

# South Carolina Law Review

---

Volume 55  
Issue 4 *SYMPOSIUM: COURT-ENFORCED  
SECRECY*

---

Article 11

Summer 2004

## The Laudable South Carolina Court Rules Must Be Broadened

Richard A. Zitrin  
*University of San Francisco School of Law*

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Zitrin, Richard A. (2004) "The Laudable South Carolina Court Rules Must Be Broadened," *South Carolina Law Review*. Vol. 55 : Iss. 4 , Article 11.

Available at: <https://scholarcommons.sc.edu/sclr/vol55/iss4/11>

This Symposium Paper is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# THE LAUDABLE SOUTH CAROLINA COURT RULES MUST BE BROADENED

RICHARD A. ZITRIN\*

I. INTRODUCTION .....	884
II. ABSENT STRONGER RULES, SECRECY WILL CONTINUE TO ENDANGER THE PUBLIC .....	887
III. EFFORTS AT OPENNESS IN STATE AND FEDERAL ARENAS .....	889
A. <i>State Attempts at Preventing Secret Settlements</i> .....	890
1. <i>Florida</i> .....	891
2. <i>Texas</i> .....	892
3. <i>Arkansas</i> .....	893
4. <i>Washington</i> .....	893
5. <i>Louisiana</i> .....	894
B. <i>Federal Attempts at Preventing Secret Settlements</i> .....	895
IV. MORE CAN AND SHOULD BE DONE IN SOUTH CAROLINA .....	897
A. <i>Practical Limitations that Courts Face</i> .....	897
B. <i>Prohibitions Against Unfiled Discovery</i> .....	899
C. <i>Protective Orders and Presumptions of Openness</i> .....	901
D. <i>Strengthening the Rules of Professional Ethics</i> .....	904
V. CONCLUSION .....	905

---

\* Director, Center for Applied Legal Ethics and Adjunct Professor of Law, University of San Francisco School of Law; Adjunct Professor of Law, University of California, Hastings College of the Law; partner, Zitrin & Mastromonaco, L.L.P., San Francisco, California. I wish to thank Jeffrey S. Lyons (J.D., Univ. of San Francisco, 2003) for his able and determined assistance on this paper. I am also grateful for the assistance of Jim Rooks, Senior Policy Research Counsel of the Center for Constitutional Litigation, P.C., who over the last several years has been the repository of the most thorough and up-to-date information about the status of the law of secret settlements across the country. Finally, I thank Hofstra Law School and the Roscoe Pound Institute for giving me the opportunity to express my ideas on court secrecy over the last five years. I acknowledge freely borrowing from a series of my earlier articles on this subject, especially the following: Richard A. Zitrin, *The Judicial Function: Justice between the Parties, or a Broader Public Interest?* 32 HOFSTRA L. REV. (forthcoming 2004) (presented at Hofstra University, Sept. 2003); Richard A. Zitrin, *Why Lawyers Keep Secrets About Public Harm*, in THE PROFESSIONAL LAWYER (American Bar Ass'n 2001); Richard A. Zitrin, *What Judges Can and Should Do About Secrecy in the Courts*, Roscoe Pound Institute, July 2000 (on file with author). Many of the ideas expressed here were originally explored in Richard Zitrin & Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER 183-208 (Ballantine 1999). Finally, in the interests of full disclosure, I consulted on the *60 Minutes II* piece cited in this article and have served as a consultant to Assembly member Darrell Steinberg of California, although not on the legislation discussed and quoted in this article. See *infra* notes 25, 67, 74 and accompanying text.

## I. INTRODUCTION

On November 1, 2002, the United States District Court for the District of South Carolina enacted its amended Rule 5.03.<sup>1</sup> New subsection (C) of this local rule, as amended, prevents settlement agreements filed with the court from being placed under seal pursuant to the preexisting rule's requirements. By including this language, South Carolina's federal judges have taken a courageous first step by moving to ban secret settlements in their courts. They should be accorded credit not just for proposing the rule, but also for the forthright comments of Chief Judge Joseph Anderson Jr.,<sup>2</sup> and for raising the consciousness of other courts, attorneys, and the press on this important issue.

As helpful as the new rule is, if it is to accomplish its goal of preventing the court from being involved in the "secretizing" of information, it unfortunately does not go far enough. First, the rule excludes the vast majority of settlements—all those not filed with the court. Second, it remains permissible to "restrict access to documents . . . not filed with the Court."<sup>3</sup> This, of course, includes the vast majority of discovery. Third, Local Rule 26.08,<sup>4</sup> referred to in Rule 5.03, both excludes unfiled discovery and allows a procedure whereby "protective agreements"—as opposed to the "settlement agreements" governed by Rule 5.03(C)—may be secretized by following the procedural hurdles contained in Rule

1. See D.S.C. LOCAL R. 5.03, which states in pertinent part (new language in *italics*):

5.03 FILING DOCUMENTS UNDER SEAL. Absent a requirement to seal in the governing rule, statute, or order, any party seeking to file documents under seal shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request or attempt to seal filed documents. Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court. See Local Civil Rule 26.08.

....

(C) *No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule.*

2. See Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1, (quoting Judge Anderson, in a letter to his colleagues:

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.).

3. D.S.C. LOCAL R. 5.03.

4. D.S.C. LOCAL R. 26.08, Protective Orders And Agreements:

There is no requirement for prior judicial approval of protective agreements intended to limit access to and use of materials gained in discovery. Protective agreements or orders which address the filing of documents with the Court shall, however, require compliance with Local Civil Rule 5.03, or such other procedures as the Court directs, before any document is filed under seal. Discovery materials protected by a court order issued pursuant to Fed. R. Civ. P. 26(c) shall not be filed without compliance with Local Civil Rule 5.03 unless the order provides other procedures to satisfy the requirements of governing case law. See Local Civil Rule 5.03.

5.03(A).<sup>5</sup> While those hurdles include the requirement that the moving party explain the need for “less drastic alternatives to sealing,” in the case of “protective agreements,”—i.e., those presumably stipulated to by the parties—careful court scrutiny is neither mandated nor, in my view, likely.

This Article focuses primarily on the district court rule. In most respects, the same analysis and argument also apply to the similar but somewhat enigmatic new South Carolina Rule of Civil Procedure 41.1.<sup>6</sup> I would be remiss if I did not briefly address this rule, especially the most interesting sentence: “This Rule does not apply to private settlement agreements and shall not be interpreted as approving confidentiality provisions in private settlement agreements where the parties agree to have the matter voluntarily dismissed under Rule 41(a)(1), SCRCF, without court involvement.”<sup>7</sup> The first half of this enigmatic sentence is clear: As with the local federal rule, private agreements to “secretize” settlements are not covered. This would appear to include all agreements to return or destroy unfiled discovery or other information and any agreement not presented to the court. The second portion implies that the court does not want to be seen as approving secrecy *sub silentio*, but apparently that is exactly what will happen when the court is not directly involved.

However, this is not necessarily so, according to Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina.<sup>8</sup> In her remarks to a University of South Carolina School of Law conference in which this paper was also presented, Justice Toal made clear that the court intended to do “more than provid[e] a football field” for opposing combatants.<sup>9</sup> She insisted that the phrase “not . . . approving

---

5. D.S.C. LOCAL R. 5.03(A) provides:

A party seeking to file documents under seal shall file and serve a “Motion to Seal” accompanied by a memorandum. See Local Civil Rule 7.04. The memorandum shall: (1) identify, with specificity, the documents or portions thereof for which sealing is requested; (2) state the reasons why sealing is necessary; (3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; and (4) address the factors governing sealing of documents reflected in controlling case law. A non-confidential descriptive index of the documents at issue shall be attached to the motion.

A separately sealed attachment labeled “Confidential Information to be Submitted to Court in Connection with Motion to Seal” shall be submitted with the motion. This attachment shall contain the documents at issue for the Court’s in camera review and shall not be filed. The Court’s docket shall reflect that the motion and memorandum were filed and were supported by a sealed attachment submitted for in camera review.

(citations omitted).

6. S.C. R. CIV. P. 41.1 (adopted May 5, 2003).

7. S.C. R. CIV. P. 41.1(a).

8. Jean Hoefer Toal, *The New Rule of Secret Settlements in the South Carolina Justice System*, Address at the Symposium, *Court-Enforced Secrecy: Formation, Debate and Application of South Carolina’s New Secrecy Rules* (Oct. 24, 2003) (video on file with the South Carolina Law Review) [hereinafter Toal Remarks].

9. *Id.*

confidentiality”<sup>10</sup> meant that the courts would apply South Carolina’s constitutional presumption of openness and referred to a 1991 ruling that allowed a third party to intervene to object to a protective order sealing a file.<sup>11</sup> Chief Justice Toal submitted that when Rule 41.1 was read in light of this case, a secret settlement agreement not presented to the court might well be found unenforceable.<sup>12</sup>

Like district court Rule 5.03(A), Rule 41.1(b) sets up a series of hurdles for sealing documents.<sup>13</sup> These hurdles specifically refer to “the public health and safety.”<sup>14</sup> As in the federal district court rule, however, there is no allowance for scrutinizing agreements to seal or to submit to a protective order. Finally, Rule 41.1(c) contains a series of hurdles that, if met, would exempt even the settlement agreement from being open, although it understandably limits openness regarding finances in family law matters.

Despite these problems, awareness of the secrecy issues by South Carolina judges—including Chief Justice Toal and especially, given his public remarks and correspondence, Chief Judge Anderson—is a marked departure from what I learned from my discussions with trial court and appellate judges in the not-too-distant past. At the Roscoe Pound Institute Forum in July, 2000,<sup>15</sup> which focused on secret settlements and occurred not long before the Firestone tire story broke and attracted substantial attention to the issue,<sup>16</sup> many members of the bench were surprised to hear of even the existence of a secrecy and public-safety problem. In our workshop discussions, it quickly became clear that secrecy, usually lawyer-driven and not requiring court approval, was simply flying below the judges’ radar.

This lack of awareness is hardly surprising. There is no doubt that the majority of information exchanged in litigation is in the form of unfiled discovery—discovery that is handled entirely by lawyers and outside the view of the court. When the settlement of a case includes secretizing this discovery, the courts—which see neither the settlement agreement and release, nor the secrecy provision, nor the agreement to return unfiled discovery—are unaware of what truly happened. Even stipulations for protective orders, unless accompanied by rules of court with strong presumptions of openness and mandated court scrutiny, are not likely to alert the bench.

This secretization is accomplished in a forum provided and paid for by the public. While it may occur outside the view of the court, it is not outside the court’s purview, since it almost always occurs in connection with a lawsuit filed in the

10. S.C. R. CIV. P. 41.1(a).

11. *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991). This case was included in the materials Chief Justice Toal provided at the Court-Enforced Secrecy Symposium.

12. Toal Remarks, *supra* note 8.

13. D.S.C. LOCAL R. 5.03(A), *supra* note 1; S.C. R. CIV. P. 41.1(b).

14. S.C. R. CIV. P. 41.1(b).

15. *The Roscoe Pound Institute Annual Forum for State Court Judges*, Chicago (July 2000).

16. *See, e.g., Richmond Eustis, Firestone Fails to Keep Ga. Wreck File Sealed*, FULTON COUNTY DAILY REP., Sept. 29, 2000 (reporting on sealed court documents arising out of auto accidents caused by defective tires); James V. Grimaldi & Carrie Johnson, *Factory Linked to Bad Tires: Data Point to Plant in North Carolina*, WASH. POST, Sept. 28, 2000, at E1.

court's venue. There is no question that courts thus have inherent power to regulate the conduct of the parties and their lawyers in matters filed in those courts and may prevent secrecy agreements regardless of the circumstances in which they occur.

The purview of this Article is those secret settlements, stipulations for protective orders, agreements to return discovery and secretize other information, and similar devices that result in hiding information from the public that concerns a substantial danger to the public health or safety. One might argue both sides of the question of whether secrecy should be severely curtailed in ordinary cases; I do not address that issue. Rather, I submit that in those cases where secret settlements conceal information which, if known, would be reasonably likely to protect the public or even save lives, courts as a policy matter should create a broad presumption of openness, put teeth in rules that cover unfiled discovery and other documents, prevent stipulations to "protect" disclosure of information about public dangers, and through these and other means, ensure that the interests of public health and safety will trump any arguable privacy interests of the litigants.

Local Rule 5.03(C) is a good start. But it is just that—a start. This Article commends that honorable court to finish the job it began and provide further protection to the public it wishes to serve.

## II. ABSENT STRONGER RULES, SECRECY WILL CONTINUE TO ENDANGER THE PUBLIC

To clarify the terminology used throughout this paper, the term "secret settlements" refers to agreements between plaintiffs and defense lawyers to keep information about a known harm—whether it is a defective product, toxic waste, or a molesting soccer coach—from the public. The plaintiff gets a large (sealed) settlement; the defendant gets silence; the public gets shortchanged. I do not object to keeping the amount of the settlement secret; there are valid reasons for doing this. Rather, my concern is with parties' private settlement agreements that "secretize" information about the claimed harm, usually obtained through independent investigation or open discovery.<sup>17</sup>

Chief Judge Anderson was right when he wrote, "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 . . . ." <sup>18</sup> But many more lives were and are lost because parties and their attorneys continue to put their interests ahead of public safety and sign secrecy agreements, most of which do not require court approval.

After the Firestone story broke, most reports estimated that shredding tires had

---

17. The focus on public health and safety rather than monetary figures is narrower than that covered by some rules, including both South Carolina rules. While a broader scope may be wise, allowing secrecy to cover settlement amounts and other financial information affects a non-substantive issue and obviates the need for exceptions to rules, such as that contemplated by S.C. R. Civ. P. 41.1(c).

18. See Liptak, *supra* note 2, at A1.

caused the deaths of over 100 innocent victims and resulted in scores of cases settled secretly. Firestone was not the first such story, nor the last, but the danger *du jour* in a series of horror stories involving secrecy. However, its timing brought the issue of secret settlements 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 after many years and hundreds of secret settlements.<sup>19</sup> 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, and disclosures about Zomax came "only after a scientist experienced a potentially fatal allergic reaction and decided to investigate."<sup>20</sup> By the time Zomax was taken off the market, "it was reportedly responsible for a dozen deaths and over four hundred severe allergic reactions, almost all of which were kept quiet through secret settlements worked out by McNeil, the drug's manufacturer."<sup>21</sup> 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.<sup>22</sup>

In 1993, General Motors (GM) sued Ralph Nader and the Center for Auto Safety for defamation in allegations concerning GM pickup trucks with side-mounted gas tanks. Meanwhile, other GM lawyers were quietly settling exploding side-mounted gas tank cases, and had been settling them 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 and the latest 23 years later, just before the records were turned over.<sup>23</sup>

19. See, e.g., STEVEN D. LYDENBERG ET AL., *RATING AMERICA'S CORPORATE CONSCIENCE: A PROVOCATIVE GUIDE TO THE COMPANIES BEHIND THE PRODUCTS YOU BUY EVERY DAY* 234–35 (Addison-Wesley 1986) (noting A.H. Robins Company's behavior during the Dalkon Shield litigation); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* 197–98 (Pantheon 1985) (same); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991) (chronicling the adoption and provisions of a Texas Rule of Civil Procedure dictating openness in civil proceedings); Bob Gibbins, *Secrecy Versus Safety: Restoring the Balance*, 77 A.B.A. J. 74 (Dec. 1991) (detailing uses of secrecy agreements and efforts to push for openness in court proceedings).

20. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 187 (Ballantine 1999).

21. *Id.* at 188.

22. See MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2002) (providing that attorneys may not participate in agreements that restrict the right of a lawyer to practice after termination of a relationship).

23. See American Judicature Society, Transcript, *Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?*, 78 JUDICATURE 304 (1995); Stephen Gillers, *Court Sanctioned Secrets Can Kill*, L.A. TIMES, May 14, 2003, at B13; Catherine Yang, *A Disturbing Trend Toward Secrecy*, BUS. WK., Oct. 2, 1995, at 60. Clarence Ditlow, director of the Center for Auto Safety in 1997 and 1998, provided the author with documentation of cases alleging GM truck fires. See

It is 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 a resident with Down's Syndrome; the administrator privately admitted to molesting over a dozen others.<sup>24</sup> 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 the Catholic Church had settled in the previous decade—almost all of them secretly.<sup>25</sup> Beginning in January 2002, *The Boston Globe* reported almost continuously throughout the year that the Catholic Archdiocese of Boston had been confidentially settling cases involving priests that had sexually molested children and then reassigning the offending priests to unsuspecting parishioners elsewhere.<sup>26</sup>

In most of these cases, court approval of the settlements was neither required nor sought. Such agreements settling lawsuits often involve returning all documents obtained through the legal discovery process. The evidence shows that secret settlements and unfiled discovery can contain information that will save lives and potentially prevent the recurrence of the incident that harmed the plaintiff. But current rules allow the "smoking gun," whether it concerns a tire, toxic dump, or pedophile, to be buried while more people are hurt. The courts are still involved because they oversee the discovery process. Without court rules that provide for open settlements, open discovery fights, and stricter rules on obtaining protective orders, these private agreements will remain off trial courts' radar screens, posing a danger to public health and safety.

### III. EFFORTS AT OPENNESS IN STATE AND FEDERAL ARENAS

In the last five years, secrecy in settlements has become an increasingly common subject of articles in the popular legal press and more scholarly forums.<sup>27</sup>

---

Phillips v. GMC, 126 F. Supp. 2d 1328 (D. Mont. 2001) (discussing the total amounts of recovery in the GM cases), vacated and remanded Phillips v. GMC, 289 F.3d 1117 (9th Cir. 2002).

24. *Home for Disabled to Pay Undisclosed Settlement in Abuse Case*, LEGAL INTELLIGENCER, June 10, 1994, at 7.

25. Harvey Berkman, *Boy Says Abuse; Priest, Ex-Nun Say Slander*, CHI. LAW., January 1994).

26. See, e.g., Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue out of Public Eye*, BOSTON GLOBE, Jan. 31, 2002, at A1 (noting efforts of Catholic Church to settle sexual abuse cases involving priests).

27. See Laurie K. Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (surveying the issue of secrecy from an ethics perspective); see, e.g., ZITRIN & LANGFORD, *supra* note 20; Martha Neil, *Confidential Settlements Scrutinized*, A.B.A. J., July 2002, at 20; Rebecca A. Womeldorf & William S.D. Cravens, *More Sunshine Laws Proposed*, NAT'L L.J., Nov. 12, 2001, at B14; Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 INST. FOR STUDY LEGAL ETHICS 115 (1999); Jill Hertz Blaustein, *Sealed But Not Secret*, LITIGATION NEWS, July 2002, at 2; Diana Digges, *Confidential Settlements Under Fire in 13 States*, LAWYER'S WEEKLY USA, Apr. 30, 2001, at B1; Frances Komoroske, *Should You Keep Settlements Secret?*, TRIAL, June 1999, at 55; Kevin Livingston, *Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists Who Want to Ban Secret Settlements*, THE RECORDER (San Francisco), May 8, 2001; James E. Rooks, Jr., *Let the Sun Shine In*, TRIAL, June 2003, at 18; Richard A. Zitrin & Carol M. Langford, *It Is Time to Question How Our Legal*



In the last three years, the general media has increasingly addressed the issue including a front page article in the *Los Angeles Times*, an editorial in *USA Today*, a segment on *60 Minutes II*, and numerous other articles.<sup>28</sup> This synergy has included a greater focus on the issue by many state courts and legislatures. But it was the actions of five states in the early to mid-1990s that led the way.

#### A. State Attempts at Preventing Secret Settlements

Many states have attempted to mitigate the harm of secret settlements. About a dozen states have endeavored to address the issue, either by court rule or statute, with varying degrees of success.<sup>29</sup> Unfortunately, none of the states' rules directly address the issue of unfiled settlements, and only Texas directly addresses unfiled discovery.<sup>30</sup> Moreover, among the states that have examined the issue of secret settlements that present a hazard to the public, only five, before South Carolina, had succeeded in passing regulations governing such conduct.

Over half of the states (29) have some kind of statute or rule regarding the sealing of court records in civil cases. According to a federal study, eight states prevent secretizing settlements when a public entity is a party.<sup>31</sup> A recent Federal Judicial Center study on secret settlement agreements reported the status of various states' rules and statutes concerning the sealing of court records in civil matters between private parties. Their findings show:

Five states explicitly require good cause to seal a court document (Delaware, Michigan, New York, Tennessee, Vermont). Four

*System Can Afford to Allow Secret Settlements*, VOIR DIRE, Spring 2000, at 12; Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, PROF. LAW., Summer 2001, at 1; Christine Hughes, *Confidential Settlements: A White Paper*, New England Legal Foundation, April 2003 (on file with the author).

28. See Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly? Judicial Orders Protecting Companies Kept Tire Case Quiet*, USA Today, Oct. 16, 2000, at B1; Editorial, *Lethal Secrets*, L.A. TIMES, Sept. 12, 2000, at B8; Davan Maharaj, *Goodyear Tire Fatalities Echo Firestone's Troubles*, L.A. TIMES, Oct. 25, 2000, at A1; Editorial, *Sealed Court Records Kept Tire Problems Hidden*, USA TODAY, Sept. 19, 2000, at 16A; *60 Minutes II: Hush Money?* (CBS television broadcast, Oct. 10, 2000). See, e.g., Eustis, *supra* note 16; Gillers, *supra* note 23; Grimaldi & Johnson, *supra* note 16; Ben Kelly, *Secret Court Settlements Prevent Needed Warnings*, BOSTON HERALD, Sept. 16, 2002, at 18; Eileen McNamara, *Courts Must End Secrecy*, BOSTON GLOBE, Feb. 27, 2002, at B1; Ray Shaw, *Sunshine in Litigation*, FLA. B.J., Jan. 2000, at 63; Roy Simon, *Some Secrets Lawyers Shouldn't Keep*, NEWSDAY, Aug. 16, 2001, at A39; Richard A. Zitrin, *Time to End the Secrecy*, S.F. CHRON., Aug. 21, 2001, at A17.

29. See, e.g., ARK. CODE ANN. § 16-55-122 (Lexis Supp. 2003); FLA. STAT. ANN. § 69.081 (West Supp. 2004); MICH. ADMIN. CODE r. 8.119(f) (2002); LA. CODE CIV. PRAC. ANN. art. 1426 (West Supp. 2004); TEX. R. CIV. P. 76a; WASH. REV. CODE § 4.24.611 (West Supp. 2004). For a current overview of the many states that have addressed this issue, see Hughes, *supra* note 27, at 21-42.

30. See TEX. R. CIV. P. 76a(2)(c).

31. See Federal Judicial Center, *Sealed Settlement Agreements in Federal District Court, May 2003 Progress Report* (2003) (on file with author) (reporting that eight states—Arkansas, Colorado, Florida, Iowa, Nevada, North Carolina, Rhode Island, and Texas—proscribe as against public policy sealed or confidential settlement agreements when there is a public entity party).

states require a finding that privacy interests outweigh public interests (California, Idaho, Indiana, North Carolina); two states require that the privacy interests clearly outweigh public interests (Georgia, Utah); and one state requires the privacy interest to be compelling (Utah).

Seven states permit sealing only if it is the least restrictive means available to serve the privacy interests (California, Florida, Idaho, Michigan, New Hampshire, North Carolina, Texas). California also requires that sealing be narrowly tailored to the privacy interests and only necessary portions of the documents be sealed, to the extent feasible.<sup>32</sup>

This report reveals that few states have legislation or court rules that address the sealing of settlement agreements. Fewer still have rules or legislation that directly address the issue of sealing settlements or court records that may contain information that presents a public harm. Only Florida, Texas, Arkansas, Washington, and Louisiana have such regulations. Unfortunately, the application of these rules and statutes has been undercut, sometimes severely, either by subsequent court decisions interpreting the regulation or by ambiguous draftsmanship. It is valuable to look briefly at the effects of these rules in each of the five states to examine their strengths and shortcomings. I address each in chronological order.

### 1. *Florida*

In 1990, Florida was the first state to significantly regulate secret settlements when the legislature approved the “Sunshine in Litigation Act.” The relevant part of this statute provides:

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.<sup>33</sup>

This statute is an excellent trailblazer and appears to void portions of settlement agreements that secretize information about public hazards. However, the statute’s effectiveness and how broadly it has been interpreted is not clear. First, and perhaps most significantly, although the statute sounds broad enough to apply to unfiled settlements or even to agreements to secretize discovery, no court has so ruled. Second, it appears that nothing in the statute prevents stipulations for

32. *Id.* at 5.

33. FLA. STAT. ANN. § 69.081(4) (West Supp. 2004).

protective orders entered between the parties that seal discovery, since they do not seem to be an “agreement or contract” within the meaning of the statute. Third, the definition of “public hazard” is still unclear. According to one appellate case, “public hazard” does not include economic fraud,<sup>34</sup> but what is included has not been concretely defined.

Finally, the statute may now require a court to determine whether there is a “public hazard” before that issue is established in litigation. An appellate court, citing constitutional procedural due process, held that summary resolution of this issue is improper and required the trial court to hold an evidentiary hearing on the question.<sup>35</sup> Since the statute, similar to the rules in Louisiana and Texas,<sup>36</sup> gives standing to “[a]ny substantially affected person, including but not limited to representatives of news media,”<sup>37</sup> to insist on openness, a Florida trial court could find itself deciding whether a public hazard exists before the litigants have exchanged discovery on the issue, if the issue is joined by a third party at an early stage.

## 2. *Texas*

In 1990, the Texas Supreme Court, by a 4-3 vote, enacted a rule of civil procedure providing that court records are presumptively open.<sup>38</sup> Rule 76a states in relevant part:

[C]ourt records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

- (a) a specific serious and substantial interest which clearly outweighs:
  - (1) this presumption of openness;
  - (2) any probable adverse effect that sealing will have upon the general public health or safety;
- (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.<sup>39</sup>

---

34. *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000). *See also* *State Farm Fire & Cas. Co. v. Sosnowski*, 830 So. 2d 886, 887–88 (Fla. Dist. Ct. App. 2002) (stating that financial practices resulting in economic fraud do not constitute a “public hazard” under Florida law).

35. *See* *DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226, 228 (Fla. Dist. Ct. App. 1995).

36. LA. CODE CIV. PROC. ANN. art. 1426 (West Supp. 2004); TEX. R. CIV. P. 76a.

37. FLA. STAT. ANN. § 69.081(6) (West Supp. 2004).

38. TEX. R. CIV. P. 76a.

39. TEX. R. CIV. P. 76a(1).

Rule 76a also provides for notice and hearing,<sup>40</sup> thus avoiding the procedural due process problem of the Florida statute.<sup>41</sup> Significantly, the Texas rule defines “court records” to include unfiled discovery and settlement agreements “that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety.”<sup>42</sup> By creating a presumption of openness where the public has a health or safety concern and by including filed and unfiled information, this excellent rule eliminates both secret settlements and the secretizing of information that could reveal a continuing harm to the public.

Unfortunately, subsequent court decisions have severely undermined this rule. In 1998, despite the rule’s clear language, the Texas Supreme Court interpreted Rule 76a to not include unfiled discovery within the definition of “court records.”<sup>43</sup> A 1999 case with a per curiam opinion is accompanied by three separate opinions from judges badly divided on the issue of what constituted court records.<sup>44</sup> Consequently, Rule 76a remains substantially weakened by judicial fiat.

### 3. *Arkansas*

Arkansas passed legislation in 1991 that relates to the disclosure of information that presents an “environmental hazard,” defining that term broadly to include conditions that “affect land, air, or water in a way that may cause harm to the property or person of someone other than the contracting parties to a lawsuit settlement contract . . . .”<sup>45</sup> However, the Arkansas statute does not define who has standing to sue, does not specifically affect the court’s ability to seal settlements, and does not appear to include unfiled information.<sup>46</sup> There are no appellate decisions interpreting this statute, so it is still unclear how effective it has been since its passage.

### 4. *Washington*

Washington enacted a statute in 1994 that presumes openness in settlement agreements.<sup>47</sup> It states, “Confidentiality provisions may be entered into or ordered or enforced by the court only if the court finds, based on the evidence, that the confidentiality provision is in the public interest.”<sup>48</sup> The statute defines a confidentiality provision as:

---

40. TEX. R. CIV. P. 76a(3)–(4).

41. FLA. STAT. ANN. § 69.081.

42. TEX. R. CIV. P. 76a(2)(b)–(c).

43. *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 523, (Tex. 1998). *See also In re Cont. Gen. Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998) (noting that the court disagrees with premise that “all discoverable trade secrets will likely constitute ‘court records’ under Rule 76a”). The fact that both these cases involved tire companies is of at least passing interest.

44. *In re Dallas Morning News, Inc.*, 10 S.W.3d 298 (Tex. 1999).

45. ARK. CODE ANN. § 16-55-122 (Lexis Supp. 2003).

46. *Id.*

47. WASH. REV. CODE § 4.24.611 (West Supp. 2004).

48. *Id.* § 4.24.611(4)(b).

[A]ny [term or] terms in a court order or a private agreement settling, concluding, or terminating a product liability/hazardous substance claim, that limit the possession, disclosure, or dissemination of information about an alleged hazard to the public, whether those terms are integrated in the order or private agreement or written separately.<sup>49</sup>

The presumption of openness in the Washington statute requires the court to determine not only whether the information in the secrecy provision presents a hazard to the public, but also whether the provision in question is in the public's interest. The court is invited to balance the interest in protecting trade and commercial secrets against the public's right to understand the risks presented by the alleged hazard.

While the Washington statute on its face discusses the limits of court orders, secrecy provisions during pending litigation are covered by procedures for issuing a protective order, while secrecy provisions terminating litigation—usually settlement agreements—are controlled by this statute. Thus, the statute does not address protective orders,<sup>50</sup> leaving a gaping hole in the antisecrecy process by allowing stipulations for protective orders to proceed unfettered by anything other than routine court ratification.

Moreover, the Washington statute is narrowly limited to products liability and hazardous substance cases.<sup>51</sup> This excludes many public dangers, such as serial molesters, and provides ammunition for others with cases on the cusp of the covered categories to argue that the statute did not intend to include their cases. The solution to this last problem is not difficult: Follow Texas' lead by emphasizing the danger to the public, rather than the type of act or circumstance that causes that danger.<sup>52</sup>

### 5. *Louisiana*

Louisiana addressed secret settlements in 1995 with a rule of civil procedure. The rule's language is very close to the Florida Sunshine in Litigation Act.<sup>53</sup> There are no appellate decisions addressing Louisiana's legislation. The rule states in relevant part:

Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information relating to a public hazard, or any information which may be useful to members of the public in protecting themselves from injury that

49. *Id.* § 4.24.611(1)(b).

50. *Id.* § 4.42.611(4)(a).

51. *Id.* § 4.42.611(1)(a).

52. See *supra* text accompanying notes 38–39.

53. FLA. STAT. ANN. § 69.081(4) (West Supp. 2004).

might result from a public hazard is null and shall be void and unenforceable as contrary to public policy, unless such information is a trade secret or other confidential research, development, or commercial information.<sup>54</sup>

The Louisiana rule also gives standing to substantially affected persons and media representatives.<sup>55</sup> Thus, a Louisiana court—as in Florida—could potentially find itself deciding whether a public hazard exists before the litigants have exchanged discovery on the issue. As with Florida’s legislation, the Louisiana rule appears to apply to unfiled settlement agreements and may even extend to agreements relating to unfiled discovery, although no court has determined these issues. As in Florida, the term “public hazard” is unclear. Moreover, it appears that nothing prevents stipulations for protective orders agreed to by the parties; the last phrase quoted above seems to invite attempts to stipulate broadly to protective orders.

Each of the states previously described have attempted to address secret settlements and their detrimental effect on the public. While they have had varying degrees of success, they have started a trend that has expanded to legislatures and courts across the country. Indeed, in 2003, this trend influenced—directly or indirectly—the South Carolina District Court to prevent settlements filed with the court from being sealed under its Local Rule 5.03.<sup>56</sup> However, opponents of openness in litigation are fighting the application of these rules through appellate court litigation, and by combing for loopholes in ambiguous language. Such attacks on what is sound public policy will only be prevented by even stronger rules of court.

### *B. Federal Attempts at Preventing Secret Settlements*

Sunshine in litigation has made less progress at the federal level. In 1991, when Florida and Texas were passing their sunshine in litigation reforms, efforts to implement federal guidelines controlling the sealing of court documents and affecting the confidentiality of government settlements were defeated in Congress.<sup>57</sup> Subsequent efforts to introduce a federal sunshine act also failed.<sup>58</sup>

---

54. LA. CODE CIV. PROC. ANN. art. 1426(D) (West Supp. 2004).

55. *Id.* art. 1426(A).

56. See D.S.C. LOCAL R. 5.03.

57. See H.R. 3803, 102d Cong. (1991). For an analysis of federal sunshine in litigation efforts, see Doré, *supra* note 27, at 311–12 n.117.

58. See S. 1404, 103d Cong. (1993); 140 CONG. REC. 14424 (103d Cong. Amend. 1930 to S. 687) (1994); S. 374, 104th Cong. (1995). See also Laurie Kratky Doré, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation*, at 12 n.19, The 2000 Roscoe Pound Institute Forum for State Court Judges: Secrecy Practices in the Courts (July 29, 2000), available at <http://www.roscoepound.org/new/00kratky.pdf> (last visited Apr. 1, 2004) (noting that the act proposed by Kohl failed both in Congress and with drafters of the Federal Rules of Civil Procedure). Senator Herb Kohl (D-Wis.) has continually expressed an interest in renewing the efforts of a decade ago but has not proposed legislation that his staff believes would be successful. Earlier efforts at such legislation

Despite this frustrating record, some federal courts have adopted a self-imposed common-law version of sunshine in litigation to limit secrecy orders. Judge Marilyn Hall Patel of the Northern District of California has long refused to allow the majority of secret settlements presented before her. As she told a reporter fifteen years ago,

The court, which is a public forum, should not be a party to closing off from public scrutiny these agreements . . . . There is a practical consideration as well as an ideological one: Secrecy agreements are essentially unenforceable. Secrecy is costly to the system, because it means that somebody else is going to have to start all over from scratch. It just smacks of anti-competitive activity.<sup>59</sup>

At least one circuit court of appeal has recognized that “[c]ircumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety . . . .”<sup>60</sup> The Third Circuit Court of Appeal noted that this policy might force litigants to enter into a private settlement contract in order to keep their information secret, which may result in a subsequent contract action to enforce the settlement<sup>61</sup>—often a difficult course to take.

Over time, federal rule changes regarding the filing of discovery have been less than helpful in creating more openness in discovery. Under the former version of Rule 5(d) of the Federal Rules of Civil Procedure, circuits previously required that “all discovery materials must be filed with the district court, unless the court orders otherwise.”<sup>62</sup> However, the current version of the rule, as amended in 2000, states:

All papers . . . must be filed with the court . . . but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.<sup>63</sup>

This change in the rule regarding what must be filed with the court—and what cannot be filed—may be necessary from a practical perspective but has an adverse

---

include two 1989 bills sponsored by Representative Cardiss Collins (D-Ill.). See H.R. 129, 101st Cong. (1989); H.R. 135, 101st Cong. (1989).

59. B.J. Palermo, *Secrecy in the Courts: Plaintiffs' Lawyers Weigh the Benefits and Harm of Confidential Settlements*, CAL. LAWYER, July 1989, at 32, 33.

60. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994).

61. *Id.* at 788–89.

62. *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir. 1987).

63. FED. R. CIV. P. 5(d). See also *New York v. Microsoft Corp.*, 206 F.R.D. 19, 24 (D.D.C. 2002) (exploring the effect of the change to Rule 5 of the Federal Rules of Civil Procedure).

effect on any rules regarding openness in litigation so long as those rules, like Local Rule 5.03, D.S.C., only apply to documents filed with the court.

Finally, the May 2003 progress report by the Federal Judicial Center found that “very few written rules concern sealed settlement agreements specifically.”<sup>64</sup> The report notes:

Forty-seven district courts (50%) have local rules concerning the sealing of court records in civil cases. For fifteen districts the rules do not limit the sealing of documents, but instead cover such issues as administrative mechanics. . . . Thirty-two districts (34%) have local rules governing either the grounds for sealing or the duration of sealing or both.

Eleven districts (12%) restrict the judge’s authority to seal documents. Nine districts require that the judge find “good cause” before sealing.<sup>65</sup>

This report shows that the South Carolina District Court’s Local Rule 5.03 is groundbreaking among federal courts. It is a commendable attempt to usher secrecy out of the courtroom, and is the boldest successful federal attempt yet at limiting secret settlements.

#### IV. MORE CAN AND SHOULD BE DONE IN SOUTH CAROLINA

By examining other venues’ attempts to eliminate secret settlements, especially in the five states cited above, both the South Carolina District Court and the Supreme Court of South Carolina can fashion their rules to be broader, stronger, and more effective. These courts can begin by reaffirming presumptions of openness where the public health and safety are at issue. These presumptions should only be overcome by showing a compelling need for secrecy after factoring in the public interest and the public’s right to know.

It is only fair to first ask these questions: If the efforts in South Carolina are so laudable, is it reasonable to suggest that these steps have not gone nearly far enough? Is it possible for courts to handle any burdens caused by broader regulation? I believe the answer to both questions is clearly “yes.”

##### *A. Practical Limitations that Courts Face*

It would be foolish to comment on courts’ abilities to act on this issue without recognizing the limitations most judges face in dealing with anything beyond the everyday business on their dockets. Resources available to courts in general and trial courts in particular vary widely from state to state, and even from venue to

---

64. See Federal Judicial Center, *supra* note 31 (noting that “[m]ore common are rules on the sealing of documents generally”).

65. *Id.*



venue within states. Some, but by no means all, of these variations include:

- the availability of research attorneys, law clerks, and law student interns, and the availability of online research;
- the extent to which the court can utilize magistrates, commissioners, special masters, or “private judges”;
- the extent of both system-wide and individual case and calendar management problems, including the extent of overall court backlog and length of each court’s docket; and
- whether courts are segregated into issue-specific departments or at least have separate criminal and civil departments.

These limits on resources present a particular problem to courts concerned with openness and secrecy. Since much of what affects openness happens outside the ordinary purview of the court and many matters within the court’s purview are not resolved before argument, the courts are often only marginally involved in the substantive issue in dispute. Taking the time to examine such cases almost certainly means extra time and work for both the judge and his or her staff beyond the ordinary functions of the court. Given the press of ordinary court business, this can be a daunting obstacle. Moreover, most judges are ordinarily loath to interfere with agreements made by counsel, particularly those that occur outside the court’s sight.

Nevertheless, I believe that judges have several viable, practical options to protect the public’s right to information. First, I agree with Judge Patel, and more recently with Chief Judge Joseph Anderson, that openness fosters judicial economy by not requiring parties to start every new piece of litigation regarding a danger to the public from scratch.<sup>66</sup> Discovery, once disclosed in one case, remains available

---

66. Indeed, at the Secret Settlement Symposium, Chief Judge Anderson made this point several times. The draft of his paper distributed at the conference states that “duplicative discovery,” as he terms it,

means that in any future litigation involving the same issue . . . the litigants will bear the cost of duplicative discovery. Nowhere is this more true than in cases where litigants, principally defendants, have established “document repositories,” entire buildings where documents produced over the years are stored. The litigant in the first case seeks production of documents and is handed the key to the document repository. When the case is over, the documents go back, and the ‘needle in the haystack’ process is repeated . . . .

The burden on the judiciary is repeated as well. I know of nothing more time consuming than pouring through boxes of documents in an effort to be fair . . . .

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, 744 (2004). In his remarks, Chief Judge Anderson likened this duplicative discovery to the Indiana Jones movie *Raiders of the Lost Ark*. The audience watches Indiana Jones who, after great time and effort (not to mention close encounters with death) recovers the Ark of the Covenant, only to learn in the movie’s last scene that the ark is buried in a crate in a gigantic storage facility containing thousands of seemingly identical crates. Anderson made it clear that courts should only have to find the “ark” once and that courts should not be parties to burying it again. Joseph F. Anderson Jr., *Hidden From the Public by Order of the Court: The Case Against Government-Enforced*

for future cases. Second, if the issue is dealt with on a systemic, jurisdiction-wide level rather than by individual courts, it becomes “policy” and obviates much of the difficulty involved in a case-by-case review.

Courts like those in South Carolina can improve the public safety with little time lost to individual trial courts in three ways. First, they should prohibit unfiled secret settlements and, especially, agreements to secretize unfiled discovery. Second, they should substantially narrow the permissibility of stipulated protective orders that undermine rules preventing “contracts” that secretize. Third, courts should be able to discipline lawyers who violate court rules, thus putting a chilling effect on lawyers who engage in prohibitive practices.

### *B. Prohibitions Against Unfiled Discovery*

Courts need to address the issue of secrecy to prevent the secretization of both the settlement and the discovery that led to that settlement. However, individual courts are understandably hesitant to enact standing orders that such information may not be sealed without uniform jurisdictional court rules.

Perhaps the most seemingly viable argument against openness is that secretizing unfiled discovery is necessary because cases would not settle without secrecy, and thus openness would increase the caseload of an already overburdened judiciary. However, there is no evidence supporting this proposition. In fact, all the anecdotal evidence I am aware of supports the idea that cases will still settle. At three judicial seminars at which I have been privileged to speak on this topic,<sup>67</sup> I spoke both informally and in workshops with many judges; none could recall a case he or she believed would not have settled had secrecy been forbidden. I did not find a single judge who believed cases would not settle in the absence of secrecy.

James E. Rooks Jr., who has compiled enormous data on secrecy in litigation, recently wrote that in his substantial experience speaking with judges at conferences, he too has never heard a judge cite a case in which settlement required secrecy.<sup>68</sup> Rooks notes that “Florida’s Sunshine in Litigation law has been in effect for nearly 13 years, and there is reason to believe that trial lawyers for both sides have simply accepted it and moved on with business.”<sup>69</sup> Rooks concludes that speculation about openness’ chilling effect on settlements was merely a “prediction” before state regulation that never came to pass and for which there is

---

*Secrecy*, Address at the Symposium, *Court-Enforced Secrecy: Formation, Debate and Application of South Carolina’s New Secrecy Rules* (Oct. 24, 2003) (video on file with the South Carolina Law Review).

67. *The Roscoe Pound Institute Annual Forum for State Court Judges*, Chicago, (July 2000); *The American Bar Association Annual Continuing Education Conference for State Appellate Judges*, Vancouver, B.C. (July 2001); *The Louisiana Judicial College* (December 2001).

68. James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. Rev. 859, 872 (2004) (expanding Rooks’ position on whether openness chills settlement; see Rooks, *supra* note 27).

69. *Id.* at 871.

no evidence.<sup>70</sup>

At the recent South Carolina conference, not only did Chief Judge Anderson challenge the assertion that cases would not settle, but he was joined by Professor (and former federal court of appeals judge) Abner Mikva and both of the defense counsel who spoke.<sup>71</sup>

A far more plausible possibility is that the amount of settlement ultimately might be lower, but only because no premium is paid for the plaintiff's silence. Indeed, this was the position of one of the defense lawyers at the South Carolina conference, Stephen E. Darling.<sup>72</sup> In his remarks, Darling asserted that under antisecrecy rules defendants would no longer be "willing to pay extra money" to settle secretly.<sup>73</sup> Without secrecy, "defendants will not pay more" and plaintiffs would have to settle "for a lesser amount." This remarkable statement is tantamount to an admission that defendants pay, and plaintiffs accept, more money than a case is worth simply to ensure secrecy, or put more bluntly, that secrecy is indeed bought and sold. As one court put it:

[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.<sup>74</sup>

In any event, even assuming the remote possibility that antisecrecy chills settlements, a policy of encouraging settlements is at best a poor reason for allowing confidentiality orders. This concept would allow a known harm concealed by a sealed settlement agreement to injure subsequent victims.

Assuming no undue burden on trial courts, there is no reason to limit so-called "private" agreements unless the regulating court believes in the now rather anachronistic perspective that "courts exist to resolve disputes that are brought to them by litigants";<sup>75</sup> or that "[l]itigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse

---

70. *Id.* at 874.

71. Stephen E. Darling, *Confidential Settlements: The Defense Perspective*, Address at the Symposium, *Court-Enforced Secrecy: Formation, Debate and Application of South Carolina's New Secrecy Rules* (Oct. 24, 2003) (video on file with the South Carolina Law Review); Stephen Morrison, panel discussion at Symposium, *Court-Enforced Secrecy: Formation, Debate and Application of South Carolina's New Secrecy Rules* (Oct. 24, 2003) (transcript on file with the South Carolina Law Review).

72. See remarks of Stephen E. Darling, *supra* note 71.

73. *Id.*

74. *United States v. Ky. Utils. Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989), *rev'd on other grounds*, 927 F.2d 252 (6th Cir. 1991).

75. Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 468 (1991).

door.”<sup>76</sup> It is not surprising that those who favor continuing secrecy in discovery and settlement agreements believe the court’s primary, if not its exclusive, function is “to decide cases according to the substantive law. The collateral effects of litigation should not be allowed to supplant this primary purpose.”<sup>77</sup>

One of these collateral effects, however, is the disclosure of information to the public that would not have been available in the absence of the litigation—information concerning a public danger.<sup>78</sup> At the least, when such information reveals the danger of a public hazard or threat, the courts have an obligation to the public they serve to disclose this information, and protection from danger must take priority over privacy.

A rule addressing only those agreements actually seen by the court allows privacy to trump the public’s right to know in most instances. When this is applied to significant dangers, the effect on the public is onerous indeed. The only reasonable alternative is to require antisecrecy provisions to apply to unfiled discovery and settlement agreements. A court is a publicly-funded institution and its main function should be to serve the broader interests of the public.<sup>79</sup> “Our courts are part of the public domain,” said Professor Abner Mikva at the South Carolina conference.<sup>80</sup> There is no presumption of privacy; rather, “All presumptions must always be in the other direction.”<sup>81</sup> As for the claim of embarrassment, Mikva submitted that “mere embarrassment” is something most adults must learn to handle.<sup>82</sup> Indeed, no one has documented any recent sightings of corporations blushing red with embarrassment.

### C. Protective Orders and Presumptions of Openness

One of the most common court-sanctioned procedures used to hide potential dangers to the public is the protective order. Defendants in cases dealing with alleged physical harm to plaintiffs will commonly seek protective orders as necessary to protect a “trade secret” or “commercial advantage.”<sup>83</sup> But protective

---

76. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 466 (1991).

77. Marcus, *supra* note 75, at 470 (footnote omitted).

78. *See id.* at 469–70.

79. *See Doré, supra* note 27, at 296–97.

80. Abner Mikva, *The Role of Judges in Secret Settlements*, Address at the Symposium, *Court-Enforced Secrecy: Formation, Debate and Application of South Carolina’s New Secrecy Rules* (Oct. 24, 2003) (video on file with the South Carolina Law Review).

81. *Id.*

82. *Id.*

83. The 60 Minutes II piece, *supra* note 28, included a video clip of Firestone executive vice president Gary Crigger using those phrases. Of course, for Firestone the validity of this concern would require concluding that tires with separation defects had a technology that someone else would want to adopt. Crigger’s statement to the effect that of course the judge had to agree that those were trade secrets stretched credulity even further. The implication that the existence of a stipulated protective order rubber-stamped by the judge constitutes the judge’s agreement that there were legitimate trade secrets underscores the point, made throughout this paper, that even a tacit acceptance will be turned into judicial ratification by lawyers and executives trained as polished spin doctors. In counterpoint, the

orders may also be used as a means of concealing “smoking guns” and other inflammatory discovery. Opponents of sunshine rules posit that these rules will vitiate the presumption that trade secrets should be protected.<sup>84</sup> This is simply not the case. Proprietary information will be protected unless it kills or maims someone. However, defendants have no legitimate need to protect a product or service that hurts people. If it is a defective product, defendants have no trade secret to protect, as no one is going to copy that design.

Some states and local court jurisdictions have begun tightening the standards required for protective orders to promote openness in litigation where the public interest is in issue. While there are strong public policy reasons to protect information such as trade secrets, commercial processes, and the identities of minors, there are at least as strong public policy reasons to protect the health and safety interests of the public. Only a presumption of openness in the issuance of protective orders will fairly balance these interests.

Most states, concerned with constitutional standards and Supreme Court precedent, have protective order rules patterned on the good cause standard of the federal rules.<sup>85</sup> Generally, federal courts have three levels of standards for protective orders, depending on the purpose for which the order is sought and the reasons for the general presumption in favor of access. Only the highest of these standards goes significantly beyond a generalized notion of “good cause.”

The highest, most stringent standard should be used in considering all protective orders within the scope of this Article. When the proponent claims that the protective order is necessary to protect a trade secret or confidential commercial information pursuant to Rule 26(c)(7) of the Federal Rules of Civil Procedure, this standard requires a three-part test that combines the general threshold showing of “good cause”<sup>86</sup> with requirements that the proponent also show that the information actually is a trade secret or commercial information and that disclosure would cause cognizable harm.<sup>87</sup>

To be effective, courts evaluating the showing made in support of protective orders in any case where substantial danger to the public health or safety is in issue must create rules that (1) set a presumption of openness and a high standard of proof for legitimate trade secret issues; (2) require a decision on the merits; and (3) deny pro forma acceptance of such orders—even when stipulated—as the path of least resistance to resolving contested issues. Such courts should also be more

60 Minutes II piece included a clip of former National Highway Transportation Safety Administration head and Public Citizen spokesperson Joan Claybrook calling such protective orders “unethical.”

84. See Kevin Livingston, *Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists Who Want to Ban Secret Settlements*, THE RECORDER (San Francisco), May 8, 2001.

85. Doré, *supra* note 27, at 326 n.172; see also *supra* note 29 (providing examples of state secret settlement statutes).

86. FED. R. CIV. P. 26(c); *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987).

87. See, e.g., *Hasbrouch v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999) (discussing the heightened standard from *Zenith Radio Corp.* and holding it not applicable in this case); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889–90 (E.D. Pa. 1981) (providing the heightened three-part test for issuing protective orders).

inclined to consider remedies for inappropriate efforts at secrecy, including discovery sanctions.

This means more work for trial courts, at least temporarily, because instead of merely accepting stipulations of the parties, these courts would require an actual showing that the limitations on access or dissemination of information are objectively warranted under the circumstances. However, through a strong presumption in a well-crafted rule, a jurisdiction will mitigate the harm posed by secrecy in litigation and thereby maintain the public's confidence in its judicial system. In short order, the jurisdiction will also see workloads return to normal—or even decrease<sup>88</sup>—as litigants learn of the futility of seeking improper protective orders and the possibility of sanctions for requesting such orders in bad faith.

Although stipulations for protective orders may be the most common form of proposed agreements, many others are possible, including stipulations regarding privilege or a privilege log; post-judgment stipulations including stipulated reversals or vacatur; and various agreements relating to case settlement, from filings under seal where court approval is necessary to stipulations to change the name of the parties to be unrecognizable to anyone seeking to examine the case file.<sup>89</sup> Courts proscribing limitations on agreements that harm the public must do so with sufficient inclusivity so that such agreements themselves may also be barred.

Although it is legislation and not a court rule, California's recently passed Assembly Bill 634 provides a large portion of a valuable template for dealing with protective orders.<sup>90</sup> This legislation prevents secretizing information in elder abuse cases, among other objectives. Section 2 states, in pertinent part:

2031.2. (a) In any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act, any information that is acquired through discovery and is protected from disclosure by a stipulated protective order shall remain subject to the protective order, except for information that is evidence of abuse of an elder

---

88. Chief Judge Anderson and others argue that less judicial labor will eventually be necessary. See Anderson, *supra* note 66. Moreover, Anderson believes that parties wishing secrecy are most unlikely to “opt [to go forward] with the most public of resolutions—a trial” and that the cases that matter are those where secrecy is asked for and where it should not be permitted. *Id.*

89. I know of no reported cases directly addressing the propriety of such name change stipulations, but during the Secret Settlement Symposium, *supra* note 8, Chief Judge Anderson referred to a dozen cases in the District of Columbia that had been changed to “Sealed v. Sealed” so that no one would know the identities of the actual parties. While researching chapter nine of *The Moral Compass of the American Lawyer*, I learned anecdotally of several such circumstances involving professionals who did not want their names sullied by being found in the court record and conditioned settlement on such “sanitization.” I personally know of two of these instances although the attendant umbrella of secrecy makes it impossible to cite to them. Indeed, the very nature of the attendant confidentiality makes such name-change situations extremely difficult to uncover, as anyone connected with the matter who disclosed information would be breaching a secrecy agreement.

90. A.B. 634 (Ca. 2003). The portions of the bill relevant to this discussion will be found in CAL. CIV. PROC. CODE §§ 2031.1–2031.2.

or dependent adult as described in Sections 15610.30, 15610.57, and 15610.63 of the Welfare and Institutions Code.<sup>91</sup>

In effect, this Civil Code section will allow stipulated protective orders but will except from that allowance any such orders that would secretize evidence of physical abuse. While I would prefer a more wide-sweeping change in the presumption affecting stipulated protective orders, this might simply be asking too much of the legislative process. A blanket presumption might well be easier for an independent court to accomplish. The California legislature has taken a large step in the right direction. The South Carolina courts are invited to follow.

#### *D. Strengthening the Rules of Professional Ethics*

As helpful as they are, rules of court and statutes are limited in their reach and should be supplemented by stronger rules of professional ethics imposed on attorneys.<sup>92</sup> Instead of lawyers feeling, as they do under the current rules, the chilling effect on their duties to the client (commonly, if incorrectly, called “zealous advocacy”) should they refuse to secretize information, they will feel the chilling effect of the prohibition against putting the public in danger when the damages to the individual client are minimal. As Tuoro law professor Marjorie Silver, who, along with dozens of other ethics professors, has joined in supporting a new ethics rule,<sup>93</sup> wrote:

I believe the most compelling response to [those who say this is not an issue for ethics rules] 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.<sup>94</sup>

The best legislation and court rules must still include exceptions—to protect, for example, the names of young victims of serial molesters. These exceptions should be there; there are appropriate exceptions even 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 that prohibit 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

91. CAL. CIV. PROC. CODE § 2031.2 (citation omitted).

92. I have discussed this issue at considerably greater length in my recently completed paper *The Judicial Function: Justice between the Parties, or a Broader Public Interest?*, *supra* note \*, part of the September 2003 Hofstra Law School National Judicial Ethics Symposium.

93. The text of that proposed ethics rule is attached as Appendix A.

94. E-mail from Marjorie Silver, Professor of Law, Tuoro Law Center, to Richard A. Zitrin, Director, Center for Applied Legal Ethics (on file with author).

who go before courts to argue, jointly, that the statute or court rule in question doesn't apply in their situation stand an excellent chance of gaining acceptance from a judge with a crowded docket.

The simple ethics rule I propose for South Carolina—and to the extent of its authority to devise such rules, for the federal district court—would prohibit lawyers from “prevent[ing] or restrict[ing] the availability to the public of information that the lawyer reasonably believes . . . directly concerns a substantial danger to the public health or safety . . . .”<sup>95</sup> Such an ethics rule requires counsel to take the high road of openness, notwithstanding the needs of individual clients.

## V. CONCLUSION

Both state and federal courts in South Carolina have approved significant rules addressing secrecy in the courts. The district court rule is the strongest of its kind in the federal court system. With deep respect, I commend these efforts. Unfortunately, the rules are not broad enough to be truly effective—to ensure, at least in those cases dealing with the public health and safety, that the public these honorable courts serve will be protected from needless danger. Fortunately, there are solutions, learned in part through the experiences of other states. These solutions are workable, concrete, and lead to a greater public good.

The three solutions suggested in this Article are not unique, but they would be effective regulations.<sup>96</sup> I commend the court's attention to them and to further progressive thinking on this important subject. The architect of Texas Rule 76a, Texas Supreme Court Justice Lloyd Doggett, now a congressman, noted that closing a court to public scrutiny of its proceedings is to “shut off the light of the law.”<sup>97</sup>

---

95. See Richard A. Zitrin, *Proposed Rule*, 2 J. INST. STUD. LEG. ETH. 115 (1999). The text of the proposed rule is attached as Appendix A.

96. See *supra* Parts IV.B.–D.

97. Doggett & Mucchetti, *supra* note 19, at 653 n.4 (quoting *State v. Cottman Transmission*, 542 A.2d 859, 864 (1988)).



## APPENDIX A

PROPOSED RULE 3.2 (B)<sup>98</sup>

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 to Proposed Rule 3.2(B):

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.

---

98. This rule is slightly altered from the rule I proposed at Hofstra in 1998. My students at the University of San Francisco and UC Hastings came up with valuable suggestions. One in particular, to clarify something I had assumed, was to add the language "among parties to a dispute." The first bracketed portion concerning reasonable belief is my original language; the second bracketed portion reflects a suggestion by Professor Robert Cochran of Pepperdine, who gave his name in support of the rule. This objective test was also suggested by several of my students. I am comfortable with either bracketed portion.