALL TORT CASES FILED

YEAR	PRODUCTS CASES FILED	ALL TORT CASES FILED
1987	906	33127
1988	1045	32953
1989	856	33570
1990	952	34145
1991	1263	34650
1992	2577	36575
1993	2300	34809
1994	2332	35873
1995	4507	38865
1996	2526	37910
1997	2614	37940
1998	2435	37496
1999	3556	37734
2000	3468	35606
TOTALS	31337	501253

(Products Filings / All Filings = 31337 / 501253 = 0.0625173 = 6.25 percent)