

# Open Courts with Sealed Files: Secrecy's Impact on American Justice

## What Judges Can and Should Do About Secrecy in the Courts

Richard A. Zitrin © 2000

### Executive Summary

Mr. Zitrin begins by disclosing his personal perspective on secrecy issues. In his view, the public's right to know should outweigh secrecy concerns as to both court records and discovery material. This follows from his belief that even private disputes take on a quasi-public character when brought to a public forum like a court. He has reached his position, however, not through allegiance to any particular side in litigation or to any public interest movement, but through his long-term involvement in the field of legal ethics.

Mr. Zitrin next acknowledges that there are many practical limitations on what courts can reasonably do, or be expected to do, about secrecy in litigation, given the universal problem of inadequate judicial resources. These realities require an analysis of secrecy that accounts for several judicial cultures that arise either from that same lack of resources or from personal or institutional philosophies. Accordingly, he divides his analysis between courts that involve themselves in secrecy matters (subdivided into situations into which the parties before the court either agree on the matter in dispute or disagree on it), and courts that do not.

Mr. Zitrin then outlines what options judges have—what courts *can* do about secrecy matters—within the bounds of each of the several judicial cultures: maintain a “hands off” policy (usually the status quo position); engage in an evaluative, or information-gathering, process when a secrecy issue arises, followed by a decision on the merits of the specific case before the court; or take a more “access-proactive” approach that promotes openness and requires parties to justify any requests for secrecy.

Finally, Mr. Zitrin returns to his personal perspective and suggests what he believes courts *should* do when faced with demands for secrecy. He argues that the justifications for secrecy raised by its proponents (e.g. privacy of civil disputes, promotion of settlements, possible encouragement of frivolous lawsuits by opening up discovery material) have not been proven. Also, he contends, there are enough examples of dangerous products and other threats to safety that have been hidden behind secrecy agreements to warrant a general policy of openness. He also argues that tolerance of secrecy may actually foster attempts to mislead the courts. In closing, Mr. Zitrin cites three individual judges who, despite the usual pressures of lengthy dockets and limited resources, have helped to advance the ideal of open court records and proceedings in the U.S.

## I. Introductory Issues and Biases

The purpose of this paper is to augment and complement rather than duplicate Professor Doré's work. Accordingly, I will attempt to minimize revisiting both her overview of the issues and her review of specific law in the area. I will focus instead, in essay format, on what choices are available to judges as they deal with a variety of issues relating to secrecy in the courts, as well as what suggestions I have for the choices courts and judges *should* make in addressing secrecy vs. openness.

### A. Personal Perspective

Because I intend to be prescriptive (or perhaps more accurately “suggestive,” since it is those in my audience who wield the gavels while I—as any lawyer appearing before members of the bench—have only words), I must confess my biases before going further. First, I believe in “sunshine in litigation” and openness of both court records and discovery. I reason that arguments about the privacy of disputes should generally be outweighed by the public's right to know. Some have strongly argued that civil courts exist to serve “private parties bringing a private dispute.”<sup>1</sup> I believe, however, that even if the dispute began as a private one, once the courts are involved it is at most a private dispute *in a public forum*. The public nature of the forum is, to me, generally more compelling than what once was the private nature of the dispute. I suppose this makes me, in Professor Doré's terminology, a “public access advocate.”

Second, although I have been a trial lawyer since my bar admission, I come to my position not primarily from the perspective of a litigator with either a plaintiffs' or defense perspective, but rather from my involvement in the field of legal ethics. Having evaluated what is and what I believe *should be* the

---

1 Arthur R. Miller, “Confidentiality, Protective Orders, and Public Access to the Courts,” 105 *Harvard Law Review* 427 (1991)

ethical behavior of lawyers, and after seeing my views evolve substantially over more than two decades in the field, I have come to believe that the traditional model of the “zealous” advocate, who does everything within the bounds of the law for his or her client almost without regard to consequences, is both inappropriate and unnecessary to being an excellent lawyer.

Yet, those lawyers—whether for plaintiffs or the defense—who might otherwise agree with this perspective too often feel they have no choice but to accept and even argue for secrecy. Because the rules of ethics generally (with narrow exceptions) require putting the interests of the client ahead of those of society, lawyers are bound to settle cases in ways that serve the needs of specific clients even if they potentially harm the interests of society as a whole. Unless counsel are operating in one of the very few states with strong “sunshine in litigation” laws (and sometimes even then, see *infra*), they may feel that there is little that can be done when the defendant demands, and the plaintiff accepts, secrecy as a condition of obtaining information or resolving a case.

Accordingly, in 1998, I proposed a new ethics rule that 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>2</sup> Such an ethics rule would give counsel an opportunity (and, indeed, *require* them) to take the high road of openness, notwithstanding the needs of individual clients.

One assumption made in drafting this rule was that courts had little power, inclination, or resources to investigate the facts behind stipulations entered into by all counsel, much less the many agreements about secrecy that routinely occur outside the court’s field of vision. I understand, of course, that most judges

---

2 This proposed rule, originally presented at Hofstra University’s symposium “Legal Ethics: Access to Justice,” was published at 2 Hofstra J. Inst. Stud. Leg. Eth. 115 (1999). The text of the proposed rule is attached hereto as Appendix A.

are ordinarily loathe to interfere with agreements made by counsel, particularly those that occur outside their purview. Nevertheless, having been asked to examine what courts might themselves do in the interests of openness, I have come to believe that judges have several viable, even reasonably practical, alternatives.

## **B. Practical Limitations on What Courts Are Able to Do**

It would be foolish to comment on what courts can and should do about openness and secrecy without recognizing the limitations some—perhaps 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, even from venue to venue within states. Among these variations (there are undoubtedly many others) are:

- C the availability of research attorneys and/or law students and the extent to which research can be done on line;
- C the extent to which the court can utilize magistrates, commissioners, special masters, or “private judges”;
- C 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
- C 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 occurs that affects openness happens outside the court’s ordinary purview, see *infra*, taking the time to examine these occurrences 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.

### **C. Two Important Variables: The Involvement of the Court and the Agreement of Counsel**

One can divide issues of openness and secrecy into two broad, general categories: those that involve lawyers interacting with the bench, and those that do not. This is undoubtedly an oversimplification, but I believe it is useful to look at this issue from the point of view of the judge. That is because there will be a considerable difference in the allocation of judicial resources depending on whether or not the court is already involved in the substantive issue.

*Court “Involved”*. Among others, the following matters that commonly require court involvement may raise issues of openness vs. secrecy:

- C motions to compel discovery and for sanctions for discovery failures;
- C protective orders;
- C rulings about privilege, including attorney-client and work product;
- C requests or motions to seal documents or testimony;
- C motions in limine and other motions affecting trial evidence;
- C motions to compromise claims where the court’s approval is necessary (e.g., bankruptcy, probate, class actions, cases involving minors, etc.)
- C stipulations regarding any of the above;
- C stipulations regarding post-trial settlement (including waivers of motions for new trial or appeal, stipulated reversals of judgment, etc.)

It is obvious that the extent of judicial resources necessary to deal with any of these matters will

depend directly on whether the parties come to the court in dispute or in agreement. For the most part, the court's decision, or even a series of decisions is required where the parties are in dispute, while if the parties agree or stipulate, all they seek is the court's ratification. It is much easier—and far less time-consuming and resource-intensive—for the judge to sign a stipulation and order than to make a decision on the merits. But while the judicial resources needed to decide the substance of the disputed matter may be vastly greater than the resources needed to ratify a stipulation, the issues concerning secrecy and openness may be identical. A court that elects to make an inquiry, *ab initio*, about the validity of such a stipulation will usually be engaged in a time-consuming, resource-intensive process that it could have avoided.

*Court “Uninvolved”*. Jurisdictions vary in the extent to which they require, or even permit, lawyers to make the court aware of their progress in litigation, both procedurally and substantively. In the last generation, the interests of judicial economy, concerns about the allocation of precious court resources, the effect of technology, and the institution of “meet and confer” requirements and the like have materially diminished courts' record-keeping about cases—and issues within cases—that are resolved outside the courthouse corridors. To the extent that document production requests, for example, are no longer even filed with a court unless there is a dispute, a court's ability to acquaint itself with a particular case, even if it wants to, is considerably less than it was a generation ago.

Nevertheless, many matters that lie beyond the court's purview or knowledge may have an important impact on the question of openness vs. secrecy. Most of these relate to how discovery is handled by the parties—interrogatories, deposition testimony, and, perhaps most significantly, document production. In order to *obtain discovery materials* they seek, parties may have to enter into private agreements to return documents after the case is concluded, or agree not to disseminate deposition

transcripts. In order to *secure a settlement*, there may be these and other requirements to maintain a veil of silence. If these agreements do not require judicial intervention or even ratification, courts will ordinarily never learn of them.

In light of the foregoing, in discussing what courts can and should do, I have broken down the analysis into three general areas: (1) where the court is involved and the parties disagree; (2) where the court is involved and the parties agree; and (3) where the court is ordinarily not involved at all.

## **II. What *Can* Courts Do? What Options Are Available to Judges?**

To an extent, the options available to some judges will be significantly affected by the laws in each jurisdiction. Existing, generally applicable civil procedure rules and statutes may be as important, or more important, than measures that specifically target secrecy. For example, the standards for protective orders vary significantly among jurisdictions.

### **A. Maintaining the Status Quo, or a “Hands Off” Policy**

(1) *Bench involved, parties disagree.* Most judges favoring a “hands off” approach will resolve contested issues presented to them in relatively traditional ways. For example, protective orders are likely to be viewed more broadly, seen as a way to move the process of discovery along in a manner that avoids costly court fights and may enhance the chances of settlement.

(2) *Bench involved, parties agree.* Traditionally, most courts have taken the view that so long as the parties agree, especially on discovery, they have neither the time nor inclination to interfere. There are sound public policy reasons for this, most tellingly courts’ limited resources and the difficulty (if not impossibility) of reevaluating the merits of matters already agreed on. Judges who take this view are most

likely to accept the stipulations offered by counsel, including those that limit access to discovery by persons not involved in the litigation.

The only likely significant limitation on a court with a “hands off” culture is any “sunshine in litigation” requirement in force in that particular jurisdiction that would limit the court’s ability to accept secrecy. Currently, only a few jurisdictions have sunshine measures of that kind that are strong enough to either preclude courts from ratifying what they choose to, or to create clear presumptions of openness that can only be overcome by specific showings of necessity.<sup>3</sup>

(3) *Bench not involved.* Courts would not inquire into the private agreements among the parties and their counsel respecting limitations on disseminating information. Even in states with the broadest “sunshine in litigation” approaches, there exists no affirmative duty on the part of courts to make inquiries *sua sponte* into parties’ agreements made outside of court.

## **B. Evaluative, or Information-Gathering**

(1) *Bench involved, parties disagree.* As part of the decision-making process, these courts would evaluate the extent to which secrecy is a necessary or appropriate condition of resolution of the dispute. This evaluation could include making active inquiry to the parties, through counsel, regarding the extent to which secrecy is actually appropriate, rather than merely desired. Courts acting in this way will, for example, tend to regard claims of trade secrets, work product, or other reasons for protective orders with some degree of skepticism.

---

3 See, e.g., Texas Rule of Civil Procedure 76a, which requires not only that the presumption of openness has been overcome, but that there is “no less restrictive means” than allowing secrecy. See, also, Florida Statute 69.081 (“Sunshine in Litigation Act”); Washington Revised Code, §§ 4.24.601 and 4.24.611, and Los Angeles (Calif.) County Local Superior Court Rule 7.19 requiring a “particularized showing” as to each document involved. Illinois’s recently proposed Code of Civ. Proc. §2-1306 is very similar to the Florida statute.

Courts evaluating the showing made in support of such claims will decide on the merits, rather than granting *pro forma* acceptance of such orders (or other secrecy devices) as the path of least resistance to resolving contested issues. Such courts will also be more inclined to consider remedies for inappropriate efforts at secrecy, including discovery sanctions.

(2) *Bench involved, parties agree.* Notwithstanding the agreement of the parties, some courts would be interested in making an independent evaluation of the legitimacy of the proposed agreement, at least to the extent it “secretizes” information or issues related to the litigation. This means that instead of merely accepting the stipulations of the parties, these courts would require an actual showing that the limitations on access or dissemination of information are actually warranted under the circumstances.

Although stipulations for protective orders may be the most common form of proposed agreement, there are many others, 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 for stipulations to change the name of the parties so that they would be unrecognizable to anyone going to the court file to examine the case.<sup>4</sup>

(3) *Bench not involved.* Many (and likely most) courts, including those that may have a substantial interest in making inquiries about the necessity for secrecy in matters that come before them, will nevertheless be unlikely to create inquiry into matters resolved by the parties and counsel outside their purview. In federal court, or where state and local judicial rules permit, courts may have options available

---

4 I know of no reported cases directly addressing the propriety of such name change stipulations, but during the course of research for chapter 9 of *The Moral Compass of the American Lawyer* (Ballantine, 1999), my co-author Carol M. Langford and 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.” Two of these instances are personally known to us, though the attendant umbrella of confidentiality 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 confidentiality order or agreement.

such as standing orders that require counsel to inform them when agreements involving secrecy are entered.<sup>5</sup> In reality, of course, such orders may be problematic: difficult to implement from a procedural point of view, and even more difficult to enforce. The principal salutary effect of such standing orders may be to enable counsel from one side to point to the order as the reason why a secrecy agreement must be refused.

### **C. Presumed Open, or “Access-Proactive”**

(1) *Bench involved, parties agree or disagree.* Courts can take the “evaluative” process a step further by presuming, as do those states with strong “sunshine in litigation” standards, that openness will be the order of the day unless there is a specific, particularized showing of the necessity for secrecy. In addition to skepticism about the reasons for secrecy, this presumption would generally be based in part on a public policy perspective that information likely to materially affect the public welfare should be available to the general public. If this “openness presumption” were uniformly applied, it would operate for all matters involving the courts, whether the parties were in dispute or evinced agreement.

This presumption of openness could apply to all those matters involving the court that are listed in part I.C. above. On the appellate level, this could include both stipulated reversals<sup>6</sup> and the somewhat counterintuitive process in a few states of “depublishing” opinions—particularly controversial and potentially erroneous ones—to avoid having them stand as precedent.<sup>7</sup> Both standing orders and case-specific orders could be used. Orders, even if broad, would almost certainly be enforceable; almost all courts have

---

5 Carol Langford and I have become aware anecdotally of such orders, including a few in Northern California. To my knowledge, no study of such orders has been conducted.

6 See, e.g., *Neary v. Regents of Univ. Of California*, 3 Cal.4th 273, 834 P.2d 119 (1992).

7 See, e.g., California Rules of Court 976-979, especially Rule 979.

recourse to a variety of sanctions, including monetary and issue preclusion sanctions and contempt powers, to enforce their orders.

(2) *Bench uninvolved*. Obviously, judges have a limited ability to monitor the activities of parties whose secrecy agreements or understandings are never before the court. This is particularly true on a case-by-case, or microcosmic level. Moreover, even among states with sunshine in litigation laws that favor openness,<sup>8</sup> only Texas specifically deals with “discovery, not filed of record,”<sup>9</sup> and only Florida, arguably, has language sufficiently broad to cover discovery and other matters not filed with the court.<sup>10</sup> Accordingly, outside of the possibility of the standing orders referred to above, there is little judges in the vast majority of states can do on a case-by-case basis if they follow the culture of their courts to stay uninvolved.

(3) *Macrocosmic solutions*. There is, however, a great deal courts can do, even when a particular case’s secrecy issues are not before them, if they choose to look at the larger landscape. Here are some of the most important possibilities:

They can implement court rules, locally and statewide, that actively promote openness. If they choose, such rules can include a bar on secrecy even for those matters, like much discovery, that are part of a case but not filed or lodged with the court.

They can adopt a scheme of sanctions or discipline for those lawyers who don’t abide by such

---

8 While it is beyond the scope of this paper, it is worth noting briefly that some of the measures described as “favoring openness” or “anti-secrecy” may actually foster secrecy, either by ratifying exceptions to openness such as the traditional broad definition of what is appropriate for protective orders (including “annoyance,” and “embarrassment”), *see, e.g.*, New Jersey Rule of Court 4-10.3 and New York Rule 3103(a), or by seeming to actually favor a presumption of secrecy, *see, e.g.*, Mass. Rules of Impoundment Procedure.

9 Texas Rule 76a(2)(c).

10 "Any portion of any agreement or contract which has the purpose or effect of concealing a public hazard...." Fla. Stat. §69.081(4). Note the contrast with the language of Wash. Code §4.24.611, limiting the agreement to those “settling, concluding, or terminating” a relevant claim. The recently proposed Illinois statute has language similar to Florida’s on this question.

court rules. With the cooperation of the state’s disciplinary authorities, they can develop ethical requirements for attorneys along lines such as those set out in my proposed amendment to ABA Model Rule 3.2, which is reproduced in Appendix A.

Both trial and appellate courts can adopt policies of openness with respect to their own proceedings. For trial courts, these might include revisiting and revising broad definitions that are currently considered adequate justification for protective orders, sealing documents, and the like. For appellate courts, these might include reexamining and revising the rules on unpublished opinions, partial publication, and depublishing. Appellate courts could also examine the informal or semi-formal practice in many states of avoiding mentioning the names of certain offending attorneys or others when a written opinion is issued. Although this practice appears most common in opinions about prosecutors found to have committed misconduct,<sup>11</sup> other sanitizations also occur.

### **III. Conclusion—What Courts *Should Do*: The Case For Openness**

#### **A. What Courts Should Do**

Given the personal perspectives set out in part I.A. above, it will surprise no one that I believe courts *should* do what they can by taking the “access-proactive” approaches I have described immediately above. The suggested “macro” solutions can reach all four corners of civil cases, whether before the courts or not. For the most part they can only be implemented by a cooperative effort among members of the bench, with input from lawyers and other interested persons. Some practices, like sanitizing or depublishing

---

11 *See*, for example, the informal survey of this issue undertaken by journalist Edward Humes in *Mean Justice* (Simon & Schuster, 1998).

court opinions, may be within the power of individual courts to change. Those solutions that relate to cases where the court is directly involved are easier to deal with case by case and court by court. But it is apparent that the resources of any court that chooses to be proactive will surely be taxed, particularly where the parties agree and the court declines to accept that agreement without examination.

## **B. Why Courts Should Favor Openness**

In addition to the perspectives with which I began this paper, there are three important additional reasons why courts should favor openness.

The first relates to the claim of Professor Arthur R. Miller and others that there exists only “anecdotal evidence,” or what Miller calls “stories,” that secrecy has ever prevented the public from learning vital information on issues of health and safety. It is true, of course, that allegations in a lawsuit—even an occasional jury verdict—don’t prove anything. But there is no evidence that openness actually encourages frivolous lawsuits. More significantly, an examination of specific cases shows that many were far more than mere “anecdotes,” several involving products that were eventually removed from the market.<sup>12</sup> Moreover, even if legal and scientific experts disagree about whether something is truly dangerous, the argument made by Professor Miller and others begs the more fundamental question: Does the public have a right to know what the risks are—and what the evidence is?

Second, while there have been numerous claims that secrecy is necessary for settlement, these

---

12 There is no space here to document what my co-author Carol M. Langford and I have articulated elsewhere on several previous occasions. See, e.g., *The Moral Compass of the American Lawyer*, *supra*, note 4, Chapter 9, and, most recently, “It Is Time to Question How Our Legal System Can Afford to Allow Secret Settlements,” 7 [ABOTA] *Voir Dire* No. 1, at 12 (Spring 2000). Among the examples of secrecy involving what appear to be circumstances of clear potential danger were the drugs Halcion and Zomax, the Shiley heart valve, the Dalkon Shield intrauterine device, and General Motors side-mounted gas tanks. (Note that such dangers are not limited to products, but also include environmental toxins, serial child molesters, and other circumstances.)

claims do not appear to have even strong “anecdotal” support. I know of no studies demonstrating this, nor of any such claims from the states with the strongest anti-secrecy laws.

Third, I believe that one of the natural consequences of permitting secrecy is to foster the art of lying to or misleading the court. Perhaps the best example of this is the *Fentress* case, which I hope to discuss in my oral remarks, in which the Kentucky Supreme Court found that lawyers who engaged in an ongoing trial after a secret settlement had already been reached showed “a serious lack of candor with the trial court, and there may have been deception, bad faith conduct, abuse of the judicial process or perhaps even fraud.”<sup>13</sup>

### **C. One Judge Can Make a Difference**

Faced with limited resources and time, no judge can take on the job of “secrecy cop” lightly. Nevertheless, it seems there have increasingly been instances in which a single jurist acted alone in a way that helped maintain openness in our courts. I close with the brief mention of three such examples, which I hope to address more fully in my oral remarks.

1. In early 1995, Kentucky judge John Potter, suspicious of the actions of the lawyers in the aforementioned *Fentress* case, changed his minute order on his own motion from recording a dismissal after verdict to “dismissed as settled.” This act set off a controversy that resulted in the discovery that the 28-plaintiff case had indeed been settled, though the judge was never told.

2. In December 1997, California appeals court justice J. Anthony Kline filed a dissent in which he said that “as a matter of conscience,” he would refuse to follow the California Supreme Court’s decision

---

13 *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449 (Ky. 1996). We have commented on *Fentress* at length elsewhere (see note 12).

allowing stipulated reversals of court judgments as a condition of case settlement.<sup>14</sup> Although Kline wrote that he would obey a direct order to implement a stipulated reversal, he nevertheless was accused by the state's Commission on Judicial Performance of "willful misconduct in office [and] conduct prejudicial to the administration of justice." The case created a political firestorm as well as front page news and lead editorials. A year and a half later, the charges against Kline were dismissed, but stipulated reversals continue in California.

3. Finally, the tobacco industry's wall of secrecy crumbled in April 1998 when the House Commerce Committee opened its files and unsealed 39,000 documents after the Supreme Court refused to overturn Judge Kenneth J. Fitzpatrick's broad December 1997 disclosure order in the State of Minnesota's suit against the industry. But much of the most explosive and shocking documents, including evidence of the Council for Tobacco Research's so-called "special projects" unit, supervised and run by lawyers in order to use the attorney-client privilege, had already been disclosed in 1992 in a published opinion written by then United States District Court Judge H. Lee Sarokin.<sup>15</sup> Judge Sarokin's opinion, overruling many of the tobacco companies' privilege claims, was reversed and he himself was removed from the case. But the opinion remained, providing the outlines of a road map for others, including many state attorneys general, to use in the years that followed.

The architect of Texas Rule 76a, former Texas Supreme Court Justice Lloyd Doggett, now a member of Congress, is another judge who made a difference. As he put it, "To close a court to public

---

14 *Morrow v. Hood Communications, Inc.*, 59 Cal.App.4th 924 (1997). Judge Kline was commenting on the *Neary* case, *supra*, note 6. His interesting defense of his dissent can be found in *California Lawyer*, September 1998, at 25.

15 *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992), *rev'd* 975 F.2d 81 (3rd Cir. 1992).

scrutiny of the proceedings is to shut off the light of the law.”<sup>16</sup>

---

16 Lloyd Doggett and Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy In the Public Interest*, 69 TEX. L. REV. 643 (1991).

## APPENDIX A

### **PROPOSED AMENDMENT**

(Wording to be added is underscored.)

#### **ABA MODEL RULE 3.2—EXPEDITING LITIGATION AND LIMITATIONS**

**(A) A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.**

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

#### **Comment**

C Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

C 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.

C 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.