

OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE

*Report of the 2000 Forum for
State Appellate Court Judges*



FORUM ENDOWED BY HABUSH, HABUSH, & ROTTIER, S.C.

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EXECUTIVE SUMMARY

On July 29, 2000, in Chicago, Illinois, 110 judges representing 31 states took part in the Roscoe Pound Institute’s Forum for State Appellate Court Judges. The judges examined the current controversy over the issue of secrecy in the courts and its impact.

Academic Papers

Two legal scholars presented papers addressing different facets of this controversy.

- Professor Laurie Kratky Doré of the Drake Law School in Des Moines, Iowa, presented a paper titled “The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation.” After defining the broad categories of “secrecy orders” that have sparked vigorous debate, Professor Doré characterized the competing camps in the debate as “Confidentiality Proponents” and “Public Access Advocates.” She used those terms to describe arguments made by both camps—noting, however, that these lines are not perfectly sharp and that they reflect “broader systemic tensions in the civil justice system itself.” Professor Doré discussed the pressures to settle, not adjudicate, cases, but noted that settlement does not provide the “public” goods that come from full adjudication, like open public debate and judicial precedent. The emphasis on settlement tends to favor secrecy as a method of facilitating compromise, but the two camps divide over how great a contribution to resolution secrecy actually makes. There is also disagreement as to the essential function of civil courts—whether they serve principally to resolve private disputes or also exist to protect very broad public interests. Responses to the assertions that there is a “secrecy crisis” have been varied. The status quo in most jurisdictions is to commit the matter to the discretion of trial court judges and to trust in their ability to reconcile strictly private and important public interests, as well as to manage their own dockets. Some jurisdictions have adopted either specific court rules relating to secrecy or even statutes governing the matter, while other jurisdictions have taken a common law approach, formulating criteria for secrecy orders but leaving their application to judges. Professor Doré advocated accommodation of the competing interests through a “functional” approach that reflects the ideal of the open court. The hurdle to be cleared by Confidentiality Proponents, she argues, should reflect the type of protection sought by litigants, the nature of the information to be protected, and the extent to which that information plays a role in the central dispute-resolving function of the courts.

- Richard A. Zitrin, an adjunct Professor at the University of San Francisco School of Law and at Hastings College of the Law, delivered a paper titled “What Judges Can and Should Do About Secrecy in the Courts.” He began 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, a position he reached through his long-term involvement in the field of legal ethics. Professor Zitrin acknowledged 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. He divided his analysis between courts that involve themselves in secrecy matters and courts that do not. Professor Zitrin then outlined what courts can do about secrecy matters: maintain a “hands off” policy; engage in an evaluative 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. Then he returned to his personal perspective and suggested what he believes courts should do when faced with demands for secrecy. He argued that the justifications for secrecy raised by its proponents have not been proved, and that 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. In closing, Professor Zitrin cited four 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.

Following the authors’ presentations, the papers were scrutinized by panels consisting of both judges and trial attorneys. After the panelists’ commentaries and responses by the paper presenters, the judges divided into six discussion groups to give their own responses to the papers and discuss a number of standardized questions under a guarantee of confidentiality.

Points of Agreement

At the closing plenary session, the discussion group moderators reported that consensus emerged from the dialogue within individual groups, along the following lines:

- Few of the judges had much experience with secrecy issues. Some judges were surprised to learn that secrecy is a problem; some felt that the issue is more complex than we had originally thought; but many thought they would have a heightened awareness of it in the future.
- Only a small percentage of the cases the judges see affect the public interest. However, keeping settlement terms or discovery documents secret could have an adverse effect on public health and safety. In such a situation, the judges might intervene, or at least question the parties. Either way, judges should be reluctant to enter orders that would conceal information about dangers to the public.
- Judges had varying views on whether secrecy agreements help to get cases settled.
- With regard to allowing discovery material to be kept secret, judges were divided, seeing a difference between documents filed with the court and other, unfiled information. Some argued that unfiled discovery was not within the court’s purview, but a counter-argument was made that discovery is inherently a part of the court system because it is a creation of the court rules. As to whether the amount of money paid in settlement of a case should be kept confidential, there was less consensus.
- Discussing what might be done to reduce secrecy in the courts, judges pointed to several possibilities:

- 1) Creation or recognition of a presumption of openness for court matters.
 - 2) Adoption of specific court rules to govern requests for secrecy.
 - 3) Enactment of state-wide “sunshine in the courts” legislation.
 - 4) Individual action to discourage secrecy—through public speaking and continuing legal education programs, training of new judges, and directly urging lawyers toward openness.
- On perhaps the central point for the judges, there was some recognition that the role of the courts is changing dramatically in our society. In the abstract, judges tended to be more comfortable with courts addressing case-specific issues than they were with determining social policy, which is traditionally within the realm of the legislative or executive branch of government. In specific situations, however, there was agreement that a court might have some responsibility for public health and safety beyond the immediate concerns of the parties in any particular case.

FOREWARD

The Roscoe Pound Institute's eighth Forum for State Appellate Court Judges was held in July 2000, in Chicago, Illinois. Like all of our past forums, it was both enjoyable and thought-provoking. In the forum setting, judges, practicing attorneys, journalists, and legal scholars were able to consider the increasingly important issue of secrecy in the state courts.

The 2000 Forum's topic, "Open Courts with Sealed Files: Secrecy's Impact on American Justice," attempted to examine the effect that secrecy is having on the rights of individuals and society to stay informed about the workings of the courts. A wide range of court proceedings and dispositions are the subject of requests that they be kept secret. Defendants typically do not want plaintiff lawyers to be able to share information, and they often try to keep even the fact of the litigation secret. Plaintiff lawyers want information from prior suits to be available freely to save effort in discovery, to test the veracity of defense pleadings and testimony, and to utilize in later, similar cases. The news media, of course, have a great aversion to secrecy, and they often petition to have secrecy orders vacated or modified. Consumer advocates have often asked courts to open their files so that they can publicize dangerous products.

The Roscoe Pound Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Pound Institute's Fellows. That diversity of viewpoints always emerges in our Forum Reports.

Our previous seven Forums for State Appellate Court Judges were devoted to other cutting-edge topics such as judicial independence, the scientific evidence controversy, the controversy surrounding discovery, the American Law Institute's Restatement on products liability, the impact of the budget crisis on judicial functions, and the impact on state courts of the Long Range Plan for the Federal Courts. We are proud of our Forums and are gratified by the increasing registrations we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past.

The Pound Institute is indebted to many people for the success of the 2000 Forum for State Appellate Court Judges:

- To Professors Laurie Kratky Doré and Richard A. Zitrin, who wrote the papers that started our discussions.
- To our panelists: Eugene I. Pavalon, Hon. Gerald T. Elliott, William V. Johnson, Hon. James D. Brosnahan, James L. Gilbert, Hon. Thomas E. Hoffman, Thomas M. Crisham, and Lucy A. Dalglish.

- To the moderators of our small-group discussions for helping us to arrive at the essence of the Forum, which is what experienced state court judges think about the issues we discussed.
- To Meghan Donohoe, former Director of the Roscoe Pound Institute, and her staff for putting together this successful program, and to the current Pound staff—Marlene Cohen, Kimberly Kornegay, and LaJuan Campbell—who, under the leadership of Dr. Richard H. Marshall, the Institute's Academic Director, were responsible for the publication and distribution of this report. Thanks also to law student interns Serwat Perwaiz and Jeffrey Rowe for their assistance in preparing the report.
- To James E. Rooks, Jr., the Forum Reporter, for his important work in developing the 2000 Forum and co-editing this Forum report with Dr. Marshall.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other.

We hope that you enjoy reviewing this Report of the Forum and that you will find it useful to you when considering future matters relating to secrecy in the courts.

Larry S. Stewart
President
Roscoe Pound Institute
1999-2001

Richard H. Middleton, Jr.
President
Roscoe Pound Institute
2003-2005

INTRODUCTION

Some Background on Secrecy in Litigation

Some things that are done in courts in the United States are kept secret. Even more is kept secret outside the courtroom, in the course of litigation for which the courts hold authority—and responsibility.

All lawyers understand that confidentiality is not only reasonable but actually important—and in some cases critical—in some legal matters. One well-known example is juvenile criminal proceedings, where, because of the different treatment accorded to young defendants in the interest of rehabilitation, their identities are not disclosed. Another is domestic relations matters, where families who must resort to the courts for resolution of problems are held to be entitled to confidentiality in matters that do not affect the rest of the public.

Some things that are done in courts in the United States are kept secret. Even more is kept secret that is done outside the courtroom.

In most other areas, however, the notion that American courts often tolerate—or even create and maintain—secret dockets, pleadings, discovery material, and correspondence is discomfiting to many judges and lawyers. To much of the public it is shocking, and to some it is nothing short of outrageous.

America's courts have always been held to be open to all persons within their jurisdictions, and they have maintained what few would disagree is the world's longest continuous commitment to justice administered in public. The American courts are publicly funded institutions, and they exercise authority on behalf of all of our people. The courts owe their very existence, in substantial part, to a fundamental rejection by American colonists of British legal institutions that had become notorious for their uses of secret proceedings,¹ their bias toward the Crown, and their systematic exclusion from their North American proceedings of public participation through jury service.

Some of these matters are of interest primarily to historians and political scientists. Others, however, can affect ordinary citizens in the most direct and serious ways. Most Americans can demonstrate no legitimate need to know all of the details of divorce, child custody, or domestic violence cases that come before the courts. Nor can those not directly affected by criminal acts alleged to have been committed by juveniles—no matter how heinous—claim a right to know details of their prosecution and possible incarceration. But citizens who may be at risk from dangerous products, ongoing patterns of negligent or other harmful conduct, or illegal commercial practices do have a presumptive right to information that could be used to protect themselves. Potentially even more important, executive branch regulators and legislators need such information to carry out their duties to protect the entire public.

1. England's Court of Star Chamber, which operated from 1487 to 1641, may be the most extreme example.

Forms of Secrecy in the Courts

Despite the general commitment of American courts to openness, since at least the mid-1970s secrecy has found a secure niche in our system, especially in civil litigation. As a condition of allowing discovery or reaching a settlement, defendants in civil litigation (sometimes through “agreements” of varying degrees of legitimacy with other parties and their lawyers), often seek to keep private some or all of the information that is uncovered during the discovery process in litigation. The mechanisms used to accomplish this vary considerably in their potential danger to the public. The best known are (roughly, in increasing order of seriousness):

- general confidentiality agreements requiring that certain matters, once discussed or agreed to by the parties, must remain confidential (e.g. the dollar amount or other details of a settlement, and sometimes even the fact that the case was settled);
- protective orders prohibiting parties who receive information from distributing it to others, and sometimes requiring its return to the producing party;
- concealment of the parties’ names;
- concealment of the existence of the case;

(Any or all of the above may be accomplished by sealing the court’s file on the matter in question.)

- negotiated vacatur of a judgment already entered by a court to prevent its becoming public;
- negotiated reversal of a judgment already entered by a court, either to prevent its becoming public or to prevent it from becoming a precedent for later decisions, or both; and
- inducements to attorneys not to represent future clients with substantially similar claims against the same defendant.

Threats to Public Health and Safety

Secrecy practices have been implicated in a number of threats to public health and safety—some of them very well known, others less so. They include:

- confidential settlements of early litigation involving hundreds of failures of Bjork-Shiley artificial heart valves implanted in the hearts of over 80,000 patients;²

2. See *Keeping Secrets: Justice on Trial* at pp. 52-53 (Report of conference sponsored jointly by the Association of Trial Lawyers of America and the Society of Professional Journalists, 1990, available at www.atla.org/secrecy; hereinafter “Keeping Secrets”).

- sealed court files from litigation over Firestone tire failures;³
- sealed court files on consumer fraud litigation over systematic, purposeful mishandling of insurance claims;⁴
- confidential settlements of suits over deadly defects in baby products ;⁵ and
- clergy abuse of vulnerable youths.⁶

In addition to its threats to public health and safety, court secrecy can create ethical problems for attorneys (both plaintiff-side and defense-side) and their clients. These include basic moral dilemmas over the propriety of keeping secrets whose disclosure might avert future injuries and deaths, conflicts of interest between lawyer and client, and, potentially, the possibility that lawyers will be charged with violating formal professional ethics rules.⁷

3. James V. Grimaldi and Carrie Johnson, *Factory Linked To Bad Tires*, THE WASHINGTON POST, Sept. 28, 2000 at E01; Richmond Eustis, *Judge Orders Unsealing of Secret Firestone Documents From Fatal 1997 Crash*, FULTON COUNTY DAILY REPORT, Sept. 29, 2000, at www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZQ9T25PDC (visited April 8, 2004) (reporting that data sealed under a settlement agreement showed an unusual pattern of defects in tires manufactured at a particular Firestone plant between 1990 and 1995; suit by news organizations to unseal the data was opposed by Firestone on grounds that the data constituted “trade secrets”).

4. *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122 (9th Cir. 2003).

5. E. Marla Felcher, *Safety Secrets Keep Consumers in the Dark*, TRIAL, April 2001, at 40, available online at www.atla.org/Publications/trial/0104/t014fel.aspx (visited April 8, 2004) (observing that “[c]onfidential settlements have become the norm in industries like juvenile products, where a company’s financial health rests heavily on its ability to project a nurturing, caring safety-conscious public image). See also E. MARLA FELCHER, *IT’S NO ACCIDENT: HOW CORPORATIONS SELL DANGEROUS BABY PRODUCTS* (Common Courage Press 2001).

6. Daniel J. Wakin, *Secrecy Over Abusive Priests Comes Back to Haunt Church*, THE NEW YORK TIMES, March 12, 2002, at www.nytimes.com/2002/03/12/national/12CHUR.html (visited April 8, 2004); U.S. CONFERENCE OF CATHOLIC BISHOPS, AD HOC COMMITTEE ON SEXUAL ABUSE, DRAFT CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, June 4, 2002, excerpted in THE BOSTON GLOBE, June 4, 2001, at A12, whose Article 3 stated:

In the past, secrecy has created an atmosphere that has inhibited the healing process, and in some cases, enabled sexually abusive behavior to be repeated. Dioceses will not enter into confidentiality agreements except for grave and substantial reasons brought forward by the victim.

The final version of the charter deleted the first sentence of the article and added “and noted in the text of the agreement” at the end of the second. The final version is available at <http://www.usccb.org/bishops/charter.htm> (visited April 8, 2004). In an article on the initiative of the federal judges in South Carolina to ban secret settlements, The New York Times quoted a lawyer who had represented abuse victims in claims against the Catholic church in Boston:

Jeffrey A. Newman, a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, . . . said he regretted having participated in secret settlements in some early abuse cases. “It was a terrible mistake,” he said, “and I think people were harmed by it.”

Adam Liptak, *South Carolina Judges Seek to Ban Secret Settlements*, N.Y. TIMES, Sept. 2, 2002, at www.nytimes.com/2002/09/02/national/02JUDG.html (visited March 31, 2003) [hereinafter “Liptak”].

7. See Zitrin paper, *infra*.

Given that professional behavior of attorneys and judges is critical to the maintenance of public respect for the courts, secrecy can undermine that trust.

Antidotes to Secrecy

Since 1990, numerous court systems, and some state legislatures, have sought to limit the circumstances under which matters arising from litigation may be kept secret, sometimes merely advising the judge to consider public health and safety when approving confidential settlements, but sometimes requiring that a party requesting secrets meet stringent standards and demonstrate that no danger to the public will be created through entry of a secrecy order.⁸ The defense bar and at least one prominent academic⁹ have warned that such restrictions on the use of various kinds of secrecy might lead to less willingness by citizens to take disputes to the courts, and to fewer settlements of litigation, but those arguments have been challenged.¹⁰

The Forum

One hundred ten judges, representing thirty-one states, took part in The Roscoe Pound Institute's 2000 Forum for State Court Judges. Their deliberations were based on original papers written for the Forum by Professor Laurie Kratky Doré of Drake University Law School ("The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation") and Professor Richard A. Zitrin, director of the legal ethics clinic of the University of San Francisco School of Law ("What Judges Can and Should Do About Secrecy in the Courts").

Given that professional behavior of attorneys and judges is critical to the maintenance of public respect for the courts, secrecy can undermine that trust.

The papers were distributed to participants in advance of the meeting, and the authors also made oral presentations of their papers to the judges. Each paper presentation was followed by discussion by a panel of distinguished commentators.

8. See Doré paper, *infra*.

9. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991) 431- 32, 486. A detailed critique of Professor Miller's article may be found in David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

10. See Diana Digges, Confidential Settlements Under Fire in 13 States, *LAWYERS WEEKLY USA*, April 30, 2001 at B1, available at www.atlanet.org/secrecy/data/confid.pdf (visited April 8, 2004):

Defense attorneys . . . argue that the anti-secrecy bills would have a chilling effect on settlements, making litigation both more common and more contentious. [] The defense bar admits there's no hard evidence of a chilling effect, but they insist it's a logical outcome if corporations feel "under siege." And, they say, their clients are giving them an earful. . . .

See also James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV 859 (2004)(arguing that there is no present evidence that existing or proposed restriction of secrecy in the courts leads to fewer settlements, and inviting communications from lawyers who can point to such cases).

Responding to Professor Doré's paper were: Eugene I. Pavalon, a plaintiff lawyer based in Chicago; William V. Johnson, a defense lawyer based in Chicago, Illinois; the Honorable Gerald T. Elliott, a judge of the Johnson County District Court in Olathe, Kansas and then-current president of the American Judges Association; and the Honorable James D. Brosnahan, a member of the Illinois House of Representatives.

Responding to Professor Zitrin's paper were: James L. Gilbert, a plaintiff lawyer based in Arvada, Colorado; the Honorable Thomas E. Hoffman, a presiding justice of the Illinois Appellate Court; Thomas M. Crisham, a defense lawyer based in Chicago; and Lucy A. Dalglish, executive director of the Reporters Committee for Freedom of the Press in Arlington, Virginia

After each paper presentation and commentary, the judges separated into seven small groups to discuss the issues raised in the papers, with Fellows of The Roscoe Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded on audio tape and transcribed by court reporters, but, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges' comments appears in this Report at pp. 67 to 111.

At the concluding plenary session, the moderators summarized the judges' views of the issues under discussion, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Doré and Professor Zitrin and on transcripts of the Forum's plenary sessions and group discussions.

James E. Rooks, Jr.
Forum Reporter

Richard H. Marshall
Academic Director, Roscoe Pound Institute

The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation

Laurie Kratky Doré

*A*fter defining the broad categories of “secrecy orders” that have sparked vigorous debate among judges, academics, and practitioners, Professor Doré characterizes the competing camps in the debate as “Confidentiality Proponents” and “Public Access Advocates.” She uses those terms throughout this paper in describing arguments made by both camps, taking care, however, to emphasize that the lines of debate are not perfectly sharp and that they reflect “broader systemic tensions in the civil justice system itself.”

Turning to the content of the debate, Professor Doré discusses the pressures to settle, not adjudicate, cases (arising from crowded dockets and the chronic lack of judicial resources). Settlement, however, does not provide the “public” goods that come from full adjudication—like open public debate and judicial precedent. This emphasis on settlement tends to favor secrecy as a method of facilitating compromise, but the two camps divide over how great a contribution to resolution secrecy actually makes. There is also disagreement as to the essential function of civil courts—whether they serve principally to resolve private disputes or to protect very broad public interests. Finally, the “ownership” of the litigation must be considered. Should the parties be permitted to dispose of their case as they like, or does its presence in a public forum alter its private nature?

Response to the assertion that there is a secrecy crisis, and to the public debate over it, has been varied. The status quo is to commit the matter to the discretion of trial court judges and to trust in their ability to reconcile private and important public interests as well as to manage their own dockets. Existing “good cause” requirements in court rules can be and are invoked for this purpose. Some jurisdictions have adopted either specific court rules relating to secrecy or even statutes governing the matter. Their breadth and strength vary, and they have not yet engendered substantial appellate review or empirical study. Thus, their effectiveness is hard to measure. Other jurisdictions have taken a common law approach, formulating criteria for secrecy orders but leaving their application to judges.

In her conclusion, Professor Doré advocates accommodation of the competing interests through a “functional” approach that reflects the ideal of the open court. The hurdle to be cleared by Confidentiality Proponents, she argues, should reflect the type of protection sought by litigants, the nature of the information to be protected, and the extent to which that information plays a role in the central dispute-resolving function of the courts. This, she believes, is preferable to the “one size fits all” approach that is implicit in some court rules and statutory approaches.

I. Secrecy Orders: The Subject of the Debate

Secrecy orders and agreements can occur at virtually every stage of a civil lawsuit, and can govern a wide spectrum of arguably confidential or private information.¹ At the inception of many lawsuits, stipulated “umbrella” protective orders permit the parties to self-designate discovery as “confidential,” to restrict its dissemination, and to require its return or destruction upon resolution of the controversy. During the progress of a lawsuit, litigants may request that pleadings, discovery, exhibits, and even docket entries and judicial opinions be filed under seal. Parties may settle civil lawsuits pursuant to a confidentiality agreement that encompasses not only the amount and terms of the compromise, but also the underlying facts upon which it was premised. Even court decisions and jury verdicts may be “depublished” or reversed by stipulation as a condition of a posttrial settlement pending appeal.²

These secrecy orders and confidentiality agreements have generated vigorous and often heated debate in legal, political, and media arenas since the early 1990s. This paper describes the continuing controversy concerning the appropriate use and limits of confidentiality in the conduct and settlement of civil lawsuits. Part II discusses the background and content of the confidentiality debate. Part III explores the various legislative and common law responses that controversy has generated. In Part IV, I depart briefly from my primarily descriptive assignment and conclude by suggesting a functional construct that may aid judges in assessing whether to issue, modify, or vacate secrecy orders.

II. The Confidentiality Debate

A. The Players: Confidentiality Proponents vs. Public Access Advocates

At the risk of oversimplifying the multifaceted discussion concerning secrecy orders, the participants in what I term the “confidentiality debate” can be painted with broad brushstrokes into two competing camps. On one side of the debate are the “Confidentiality Proponents.” These judges, lawyers, and academics highly value the use of confidentiality in achieving settlement and believe that judicial discretion, as it currently exists, can adequately account for and accommodate the competing private and public interests implicated when secrecy issues arise during the course of a civil lawsuit. The Confidentiality Proponents thus oppose any attempt to further cabin or restrict judicial discretion or party autonomy concerning litigation confidentiality.³

1. This paper draws upon an earlier, more comprehensive article in which I examine secrecy orders and the arguably distinct uses of stipulated confidentiality in civil litigation. See Laurie Kratky Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999). In that article, I reject a “one size fits all” approach to secrecy orders and, instead, suggest a nuanced judicial approach that assesses protective orders, sealing orders, and confidential settlements in light of the principal objectives underlying the traditional right of public access to judicial proceedings. See *infra* Part IV.

2. Although the United States Supreme Court has restricted the use of stipulated vacatur in federal appellate courts, see *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 25 (1994), the California Supreme Court created a “strong presumption” in favor of the practice. See *Neary v. Regents of Univ. of Calif.*, 834 P.2d 119, 121 (Cal. 1992). Effective January 1, 2000, however, the California legislature has significantly constricted the power of California appellate courts to accept a stipulation to reverse a judgment. See CAL. CIV. PROC. CODE § 128(a)(8)(B) (West 1999). See generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

3. See, e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, U. ILL. L. REV. 457 (1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

On the other side of the debate are what I have dubbed the “Public Access Advocates.” These judges, lawyers, and academics believe that the status quo (unfettered judicial discretion) fails to adequately protect the public’s legitimate interest in much contemporary civil litigation. They decry court secrecy as contrary to the tradition of public access to judicial proceedings and, more importantly, as hazardous to public health and safety. The Public Access Advocates thus seek to further regulate (and limit) what they perceive as an escalating incidence of secrecy in the courts.⁴

B. Is There A Secrecy Crisis in Our Courts?

Before examining the content of the confidentiality debate, one must initially explore whether there is, in fact, a dangerous excess of secrecy in our civil court system. Public Access Advocates often cite high profile product liability and toxic tort cases as evidence of a secrecy crisis that jeopardizes public health and safety.⁵ In contrast, Confidentiality Proponents dismiss these claims as anecdotal, empirically unsubstantiated, and myopically focused upon product liability cases that account for only a small percentage of secrecy orders.⁶

The “Public Access Advocates” decry court secrecy as contrary to the tradition of public access to judicial proceedings.

The paucity of empirical studies concerning secrecy orders, however, makes it virtually impossible to confirm or deny the existence or extent of any secrecy crisis that may be plaguing our courts. A study conducted by the Federal Judicial Center concerning the extent of protective order activity does appear to contradict the claim that federal courts perfunctorily issue stipulated protective orders that endanger public health and safety. In the three federal judicial districts studied, protective orders were sought in only about five to ten percent of all civil cases, most of which were contract or civil rights cases. Further, approximately one-half of all motions for protective orders were contested and about sixty percent of all requests for protective orders were partially or completely denied.⁷

4. See, e.g., Lloyd Doggett and Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991); James L. Gilbert, Francis H. Hare, Jr., and Stuart Ollanik, *Negotiation and Settlement: The Price of Silence*, TRIAL, June 1994, at 17.

5. See generally Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 HOFSTRA J. INST. FOR STUDY LEGAL ETHICS 115 (1999) (citing cases involving silicone breast implants, prescription drugs Zomax and Halcion, the fungicide Benlate, the Shiley heart valve, and GM pickups with side-mounted gas tanks).

6. See Miller, *supra* note 3, at 480 (arguing that reformers overlook the significant number of non-personal injury cases in which protective orders legitimately protect personal privacy and trade secrets).

7. See Elizabeth C. Wiggins & Melissa J. Percherski, Federal Judicial Center, *Protective Order Activity in Three Federal Judicial Districts—Interim Report to the Advisory Committee on Civil Rules* (Oct. 14, 1994). The FJC studied protective order activity in approximately 300 cases filed in each of three judicial districts, the Eastern District of Michigan, the Eastern District of Pennsylvania, and the District of Columbia, for the period 1990-1992. See also Doré, *supra* note 1, at 300-03 (discussing the FJC Study and examining whether there is an excess of court secrecy).

The limited scope of the FJC Study, however, dealing exclusively with protective orders governing unfiled discovery in a handful of federal districts, should make one hesitant to draw any firm conclusions concerning the extent of such activity in state courts or the incidence of secrecy activity concerning materials other than unfiled discovery. Moreover, a cumulative body of even “anecdotal” evidence, particularly if it suggests a threat to public health or safety, certainly justifies a deeper probe of the arguments made for and against secrecy orders.

Settlement has replaced adjudication on the merits as the primary focus of most civil litigation today. Indeed, judges today actively promote (and sometimes even strong-arm) such settlement.

C. The Content of the Confidentiality Debate

Of course, the dramatis personae of this debate are not the black and white warring factions that the above-generalized description might suggest; nor can the disagreements between them fairly be described as entirely pro-secrecy or anti-secrecy platforms. In actuality, the debate consists of more subtle arguments that reflect broader systemic tensions in the civil justice system itself—tensions that contribute to and more accurately frame the confidentiality debate.

Settlement vs. Adjudication⁸

Settlement has replaced adjudication on the merits as the primary focus of most civil litigation today. Indeed, judges today actively promote (and sometimes even strong-arm) such settlement. This trend reflects, at least in part, the long-standing and increasingly strong public policy favoring the private settlement of disputes.⁹ To many, however, this push toward settlement comes at a significant cost. “Public goods” previously associated with adjudication (such as judicial precedent and public debate) are lost when cases settle and non-parties affected by a dispute are entirely cut out of its resolution.¹⁰

The value one places upon settlement, as opposed to adjudication, affects one’s willingness to sanction secrecy as a method of achieving compromise. Confidentiality Proponents, for instance, argue that confidentiality facilitates the efficient disposition of lawsuits and, in many cases, is critical to achieving settlement. Confidentiality, they argue, conserves scarce judicial and party

8. For supporting authorities and a complete discussion of how the tension between settlement and adjudication informs the confidentiality debate, see Doré, *supra* note 1, at 304-05.

9. Procedural rules and federal statutes promote settlement from the inception of a civil lawsuit to its appeal. *See, e.g.*, Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651 *et seq.* (1998) (mandating that federal courts authorize the use of alternative dispute resolution in all civil cases); Fed. R. App. P. 33 (authorizing appellate settlement conferences). *See generally* Doré, *supra* note 1, at 290-92 (discussing the public policy favoring and judicial promotion of settlement).

10. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995). *See also* Doré, *supra* note 1, at 290-95 (examining systemic tension between settlement and adjudication).

resources by facilitating the cooperative exchange of discovery and by minimizing court involvement. Any reduction in the availability or reliability of secrecy orders, they continue, will jeopardize these savings by making litigants reluctant to voluntarily disclose “private” or “proprietary” information in discovery, to establish settlement benchmarks for future, related cases, or to settle frivolous, high profile claims. In short, Confidentiality Proponents argue that any restriction upon secrecy orders will hinder the settlement process and further burden an already overburdened court system.

In contrast, Public Access Advocates question how essential confidentiality really is to most settlements and posit that settlements will occur without secrecy given the expensive, time-consuming, and risky alternative of a trial. Indeed, they contend that increased public access to discovery and judicial records enhances efficiency in the long run by avoiding the

The value one places upon settlement, as opposed to adjudication, affects one’s willingness to sanction secrecy as a method of achieving compromise.

multiplication of expense and the relitigation of issues in future, related lawsuits. In any event, the public benefits that flow from increased access to civil proceedings should override mere “housekeeping” concerns like judicial efficiency and resources. Thus, while they admittedly cannot wholly eradicate settlements,

Public Access Advocates attempt to achieve some of the “public goods” of adjudication by facilitating public access to the increasingly prevalent pretrial and settlement process.

2. The Judicial Function¹¹

The confidentiality debate reflects a further systemic dispute concerning the primary judicial function. Confidentiality Proponents perceive the civil justice system as a public service for private dispute resolution. Under this view, courts perform primarily a problem-solving function and, accordingly, should be willing to sanction confidentiality if doing so will assist the litigants in this endeavor. Unlike executive or legislative bodies, courts are not principally charged with disseminating information for public consumption, formulating major social policy, or regulating public health or safety. Efforts to restrict litigation confidentiality or enhance public access thus obscure the primary judicial task and improperly transform the courts into consumer watchdogs or information clearinghouses. Such a transformation, Confidentiality Proponents further argue, might motivate some litigants to utilize courts for reasons less altruistic than public protection or for purposes other than resolution of the dispute at hand—to exploit discovery for use in other cases, to institute strike suits, to circumvent regulatory channels, to solicit business, or to foment adverse publicity. In short, Confidentiality Proponents fear that anti-secrecy reforms will supplant the courts’ principal adjudicative role with what previously have been considered mere collateral benefits.

Not surprisingly, Public Access Advocates often adhere to a very different conception of the judicial function. They generally perceive courts as public institutions that are accountable to,

11. See Doré, *supra* note 1, at 305-07 (exploring how differing conceptions of the judicial function impact the confidentiality debate).

and guardians of, a broader public interest. That is, courts serve interests beyond those of the individual litigants and play a role beyond resolution of the case at hand. Courts additionally explicate public values and protect the interests of non-parties and the public at large. More cynically, Public Access Advocates view courts as a last defense when the executive and legislative branches fail (or refuse) to protect the public interest. As representatives and guardians of the general public, courts should thus oppose even stipulated requests by litigants to shield information that is of public interest or that is relevant to public health and safety.

Public Access Advocates tend to doubt whether courts are capable of or willing to fulfill this public function, however. Whether for lack of resources, reluctance to disturb the parties' mutual resolution, or administrative interest in clearing congested dockets, they question whether courts adequately account for or protect the broader public interest in deciding whether to issue, modify, or vacate secrecy orders. Public Access Advocates thus support reforms aimed at constricting judicial discretion in this regard and at reducing the level of secrecy in the courts. In this way, similarly situated plaintiffs, future victims, regulatory authorities, and the media might gain timely access to information concerning a defendant's possible wrongdoing, a product defect, or other public hazard.

Confidentiality Proponents fear that anti-secrecy reforms will supplant the courts' principal adjudicative role with what previously have been considered mere collateral benefits.

3. Party Autonomy—Whose Lawsuit Is It?¹²

Secrecy orders generally provoke little controversy when issued to protect intimate personal information or bona fide trade secrets. Positions vociferously divide, however, concerning secrecy orders that are issued to protect commercial litigants “from annoyance, embarrassment, [or] oppression,” or to restrict public disclosure of “confidential research, development, or commercial information” not amounting to a trade secret.¹³ Confidentiality Proponents argue that litigants, even commercial litigants, do not abandon their privacy rights when they enter the courthouse doors and that the exceedingly broad scope of discovery necessitates a correspondingly liberal use of protective orders. Public Access Advocates counter that individuals alone—not corporate litigants—can suffer “embarrassment” necessary to justify a secrecy order and that only a particularized and weighty showing of good cause for confidentiality can override the public's interest in access. How one ultimately resolves these privacy questions often reflects one's response to the more fundamental issue of who “owns” a dispute once the parties resort to the publicly subsidized court system for its resolution.

12. See Doré, *supra* note 1, at 297-300, 308-09 (discussing party autonomy and the confidentiality debate).

13. Fed. R. Civ. P. 26(c). The federal protective order rule implicitly protects a wide spectrum of privacy interests, but fails to distinguish between individual and business entities.

Our party-initiated, party-controlled, and party-centered civil justice system places a high premium on litigant autonomy. Confidentiality Proponents tend to adopt this proprietary view of a lawsuit and contend that litigants should be permitted to control and dispose of “their” private dispute in any mutually agreeable manner. This autonomy includes the ability to utilize stipulated protective orders, sealing orders, and confidentiality orders and agreements when mutually deemed necessary to expedite litigation or achieve settlement. Confidentiality Proponents argue that unless parties can rely upon confidentiality agreements and stipulated secrecy orders, litigants may either abandon meritorious claims or opt out of the public court system altogether in favor of private dispute resolution.

In contrast, Public Access Advocates often adopt more of a public ownership stance toward civil litigation. The public creates and heavily subsidizes the civil justice system and, accordingly, has an interest in observing and

Our party-initiated, party-controlled, and party-centered civil justice system places a high premium on litigant autonomy.

monitoring that system in order to ensure its proper functioning. Public access to a major component of that process—pretrial activities and settlement—serves that supervisory function and instills public confidence in “our” court system.¹⁴

III. Responses to the Confidentiality Debate

The public response to the confidentiality debate varies among jurisdictions and generally takes one of three primary forms. One response argues for the maintenance of the status quo, which places decisions concerning litigation confidentiality in the discretionary and largely unreviewable hands of the trial court. Approximately a dozen states modify this status quo with “sunshine” statutes or rules that legislatively curb judicial discretion concerning secrecy orders. Finally, some courts have self-imposed flexible, but articulated, common law limits on their authority to issue, vacate, or modify such orders.¹⁵

14. Pretrial litigation, including discovery, pretrial motions, settlement negotiations and settlement, now occupies an extraordinary amount of time and resources in our civil justice system. Indeed, courts adjudicate an astoundingly small percentage of filed cases, and an even smaller fraction of those cases actually proceed to a public trial. Thus, if pretrial proceedings are closed to public scrutiny, the lion’s share of judicial business will arguably be conducted behind closed doors. See Doré, *supra* note 1, at 288-89 (citing statistics regarding the shift from trial to pretrial litigation and from adjudication to settlement).

15. Yet a fourth response, urged by Professor Zitrin and others, advocates more stringent ethical limits on an attorney’s participation in certain secrecy agreements. Under Professor Zitrin’s proposed ethical rule, for instance, “[a] lawyer shall not participate in offering or making an agreement, ... 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).” Zitrin, *supra* note 5, at 116. See also Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 7 GEO. J. LEGAL ETHICS 111, 128-30 (1992) (arguing that plaintiffs’ attorneys are better positioned than judges to determine whether settlements should be confidential).

A. Maintaining the Status Quo: Judicial Discretion and “Good Cause Shown”

Most Confidentiality Proponents adopt an “if it ain’t broke, don’t fix it” approach to secrecy orders. Courts currently possess broad discretion regarding virtually all types of secrecy orders. The elastic and undefined “good cause” standard of state and federal protective order rules governs confidentiality as it relates to discovery.¹⁶ Courts may seal filed materials after utilizing a balancing approach that assesses whether the need for confidentiality outweighs the rebuttable presumption of public access to judicial records and proceedings.¹⁷ Parties themselves may privately contract for confidential settlements, but must show good cause when seeking a confidentiality order from the court concerning their compromise.¹⁸

Some courts have self-imposed flexible, but articulated, common law limits on their authority to issue, vacate, or modify such orders.

Confidentiality Proponents argue that litigation confidentiality is an issue best committed to the sound discretion of trial courts who must flexibly fashion confidentiality orders on a case-by-case, issue-by-issue basis. The flexible “good cause” standard, they contend, already authorizes courts to consider potential public and

non-party interests when deciding whether to issue, modify, or vacate secrecy orders. Legislative efforts to channel or restrict this broad discretion thus unnecessarily jeopardize the intricate balancing of case-specific interests that trial courts perform best.

B. Sunshine Statutes and Rules

Public Access Advocates contend that courts are unlikely to veto the parties’ mutual resolution of a controversy and are ill-equipped, over-worked, or too self-interested to consider the public interest when deciding whether to issue, modify, or vacate confidentiality orders. This distrust of unguided judicial discretion motivated a series of state and federal initiatives, beginning in the early to mid-1990s, to legislate “sunshine in litigation” reforms. Although all federal¹⁹ and many state

16. See Fed. R. Civ. P. 26(c). Most states have protective order rules patterned on the good cause standard of the federal rules. See Doré, *supra* note 1, at 324-71 (examining discovery confidentiality and stipulated protective orders).

17. See Doré, *supra* note 1, at 371-83 (discussing the sealing of judicial records).

18. See Doré, *supra* note 1, at 384-401 (exploring confidential settlements).

19. Federal attempts to restrict secrecy failed at two levels, both in Congress and with the drafters of the Federal Rules of Civil Procedure. In 1993, 1994, and 1995, Senator Herbert Kohl unsuccessfully introduced three substantially identical versions of a Federal Sunshine in Litigation Act: See S. Res. 1404, 103d Cong. (1993); 140 CONG. REC. 7719 (103d Cong. Amend. 1930 to S. Res. 687) (1994); S. Res. 374, 104th Cong. (1995). That Act would have limited judicial discretion to issue Rule 26(c) discovery protective orders or any other “order restricting access to court records in a civil case.” Efforts to enact federal guidelines for the sealing of judicial records and for the confidentiality of government settlements met a similar fate. See H.R. 3803, 102d Cong. (1991) (proposing Federal Court Settlements Sunshine Act). Faced with attempts to statutorily amend Rule 26(c), the Judicial Conference of the United States charged its Advisory Committee on Civil Rules with studying protective orders concerning discovery. The Advisory Committee proposed amending Rule 26(c) to permit issuance of protective orders more readily—“for good cause shown or on stipulation of the parties.” The proposed endorsement of stipulated protective orders proved extremely controversial and was ultimately rejected by the Judicial Conference. The Advisory Committee eventually tabled amendment of Rule 26(c) pending its anticipated study (and ultimate restriction) of the general scope of discovery. For a discussion of federal sunshine efforts, see Doré, *supra* note 1, at 311-12 note 117.

efforts ultimately failed, approximately a dozen states did enact some type of anti-secrecy rules governing their courts. Efforts to enact sunshine laws continue, but at a reduced pace.²⁰

Sunshine legislation obviously varies by jurisdiction. Texas, which enacted one of the earliest and most sweeping of these reforms, illustrates the statutory or rule-based response to the confidentiality debate. Texas Rule of Civil Procedure 76a creates a presumption of public access to “court records,” which, in addition to filed documents or pleadings, includes unfiled settlement agreements and unfiled pretrial discovery that “have a probable adverse effect upon the general health or safety, or the administration of public office, or the operation of government.”²¹ The Texas rule prohibits the sealing of these “court records” unless the party

Public Access Advocates contend that courts are unlikely to veto the parties’ mutual resolution of a controversy.

seeking secrecy establishes (1) a “specific, serious, and substantial interest which clearly outweighs” the presumption of public access and any adverse impact on public health or safety and (2) the absence of any less restrictive alternative than sealing.²²

This substantive balancing test must be undertaken pursuant to numerous procedural safeguards that include public notice and an open hearing in which any interested person may intervene.²³

Sunshine legislation in most other states is considerably less ambitious than that of Texas (or Florida).²⁴ Many jurisdictions confine their statutes to the sealing of judicial records.²⁵ Others speak only to confidential settlements involving a governmental agency²⁶ or to

20. See 1999 California Senate Bill 1254 (“Sunshine in the Courts Act”); 1999 Illinois House Bill 3239 (“Sunshine in Litigation”) [the text of both bills was provided in the materials distributed to Forum attendees].

21. TEX. R. CIV. P. 76a(2)(b)-(c). The Texas rule thus covers the gamut of secrecy orders, including discovery protective orders, sealing orders, and confidential settlements. The presumption of public access, however, does not encompass references to settlement amounts, *id.* § (2)(b), “discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights, *id.* § (2)(c), or documents filed in camera for the purpose of obtaining a discovery ruling, *id.* § (2)(a)(1).

22. *Id.* § 76a(1)(a)-(b).

23. See *id.* §§ (3) & (4). For a discussion of the history and operation of Texas Rule 76a, see Doggett, *supra* note 4.

24. The Florida statute, FLA. STAT. ANN. § 69.081 (West Supp. 1998), is also ambitious, prohibiting secrecy orders that have “the purpose or effect of concealing a public hazard or 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.” FLA. STAT. ANN. § 69.081(3). The Florida statute additionally voids as against public policy any settlement provision that conceals information concerning public hazards, *id.* § 4, or any settlement of a claim with a government entity. *Id.* § 8 (a). See also LA. CODE CIV. P. art. 1426 (prohibiting similar secrecy orders and agreements unless they involve “trade secret or other confidential research, development, or commercial information”).

25. See DEL. CHANCERY CT. R. 5(g); DEL. SUP. CT. R. 9(bb); GA. SUPER. CT. R. 21; IDAHO CT. R. 32(f); IND. CODE ANN. § 5-14-3-5.5 (West 1989); MASS. IMPOUNDMENT PROC. R. 7; MICH. STAT. ANN. R. 8.105(D) (Law Co-op. 1992); N.Y. CT. R. § 216.1.

26. See ARK. CODE ANN. § 25-18401-03; N.C. GEN. STAT. § 132-1.3 (1995); OR. REV. STAT. ANN. § 30.402 (Michie Supp. 1996).

particular public hazards.²⁷ Still others narrowly address the sharing of information in specified, related litigation,²⁸ or merely express a hortatory open records policy.²⁹

Notwithstanding the controversy surrounding the enactment of these anti-secrecy reforms, they have attracted scant appellate scrutiny or empirical review. It is accordingly difficult to assess whether these reforms have wrought the dire consequences predicted by the Confidentiality Proponents (perhaps because litigants can still mutually manipulate the guidelines) or the improved public health and safety sought by the Public Access Advocates (perhaps because many secrecy orders simply fall outside the statutory parameters).

C. Common Law Sunshine Reform

Concerned with the routine endorsement of stipulated confidentiality orders and a perceived escalation in judicial secrecy, some courts have self-imposed restraints on the issuance and modification of secrecy orders. This common law sunshine reform, illustrated by cases like *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), generally requires a court to expressly find and articulate “good cause” for issuing or maintaining a confidentiality order. In making that assessment, a court must consider public, as well as private, interests, including whether the information is relevant to public health and safety or is otherwise in the public interest, whether any government entity or officer is a party, whether the arguably confidential information would otherwise be subject to a freedom of information request, or whether public access would facilitate discovery sharing in other cases. Although a court may properly consider the litigants’ “particularized” reliance upon confidentiality, a general interest in encouraging settlement, standing alone, will not suffice.³⁰ Courts operating in such a common law sunshine regime appear understandably reluctant to approve stipulated confidentiality orders.

IV. Conclusion: “Good Cause” for Court Secrecy

In my view, both sides of the confidentiality debate make many legitimate points, and courts need not exclusively embrace one view or the other in order to deal with confidentiality issues as they arise during the course of a lawsuit. Instead, courts should accommodate the various competing interests, both public and private, in determining whether and when to override the litigants’ mutual desire or need for privacy and the strong, institutional policy favoring settlement.

Elsewhere, I have suggested that courts be guided in this endeavor by a functional approach that uses as its touchstone the primary reason for open courts—the need for public monitoring of

27. See ARK. CODE ANN. § 16-55-122 (Michie Supp. 1997) (environmental hazards); WASH. REV. CODE ANN. § 4.24.611 (West Supp. 1998) (product liability or hazardous substance claims).

28. See VA. CODE ANN. § 8.01-420.01 (Michie 1992).

29. See ARIZ. SUP. CT. R. 123(c)(1).

30. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-92 (3d Cir. 1994) (identifying a nonexhaustive and nonmandatory set of private and public “good cause” factors). See also Doré, *supra* note 1, at 315-16, 356-70 (discussing the *Pansy* decision and other public and private factors relevant in determining good cause).

the judicial system and its core adjudicative product. Thus, the level of “good cause” necessary to sustain the entry and continued maintenance of a secrecy order, as well as the appropriate weight accorded the various competing interests, should vary depending upon the nature of the confidentiality order, the information it seeks to protect, and the role those materials play in the court’s principal dispute-resolving function.

The discovery process, for example, is (theoretically, at least) a self-regulating process that entails minimal judicial involvement. A great deal of discovery is never filed with, reviewed by, or relied upon by the court in its decision-making. Accordingly, a threshold showing of good cause might suffice for a stipulated protective order governing unfiled discovery entered at the inception of a lawsuit. In contrast, a more onerous and particularized showing of good cause should be required to justify sealing that discovery once it is filed and utilized in connection with non-discovery court proceedings. Likewise, while private factors such as party autonomy, party reliance, and the preference for settlement might be accorded controlling weight in connection with some confidentiality issues, public interests in discovery sharing, public health and safety, or the administration of public office and the operation of government, might trump the litigants’ need for secrecy in yet other cases. In the end, the case-specific nature of this balancing approach makes this a task ideally suited and best committed to the sound discretion of the courts.

Courts should accommodate the various competing interests, both public and private, in determining whether and when to override the litigants’ mutual desire or need for privacy.

Morning Panel Discussion

Oral Remarks of Professor Doré

The topic of this year's forum has provoked very vigorous, and often heated, debate since the late 1980s or early 1990s, and it continues to provoke significant controversy. Indeed, even the title of this year's forum, "Open Courts with Sealed Files: Secrecy's Impact on American Justice," tends to raise one's hackles.

So today I would like to try and peel away some of the emotional rhetoric and highly charged arguments that frequently accompany this subject and describe for you, in a brief thumbnail sketch, the continuing debate concerning confidentiality orders and confidentiality agreements in the conduct and settlement of civil lawsuits—what I will call "the confidentiality debate."

Before I describe the content of that debate for you, however, I think it is important that we define the subject of the debate, and then briefly introduce its players.

What is a "Secrecy Order"?

Courts, commentators, and academics alike tend to lump all of the varying uses of litigation confidentiality under the rubric of "secrecy orders." These secrecy orders have been the lightning rod of the litigation confidentiality debate.

However, as you well know, the term "secrecy order" is, in actuality, a very broad concept. Confidentiality orders can be entered, and confidentiality agreements can be made, at virtually every stage of a civil lawsuit. They can govern a very wide spectrum of confidential or private information, ranging from anything that is just simply embarrassing to bona fide trade secrets or intimate personal information.

Most importantly, secrecy orders and the information they protect can play very different roles in a court's decision or adjudication of a case. So my viewpoint is that not all secrecy orders are alike, and that courts should shy away from adopting any kind of one-size-fits-all approach to litigation confidentiality.

The Participants in the Debate: Confidentiality Proponents v. Public Access Advocates

When I describe the participants in the debate, I do run a risk of oversimplifying the issues or perhaps painting the two positions as entirely black or white. But, I think it is helpful, at least for clarity's sake, to divide the debaters into two competing camps.

I am going to call the academics, judges, and lawyers on one side of the debate, the Confidentiality Proponents. These are people who view litigation confidentiality as a useful—and, indeed, in some cases, an essential—tool for the expeditious conduct and ultimate settlement of

many lawsuits. They generally oppose any attempt to legislatively cabin judicial discretion to issue secrecy orders.

At the risk of sounding Ralph Naderish, I call the other competing camp, the Public Access Advocates. These Public Access Advocates perceive an excess of secrecy in our civil court system—secrecy that runs contrary to a long tradition in this country of open court proceedings and that, more importantly, arguably jeopardizes public health and safety. They advocate what is called “sunshine in litigation,” or “sunshine in the courts” reform. In addition to restricting trial court discretion to issue secrecy orders, such reforms facilitate and increase public access to the pretrial and settlement process.

The Debate

In the course of researching my paper for this Forum and my longer article on the topic, I have read a great deal of literature that describes the various arguments made by both the

The arguments made about litigation confidentiality mirrored much deeper tensions that underlie our civil justice system itself.

Confidentiality Proponents and the Public Access Advocates. As I suppose law professors tend to do, I tried to find some kind of unifying thread that might connect what seemed to me to be disconnected arguments that were being made in the course of that debate. As you heard, I teach civil procedure. In the course of reading

these arguments, I couldn't help noticing that the arguments made about litigation confidentiality—from both perspectives, really—mirrored much deeper tensions that underlie our civil justice system itself.

Settlement v. Adjudication

One tension that I think is reflected in the confidentiality debate is that between settlement and adjudication on the merits. It arises from the shift of emphasis in our civil justice system away from trial and toward pretrial activities like discovery; away from adjudication on the merits toward settlement.

As you all know, public trial no longer holds center stage in the civil court system. In federal court, less than four percent of cases are resolved through an actual trial. And, at least two-thirds of that overwhelming majority of pretrial dispositions are settled without any adjudication of their merits. I think this trend reflects, in large part, a very long-established and increasingly-emphasized public policy favoring settlement. We see that policy reflected in the Alternative Dispute Resolution Act recently enacted by Congress¹ and in our rules of civil procedure that promote settlement.

The promotion of settlement, though, brings some costs. Among those costs are a lack of judicial precedent, a lack of public debate, and the nondisclosure of facts—all of which

1. See Doré paper, *supra* note 9.

otherwise accompany a public trial. So, I believe one's stance in the confidentiality debate really reflects how bothered one is by this increase in settlement and this decline in adjudication on the merits.

Thus, virtually all Confidentiality Proponents emphasize the importance of settlement and the role of litigation confidentiality in achieving settlement. Confidentiality Proponents argue that confidentiality is, in fact, essential to the conduct and the ultimate resolution of many civil lawsuits. They argue that protective orders, such as those governing discovery, conserve scarce judicial and party resources because they facilitate the cooperative exchange of information. Protective orders reduce the number of objections that are made during the discovery process and minimize judicial involvement therein, and all of this arguably paves the way to quicker, more efficient resolution of disputes through settlement. According to Confidentiality Proponents, any reduction in the availability, or, more importantly, the reliability of secrecy orders would jeopardize these savings in costs and efficiency and impede settlement. In short, any hindrance of the settlement process will arguably further burden an already overburdened judicial system.

A tension exists between a problem-solving view of the judiciary and a more public conception of the courts.

On the other side of the debate stand the Public Access Advocates. This group contends that a general interest in promoting settlement is not, and, indeed, should not, standing alone, ever constitute good cause for issuing a secrecy order. They doubt that confidentiality is really all that essential in the settlement process, and they predict that settlements would continue to occur at a significant rate without confidentiality given the alternative—which is a risky, time-consuming, costly trial. In any event, Public Access Advocates characterize the desires to promote settlement, save costs, and improve efficiency as mere housekeeping concerns. Moreover, increased public access will arguably foster efficiency in the long run by promoting the sharing of discovery in similar litigation and thus avoid the duplication of expense and effort and the relitigation of issues that secrecy often necessitates.

Public Access Advocates contend that when judges consider secrecy requests, “housekeeping” interests like cost and efficiency should be of secondary concern. Instead, judges should attempt to recapture some of the benefits of public adjudication that we lose in the settlement process. That is, by shedding light on the pretrial process, we can regain the public debate, the discovery and dissemination of facts, and the public warning associated with adjudication on the merits.

The Judicial Function

Another tension that I see reflected in the confidentiality debate concerns how we perceive the role of the court in our civil justice system. What is the principal adjudicative function? What is the primary judicial role? A tension exists between a problem-solving view of the judiciary and a more public conception of the courts.

Confidentiality Proponents, who oppose any further restriction on court secrecy, tend to adopt a problem-solving view of the judiciary. They view judges as neutral arbiters who adjudicate cases

based on their facts according to the substantive law. Under this view, the court system functions as a public service for private dispute resolution. If problem-solving is the primary judicial role, judges should be willing to embrace confidentiality to the extent that it will solve problems and facilitate resolution of the dispute.

Confidentiality Proponents frequently caution that courts are not information clearinghouses or consumer watchdogs. Unlike the legislative or executive branches of government, the major purpose of the courts is not to disseminate information for public consumption. Courts are not there to formulate major social policy. They do not exist to regulate public health and safety.

In fact, the courts might not be qualified to assess the risks and to perform that regulatory function. Confidentiality Proponents warn that increased public access will transform the courts in this manner and that litigants will then be motivated to use the court system for purposes other than the just resolution of the case at hand.

Public Access Advocates argue that courts should not primarily serve the interests of the individual litigants, and that courts should serve a purpose beyond resolution of the case at hand.

They predict that lawyers may use the court system to drum up business, to identify future clients or other potential lawsuits. We may see people trying to use the court system to circumvent regulatory channels. Or, litigants may attempt to use discovery in one case in order to evade discovery restrictions in another. We might even see people using the courts solely to generate adverse publicity about a particular defendant. In a sense, Confidentiality Proponents fear that sunshine efforts put the tail before the dog, so to speak. Sunshine efforts can turn what before were just side effects or collateral benefits of litigation into the primary judicial function, which instead should principally aim to resolve the dispute before the court.

Not surprisingly, Public Access Advocates have a very different conception of the judicial function. They argue that courts should not primarily serve the interests of the individual litigants, and that courts should serve a purpose beyond resolution of the case at hand. Courts are public institutions that are accountable to and guardians of a broader public interest. They explicate public values, and they represent interests of non-parties and the general public, as well as the interests of the parties themselves.

This broader judicial role is of particular importance, they contend, when the legislative and executive branches of government have failed to perform this protective function. Public Access Advocates, however, do not see the courts as fulfilling this public function when they consider secrecy orders. Whether it is because courts just don't possess the administrative resources to adequately deal with the issue, or because they are reluctant to disturb the parties' mutual resolution of a controversy, or because of self-interest in clearing their own congested dockets, courts arguably don't even consider, let alone protect, the public interest when deciding whether to issue, modify, or vacate secrecy orders. Public Access Advocates thus tend to support reforms that would actually force judges to consider the public interest and that would restrict and guide judicial discretion concerning secrecy orders.

Whose Lawsuit Is It?

A third and a final systemic tension that I see mirrored in the confidentiality debate concerns the notion of party autonomy and the question of who owns a civil lawsuit once the litigants bring their disputes to the courts for resolution. Unlike the courts in other countries, our civil justice system is very party-centered. Parties initiate the process and, to a very large extent, parties control the process.

Confidentiality Proponents tend to rely heavily on this commitment to party autonomy in the confidentiality debate. They argue that litigants—even commercial litigants, believe it or not—have privacy interests and autonomy interests that they do not abandon when they enter, often involuntarily, the courthouse doors. They point to the very broad scope of discovery that is provided in our system, and they argue that that broad scope requires a very liberal use of protective orders and other kinds of secrecy orders.

Unlike the courts in other countries, our civil justice system is very party-centered.

Unless the litigants can utilize secrecy orders, and rely upon them when it comes time to modify them or request that they be terminated, Confidentiality Proponents fear that litigants will either abandon meritorious claims or defenses or simply opt out of the public court system al-

together in favor of private alternative dispute resolution. In those private systems, the parties will be able to use as much secrecy as they desire. So, Confidentiality Proponents adopt a proprietary view of lawsuits, arguing that litigants should be allowed to use secrecy and litigation confidentiality to the extent that they mutually deem necessary to settle their lawsuits. After all, litigants own their disputes. They should be allowed to resolve them however they wish.

Public Access Advocates condemn this proprietary view of litigation. They argue that lawsuits are not private property—that when litigants bring a dispute into a public court, the dispute becomes public property. The public creates the civil court system, staffs it, and very heavily subsidizes it. The public thus has a significant interest—sometimes even a controlling interest—in monitoring that court system and holding it publicly accountable. How can the public perform this supervisory function unless it has access to the lion’s share of judicial business today? That means access to pretrial and settlement proceedings because that’s what courts do today. Public Access Advocates argue that increased public access will facilitate the monitoring function and, in the process, educate the public about, and encourage respect for, our courts.

Responses to the Confidentiality Debate

That is a thumbnail sketch of the arguments made for and against secrecy orders. Again, by the term “secrecy orders,” I include everything from stipulated protective orders governing unfiled discovery, to sealing orders governing judicial records, to confidential settlements entered privately by the parties and perhaps approved by the courts.

There have been many responses to the confidentiality debate, which I have identified in my paper. Essentially, one response argues to maintain the status quo—an “if it’s not broke, don’t fix it”

approach. Another response argues for legislative “sunshine” reform. About 12 states have some type of reform aimed at court secrecy, either through rules of civil procedure or through statutes. Some of those measures are broader than others. Texas and Florida, for instance, probably have the broadest of these sunshine reforms. Other measures in the remaining 10 states are more limited. Still other jurisdictions have common law sunshine reform, where judges themselves are getting concerned about the willy nilly endorsement of stipulated secrecy orders and, on their own motion, impose some judicial limits on the issuance of these particular orders.

Trial Court Discretion

That is a descriptive summary of the confidentiality debate. Now let me give you my prescriptive views on the topic. Essentially, I believe that both sides of the confidentiality debate have valid arguments, and that you, as judges, do not need to accept one view to the exclusion of the other in dealing with secrecy orders as they arise in the course of lawsuits. Secrecy orders are not all alike. They are going to vary, and the importance of two important values in our system—party autonomy and settlement of disputes—are going to likewise vary according to the type of secrecy order at issue and the nature of the materials that such an order seeks to protect.

Courts shouldn't just automatically endorse stipulated requests for secrecy, because litigants really don't have any desire or any incentive to consider other interests when they agree to confidentiality. There are some cases that implicate a broader public interest and to which public access would be justified. But that doesn't mean that courts need to auto-

matically reject all stipulated requests for secrecy orders. So in my paper I propose that when courts are dealing with secrecy orders, when they are trying to assess whether good cause exists to enter secrecy orders, they should be guided by the fundamental objective that underlies the whole idea of open courts.

It seems to me—and the Supreme Court has said this—that the reason we have open courts is to allow the public to see their court system in operation and to monitor the judicial product. I do think that the primary judicial product, the core judicial function, is adjudication—the determination of the litigants' substantive rights. So, I think that the level of good cause necessary, as well as the weight that needs to be accorded to the relevant public and private factors, will vary depending upon the role that the “confidential” materials play in the courts' decision-making—in the core adjudicative function of the court.

Maybe when I have time to respond to the panelists' comments, I can give you some examples of this, by comparing, for instance, stipulated protective orders with sealing orders concerning judicial records. Ultimately, I think it is a very case-specific process that entails

Courts shouldn't just automatically endorse stipulated requests for secrecy, because litigants really don't have any desire or any incentive to consider other interests when they agree to confidentiality.

balancing a potentially infinite variety of both public and private interests. And, because of the nature of that process, I believe that the good cause determination properly belongs in, and is really best suited for, the discretion of the trial court—a discretion that is informed and perhaps guided to some extent, but that should not necessarily be predetermined in advance.

Comments by Panelists

Eugene I. Pavalon, Esq.

Honorable Gerald T. Elliott

William V. Johnson, Esq.

Honorable James D. Brosnahan

Eugene I. Pavalon

First, I want to thank and compliment Professor Doré in stating so fully all the issues that are presented in this debate concerning sunshine in litigation and open access.

Let me state right at the beginning, I would be what Professor Doré characterizes as a Public Access Advocate. I believe in strong sunshine laws. The thrust of the people who are proposing strong sunshine laws is really the concern for access of the public to information, records, and details concerning their own public health and public welfare.

The other areas that are of concern that Professor Doré mentioned—the strong institutional inclination of courts to settle cases, the concern about more personal issues concerning privacy that might arise (for example in domestic relations cases)—can, I think, be taken care of through the sunshine laws because the emphasis in those laws is, as I stated, the public welfare.

Practical Considerations

As a litigator for over 40 years in the product liability and medical malpractice field, I can tell you that as soon as the discovery order or discovery request is filed in a product liability case—particularly if it involves a major corporation, and if it involves a product that has broad dissemination about the country—you are immediately met with an argument on almost every document, on every fact about which you are seeking discovery, either that it is a trade secret or that there is some other privilege that is associated with it.

A plaintiff lawyer is given two options. Either he is going to go through a line-by-line argument as to what should be discoverable and what shouldn't be discoverable, or he is going to go through extensive briefing and arguments as to whether or not something is protected. This is going to eat up a considerable amount of time and money. The plaintiff lawyer's other option is to agree to a confidentiality order, and if you do that you will get everything you request. Well, the pressures too often are great, so the plaintiff lawyer agrees. The court isn't really much involved in the process since the court signs the order. What really happens, of course, is that you still don't get all the information. Then you begin the argument as to whether or not the defendant is responding appropriately to the discovery request.

Relieving Pressure on Courts and Lawyers

Well, what would the sunshine laws do? They would take a great deal of pressure off the court, because it places the burden on the defendant to justify a secrecy order. The court is protected by the statute and the court's duty and role is to be sure that the person or parties seeking the protection really can meet these rigorous standards.

I like the Texas rule. I believe it should be very effective in preventing this type of pressure that is placed on lawyers. I believe Richard Zitrin's recommendation of an ethical rule is an excellent one, because that takes the pressures off both the plaintiff lawyers and the defense lawyers. Such a rule would just simply make it unethical for any lawyer to engage in any type of grievance that would in any way prevent the dissemination of important information related to public health and welfare. So both the plaintiff lawyers and the defense lawyers could tell their client, "This is what I am required to do. I cannot enter into any type of out-of-court secret agreement." And the plaintiffs' lawyers are also protected. The courts, as I said, would also have the ability to insist on this rigorous meeting of the standards.

What would sunshine laws do? They would take a great deal of pressure off the court, because it places the burden on the defendant to justify a secrecy order.

Lastly, I might say that there is a certain concern about the public perception as to what is going on. If I have time later I will tell you about two local incidents, where secrecy orders were entered at the personal request of a litigant, that caused a great deal of stir in the public press as to whether or not these courts really are just handmaidens of certain individuals who have clout.

Honorable Gerald T. Elliott

This is a topic and a subject that comes up on a fairly regular basis for trial court judges—depending, of course, on your jurisdiction and your locality. But it is an important issue, and it is an issue that we have an opportunity to think about at this Forum free of the confines of a particular case, free of a particular fact situation, and free of the arguments of the lawyers that inevitably accompany these issues. So, I say to you, Larry, on behalf of the judges, thank you very much for this opportunity to think about this problem in a more pristine environment. It is important that we think about these issues in a different environment from time to time.

I would like to say also that having had the opportunity to read the papers that both Professor Doré and Professor Zitrin provided, I can tell you that in my experience, they very adequately and very appropriately set out many of the issues and many of the responses, and I found them very useful.

I would like to add just for our mutual benefit that the article that Professor Doré wrote in the *Notre Dame Law Review*, where she really expands on her thoughts and her ideas with a lot more in the citations, really is a very helpful and productive article. Professor Arthur Miller from Harvard also has a very good article—and I think you cite that article in your piece, Laurie. So, between the

two of them, you really get a balanced point of view, and I would really commend it to you if you have these issues that you want to do some careful study on.

Not Just a Scholarly Debate

Probably the first thing that comes to my mind, however, in reading these papers, is that this issue does not usually come up in a scholarly environment. At the trial court level, this comes up as a controversy between two lawyers and by the time it gets to me, their opinions and their views are fixed. They have already gone through their golden rule procedures and they have spoken with their clients. They know exactly what they think about it. Their opinions are fixed. They are not here to discuss any of the First Amendment considerations or the deep secrecy consequences. They are here to tell me “This is a burdensome, oppressive, unnecessary request for production. And that is what this issue is all about.”

So, it comes up in a very practical context, and that is why a conference like this, where you can think out your points of view before you sit down in the courtroom with these two lawyers and sometimes their employer, also is very useful. But it does come up in a very practical environment and, frankly, it is largely, if not always, initiated by one side and that, as we all know, is the defense. It is the lawyer who represents the person who does the manufacturing or the distributing of a product, and it is largely an effort to protect this manufacturer or this entity from being required to reveal a certain type or group or style of information or evidence or the opinions of individuals employed in the company. Frankly, it appears to be, by and large, an effort to insulate or to limit liability. That is what it looks like to me when it comes before me as a trial court judge. The discussions are not really high level discussions at all. They are very practical discussions, and there is not much academic consideration given to the arguments.

Public Confidence in the Courts

There are a couple of things that are going on among the trial court judges that I think bear on this. First, the recent discussions among all judges, but particularly trial court judges, about public trust and confidence, reveal that one of the major concerns that the public and the consuming public has is the expense of litigation. Make no mistake about it—secrecy and confidentiality orders do impact on the expense of litigation, for both sides. Trial courts take these practical considerations into account when they are making their decisions and then evaluating their rulings.

Second, most of you as judges are aware of the Trial Court Performance Standards that were established in 1990 by a Commission of the National Center for State Courts. The Standards represent the consensus views of the judicial and legal profession on what the performance objectives or standards of trial courts ought to be. It would not surprise any of us that the very first standard or objective that the Commission set out, Standard 1.1, states, “The court conducts its proceedings and other public business openly.”¹ That is a guideline that has been

1. Commission on Trial Court Performance Standards, Trial Court Performance Standards (National Center for State Courts 1990).

adopted by the Conference of Chief Justices, the American Judges Association, and the court administrators' organizations, and we all would concede that one of the objectives that we have is to conduct our business in an open fashion that is accessible to the public. The courts are very concerned about that.

We need to be very cautious in entering any of these sorts of orders. As concern over public trust and confidence continues to heat up, this will continue to be an issue that the courts are concerned about.

William V. Johnson

I like Gene Pavalon a lot, but I don't agree with him on this issue. I think secrecy orders have a role in litigation and I think the judiciary plays an important role in determining and keeping that role in its rightful position, the rightful place.

Goals of Defendants

I represent clients who don't choose to get sued. They don't want more lawsuits and they don't want higher settlements publicized to attract more lawsuits. So, they have a legitimate goal that really doesn't have, as far as they are concerned, anything to do with public safety. It's about protecting their business interest or their personal interest or their professional interest.

It is very easy to get sued in this country and it is very easy to get an expert to criticize the defendant's product or the defendant's professional conduct. If that gets publicized, it is very harmful to the defendants. There is a legitimate interest, I think, to protect the defendant under the right circumstances, and there is a lot of pressure from the courts to settle. All judges know that it would be impossible to try every case that is filed. The judicial resources aren't there. So there are legitimate reasons to promote settlement. And when we talk to a client and say, "You ought to settle," one of their concerns is adverse publicity, and it is a legitimate concern.

Publicizing Settlement Amounts

Now, Illinois law is fairly subtle, from what I have experienced. I don't run into this that often. So, it may be a big issue, but I handle a lot of litigation and it isn't a big issue with my office. The biggest issue with my office is the amount of the settlement. Our clients don't want to read in the paper that they paid millions of dollars in settlement of a lawsuit. I have talked with Representative Brosnahan, and as far as he is concerned, the amount of the settlement is really not an issue, because he doesn't believe the amount of money has to do with public safety. So the sunshine law he sponsored would not require disclosure of the amount of a settlement.

I have never had a problem getting a plaintiff lawyer to agree to not publicize a settlement of a highly publicized case if it was a low settlement. If it was a high settlement, that is something different. So, there are two sides to the story. Up until the 1990s, it wasn't even an issue. The judges would enter the orders. They would rule the way they would rule and we would go on. In the nineties, the term "sunshine legislation" began to be used.

As far as I am concerned, there have been abuses, but there have been abuses on both sides. The company that makes Audi cars was just about put out of business because of publicity about a defect in their product that was subsequently proved not to be defective. I still have yet to hear or read about an authoritative epidemiologic study that says breast implants cause harm. But there is a lot of litigation that says they do, and there was a big verdict in San Francisco when a lay jury found that they do. But there is no epidemiologic evidence that I am aware of that supports that, and that industry is out of business. It is out of business, and it is paying billions of dollars.

So, there are two sides to the story and I would just ask that the judges continue to do what they have done in the past. There are private disputes. The court is the arbiter of that dispute. I think the court should be neutral. I don't want to go into a court that is not neutral. That is what we all look for. That is what we tell the jury the judges are.

To expand beyond that, I think, is risky. That is my defense position.

Honorable James D. Brosnahan

I have been in the Illinois legislature since 1996. During those four years, I have worked very closely with the Coalition for Consumer Rights, as well as Illinois Citizens Action. These are two widely respected consumer rights groups here in the State of Illinois. I have also worked very closely with the Illinois Trial Lawyers Association on this issue of secrecy.

There are private disputes. The court is the arbiter of that dispute. I think the court should be neutral.

I feel very strongly that the State of Illinois, as well as other states, needs sunshine laws. I would definitely be, to use Professor Doré's term, a Public Access Advocate. In the course of determining if a manufacturer is guilty of producing a dangerous product, the

case of just one injured victim can generate a public record that educates other citizens about risks and dangers before more people are injured.

Our civil justice system has the ability—and, I would argue, in some cases it has the duty—to identify threats to public safety. Lawsuits can notify the public of a risk long before the number of injured people increases due to a public hazard. But when court records are hidden from public view, the public is denied the chance to learn from these other tragedies. Many times, corrective action that could have been taken is not taken, and we have further lawsuits, more injuries.

Effects of Sealed Settlements

While researching this issue, I came across reports of some very disturbing cases from around the country. Richard Zitrin's paper mentions a few of them. I want to mention three that I don't think are in his paper.

The first relates to asbestos. Everyone here knows asbestos was used as a very useful insulator for years and is still found today in rail yards and in the construction of older homes. But we later found out what the real cost of asbestos was and how it produced debilitating lung diseases. By the 1970s, the government started to ban the use of asbestos. When you look at it, you see that it's frustrating. A lot of this could have been prevented. A lot of the injuries to workers could have been stopped. In 1933, 11 former employees of the Johns Manville Company sued the company, claiming that the work place exposure to asbestos produced their illnesses. The company settled the claim, but sealed the records. The plaintiff's lawyer even accepted a payment for agreeing that he would not help other plaintiffs in similar lawsuits. That settlement was not disclosed until the 1970s, by which time hundreds of thousands of additional workers had been exposed to asbestos.

I have also learned of some other cases that underscore the need to protect our children, which in many cases are our most vulnerable citizens. One of the cases involved a 16 month old child who weighed 22 pounds. He was in a car accident in 1989 that resulted in a broken neck and paralysis from the waist down. The boy was properly secured in a car seat whose manufacturer claimed it was safe for children weighing at least 20 pounds. However, most other car seat manufacturers disagreed, and so did the National Highway Traffic Safety Administration, which regulates car seats. They said that type of car seat was inappropriate for any child under 30 pounds. The boy's family agreed to a confidential settlement of their suit against the manufacturer that forbade them from even publicly naming the manufacturers.

“My sunshine bill would prevent courts from entering orders to conceal a public hazard or information about one.”

In another case, a boy was playing on a water slide in his backyard pool and he broke his neck, resulting in paralysis from the neck down. His family later learned that seven other children had broken their necks playing on the same model slide, and that the manufacturer of the slide had made confidential settlements with those families. The boy's lawyer even discovered a videotape, made for an earlier trial of one of those cases, that demonstrated how the slide was dangerous. The file in that earlier case was sealed. The manufacturer issued no recall, made no public announcement, and did not warn other owners of the slide of the risk of neck injury. The manufacturer insisted that this victim's family sign a similar confidentiality agreement. Luckily, they refused to do so. The trial of the case resulted in a plaintiff's verdict, and in that way the earlier confidential settlements became public.

The Illinois Sunshine in Litigation Act

It is because of cases like that that I became a chief sponsor of Illinois House Bill 3239—the Sunshine in Litigation Act in Illinois. The bill passed the House by a vote of 63 to 50. In the State of Illinois we need 60 “yes” votes to pass a bill, and we only got 63. Unfortunately, it was a very partisan fight. Of those 63 votes, 60 came from Democratic members. Only three Republicans supported it. The bill was then passed over to the Senate. In the State of Illinois, the Republicans control the Senate, and that bill was buried in the Senate Rules Committee, which is also known as a graveyard for many of our Democratic bills. However, I do think it is a very important piece of

legislation, and it is going to remain one of my legislative priorities, and I do plan on reintroducing it.

My sunshine bill would prevent courts from entering orders to conceal a public hazard or information about one. It would also invalidate any settlement agreements or contracts intending to conceal a public hazard. It gives standing to citizens, as well as the media, to contest such orders. It also allows judges to determine the validity of trade secret concerns and allow disclosure only of that portion of the information on materials necessary or useful to the public regarding the public hazard.

That is what the bill would do. It is also important to note what the bill does not do. Mr. Johnson mentioned that a little bit. I tried to craft this legislation somewhat narrowly. I don't want

it to apply to cases involving minors or cases involving divorce. I also don't think it should apply to medical records. As Mr. Johnson stated, I don't think it should apply to the amount of settlements. I know Mr. Pavalon disagrees with me on that, and many trial lawyers would like to see that provision changed. However, to me, making the amounts of settlements public takes away from the argument in favor of the bill—which is that we are only going after public hazards and trying to save the public from future tragedies. There is also a provision in my bill that a litigant who wants to prevent disclosure can file a motion with the court, and that can trigger an in camera inspection. So it is not automatic—a litigant has a chance to contest disclosure.

We are only going after public hazards and trying to save the public from future tragedies.

A Chilling Effect on Settlements?

As I hear some of the arguments today against disclosure, I couldn't help but think of the arguments that I heard when I was down in Springfield, arguing about this bill on the floor of the Illinois House. The one argument that kept on coming up was that this would have a chilling effect on settlements. However, nowhere in the papers, nowhere in the arguments when we talked about this bill in committee in Springfield, as well as on the House floor, did anyone have any evidence whatsoever that, in the other states that had these sunshine laws, there is a chilling effect on settlements. I don't think there have been any studies done on this. The opponents of this legislation are very well organized. They are a very powerful lobbying group. I believe that, if they had evidence, they would have definitely presented it to us down in Springfield, but they did not.

I still think that there are many, many compelling incentives for litigants to settle a case. Actually, those were mentioned earlier. Going to the jury is always risky, because you don't know what the amount of the damages might be that a jury may award. A jury trial is also is very time-consuming and costly. So I still think there are incentives to settle cases.

One thing that I found interesting is that plaintiff lawyers are obviously big proponents of this legislation. The plaintiff lawyers do not want a chilling effect on settlements. The trial

lawyers that I know want to settle cases. They don't want to go to trial. They don't want to spend two months tied up in a courtroom. And they are big supporters of this legislation. I don't think they would support it if they honestly believed this would have a chilling effect on settlements.

In conclusion, I do believe that it is good public policy to lift this veil of secrecy on court records pertaining to public hazards, and that is as far as my legislation went—it pertains only to public hazards. I think this will prevent tragedies from occurring in the future. I also think it will help to maintain the public's trust in the judicial system. To me, the public's right to know about a public hazard far outweighs any litigant's privacy interests.

Response by Professor Doré

Need for Empirical Evidence

Representative Brosnahan makes a good point that, with all of this debate concerning litigation confidentiality, we really do have little empirical evidence on, first, whether there is an excess of

There is a real need for the state judges to do some studies and some self-monitoring as to the extent of protective order activity and sealing order activity in your courts.

secrecy in our courts and, second, whether excess secrecy—if it does exist—results in any adverse impact on public health or safety. There is a study out there by the Federal Judicial Center, which I referenced in my paper, but it limits itself to protective orders in discovery. It deals with only a handful of judicial districts, and it doesn't touch on state activity.

Nor do we have, really, any empirical evidence concerning the impact that these sunshine statutes have actually had—whether they have had the chilling effect on settlements feared by Confidentiality Proponents or whether, on the other hand, they have resulted in any improvement in public health or safety, which obviously is sought by the Public Access Advocates. So I think, perhaps, there is a real need for the state judges to do some studies and some self-monitoring as to the extent of protective order activity and sealing order activity in your courts. For instance, to what extent are they stipulated? To what extent are they contested? To what extent do they concern cases that arguably impact the public interest or that have any adverse effect on public safety?

That, I think, would be a very valuable exercise to undertake. Again, it is part of just staying vigilant on these various issues. I think one problem about sunshine statutes is, in fact, the partisanship Representative Brosnahan mentioned, and with that partisanship, perhaps we lose a little bit of the neutrality that I think is really necessary—because, as I have pointed out, I think that there is a role for confidentiality and promoting settlement.

Discovery—Filed and Unfiled

There is also a role for party autonomy—depending, again, on the kind of secrecy order that we are talking about. And the sunshine statutes that have been adopted generally do not make any distinction in these secrecy orders. They treat confidentiality, even private confidentiality

agreements, the same as orders that seal court records. For instance, I think that there is a great difference between an order sealing a case file and a stipulated protective order governing unfiled discovery. Discovery, as you know, is largely a self-regulating process. The judge generally does not get involved, at least ideally, in the discovery process. Discovery is not filtered for reliability. It is not filtered for admissibility. We have a very broad scope of discovery concerning the subject matter of the litigation, so it doesn't even need to be relevant to the claims and the defenses of the parties. The Supreme Court of the United States has said that discovery is generally a closed proceeding—that the sole purpose of discovery is to assist in the preparation or the trial or the settlement of lawsuits.²

So, I don't think that there should be any presumption of public access to unfiled discovery—discovery that never comes before the court, before the judge. There should not be a presumption because, if the judge never even sees the material, it is never filed with the judge, it is never reviewed by the judge, then opening up that discovery to public light is not going to help the public in assessing the judicial function—that is, to see whether the judges are doing their job.

So, I would ask that courts be cognizant of the fact that not all secrecy orders are alike and that there is a role for confidentiality, but that the public interest is also a factor.

It is a very different matter, though, when that discovery is actually filed with the court or utilized in connection with court proceedings. There, public access is going to directly enhance public monitoring of the judicial function. And, again, to the extent that the material is relied upon by the court or used by the court in decision-making, then, to me, that is a public record. It is a court record. It carries with it a presumption of public access. But I don't believe that presumption is irrebuttable. I believe that the strength of that presumption varies according to the role that the material plays in the court's decision-making process. For instance, a confidential settlement that is filed with the court, and for which the court issues a confidentiality order, probably plays a very small role in the court's decision-making concerning the litigants' substantive rights. Certainly, the amount and the terms of that settlement don't play a very central role. So there is a greater argument for ensuring secrecy or confidentiality for the terms and the amount of the compromise. Of course, a very different matter might arise if the parties were to gag each other from talking about the underlying facts of the lawsuit, because that would, in a sense, suppress evidence.

So, I would ask that courts be cognizant of the fact that not all secrecy orders are alike and that there is a role for confidentiality, but that the public interest is also a factor. The problem is defining the public interest and its applicability in particular cases. When litigants request that courts approve a stipulated secrecy order, then, a judge should be cognizant of and consider those relevant public interests. However, a judge may also consider the need for efficiency and the interest favoring settlement of disputes.

2. Seattle Times v. Rhinehart, 467 U.S. 20, 34 (1984).

What Judges Can and Should Do About Secrecy in the Courts

Richard A. Zitrin

Professor 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.

Professor 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.

Professor 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, Professor 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 proved. 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, Professor Zitrin cites four 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 versus 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.”¹ 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.

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.

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 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

1. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access To the Courts*, 105 HARV. L. REV. 427 (1991).

operating in one of the very few states with strong “sunshine in litigation” laws (and sometimes even then, as I discuss later), 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. . . .”² 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 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:

- the availability of research attorneys and/or law students and the extent to which research can be done on-line;
- 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 the 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 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.

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.

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 versus secrecy:

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

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.

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.³

(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.

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.

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.

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.⁴

3. See, e.g., Tex R. 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, FL STAT. 69.081 (“Sunshine in Litigation Act”); WASH. REV. CODE §§ 4.24.601 and 4.24.611; and Los Angeles (Calif.) County Local Super Ct R. 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.

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.

(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 such as standing orders that require counsel to inform them when agreements involving secrecy are entered.⁵ 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.

Courts can take the “evaluative” process a step further by presuming that openness will be the order of the day.

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 reversals⁶ 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.⁷ Both standing orders and case-specific orders could be used. Orders, even if broad, would almost certainly be enforceable; almost all courts have 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

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.

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 Calif.*, 3 Cal.4th 273, 834 P.2d 119 (1992).

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

litigation laws that favor openness,⁸ only Texas specifically deals with “discovery, not filed of record,”⁹ and only Florida, arguably, has language sufficiently broad to cover discovery and other matters not filed with the court.¹⁰ 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 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 on page 46 of this Forum Report.

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 depublishation. 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,¹¹ 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

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. Tex. R. 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. REV. 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.

11. *See, e.g.*, the informal survey of this issue undertaken by journalist Edward Humes in *MEAN JUSTICE* (Simon & Schuster 1998).

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 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.¹² 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.¹³ 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?

While there have been numerous claims that secrecy is necessary for settlement, these claims do not appear to have even strong “anecdotal” support.

Second, while there have been numerous claims that secrecy is necessary for settlement, these 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.”¹⁴

12. Miller, *supra* note 1, at 479.

13. 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.)

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

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 four 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 allowing stipulated reversals of court judgments as a condition of case settlement.¹⁵ 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.

“To close a court to public scrutiny of the proceedings is to shut off the light of the law.”

3. 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.¹⁶ 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.

4. 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 scrutiny of the proceedings is to shut off the light of the law.”¹⁷

15. *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.

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

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

AMENDMENT TO ABA MODEL RULE 3.2 PROPOSED BY RICHARD A. ZITRIN

(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

- 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.
- 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.

Afternoon Panel Discussion

Oral Remarks of Professor Zitrin

Let's suppose that I have a former law student out there who is a plaintiff's lawyer. She has several clients who are suing a drug company, alleging injuries caused by one of the company's products. The company has known for some time that its drug has a defect, and that there have been 400 adverse incidents, but it didn't do anything to correct the problem. Let's further suppose that I have another former law student who is assistant general counsel to that drug company, who is familiar with the defect, and who knows that the adverse incidents weren't reported to the Food and Drug Administration. He knows that they have big liability problems, and he knows that there are smoking guns in the information that is subject to discovery.

Ethical Binds for Lawyers

Let's further suppose that these two former law students of mine, knowing that the public will be at risk but nevertheless adhering to the rules that one should zealously represent their clients, enter into a secrecy agreement that the plaintiff's lawyer can get all of this information but only if it is returned to the defense lawyer at the end of the case.

The judge never finds out about it. It never goes before the court. It is never part of the actual settlement agreement in the case, because it is a binding contract between the two lawyers and parties thereto prior to the settlement of the case.

At the end of the case, the plaintiff's lawyer dutifully but reluctantly returns all of that discovery to the defense and to the drug company, and that means that the next person injured by that drug doesn't find out about it—but more importantly, it means that someone else will be injured by that drug because it is still on the market.

There is something terribly wrong with that. There really is something terribly wrong with that. No reasonable human being would want that kind of result, and yet lawyers are forced into that kind of result every day. In a couple of the discussion groups at this Forum we were talking about the fact that judges don't hear about this kind of thing a lot, and that is because it is flying beneath their radar. It is even beneath the radar of trial court judges. There is something wrong when lawyers can enter into that kind of agreement, asserting that it is necessary because of the requirement of advocating zealously on behalf of one's client.

Judges' Inherent Authority to Act

In fact, many people would rather not enter into that agreement, but feel compelled to do so because of their duties to particular clients. You judges have the power to change that. You have the power to change that by court rule. You have the power to change that by individual fiat. You have the power to change that by changing the ethical rules in your state. You have the power to change that by changing the rules in your appellate district in your state. And I will

tell you, even you trial court judges, you have the power to change it in your courtroom. I know that because Monday I am filing a paper in a court in Northern California. I have to file three copies, two of which have to be in black binders with a face sheet stuck into a little sleeve and a certain thing on the binding. If the binding doesn't say the right thing, the court will say, "Hey, I am not accepting it. It is not getting filed."

So, if that judge can require me to file matters in black binders of no less than one nor more than two inches thick, I am sure the judge has the authority to say "there aren't going to be any secret deals in my courtroom." You judges, particularly those of you who serve on the appeals courts and

If that judge can require me to file matters in black binders of no less than one nor more than two inches thick, I am sure the judge has the authority to say "there aren't going to be any secret details in my courtroom."

the supreme courts of your state, have the power to make sure that the public is not harmed by what lawyers do—and by what they feel required to do—in the interest of individual clients.

There are some things I agree with about Professor Doré's paper, and a couple of things that I disagree with—not that strongly, but things I might take some issue with.

The first thing I agree with is that she has done an excellent job of summarizing what the law is in this area, a really excellent, first rate job and I really defer to her expertise. As someone said this morning, if you really want to find the whole story, read her *Notre Dame Law Review* article.

The second thing is that she says that courts adjudicate these matters in an astoundingly small number of cases and that is why this problem has been a latent problem and isn't one that often comes across some of your screens, but it is out there for all of us.

The third thing that I agree with is that, no matter what regulations there are, litigants and litigators will still manipulate the system—a fact with which I completely agree. One of the ways to avoid having litigators manipulate the system is to have court rules strong enough to sanction them so that when they do, they will pay for it. Speaking as a recovering trial lawyer and as a still occasional trial lawyer, I don't think that judges should underestimate the power of a court order in terms of its deterrent effect. There is an enormous deterrent effect of a court order that says you can't enter into these kinds of secrecy agreements, even if you can't enforce a court order like that, because lawyers don't want to disobey the direct order of a court. So even if we are talking about coming up with rules and regulations that may not be entirely enforceable, the reality is that most lawyers will abide by them simply because a court has told them that this is the way it will be in its jurisdiction. Finally, I agree with Laurie that most of the rules that exist are not terribly strong ones. Some of those are actually pro-secrecy provisions, as my paper mentioned.

Now, I want to disagree with a couple of things that Professor Doré said—not completely disagree, but just take a slightly different view of it.

“Secrecy” versus “Confidentiality”

First, I think it is very important that this debate be about secrecy. This is not about confidentiality. This is about secrecy. Confidentiality is something else. As one judge said in one of the discussion group sessions, “confidentiality” is about trade secrets. Privilege may be about trade secrets. “Confidentiality” is a concept in the law, as I understand it, that is about the attorney-client relationship and about keeping that relationship confidential. But what we’re here to talk about is not confidentiality. This is about secrecy. I really think it is important to think about it in those terms. This is about keeping things from other people, and the issue is whether they have a right to know.

Second, there has been some discussion that the only evidence of situations in which secrecy presents a serious danger to the public is anecdotal; and the only evidence that restricting secrecy won’t inhibit settlement of cases is also anecdotal. Professor Doré pointed out that that’s what the Confidentiality Proponents will say. But I want to make two points about that. One of them Jim Brosnahan already made this morning: there is an overwhelming

What we’re here to talk about is not confidentiality. This is about secrecy. I really think it is important to think about it in those terms. This is about keeping things from other people, and the issue is whether they have a right to know.

amount of credible evidence—and after all, what is anecdotal evidence if not examples of things which, when they happen with enough frequency, become probative evidence—to show that there are numerous situations in which the public has been harmed by secrecy in the courts.

Jim Brosnahan cited the example of the asbestos cases. Someone else this morning mentioned the Dalkon Shield cases. The Dalkon Shield was removed

from the market in the United States in 1974 but was kept on the international market for another 12 years, despite the overwhelming evidence that it was dangerous.

Other examples abound, like the drug Zomax, which I mentioned in my paper. Four hundred cases were reported settled, 12 of which were death cases. Nothing was done about Zomax until a scientist did her own investigation when she had her own allergic reaction to the medication. The drug was taken off the market. Priests, Boy Scout leaders, soccer coaches and the like kept their predilections secret by a series of secret settlements. Law firms have used secrecy, too. Baker & MacKenzie settled an employment discrimination case secretly without revealing that it had ever been involved in a lawsuit. So there is enough out there so that this is far more than anecdotal.

Hindering Settlement?

Finally, the idea that secrecy hinders settlement. There has been some talk that, “Well, there is no proof either way that secrecy hinders settlement or that a lack of secrecy hinders settlement.” But, in fact, there is an enormous amount of evidence that restricting secrecy does not hinder

settlement. The reason is that, in those states where there is openness in the courts, particularly in Texas, there have been no reports of any difficulty in settling cases. Another indication is the fact that some members of the plaintiff bar have argued that, “Well, if we have an open court, then there is going to be an enormous problem getting what the case is actually worth, and the value of the case will go down.” Yet it seems that members of the plaintiff bar—certainly not all of them—are more willing to support restrictions on secrecy; whereas, members of the defense bar seem more often to be against them. Just as a practical matter, that seems to undercut the idea that secrecy fosters settlement and that openness does not.

Finally, there is an issue that came up this morning, which is very important—whether something that is not filed in court should be treated differently than something that is filed in court. Here, I must take issue with Professor Doré. The standards for whether something should be open should and must be the same, whether it is filed in court or is not filed in court, but is related to the court proceeding. There is no difference between them. The real danger, when it comes to secrecy, relates to those things that are never seen in the court files—such as production of documents, letter agreements to keep production of documents secret, or to return the documents to the other side at the end of the case. You might say, “Well, how do we as judges deal with that?” Well, you can deal with it by judge-made rule, by court rule, by ethics rule, or in any one of a number of ways.

Half of the enforcement will come in the mere making of the rule, because lawyers tend to respect the clear judicial rules of their courts. It would have an enormous deterrent effect.

You might then ask, “Well, how can we enforce it?” That is a very good question. The answer is that, as I said before, half of the enforcement will come in the mere making of the rule, because lawyers tend to respect the clear judicial rules of their courts. It would have an enormous deterrent effect. But there is no reason in my mind why the standards should be different and they should be, presumptively, that there will not be any secrecy even as it relates to unfiled discovery. That is what the Texas Supreme Court’s Rule 76(a), says, and that rule is in your materials and is cited in both of our papers.

The Kentucky Prozac Case

I want to tell you about a courageous judge named John Potter in Louisville, Kentucky¹ In 1989, there was a fellow named Wesbecker, who killed eight people and wounded 12 in a shootout in a printing plant in Louisville. He was on Prozac. Clearly, a suit against the maker of Prozac was not the strongest plaintiff case.

Twenty-eight plaintiffs sued Eli Lilly, asserting that, because Wesbecker was on Prozac, it basically drove him crazy, for a variety of reasons too numerous to go into here.² The first case

1. I base this abbreviated narrative on RICHARD A. ZITRIN AND CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 193-201 (Ballantine 1999).

2. *Fentress v. Eli Lilly and Co.*, Tenn., Jefferson County Cir. Ct., No. 90-CI-6033.

against Prozac to go to trial went to trial in December of 1994. There were 28 plaintiffs. The plaintiffs wanted to get it into evidence that Lilly had previously committed 25 criminal violations of law in their failure to report adverse incidences relating to a drug called Oraflex to the Food and Drug Administration.

Judge Potter kept that evidence out. He said that the probative value of the evidence was outweighed by its prejudicial value, and he wasn't going to allow the plaintiffs to get into that. But when the Lilly executives testified in court, they kept on talking about what a great job they had done in reporting to the FDA all adverse incidents, and what a great reputation they had.

The plaintiffs' counsel raised his hand and said, "I think they have opened the door, Judge." So did Judge Potter. He reversed his ruling and said, "You can bring in the Oraflex evidence." But instead of the plaintiffs' lawyer bringing in the evidence, there was a lot of conversation in the courtroom and in the court corridors. They asked for a day and a half recess. All the lawyers were talking with each other and the air of settlement was all over the courtroom. The press showed up, eager to hear what the results of the settlement were going to be or whatever they could find out.

In any event, the plaintiffs' lawyers and the defense lawyers took a day and a half to talk to each other, and they came back in the next afternoon. Judge Potter said, "Okay, have you guys got this case settled?" And they said, "No, Your Honor, we are ready to go forward with the trial." And, surprised, the judge said, "Are you sure? No settlement?" They said, "Absolutely no settlement." Whereupon, the plaintiffs got up in open court in front of the jury and rested their case, without putting the Oraflex evidence on. Now, needless to say, Judge Potter, being no fool, was surprised by that, but the plaintiffs' lawyers said that it was a bifurcated trial, so they were going to look to get the victory in the first stage of the trial and then bring in the damning Oraflex evidence in stage two on damages.

Talking Settlement in the Courthouse Corridors

A juror came forward, and she said, "You know, I have been hearing about settlement in the corridors." So Judge Potter gathered the lawyers together. There were a whole bunch of lawyers involved in the case. He brings them all in and he says, "Okay, listen to this juror." And the juror said, "I heard the defense lawyers and the plaintiffs' lawyers discussing settlement. I am worried. I don't want to be hearing that stuff. I am a juror. I am doing my duty. I am coming forward."

Judge Potter excused the juror and he said to the assemblage, "Does anybody here have anything they want to say?" Nobody said anything. So he said, "Does anyone have the slightest clue?" "No," said the chief plaintiffs' counsel. "I can't imagine," said one of the defense lawyers. So, Potter allowed the case to go forward, and within a day the jury returned a verdict in favor of Lilly. Lilly trumpeted their verdict and the vindication of Prozac across the country. (I am not saying, by the way, that Prozac is a dangerous drug. I don't happen to believe that it is. The question here is what happened in this courtroom and whether that was an appropriate thing.)

Judge Potter entered a minute order that the case was "Decided by Jury Verdict." He was very suspicious. But rather than doing anything, he waited. What he waited for was until the

time by which you have to appeal a case in Kentucky. That day came and that day went, and nobody from the plaintiffs' side had filed an appeal. At that point, he called the lawyers back in and said, "I want to know whether you folks have settled this case."

The Judge Gets Sued

Everyone denied settling the case. Nevertheless, Judge Potter was convinced that there obviously had not been a genuine verdict, and he did something on his own motion, which was pretty courageous. He changed his minute order from "Decided by Jury Verdict" to "Dismissed as Settled." When he did that, he became the defendant in the case known as *Eli Lilly v. Potter*.³ They sued him, and they took him to the Kentucky Court of Appeal, and eventually to the Kentucky Supreme Court. He lost in the Kentucky Court of Appeal until he was finally vindicated by the Kentucky Supreme Court, which excoriated the lawyers for their behavior and their apparent willingness to tell falsehoods to the judge.

We should require our lawyers not to engage in this kind of conduct by creating rules—local, district-wide and statewide rules—about secrecy and openness, which will prevent this kind of thing from happening in the future.

Between the time that he entered his minute order and the time the Kentucky Supreme Court decided the case, both sides admitted that, in fact, there had been a settlement. They just hadn't remembered to tell the judge about it. The supreme court allowed Potter to hire a special

master, who was a deputy attorney general named Ann Sheadel, to investigate what actually happened and she had subpoena power and went about trying to figure out what actually happened and was never able to do it.

There was no written agreement of settlement. All there was was a general written memorandum about an agreement to settle. No one ever found out what the amount was. The only indication was in a divorce case where one lawyer representing a party in the divorce said that the amount of the settlement was "tremendous."

Judge Potter eventually recused himself from the case when both sides started blaming him for being biased. He said on the way out the door that, "The focus should be on what is under the log, not on who is rolling it over."

Why am I telling you this story? (By the way, it doesn't have a terribly happy ending, because none of the lawyers were ever disciplined.) The cases of the lead plaintiffs' counsel were all settled in the multi-district litigation (which was consolidated in Indianapolis, the hometown of Lilly), without any explanation being given as to why. Plaintiffs' lead counsel withdrew from his role as lead counsel, much to the dismay of the other counsel left, who had no knowledge of the case that he had. Nobody was ever sanctioned for the behavior. But the relevance of the story to what we're

3. *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449 (Ky. 1996).

discussing here is that this is what happens if secrecy is allowed in the courts. The Prozac case is not the only case like this. What we have here is a courageous, “activist” judge, who was willing to find out what is going on.

Docket Pressure

A judge in one of the discussion group meetings this morning told us about a docket of 1,200 cases, and said that it is hard to pick out every one and do this with each one of those cases. The way to avoid the kind of situation that John Potter found himself in is to require our lawyers not to engage in this kind of conduct by creating rules—local, district-wide and statewide rules—about secrecy and openness, which will prevent this kind of thing from happening in the future.

Comments by Panelists

James L. Gilbert, Esq.

Honorable Thomas E. Hoffman

Thomas M. Crisham, Esq.

Lucy A. Dalglish

James L. Gilbert

I want to do several things in the few minutes I have available. First of all, I want to identify the problem—make sure we all understand and agree that these are at least components of the problem. Second, I want to discuss the role of the courts and the role of counsel. Third and finally, I want to tell you a story about a real experience that we had that is absolutely typical of hundreds and hundreds of cases throughout the country each year.

The Problem

First of all, the problem. The first component of the problem is the court backlog. All of you know the kinds of cases. I heard one judge say this morning that she had, at the end of the year, 800 cases on her docket. And another judge said, “I am dealing with 1,400 cases.” In other words, what time do the courts have to deal with these problems associated with secrecy in the courts?

Granted, only a small number of cases have some of these problems. But look at the kinds of cases they are and the millions of people affected by one case. Take, for example, a case involving a design defect in the restraint system of an automobile. The design in that one case ultimately can affect millions and millions of American consumers. So the enormity of the problem can't be measured solely by the fact that there are only one or two cases. The enormity of the problem must be measured in terms of public health and risk to American consumers.

The enormity of the problem must be measured in terms of public health and risk to American consumers.

Now, let's assume for a moment that secrecy does encourage settlement. I don't necessarily agree with that, and there are cases which have found to the contrary, but let's assume for the sake of argument that that is, in fact, what is happening. What about the settlement? Is it just any settlement that is acceptable? Or is it a settlement based on the merits of the case. Is it a fair and just settlement? I submit to all of you that if secrecy in our courts is promoting settlements that are unfair and unjust and that affect the lives and health of millions of American consumers, we have to think about this differently.

If we are to assume that fairness in settlement is the goal, in order to have a fair settlement, you must have full disclosure of all the information. Otherwise, you can't assure a fair settlement. So when we discuss what the problem is, it has to be discussed in conjunction with disclosure of the relevant information and then open access to that information.

Tom Crisham, who will address you in just a few moments, is a lawyer whom I and other plaintiffs' lawyers encounter on the other side of the case. He represents typical defendants—manufacturers and the like. We have some similarities. First of all, Tom is a hell of a trial lawyer and, second, he is a great guy and, third, we are both strong advocates for our clients' positions.

But the similarities end right there. Look at the enormous differences in who we represent. The resources available to the other side of a product case are staggering. Millions of dollars are available to be spent on the case. Then you look at the plaintiff's resources. Often, the client is a single parent, or family with a devastating injury. They don't have those resources. They look to their lawyer and they look to the courts around the country to protect their interests.

Roles of the Courts and Counsel

The plaintiff's greatest need in a product case is the information that is possessed by the opponent. These are the documents in the possession of the defendant that relate to safety testing, risk-benefit studies, engineering analyses, and things like that. The flip side of the plaintiff's need is the defendant's desire to keep that information out of the hands of the plaintiff, because the defendant knows that its chances for a better, more advantageous settlement are greater that way—and if it can't be kept out of the hands of this plaintiff, then at least keep it out of the hands of similarly situated plaintiffs throughout the country.

It is the role of counsel after they have obtained full disclosure to go out and network with lawyers who have handled similar cases. When they discover violations of discovery orders, they must bring them to the attention of the court.

Now let's briefly discuss the role of the court. Much of what I am about to say has already been suggested by Professor Zitrin. Early on, in one of its early planning conferences, the court must sit the parties down and say, "Look, ladies and gentlemen, I will not babysit you throughout this case. I expect that my orders will be followed. I expect that, when I say these materials will be produced, that they, in fact, will be produced—and if they aren't, I will consider the most severe sanctions." I think that to rely solely upon an ethics rule, as suggested by Professor Zitrin, is not realistic. It is the court that needs to assure all parties that they will be dealt with severely if the rules aren't followed.

Then there's the role of counsel. It is the role of counsel after they have obtained full disclosure to go out and network with lawyers who have handled similar cases. When they discover violations of discovery orders—as when they discover that information that was produced in other cases has not been produced in this case—they must bring them to the attention of the court.

A Real Case

In closing, I want to give you one example of a court in central Pennsylvania, where we had a design case involving a restraint system common to millions of automobiles. We were not given full production of discovery materials, and we knew it, because we looked at a similar case in Texas where there was no secrecy order which allowed us to inspect those materials. We brought this to the attention of this court. The manufacturer laughed at us. The manufacturer said, “This judge has never handled one of these cases before. He will never be able to get through all of the documents, and we don’t care. It will be five years before you get what you want.”

Luckily, this judge had enough resolve and ability that he took it upon himself to start scheduling evidentiary hearings and requiring the attendance of the defendant’s corporate representative. Within three months he had uncovered violations of three or four major court orders and was considering the severest of sanctions. At that time, the case settled.

Fair settlements or real adjudication on the merits are only possible when there is full disclosure. That requires the help of our courts.

Honorable Thomas E. Hoffman

I don’t think amendments to ethical rules are any answer to this problem. Any time we start placing on attorneys an obligation to “society” above their obligation to their client, I think we go down a terribly slippery slope.

But the status quo isn’t the answer to this problem, either; and, to my mind, legislation isn’t the answer to the problem. I think experience tells us that when the legislature enters into the area of judicial discretion, that they generally do a very poor job of it. We start seeing words like “shall,” and the discretion is gone and we have interference with a coequal branch of government.

Legislation versus Court Rule

I think the answer is court rules—rules that are applicable to the entire jurisdiction, rules emanating from our rulemaking bodies. But I think we ought to focus on what we are talking about first. This discussion has focused on “the public’s right to know,” which begs the question. The public’s right to know what? There are some courts that will tell you the public has a right to know everything. They have a right to know what is in a marital settlement agreement between a husband and wife who have no children. But they didn’t have a right to know how many shares of AT&T the couple had the day before they filed a lawsuit, so why do they have a right to know how many shares of AT&T they have on the day the decree is signed? But the public does have a right to know certain things, namely information that in any way impacts on their health and safety. I think we have an obligation to make sure that they get that information.

At this point I think we begin to focus on what the real issue is here. It is not just simply secrecy of records and agreements between parties to seal records of lawsuits. It is agreements to keep secret information that can impact on the health and safety of a nonparty, or of the public generally.

Now, how do we handle it? I don't think it is any solution to leave it to the discretion of each individual trial judge, and to expect each individual trial judge to do everything they can to make sure that these agreements aren't entered into. I think that is kind of a Pollyanna approach. We know it is not going to happen. Judges have always had the discretion to enter these orders, but evidently there are courts that believe we have a problem. So, how do we solve it?

Differences Among Cases

First of all, we need to define it narrowly. I don't know that we define it narrowly by merely saying that it relates to "litigation that impacts on the public health and safety," because then we will get into big debates about what that is. I think we have to be fairly specific on what we are talking about. I think we have to have a presumption of openness in these types of cases. We have to remove from the equation the ability of parties to enter into these orders without prior court approval, and we have to establish who has the burden.

We have to place the burden on the party that seeks secrecy, or closure of the court file, or the filing of documents under seal, to prove that the need for confidentiality outweighs any adverse impact to the public.

Once we identify a case as being within this group, I think we have to place the burden on the party that seeks secrecy, or closure of the court file, or the filing of documents under seal, to prove that the need for confidentiality outweighs any adverse impact to the public. If they can't do that, then neither party can enter into the agreement, or the agreement is not enforceable.

I agree with the prior speakers. The rule as it relates to discovery exchange can be different. If we exchange discovery and there are papers in there that impact on public health and safety, what are we going to say? That we will allow a secrecy agreement covering that because it wasn't filed in court? That simply makes no sense.

So I believe we should handle it with a court rule applicable to our entire jurisdiction. We should keep the legislature out of this. We should maintain our discretion, but we set some boundaries on cases where the problem is perceived. I think we are capable of doing it, and I think that is the way should be handled.

Thomas M. Crisham

In the area of confidentiality, or secrecy in the courts, as in all affairs in life, it depends on whose ox is being gored. One of the areas where I spend a lot of my time is defending legal malpractice cases. I am sure it will come as a shock to all, but, on occasions, plaintiff lawyers are sued for legal malpractice—and oftentimes I am called upon to defend them. I can assure you with all the honesty and truthfulness that a defense lawyer can muster at a gathering sponsored

by the plaintiff bar, that my plaintiff lawyer legal malpractice defendant clients, when they find themselves in that situation, are every bit as interested in confidentiality and secrecy as the meanest, rottenest corporation I have ever represented.

Documents Filed versus Documents Unfiled

That having been said, returning to the real issue, I do draw a clear distinction—and I think the law does draw a clear distinction between what is filed in court and what is not. Some of our speakers today would like to change the law, but as the law stands now, every place I am aware of, there is a distinction between those matters that find themselves into the court file—i.e., which are a part of the public record—and those things that may have been exchanged by lawyers, but never see the light of day, other than in the respective lawyers' offices.

We were first instructed on this by the United States Supreme Court in the Nixon papers case, *Nixon v. Warner Communications*.¹ In that case, the Court said that there is a common law

Voluntary protective orders between the attorneys for the parties add to the resolution of the litigation and they help trial judges so that they won't have to micromanage the litigation.

right of public access, as well as a First Amendment right of public access, to those matters which are a part of the public record. Many states, such as Illinois, have codified this by statute.² Ours is called the Clerks of Courts Act, and it provides that, if something is a part of the court record, there is a strong presumption in favor of a right of public access. It is not an absolute right of public access, as the U.S. Supreme Court pointed out in the Nixon papers

case. But there is a strong presumption—and there ought to be. That portion of the dispute—and bear in mind that we are dealing with private disputes, and civil litigation—has been brought to a public entity, a court system, for resolution.

That part of the private dispute that finds itself into the public court record is clearly subject to access in all but the rarest of instances. As trial lawyers and judges we all know that the vast majority of that private dispute never becomes a part of the public record. We all know that 90 percent—maybe 99 percent—of the paper that we exchange with our opponents, whether plaintiffs or defendants, never sees the light of day, never gets into a court file, never is admitted into evidence. Most of it would never pass muster for admission to evidence. So, I do see a clear distinction between information that is in the court file and information that never gets there.

What about confidentiality or protective orders with respect to discovery? I am not talking about things that are filed and made a part of the record. I have no quarrel with the idea that, if

1. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

2. 705 ILL. COMP. STAT. 105/16/6: [] All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto.

something is filed, and if some party wants that to be under seal, then that party ought to have a very, very strong burden to obtain that. With respect to confidentiality or protective orders concerning discovery, however, I take a different approach to that. I think that voluntary protective orders between the attorneys for the parties add to the resolution of the litigation and they help trial judges so that they won't have to micromanage the litigation.

I'm not talking about dealing with some of the people Professor Zitrin referred to earlier. The problem with those guys is they are liars. Those guys don't obey the rules that are already in existence. They are certainly not going to obey this new ethical rule that Professor Zitrin wants to adopt. But if I have a confidentiality order, I am not worried about producing everything in my file because I know I am safe in doing so. I don't have to go to the court with privilege logs and fight over confidentiality and relevancy at the discovery stage. That, in my opinion, moves the discovery process along.

Keeping the Settlement Amount Confidential

As to whether the amount of settlement should be kept confidential, at least in Illinois, if it is a wrongful death case or a minor settlement, it must be approved by the probate court. Therefore, it is a part of the court record. Therefore, the public has a right of access to it. My experience has been that few if any judges in Illinois will make secret a wrongful death or minor settlement amount. With respect to other injury cases, where it does not become a part of the public record, once again, if the parties for whatever reasons want to keep it confidential, I think it is their right to do so.

They go into court under stipulation to dismiss their lawsuit. They say, "Your Honor, we have settled the case."

"Just out of curiosity," the judge asks, "what did you settle the case for?"

"I am sorry, Judge, we can't tell you."

I think the parties have the right to do that.

Lucy A. Dalglish

I guess I am here representing a defense attorney's worst nightmare: the news media.

Let me explain to you a little bit about what my organization does. I am the Executive Director of the Reporters Committee for Freedom of the Press. We are a nonprofit legal defense organization. We are about 30 years old, and I have a staff of lawyers and journalists who do publications and Website publications, but we also do legal defense work for any journalist in the United States who runs into difficulty—whether it is getting into a closed court hearing, or somebody who can't get information through a freedom-of-information request of the Federal Government or a state government, or some reporter who has been subpoenaed to testify in a trial. If that happens, we have a 24 hour a day, toll-free hot line. We

do an awful lot of amicus briefs and any other type of legal assistance that we can, and we do a small amount of lobbying also.

To give you an idea of where I am coming from here, my background is as a reporter and an editor. I was a newspaper journalist for 13 years. Then I went to law school. Then I went to work for an enormous defense firm in the upper Midwest. For five years, I represented media companies and defended media law claims, but I also did a lot of defense work on mass tort claims and some products liability claims.

So I have drafted more protective orders than I really am comfortable admitting. But I will tell you that I know a lot about what defense attorneys and clients are worried about when it comes to this. All of that said, every time I did it, I can tell you it made my skin crawl because there was not a single time I did it that I didn't think there was some information in that protective order that was part of the public's business.

Anything of importance in the United States eventually finds itself in the courts in some way.

Suits Against Public Entities

How do we get involved in these cases, and what is our interest in it? Obviously, in most instances in the United States, when the public needs to know about something, they find out about it through the news media. Most of the time when my organization is called in, it is because we get a phone call from a reporter or editor in a small town like Huntsville, Texas, where somebody says, "You know, there is this case that has been going on here for years where an employee sued the city. It was a big deal. They talked about it at city council meetings. We have been writing about it. People have been talking about it in the cafes. All of sudden, they said they settled it and sealed it. We have absolutely no idea how much money the city of Huntsville is going to be paying out to this former employee, who, obviously, was discriminated against in some respect."

So, they call us and say what can we do? What we oftentimes do is find them local counsel who, on a pro bono basis, can help them seek to intervene in this case—or, if someone else has tried to intervene, we may try to help them out with an amicus brief. Why are we doing this? The reason we do this is because journalists feel a deep ethical need to let people know what is going on in their backyard. It is the journalist's job to let people know if something is going to affect their health, their safety, their welfare, or their pocketbook.

Role of the News Media

As you know, anything of importance in the United States eventually finds itself in the courts in some way. So, in addition to looking out for the health, safety and welfare of the public, we are also there to scrutinize how these public systems, including the courts, are operating. Unless we know what is going on—and that includes how things are being settled in these very public court systems—unless we are able to go in there and take a look at it, we can't tell the public and we

cannot report to them how well their elected—usually elected—public officials are operating on their behalf.

There are two types of cases that I have noticed really draw the ire and the attention of the media that are probably more important than any other case we get involved in. One I have already mentioned. That is when there is a secret court settlement and one of the parties to the settlement is a public body—whether that be a city council, the Environmental Protection Agency, whoever it is. Oftentimes, we have discovered these cases concern discrimination involving a public employee, that has an impact on the taxpayers’ pocketbook. They want to know whether or not the city of, say, Portland, Oregon, is treating its employees fairly and whether or not, because of discrimination going on in the city, the taxpayer is going to have to pay out judgments or pay out settlements of incredibly large amounts of money. It is in the taxpayers’ interest to know whether or not their public officials are doing a good job. To me this should be a no-brainer. However, in the last few months, we have tried to intervene in several cases across the country where, in violation of state public records laws, judges have signed off on secret settlements between a public body and a public employee. I just find that to be outrageous.

It is not really that tough for a judge to identify when to take an extra careful look at a proposed settlement agreement that somebody wants to be kept secret.

Equally outrageous are the cases that we have mostly been talking about here today, cases that have to do with somebody’s health, safety, and welfare—cases involving things that can hurt people. I heard several judges this morning say, “Well, you know, this is just kind of below our radar. We don’t really know this is going on.” Or they may say, “You know, I have heard trial court judges say, look, if two parties can agree on something and it is probably the first thing they have agreed on in three years of litigation, I am going to sign it, just to get them moving along.”

Sometimes I think a trial court judge might just sign a ham sandwich if he or she thought it would get the parties together here. But it is not really that tough for a judge to identify when to take an extra careful look at a proposed settlement agreement that somebody wants to be kept secret. If the case has been in the news at all, that should be your top tipoff. If you have had reporters stopping by your chambers asking, “What is going on in the XYZ case,” that should be a tipoff to you that there is great public interest in that case and that before you sign a settlement agreement in that case, you should take a very careful look at it.

The “Efficiency” Argument

The last point that I would like to make concerns one of the other arguments I have heard judges make, that “We like an efficient court system. We like things to move along expediently. I have got a big caseload, got to move things through as quickly as possible.” You know, I am sorry, folks, but our system of government is kind of messy and that includes our court system.

A couple of weeks ago, Judge Easterbrook of the Seventh Circuit wrote a wonderful decision in a case having to do with secrecy.³ In it he essentially said, “If you want an efficient court system or if you want an efficient result in a case, go mediate it or arbitrate it.” I think he is absolutely right. If you are going to use the public court system, you are going to have to do it in an aboveboard way that people can scrutinize. It is in the media’s interest and it is actually the media’s job to hold your feet to the fire to make sure that this is done as much in the public eye as possible.

Response by Professor Zitrin

It seems to me that there has been some degree of consensus here, at least among this panel, across the board and among virtually every member of the panel this morning as well, at least as it relates to the need for dealing with the issue of secrecy and doing something about it.

I don’t think there is anyone among us who would ever balance the judicial efficiency in a particular case against a situation where there is a real danger to the public health and safety.

I am very gratified to hear that. There is far more agreement than I expected there to be, and certainly on more things than I would have expected. There are some issues that remain, but it sounds like folks are saying, whether they be judges, defense lawyers or plaintiffs’ lawyers or somewhere in between, that the goal of openness, when it relates to the public health and safety, is a goal that should be attained.

What Is a “Public Hazard”?

As Justice Hoffman said, there is going to have to be some limiting language so that we are not all over the lot about what that means. Florida’s Sunshine in Litigation Act, for instance, uses the term “public hazard” in regulating what can be kept secret. It defines it very explicitly, as follows:

“As used in this section, “public hazard” means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.”⁴

We can make definitions about what the public health and safety means. We all have an intuitive understanding. We have been talking today about drugs that harm, cars that blow up and we all know the range of those kinds of things. As Lucy Dalglish said, when the media is hanging around I believe that judges also know when they have a case like that. All you have to do is go to the first status conference and hear five words out of the plaintiff lawyer’s mouth. Jim Gilbert might say, “Your Honor, this case is about a defective X model car.” That is enough to alert the courts to the kind of case in which this kind of discovery situation or secrecy situation might occur.

3. Union Oil Company of Cal. v. Leavell, 20 F.3d 562 (7th Cir. 2000).

4. FLA. STAT. CH. 69.081 (“Sunshine in litigation; concealment of public hazards prohibited”), subsec. 2.

Let me make just a few comments on some of the points made by others. First, on the issue of efficiency that Lucy mentioned, we did hear this mentioned in some of our discussion groups. I know that there is not a single judge here who, in the interest of efficiency, would put aside a real danger to the public health and safety. I appreciate the need for efficiency. I wrote about it in the introductory paragraph to my paper. I know how important it is to move dockets along. But I don't think there is anyone among us who would ever balance the judicial efficiency in a particular case against a situation where there is a real danger to the public health and safety by allowing materials to be secreted in a manner that could be or is likely to be harmful to the public.

Settlement Amounts

Jim Gilbert talked about fairness in settlement and the fact that he is not really worried whether the amount involved is kept secret. I am not particularly worried about that either. I

If we are going to be true to the idea of public health and safety, then we should be true to the idea that what we are talking about is the dissemination of information, not the amount of any particular settlement.

know Tom Crisham mentioned that as well. I don't care, Tom, if you and I settle and you are giving me millions of dollars, if you want to keep the amount secret. It might keep me off the evening news, but it won't keep me off the golf course on my extended vacation. What I do mind is that I might not be able to convey the information to anyone else, and that if I do I will have to give the money back. If we are going to be true to the

idea of public health and safety, then we should be true to the idea that what we are talking about is the dissemination of information, not the amount of any particular settlement. I have no quarrel with Tom's point of view about that.

Justice Hoffman suggested that there should be a presumption of openness. In fact, that is almost the exact language of Texas Supreme Court Rule 76(a), which he well recognized, which is the best example of how to do this right. The Texas Rule, again, explicitly refers to unfiled discovery, which affects the health and safety of the public, and is very explicit in that regard, and I suspect that is what he had in mind when he suggested looking at those issues.

A Role for an Ethics Rule

I agree with Justice Hoffman that an ethical rule is not a panacea, and, ideally, it may not even be necessary. But I think it is worth doing, because it keeps us, as advocates, from advocating an untenable position—or, as Lucy put it, we can avoid having our skin crawl. But Lucy was put in that position, with her skin crawling, because she couldn't point to an ethical rule that required her to say to her client, "I am sorry, but I can't do this." I see that as an escape valve for the students I described to you earlier. If we don't have an ethics rule, I would rather see rules of court. I agree with Justice Hoffman. I would rather see rules of court. I would rather see 50 little Texas Rule 76(a)'s around the country.

One third of the states in this country are represented at this conference by members of their highest court. We have two of my supreme court's associate justices here in the room. This is the kind of thing that can be done by those supreme courts. But I think an ethics rule gives the lawyers a way to tell their clients, "The rules of professional conduct don't allow me to do it," and it gives people like Lucy and people like Jim Gilbert a way out of the box that they find themselves in.

Tom Crisham's mention of defending legal malpractice cases is an interesting example, because I wrote in my paper about it, and I will now tell you that I was involved in a legal malpractice case recently. It settled in the middle of trial, in a Bay Area

county. I can't say which county, because they will probably say I violated the confidentiality order. The order changed the case caption to "Doe v. XYZ," so that no one knows the very clear malpractice conduct of that law firm. I think there is something wrong with that. I really think there is something wrong with that. That kind of thing shouldn't be permitted.

We had a recent situation that I also wrote about in my paper about stipulated reversals and a judge who was brought up before our judicial commission for saying that he didn't like stipulated reversals and wouldn't want to approve one unless directly ordered to do so by our supreme court.⁵ Fortunately, that case has been resolved in the correct way.

By the way, when there is a stipulated protective order, and both sides come to you and ask you to sign it, and they say, "This is okay, Judge," don't forget whose venue it is. It is yours, not theirs. If you are going to approve that, put your name on it and say "I so order" or "So ordered." What is your responsibility, to make sure it is really something that should be ordered? I think you all know the answer to that question.

That brings me to the final point that I want to make, and that is about this distinction between unfiled and filed items. I was glad to hear Justice Hoffman say that he saw no distinction between them. There cannot be a distinction between files and unfiled items. There cannot be because, in fact, most of what we are talking about is not stipulated orders or protective orders. It is discovery.

Discovery Material

When we talk about filed and unfiled discovery, I believe in most states—it is certainly true in California—that if I want Tom Crisham to produce documents, I send him a request to produce documents. It is on pleading paper. It has the court and cause of the case involved. It has my name,

5. See *Morrow v. Hood Communications, Inc.*, 69 Cal.Rptr. 489-90 (Ct.App. 1997) (Opinion of Kline, J., dissenting. Judge Kline expressed opposition to the stipulated reversal mechanism authorized by the California Supreme Court in *Neary v. Regents of University of Cal.*, 834 P.2d 119 (Cal. 1992), and stated he would refuse henceforth to participate in granting stipulated motions for reversal.

There cannot be a distinction between filed and unfiled items. There cannot be because, in fact, most of what we are talking about is not stipulated orders or protective orders. It is discovery.

bar number, and law firm in the upper left hand corner. I sign it, and I often have to sign it under penalty of perjury—or I at least have to aver that the materials that I am seeking are appropriate for discovery. That is a court document, even if it is not filed.

The response to that production, which comes complete with a verification (and, of course, possibly a series of objections by Tom) is also a court document. If we have a dispute, we are going to go to court on a motion to compel. But the fact that it is not filed does not mean it is not a court document. It is a court document every bit as much as it used to be when we filed them with the court. There should be no distinction between them. It is there that the greatest abuses to the public's health and safety occur.

THE JUDGES' RESPONSES

Participants in seven discussion groups were invited to consider a number of standardized questions related to the papers and oral remarks. The judges devoted more time to some of the questions than to others, and to consider a few related matters as well.

Remarks made by judges during the discussions are excerpted below, arranged by topic, edited for clarity, and summarized in the italicized sections at the beginning of each new topic. The comments of different participants are separated by spaces between paragraphs. Where they appear, paragraphing within comments and footnote content have been provided by the Forum Reporter. Although some comments may appear to be responses to those immediately above them, they usually are not.

The excerpts are individual remarks, not statements of consensus. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but all of the viewpoints expressed in the discussion groups are represented in the following discussion excerpts.

MORNING DISCUSSIONS

How often have you encountered secrecy requests?

Appellate judges and trial judges had different levels of experience regarding secrecy requests, and those judges who have served on both benches had varying experiences in the respective courts.

Some judges had little experience with secrecy requests.

At the appellate level—I have been on an intermediate and now on our supreme court—and at the appellate level we don't get it very often. It is at the trial level principally. I cannot think of an appeal we have had in our southern state over a secrecy order. It is pretty much going to stop at the trial level from my experience, and I had several of them at the trial level. Most of the ones I had dealt with the amount of the judgment or the amount of the settlement.

I am on a midwestern court of appeals, and was a trial court judge for about 14 years before going on this court. I don't see much activity at the appellate level. I have certainly dealt with issues like this in a number of different areas as a trial court judge in the civil context, most often with regard to stipulated records at the pretrial discovery stage.

I am on the supreme court now. I haven't seen that. When I was in the trial court, there would be motions for protective orders, but they would be on legitimate grounds of attorney-client privilege, etc., or trade secrets. Then I would look at the documents in camera and make a determination.

I am from a southern state and I have been an appellate judge now for twenty years and I think that we have had, to my knowledge, maybe two instances, just basically reviewing trial courts to determine whether or not they did use discretion in sealing them.

I quit being a trial judge in 1986 and I think these kinds of questions, this secrecy thing, isn't that of more recent vintage in the legal system? I mean, as these class action and product liability cases have become what they are today. They were not of that magnitude back in the early eighties, at least where I was from.

I'm from the midwest. Rarely have I faced anything dealing with this topic. It is so rare that I'm not sure I can recall the one or two cases that I have seen it. I suspect it is because our court rule promotes openness.

I am from the midwest and, if anybody would be litigating in this area, it would be the media. As a trial judge, every now and then in product liability you encounter this problem, usually in sealing discovery. I don't think we have any appellate cases in our area because almost everybody agrees to secrecy.

Notwithstanding the suits from the media, secrecy just doesn't seem to be a big issue.

In 20 years on the court of appeals, I don't think we have had this three times.

I am from a southeastern state, and I was a trial judge before I became an appellate judge in 1986. As a trial judge I don't recall this being any issue at all. I don't have any recollection of this being an issue on the court that I sit on now.

My sense is that in the vast majority of cases, confidentiality isn't really an issue. Some of you who have been trial lawyers or trial judges would know better than I, but my sense is that we are probably talking about one percent of the cases where there is any interest in imposing confidentiality.

I have been an appellate judge for 20 years, and I have never heard of a case where the issue has arisen in my state in 20 years. Once in awhile it comes up in a federal court, but I am not aware of a single case in 20 years where this issue has ever surfaced.

I sit on the appellate court here in a midwestern state. Like others who sit on reviewing courts, I have the same experience. I have seen very few of these cases at the appellate level.

Several judges, however, had encountered secrecy requests more frequently.

When I started my trial court career, I always got requests to seal documents.

Probably every week, every couple of weeks.

In eight years I was asked to do this about three times. This is not a problem for judges—unless you are in some jurisdiction where they have some big deal, where they are trying to drive the judges crazy.

I have had motions for attempted orders or stipulated orders almost on a weekly basis at the discovery level. I assume that one time, defense counsel evidently went to a convention, and they told them to come back and file the protective order.

I was a trial judge for 12 years, and the occasion did come up on numerous occasions.

In what types of cases did you experience secrecy requests?

Several judges indicated they encountered secrecy requests most often in product liability cases.

I'm a circuit judge from a southern state. I receive requests for protective orders on a routine basis. Normally they deal with trade secrets.

Most of the cases involve defective products. By the time we get them, the product has been changed and improved and the defect is gone. So the whole to-do is much ado about nothing.

There were some product liability cases, but nothing like the class action things that you see now. I remember one about a chain saw that would kick back. Others were car wrecks, just the regular old kind of case, before things got as big as they have.

I did a lot of products liability work, both as a lawyer and later as a judge, and it was very, very common in medical negligence and in products liability to have an effort made to hold back or at least render confidential some of the discovery material.

As far as secrecy in discovery issues goes, most of what I have seen comes across in business versus business cases or in wage and hour type cases, and hasn't come up very often in personal injury or private liability cases.

In our appellate court, most of the sealed records come up in child custody cases, true trade secret cases, for instance, where the plaintiff is the employer seeking to enjoin the former employee from making use of the documents.

At what point in the trial process did you encounter secrecy requests?

Several judges encountered secrecy requests frequently during discovery.

I was a trial judge long ago, but what I keep hearing is that there are still in discovery matters almost routinely an early hearing as to what is going to be required, and what confidentiality, if any, will attend that request.

I have had motions for attempted orders or stipulated orders almost on a weekly basis at the discovery level. I assume that one time, defense counsel evidently went to a convention, and they told them to come back and file the protective order.

I don't know that it comes up as much at the settlement stage as in the pretrial discovery stage. I look at trials with thousands of documents. They don't get filed, but once we get to trial I have got these exhibit books with thousands of pages, every one stamped with big red letters that this is confidential. I say, "Wait a second. This is a copy of a newspaper article. I have already read this."

I have got these exhibit books with thousands of pages, every one stamped with big red letters that this is confidential. I say, "Wait a second. This is a copy of a newspaper article."

Well, it seems to be a presumption that everything is confidential. So, we are starting with the idea that the lawsuit is a secret proceeding unless the lawyers decide to unseal it.

I have not seen anything on the appellate level that would deal with discovery and protective orders. I did see them frequently on the trial level. In the context that I am aware of, somebody would ask for

something specific, and there would be an objection and a motion for a protective order. So it would come up in a real specific manner, and then the parties would either agree or not agree. I would generally rule that for purposes of discovery at that point, that the protective order would issue. It was always pretty narrowly drawn.

In pretrial discovery they could claim that "This is a trade secret. We won't divulge it." So, then the plaintiff who is trying to discover this material files a motion to compel, and then the other side files a motion for a protective order.

I think you have to differentiate between sealing files and protective orders. If you seal files, you have the news media in there right away. When you are talking about protective orders, of course, it is not as drastic a thing, I think, as a case-by-case situation where you are looking at the facts of the situation in terms of discovery. What is the interest of the public when the litigation is over?

Other judges encountered secrecy requests more often as part of a proposed settlement.

The type of which we are talking here generally doesn't come up to us that much, because where the order is in place, it is generally in a settlement. The case is settled. Neither of the litigants has any interest in appealing anything. The case is over.

The other instance when it would come up is if they want the settlement made a part of the record. Then they ask that it be sealed. I refuse. So, it rarely is an issue.

What is your experience with requests for the depublication of opinions?

Some judges noted that their courts normally oppose such requests, while others said that their courts routinely depublish opinions, with or without a request from a party.

We don't get many confidentiality orders appealed. But we do get lots of requests to withdraw our opinions after the parties have settled, after the opinion comes down. They want the opinions withdrawn not to protect trade secrets or something like that, but to suppress our opinion on the law where they don't want the public to know, where they don't want other lawyers to know that a court has

agreed with a particular “advancement,” shall we say, in the law. We almost always refuse these motions.

Why should it be undone? Why should a judgment be undone if the public has an interest in a verdict, and the jury has an interest in the verdict?

I’m on a western state supreme court, so I don’t really see this very often. All of our opinions are published. I have never seen a motion to—I know some states have publication committees and so forth, but in our case, both at our immediate appellate level and on my court, we don’t have that.

If that verdict affects some interest, such as a health or safety issue, I think it is one case, but if it is simply a motor vehicle accident and then they settle it but they want the judgment taken off the record, what public interest is served by maintaining that? People are going to know about it. We are not expunging it. We are just eliminating whatever legal effect a judgment might have.

I wrote a decision construing an insurance policy and reversed and rendered judgement for the plaintiff in the case. The parties came in and announced, by motion, that they had settled the case and wanted the court to withdraw its judgment and opinion.

I wrote a decision construing an insurance policy and reversed and rendered judgment for the plaintiff in the case. The parties came in and announced, by motion, that they had settled the case and wanted the court to withdraw its judgment and opinion. At that time—we have six judges on our court—I was told that it was customary that when the appeal was moot by way of settlement, that we had customarily withdrawn, not only our judgment, but also our

opinion. So, I acceded to that request, even though I complained rather bitterly. Subsequent to that time, the supreme court has changed the rule. Now the appellate courts are entitled to look at the case and to decide on their own whether they want to withdraw the opinion or not. We have had several instances since that time where we have refused to withdraw the opinion. We have always acceded to the request of withdrawing the judgment, but we have refused to withdraw our opinion.

Generally it is the defendant seeking to have the opinion withdrawn because they don’t want that adverse legal point to be public. But we nearly always refuse that, as it is a new development in the law and we feel that, as a matter of public policy, and for the advancement of the law, the people ought to have that. Sometimes we order an opinion not published initially and then the winner comes back and asks us to publish it. When they do that we generally agree to publish it.

We don’t have such a thing as an unpublished opinion in our southeastern state. We publish everything.

We have a situation where the supreme court took our case on a petition for certification. The parties, during the interim, settled the case, and then the supreme court issued an order—I think someone used the term “depublishing” our decision. They certainly have the right to reverse us, but they didn’t reverse us, and they didn’t issue an opinion. They simply entered an order vacating our opinion, and the reason for that was that the case was settled, and it had become moot. We struggle with that actually in our court a lot.

I have seen this a couple of times in our state where the case goes to the court of appeals and a decision is rendered and then the parties decide that they want to settle, and they petition the supreme court and they say, “We would like the petition granted and to have you depublish the decision of the court of appeals, and this will be settled and everything will go away.” But we don’t have the authority to depublish a decision of the court of appeals. We can remand it to the court of appeals and see if they want to depublish the order, I suppose.

Depublication violates one of the purposes of the published opinion. It is not just for that particular case but its precedential value.

I have been on the court of appeals for seven years. We can choose to publish opinions or choose not to publish opinions. We have an appellate rule that has a criterion for when we publish. We have to have a written opinion in all of our cases. So a lot of times, when this comes in, they try to tell us not to publish. We get motions not to publish. That is the only kind of context I can put this secrecy issue in. We usually publish opinions of public interest.

It is a race to the courthouse for us. Sometimes a rumor gets out that a decision is coming out in a case, and those parties start getting together to settle, and they write to us and they say, “Don’t put that decision out, because we are going to settle.” We say, “Too bad. This thing has been pending for three years. You should have settled it before.” If they file that request a minute after our opinion gets filed, they are out of luck. We don’t withdraw it. Really, you put your heart and soul into this opinion, you craft it for months and months and they have had years to settle and now they want you to withdraw it. So we don’t ever withdraw opinions.

Sometimes a rumor gets out that a decision is coming out in a case, and those parties start getting together to settle, and they write to us and they say, “Don’t put that decision out, because we are going to settle.” We say “Too bad. You should have settled it before.”

We can publish our cases if we think that they fall within the parameters of public interest, or the law needs some explanation. The supreme court can essentially request that we don’t publish them. I think the distinction between publication and non-published cases is blurring. Even the cases that we don’t publish go on our Website the day that they are filed, so they are out there for anybody in the world to read. So even though they are not published, they certainly are not secret.

I have been on the court of appeals for 18 years, and one of the issues we have been asked to address

are publication and de-publications of opinions. Of course, most intermediate courts of appeal in this country don't publish anything. We have kind of a strange publication situation in our state. Not frequently, but we are asked sometimes, "Would you please publish this decision that has just been filed?" When I first got on the court, we sort of did that. If anybody wanted it, we did it. Since then, we have been very hesitant about it, because we recognize that the party that is asking the case to be published is doing it to enhance their position at the trial court level.

To what extent do you believe that secrecy promotes the settlement of litigation?

There were divergent views on whether secrecy helped the settlement process. Some judges believe it has no effect on settlements.

Some parties will offer \$100,000 for the claim and \$20,000 for the confidentiality agreement, after the claim is settled.

I have never had a settlement fall apart because I expressed a reluctance to close a file or keep the settlement secret—never.

I don't think confidentiality helps settlements. I think settlements go through because of the risks of trial. If you get confidentiality too, that is great, but I think the same numbers of cases would settle.

The anecdotal evidence we have is to the contrary. There is one federal judge in (a western city) who is not taking any confidential settlements. There are a number of lawyers whom I have talked to from around the country who refuse to participate in confidential settlements. I myself include that in my now increasingly rare agreements, that I will not do it. I have never seen a case that didn't settle, notwithstanding the lack of secrecy.

Some parties will offer \$100,000 for the claim and \$20,000 for the confidentiality agreement, after the claim is settled.

I see no evidence that the secrecy provisions relating to the sequestration of the documents helps at all. In fact, I think it stirs up the well-known paranoia that causes lawyers to engage in even greater and more intrusive efforts, because they say, "If they are burning those, I've got to engage in even more extensive discovery the next time around, to be sure I've got it all." So I do not think that secrecy regarding the identity of the documents promotes settlement.

I have never ever sealed anything, and I have had no bad repercussions. So, to answer your question, the answer is no. I don't think it hinders settlements at all.

I think if the lawyer's client is interested enough in wanting to keep it confidential, even in the caverns of the courthouse, the client is going to feel much more threatened by somebody getting up in a courtroom and speaking about the effects and exposing them to the world than he is about the papers, where one could fish it out. So I have no doubt that settlements can be reached more quickly with these documents. But I think when you come to the end of the line, if there is going to be a settlement, there is going to be a settlement with or without the secrecy,

because if it is going to go to trial, it is going to be far more exposed than it would be in the county clerk's file jacket.

When I was in the trial court, and I think most of us here are on courts of review, and so I am speaking from the time I was on the trial court. I would automatically not permit a secrecy order. When they came in, most of these cases involved lawyers of some repute, lawyers who were highly experienced, and they would say, "Oh, Judge, we have a settlement, but it has got

to have this in it," and I would say, "No. I am going to continue the case for one week. You come back and tell me if you still have a settlement without that secrecy portion of it," and in no instance have they failed to settle. They come back with a settlement. They take it out if you are firm enough.

It seems to me that sealed settlements around the country are pretty well perfunctorily accepted by the courts, and I think that it is probably the rule to encourage settlement of litigation, to clear dockets off, for good reasons.

Almost every product liability case, we would get the request to seal as almost a condition of settlement. I routinely refused. I never had one case in all the

years I have done it—I did it about eight or nine years—I never had one case not settle because I refused the secrecy order, not ever once.

What is the option? If the defense wants to keep it a secret, if he or she doesn't settle the case on the part of some refusal on our part to seal, it goes in front of a jury and there is a public trial. There really is no option. I just don't see it having any impact at all on settlement.

Other judges believe secrecy does help in settling cases.

I think it helps settlement, because in every case where there was not a privilege and there was not a trade secret, and I didn't grant the order, attorneys settled, either in cases where there were medical records that they are permitted to get—if they don't want them, I figure they are going to resolve the cases.

To a certain degree, it does help settle cases. It boils down to the parties and the type of litigation that you're looking at.

Litigation is what brings about settlements. You really have to get into it for a period of time until everybody wakes up and they say at this time we are going to have to come to some resolution, but we don't want to make it public.

It seems to me that sealed settlements around the country are pretty well perfunctorily accepted by the courts, and I think that it is probably the rule to encourage settlement of litigation, to clear dockets off, for basically good reasons.

I think for ease of operation of court, yes, the possibility of confidentiality makes our job much easier, and justice much better.

It seems to me, on the cases I have seen over the past four years, that almost any defendant who will pay a sizeable amount to settle will insist on either a vacatur of the judgment, if there is in fact a judgment that has been entered, confidentiality certainly as to the number, and other facts involving confidentiality. I have a problem accepting the fact that it has nothing to do with settlement.

Are the hands of those involved in the litigation tied when it comes to secrecy tied to settlement?

Many judges spoke of the conflicts that parties in a case face when a demand for secrecy accompanies a settlement offer. Often, overburdened judges feel compelled to accept the secrecy request when both parties come to them and present it as part of a settlement that will take the case off their crowded docket.

I go back to what Clarence Darrow had to say: “A courtroom is not a place where truth and justice inevitably prevail. It is an arena where competing lawyers fight to win.” I think it places the court judge in a very uncomfortable position to go outside of an agreement of the parties for the sake of public policy.

It is strictly a question of time and economics and it is a pyramid. You have got the judge involved, who doesn't want to devote the time to going through all those documents one by

The problem that I am facing is that I carry a caseload, a constant caseload, of over 1400 cases. I don't have the luxury to sit and look at each case and each order.

one. You have got the plaintiff's lawyer involved, who is charging on a contingency fee basis, and time is money, and can't put a lot of time in the file unnecessarily. The defense lawyer is well paid for time, and wants to put as much time into that file as possible. There's a client who is willing to pay for that time, because the

manufacturer doesn't want to give up that material in future cases. It all ratchets one way, and the way that it ratchets is in favor of the plaintiff's lawyer signing the confidentiality agreement and going ahead and getting the documents as expeditiously as possible.

I think it is a balancing act. When there is public safety involved I could see our stepping in and our doing something about it—or, as you mentioned, some kind of court rule. But it is like putting your finger in the dike with the water coming over the top of the dam. You are going as fast as you can with six- and seven- and eight- and nine-hundred case dockets, and these things are peripheral, and you are saying, “You've settled it? Good. Let's go to the next case.”

We have to settle cases. The judge next door to me at the courthouse is 84 years old, and he disposes of 75 cases a month—and he probably has five or six jury trials during that time. He has two juries sitting there. He gets one picked and he has another one standing by, ready to go on the next case. So he settles cases, with or without confidentiality agreements. But we have to get cases settled. That is survival.

The problem that I am facing is that I carry a caseload, a constant caseload, of over 1400 cases.

I don't have the luxury to sit and look at each case and each order. If I get a basic agreed order with both sides agreeing that we agree that the material here is confidential, I'm not going to sit and go through—I just don't have the luxury of time to sit and go through and make an independent decision, maybe contrary to what the attorneys both agree is confidential. Because then I have to call them in, we would have to have a hearing, and it is me against them.

It is hard for me as a judge when I have got the plaintiff's lawyer saying, "Look, judge, we want to settle." Here is the defense lawyer, also, "Yes judge, we want to settle these," and I feel like in some instances I am doing wrong.

In cases that may be tried or put on the record, basically, the judge may not know very much about the facts of the case. If you settle it, if you want to settle it, fine, that is a settlement, unless someone is a squeaking wheel. We approve the settlement. That is how we get cases done.

I started out thinking, if both parties agree, what harm is there in doing this? They agree. I am just agreeing to what they agreed to.

While I agree, basically, that judges can't be proactive to the extent that you are talking about, the way that this all results is that you come in with a minor settlement and you say, "Judge, we have reached this settlement and we want you to approve it." The judge looks down there and, within the agreed order, there is a clause that says, "The results of this case, the settlement amounts and any discovery materials will be confidential and will not be disclosed to the public." Now, that is the red flag that goes up, that the judge might have some obligation to go further.

It is hard for me as a judge when I have got the plaintiff's lawyer saying, "Look, judge, we want to settle." Here is the defense lawyer, also, "Yes, judge, we want to settle these," and I feel like in some instances I am doing wrong.

Even in those cases where a settlement has to be approved by the court, for example cases involving infants, the issue really is whether this is enough money to compensate for the injury. The cause of the injury, that is not even an issue at that point. You are just talking about the adequacy of the compensation.

Judges recognized that plaintiff attorneys are sometimes faced with a choice between agreeing to secrecy and doing what is right for their client.

There is no doubt that the plaintiff lawyers, if they want this money, have to agree with this. That gets solved by a court rule that says the agreements don't hold water if you are dealing with a case of personal injury or property damage where there are possible implications for someone other than the immediate parties. In that case, the rule says, you have to get it approved by a judge. That's it. Over.

What happens when the defense lawyer says, "I will settle rather than have this information revealed to the public. Here is \$50 million, but the condition is, it is secret." Now, the plaintiff's lawyer either has to tell his client, "Get another lawyer," or reject the settlement. He rejects the

settlement and the jury finds the defendant not guilty. Is there any judge in this room who wouldn't enter a summary judgment in a legal malpractice case that follows where the lawyer has convinced the client not to take a settlement because the hook or the condition for that settlement is secrecy? I don't understand what kind of a position you are putting the plaintiff's lawyer in unless you have the ethical consideration that affects both the plaintiff and the defendant and bars both of them from making that kind of a condition. Without that ethical consideration, how can a plaintiff's lawyer say, "No"? I don't understand.

I don't see how a lawyer could refuse to agree to secrecy. First and foremost are the best interests of his client.

If there is a conflict, it is pretty much a conflict for the plaintiff's lawyer, whose viewpoint is, "My sole role in this case is as a zealous advocate for my plaintiffs here, and if it is to the interest of this individual plaintiff to seal this record, then no matter how I may feel about it, that is my obligation."

Too often the plaintiff lawyers are put in the position of having to make a choice. What happens is that they realize that they could lose a lot of valuable time, before they get into the actual substantive discovery, just in fighting over all this. So, they do consent, and the court is presented an agree order and the court, really because of all of the pressures that we all know about, signs it.

Isn't that really the reason why we need a court rule? Without a court rule requiring judicial examination to make the determination whether there will be or will not be sealing of discovery

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information, you cannot put a plaintiff's attorney in the position of saying, "I have to turn down this very advantageous settlement to the client who hired me because I perceive a greater good to the public." That is silly. That individual client hired that plaintiff's attorney and if that is a great

deal for that plaintiff, then that attorney ought to take it. But you should not put the plaintiff's attorney in the position of being required to make that choice.

When the plaintiff lawyer is offered X number of dollars, and the clients say, "We want our money," that plaintiff lawyer's hands are tied because he cannot say, "No." He has to look to the best interests of the client.

The plaintiff lawyer may want this to be out in the open, but if he has a settlement offer in front of his face and the defense attorney is saying, "This is one of our conditions: you have to conceal it," he is going to look out for his client's best interests maybe and agree to it. He may not want to, but he will do it for his client.

We talk about public interest, but it seems to me that the tension exists in many of these cases where the lawyer for the plaintiff feels that he or she has to get the client the money that the client wants. The client has zero interest in the public interest and 100 percent interest in his or

her pocketbook. So, now the lawyer, who may have good motivation, but also has two other lawsuits for which this information would be very important and would make it more efficient for him or her to pursue those other lawsuits if there were no secrecy order, what's the lawyer supposed to do?

Defense lawyers often have to acquiesce to the wishes of clients who demand secrecy.

If the defense lawyer says, "I don't want to put a confidentiality provision in this," and the client says, "I want that," is the lawyer going to say, "In the interest of the public I'm going to turn that down?"

I have seen very few cases that have settled where they have not insisted on no admission of liability, "we are not going to produce the number we are settling for." I think that it is difficult, as strong as I feel for public access, I think it is

As strong as I feel for public access, I think it is difficult to get a defendant to settle a case without doing it on a confidential basis.

difficult to get a defendant to settle a case without doing it on a confidential basis. If you want to encourage settlements, I don't know how you get around that issue.

There is an extortionate concept here. The plaintiff brings this case that may be a new mass tort situation. The defense says, "We can either fight over every piece of paper or you can sign this confidentiality agreement." Effectively, plaintiff's counsel has no choice. Then the judge approves it, but we are not really approving it. The plaintiff is coming in and saying, "Please approve this," but really, this wasn't a negotiated thing. This was extortion.

One judge said everyone's hands are tied.

You know the triangle: the plaintiff has this powerful motivation to settle to get compensation; the defendant has a powerful motivation to settle; he gets closure on everything; the court has a powerful motivation to settle because it clears the docket. So you've got the economic incentives tied into this almost irresistible dynamic, and it may not be good. The same thing is true in stipulated orders. Plaintiffs and defendants have offsetting but equally powerful motivations to enter into stipulated orders that have terrible effects on other courts and on the lawyers, much less the public.

What is motivating people to either demand secrecy or accept secret settlements?

Some judges noted that the motivation of some of the participants may not be as easily identifiable as one might think.

Of course, the seamy side of this whole subject, which we haven't touched on at all, is that there are some very accomplished trial lawyers out there who recognize the fact that secrecy might be a premium in a settlement. So, if the lawyer has a case that is worth a million dollars, he might

be able to get a million and a half or two million dollars out of that defendant if there is a good iron-clad secrecy agreement—especially if the defendant knows that if the case goes to trial, everything is going to be on the public record from that point forward.

I see some instances where I am really not convinced it is necessarily the litigant that is pressing for the confidentiality order. A lot of times the insurance company or defense counsel seem to have it in the word processor, and it comes out, and since the plaintiff doesn't care, again, it ends up on my desk. And I pick up the phone, and when I talk with them I try to find out what it is that they are concerned about protecting. Usually you get some dumb looks and, "Well, we don't know."

Sometimes I feel like there is just really no direction behind this, that it is just a boiler plate word process kind of thing that somebody thought would be a good idea to press. When you push a little and you get the insurance company defense lawyers to go back to the client and find out if the client cares, the client often doesn't really care. Again, I think when they really start to care is when you are talking about a particular product that they know has been hurting people, and they just don't want that information to get any further.

Does granting secrecy requests conceal public hazards?

While there was no real consensus on whether secrecy requests result in public hazards being concealed, some judges did express concern over keeping documents secret if they would reveal dangers to the public.

The real problem can be shown by the infamous memo in the Ford Pinto cases, where a decision was made on a cost-benefit analysis that it would be cheaper to pay the people who were burned to death and mutilated. What happens is, they know about the danger, and they don't correct it, and they are willing to pay. The longer they keep it a secret the better it is for them, because the cars they built go off the road because of age and a lot of other things. But it has a significant impact on the public. It really does. The public doesn't know about it. They buy the vehicle, and then they get hurt.

If they can bury the smoking gun for eight to 10 years, then that is eight to 10 years of profits.

When they have to they will fight tooth and nail, they will want secrecy, they will want to seal documents when they end up paying. Eventually, if it is like the cases involving the medication Zomax, for example, or the Shiley heart valve, because of the dramatic and public nature of the cases, they have the pressure to withdraw the product and make the corrections. Too often, the correction is never made. They never made the corrections on the Corvair vehicle, which was a big problem of this type of litigation.

If they can bury the smoking gun for eight to 10 years, then that is eight to 10 years of profits. That is exactly what has happened in major product liability litigation over the years.

That is what happened in the tobacco litigation. In that General Motors case in Los Angeles where there was a \$4 billion verdict, they brought in the documents from another case in Florida and used them in the trial, and that is what blew the case open.

You need something that is in the interest of the public to know at that time. If you want the people in the Concorde, the people in the airlines, to know that the tires on the Concorde will heat and the planes crash, you don't want that preserved, you want that known immediately for the interests of the public. What is the purpose of preservation if it is dangerous to the public?

The fact of the matter is I think that is an irrelevant argument that the number of secrecy orders and sealing orders in terms of total number of cases is small. If five or six involve a major problem for the public health that could have been stemmed, it is indeed significant.

I think that the courts are established as an entity for the citizenry of the state of this country. They are established by our constitutions, both federal and state, and they really belong to the people.

I would think that is very much a subject of grading, from white to dark. Obviously if you see something which has not been previously revealed, which reveals a real and immediate danger, I would think that it would be appropriate to say, "Notify the appropriate agency."

I really don't believe that any good purpose is served by keeping the settlement secret. I think that it could provide an indication of the level of a particular hazard.

I think the argument would be, well, there may be a document in there that says something terribly poignant concerning the public health and safety. And it is possible that some document is in the body of documents that have not been made court records, that if the public knew about it, would alert them to some danger. But I share the concern that I don't think it is the court's duty to sift through those and to make it available.

Why should courts be concerned about the public health and public welfare?

Several judges asserted that the public's interest in the courts is an integral part of the system. Some judges did suggest, however, that the public interest was not always paramount.

I think that the courts are established as an entity for the citizenry of the state of this country. They are established by our constitutions, both federal and state, and they really belong to the people.

The whole premise of the public interest in this is that they are using a public asset here to resolve a private dispute.

The courts are supported by the people to help them and enforce whatever they come up with. So if the public is going to enforce it, then the public maybe could have a little something to say about it.

I think we have to define more closely who this “public” is whose interests have to be protected and how best to protect them and acknowledge that these situations arise in very practical contexts wherein people have other interests than they profess to have, and I don’t know that the public that may be involved in a different class of cases is always the same.

I think one of the things we forget is that when a settlement comes down with records kept confidential, one group seems to be singled out for some favor as opposed to some other group. We need to understand that the public thinks we are aiding and abetting that. They don’t make these nice distinctions.

If you are going to make it non-public, then you should have a good reason for making it non-public.

The public’s access is based on some concept that they have the right to examine those documents that influence the judge to reach their decision. If these documents are not before the court, then they are not implicated in the judge’s decision-making process, therefore they are not subject to public access.

One of the issues though is the issue of public courts. How far can you go? I have had some cases in which they want everything—depositions, motions for summary judgment—completely under seal. If I do that, it is not a public court any longer.

That is a problem. There is a public policy issue involved.

I have had some cases in which they want everything—depositions, motions for summary judgment—completely under seal. If I do that, it is not a public court any longer.

Isn’t there a symptom of the underlying concern here, that this is going on completely without any public policy limitations or even consideration of the fact that these are very serious failures, in that situations that implicate public welfare are being resolved by private understandings between lawyers and litigants?

Who “owns” the litigation?

An area of ripe discussion revolved around the “ownership” of the dispute, with some judges asserting that the dispute was purely a note between parties, with little public interest involved, while others disagreed with that notion.

I go back to the whole idea of what a lawsuit is. It is a dispute between parties, and that is what I feel like our functions are as judges—to sit there and provide a forum for this dispute to be settled, and where the parties are agreeable to the settlement I have got no problem with that.

Do the parties own the litigation to the extent that if they want to have a trial, and they want me to preside, that they can agree that I am going to close the courtroom door and put my sheriff there so no one hears what is going on?

I think the vast majority of all the judges felt like, you know, “let sleeping dogs lie,” if people want to agree to stuff, that is their business, it is their case. If they want to do it that way, that is their business, as long as everybody is in agreement. I think that probably almost everybody felt that way, certainly the vast majority.

It seems to me that if you start out with the premise that courts are primarily for the resolution of private conflicts, and we allow people and permit people to go to these forums to resolve their conflicts, those folks ought to be able to withdraw from those forums if they choose to, and resolve the issue via settlement. Now, obviously what they want to do is they want to do both—they want to stay and use court support to enforce the settlements. I don’t think we have rules anywhere that would say that parties could not agree to dismiss a lawsuit and go outside the forum to settle cases, and then we wouldn’t have much interest in it. It also

If we start with the premise that they own the lawsuit and they can do with it whatever they damn well want with it, why can’t they just walk out and say, “Seal the damn court—don’t let anybody in to watch the trial”?

seems to me that anytime there is even the slightest public interest involved in the litigation that it must remain open, and that is the rub comes naturally.

If we start with the premise that they own the lawsuit and they can do with it whatever they damn well want with it, why can’t they just walk out and say, “Seal the damn court—don’t let anybody in to watch the trial”? All of a sudden they are going to be running this public institution, and if they choose to make use of this public institution, one of the things that occurs is that many of the documents are going to be public.

This is where I kind of get squeamish about this. It is their dispute. They own the dispute because the only way they are able to resolve the dispute in the way they want to is to step into that public forum, and granted a lot of defendants don’t want to be there, but in the American system we have decided to have a judicial system and not do administrative disposition of these kinds of things.

Why is it that it is before us now and we have the questions and we have the case; does it become our thing and beyond the interests of the litigants? Again, if the litigants can basically maneuver always around whatever is going on that the court might claim to be its product or its ability to control things, then it really is just a matter of having enough insight to know they can seek review. We like this decision. Let us give them the million bucks and be done with it.

It seems to me that that is one of the fundamental things that this forum is about: whose case is it, really?

I think I am probably still of the mind that it is the parties’ case.

It is the parties’ case, and they elect to bring the case.

They don’t have to bring the case.

The Role of Judges

Some judges questioned whether their role is merely to be an arbiter in the resolution of a private dispute or to be a guardian of the public interest.

I thought our job was to adjudicate, and if that is our role, why are we getting mixed up in what the parties want to do between themselves? Why is that our responsibility? What is our duty to the public beyond the right of the litigants appearing before us?

Let's just say for the sake of the argument that it is clearly not a part of the court record. Wherein is there an historic right of public access? Wherein does the state, and in this instance the judiciary have the right to make public documents that have not been public before, towards which someone may have taken great efforts to make them confidential?

I see an overlap between some regulatory agency that may have a very specific mandate towards the public's health and safety, and information that is in the hands of a court concerning which the power to release it is not very clear.

Who gave you that job of protecting your neighbor because of something you learned in the courthouse? When did that become a part of your job? I agree as a human being that is exactly

Who gave you that job of protecting your neighbor because of something you learned in the courthouse? When did that become a part of your job?

what I would want to do but who said that was part of your job as a judge to be responsible for the well-being of that little girl or one you don't know that is not your neighbor but she lives two streets over, and she has got the same pool and how do you get the word to her? Your neighbor gets warned, but the one two streets over

now dies because you didn't know her. At some point we become the protectors of everybody, and we lose our focus on what our job is as judges—which is to run a clean fight.

What right have you to prevent an otherwise public proceeding from being made public just because they came to you and are asking for your signature? You are a public official. You are being asked to perform an act that the constitution empowers you to do. Your state laws have empowered you to do it. The rules have empowered you to do it. Do you have such a disinterest in what you are doing?

We are public officials paid by the public to do public work, and I think that essentially means we do it publicly, and so, if what is involved is something that has to do with what you are doing as a judge you are basically wise to do it in a manner that allows the public to scrutinize that, and that is different from what the litigants might prefer to work out if they could, but again, the Constitution has been interpreted to make quite clear because it has an open courts provision that everything the court does is to be done openly.

I would hate to be a trial judge and seal the record on the dangerousness of a slide in a particular swimming pool knowing that my next-door neighbor had a little 4-year-old

daughter who had that very same kind of pool and not be able to say, “We just settled a case in my court for that very pool with that very slide. It caused a 4-year-old boy to break his neck, and I understand that this happened 20 times around this country.” I would hate to be that trial judge.

I was a trial judge for 20 years before I went on the supreme court. There was a case about five or six years before my court in which the discovery had all been sealed. Included in that discovery was a promo tape for selling a pool, and it showed in that promo tape a man diving off of a platform into the pool. In my case, the defendants denied throughout discovery and were prepared to deny at trial that they ever advertised that the pool should be dived into. They barred the litigants in my state from having access to the Illinois files. I cannot remember how they ended up getting it, but I ruled it was admissible. To hell with Illinois’s rule—we ended up trying the case, and it was a \$3 million verdict because the guy broke his neck in the pool. It is absolutely wrong to hide that kind of information. I don’t see how anybody could say that it is right to hide that kind of information.

I think it is not good for court systems when it seems as though those with means or resources somehow always have secret arrangements that no one knows about.

Fortunately the Full Faith and Credit Clause does not require us to enforce the injunctive orders of sister states. We had situations where we did have plaintiff lawyers come up with documents and all of a sudden in comes the auto manufacturer, saying, “Where did you get that?” The plaintiff’s lawyer said, “I’m not telling you.” Then the manufacturer is turning around and they want us to order him to tell us because they think he got it from the case of A v. B in Indiana. I said, “Go to Indiana. That’s their problem, not my problem.” So I supposed there is a little trading of documents underneath these things.

I don’t have an obligation to get the things under the radar.

The line is real easy. If it is going to come in my courtroom, anybody who wants to can walk in there and hear it. If it is something they do in the boardroom, they can do that however they damn well please.

If the release of information permits other people to have their rights adjudicated, we as American citizens ought to be for that to undo wrongs against anybody whether it is a child in Mississippi or the State of Washington.

What about the situation where there are 100 or 200 or 300 other cases out there? I mean so often this litigation involves a claim of product defect of a product that has widespread distribution, and if there is discovery in one case it definitely would be relevant, admissible information in another case. Should a party be able to in effect quash that, seal it, whatever, and have the focus on the case B, C, and D start all over again?

I think it is not good for court systems when it seems as though those with means or resources somehow always have secret arrangements that no one knows about.

I think whether it is a discovery matter that I am ruling on or maybe the trial evidence issue, at the very least if it affects my ruling then I think it affects the judiciary. I think it affects the public. It affects the

public's perception of the judiciary and public confidence in the system. So, if it is something that is going to form a component of my ruling I feel very strongly that it shouldn't be secret.

The one thing that is being overlooked in all of this is sort of the deterrent factor that we were always taught, that tort cases and/or punitive damages serve. If you always approve or enter confidentiality agreements, then it seems to me that you lose at least a significant part of tort law, and that is, its deterrent factor.

And that is the penalty of the way we are doing things now because the law never develops, doesn't change, unless somebody sues somebody and you try the case and then you appeal it. That is the price you pay. What it does is make the litigation less contentious and that is nice, but nothing happens to the law, nothing develops in the law.

What types of cases involve secrecy?

Judges noted a wide variety of cases that involve secrecy. However, some case types may lend themselves to a need for openness, such as cases involving public safety issues, but others, like family law or juvenile proceedings, may be better kept secret depending on the circumstances.

It seems to me there is a substantial difference between medical records, public safety issues, and domestic relations issues. There is a difference, for example, between the public's need to know how much Mr. Jones made in a given year versus the negative employment practices of a major local employer. To me, there are just major differences there, and it seems to me that has to be recognized.

When you are talking about health issues, trade secrets, civil rights issues, employment issues with major employers, it seems to me that it is fairly easy to find that there is some public interest, and we need to keep that kind of case totally open. But it also that when one goes to court you do not necessarily voluntarily or legally lay your whole life open to public scrutiny, particularly with medical or domestic information, and I think

When you are talking about health issues, trade secrets, civil rights issues, employment issues with major employers, it seems to me that it is fairly easy to find that there is some public interest.

we have to leave it to the trial courts to make those decisions, giving them the discretion based on case law to decide what is public interest and what is not.

It seems to me that the kind of things we are talking about, there may be more categories, but they sort of fall into three categories. There are the facts of the case kind of discovery issues that you deal with. There is the settlement of the case and then there are these cases where there is a news interest in it just because of the lurid details of the case or the notoriety of the person involved. It would seem to me that you would look at those three things differently. While the newspapers want to sell papers and know about Jackie Gleason's divorce, it is really not going to

make any difference to any other litigant who comes before the court whether the details of the divorce are reported in the paper or not.

I think the most interesting case of that nature I had was a case where all the records and briefs came up under seal, and the primary litigant was a major urban newspaper. Apparently, at the trial level it had all been agreed upon among everybody, the insurance companies and the paper. So these things had all been sealed in the trial court, and that is the way it came to us. So we maintained that, simply because nobody was coming in and saying, would you open this up. I just thought it was the ultimate irony that this newspaper, which submits freedom-of-information requests all the time, is doing its own litigation in secret.

Does the public have a right to access court records?

The judges seemed to feel that the public does have right to access court records, but with some limitations.

The epistemological basis for the right of access was that the public has an interest in knowing the basis on which its organs of government make the decisions. If something is in the court record, then it is presumed that the court either did or could have looked at that in formulating its decision making process. Well, that makes it subject to public access. But if it is not in the court record—and again, I recognize that the court record is a word of art that has different meanings, but there are some things that are clearly outside of court records and there are some things admitted into

evidence that clearly aren't in the court record or filed pleadings.

The epistemological basis for the right of access was that the public has an interest in knowing the basis on which its organs of government make the decisions.

If they are not physically deposited in court, are they part of the public record? At that point, I think they probably are, once they have been identified.

Just like we have been saying, you schedule that hearing, the whole city knows about it. That puts on notice public interest groups or the newspapers

or whoever to come in and say what is it that is being proposed, and maybe intervene. Then you've got someone who is interested in opening it up.

Whether the court is going to make a determination at that time that you're bound by it, or whether you are just going to leave that as a public notice to the world that there is a secrecy agreement here, somebody may want to investigate or try to open for some reason that may be unknown to me.

I was just trying to return to this Texas rule and come to understand it, and since it is presumed to be open to general public, and I am just intrigued with the thought that you are a lawyer and someone walks in the door and says, "I am a member of the public. I want all your discovery. Would you mind running the copies off for me and giving it to me?" I can see going to public officials and saying, "I want public records." It is a little funnier to walk into a private law firm and saying, "This is presumably open to the public. Give me everything in your files."

What impact has the Internet had on public access to court records, especially electronic filings?

Several judges discussed the impact of the Internet on the public's access to court proceedings, noting that the openness of the Internet may not change their decision to seal or not seal documents, but it certainly has changed how the public finds about them.

The internet has really made an explosion of things. It used to be, when they had these confidentiality agreements, if something was kind of leaked out, you could kind of trace back to who was the leaker or where the stuff was. You could kind of keep it in a closed circle. Now, somebody gets it and puts it on the Internet and the whole world has it. That has really kind of exploded a lot of this stuff.

They can also search them. There are firewalls, there are all kinds of ways to protect electronic filing from prying eyes. But it is not so much a matter of protection. It is a question of whether or not they have the right to get them, if they are court records.

Yes, but if you make the assumption that they do or don't, that is not going to be impacted whatsoever by electronic filing, any more so than what you have now. You can set up a special file

One of the easiest ways to get your name in the paper is to order a file sealed when the statute prohibits that order.

that is just simply not accessible by court order, and put the things that are going to be confidential or secret in that file. I don't think that changes the dynamic of the decision at all.

I think a lot of our presumptions about what happens to these records may go by the board, because you are going to have electronic filing, which means instant access to a lot of things. Where those files may have gone into the courthouse basement at one point, now they are electronically filed and people may feel that they have the right to access them.

I have a couple of those Ford Bronco II rollover cases. Ford insists that they will give the documents, but they insist that there has to be language in the order that says that the lawyer won't share that information with anybody else. I have even had four attorneys come and argue that that was one of their concerns about things getting on the Internet.

What is the role of the media in the debate over secrecy?

As one judge said, the media is the "400 pound gorilla," and judges frequently have to deal with the media, either by custom or by law, when operating their courtroom.

I do some new judge orientation in my own state, and one thing that we always cover is, I always say, just remember, one of the easiest ways to get your name in the paper is to order a file sealed when the statute prohibits that order. Your authority is questionable, because we have some very vigilant newspapers, and nothing gets their blood running as quickly.

That is a 400-pound gorilla, the press coming in on something. You want to pay attention to it and look it over, dot all your “I’s.”

They are the paparazzi of product liability.

Just because the media thinks it might be interesting, and that there might be something in there that ultimately the public would like to know, and would in fact protect to some incremental degree public health and safety, I don’t get where the entitlement to that paper comes from, I just don’t.

In our southern state we have a sunshine law. All meetings of public officials must be public. In our area, we have a particularly nasty investigative reporter from one of the TV stations that has threatened other judges of our court, that under the public records law he is entitled to any notes or matters pertaining to the drafting of an opinion. He wants to sit in on the judges’ conferences!

We have reporters who have insisted that they had right to sit in on rule-making meetings and judges’ meetings. They say that although we are the judicial branch of government, we operate our rule-making capacity more like a mini-legislature and therefore the law ought to apply to us. Our supreme court has taken care of all of those questions quite easily, but people have tried.

I can see a member of the media saying, “I want to be present when that deposition is taken.”

The slippery slope gets even steeper because I can see a member of the media saying, “I want to be present when that deposition is taken.” What about those depositions where the judge actually presides? Are those presumed to be open, too?

We have case law in our state that says when a proceeding is to be closed, you must notify the media as the representative of the public. What if that rule were extended to protective orders that sought to seal certain information, that prior to that you would have to notify the media and make a showing of necessity to seal or protect those documents? I wonder what that would do to reduce the number of motions?

Just as in the legal profession there are responsible lawyers and irresponsible lawyers, in the media area you have got responsible TV stations and newspaper reporters and so forth, and you have got irresponsible ones.

What other groups might have an interest in reversing sealed orders?

Judges noted that some interest groups, such as the ACLU, and even government entities express an interest in examining sealed records.

There are some public interest groups in our state that do have an interest in making their views known in some particular area. There is Businessmen for the Public Interest, and health groups, like the American Lung Association.

The ACLU has come in on cases and asked that certain information that may not be relevant at all to the particular lawsuit be revealed publicly.

It seems to me that emerging out of this discussion is maybe a shadow category that we haven't been talking about. I'm not so much hung up on whether there ought or ought not to be secrecy orders. I don't like secrecy orders. But I am bothered by the notion that self-appointed watchdogs, however well intentioned and however they dress it up, can simply wade through material because they have a right to access to it, when it is not part of the record in a private dispute, and privacy becomes an issue. I don't know where that prerogative comes from.

I don't like secrecy orders. But I am bothered by the notion that self-appointed watchdogs can simply wade through material.

If other similarly situated plaintiffs came in, it is a question sometimes of cost of litigation. They are going to be in there, they are going to be asking for the documents anyway. The only concern there, of course, is when you have plaintiffs from other jurisdictions that might be under different discovery rules, which comes up from time to time as well.

I haven't seen too many instances where the government has been denied an opportunity to intervene in any kind of a civil case. It is pretty common. I guess I wouldn't think the standards would materially change for the government to obtain the documents. They would still have to demonstrate some relationship to the regulatory purpose of the agency.

The reality of the secrecy issue—do “secrets” really stay secret?

Several judges expressed skepticism that sealed records stay “sealed,” thought that the quest for secrecy may be illusory, and suggested that asking for secrecy may itself invite scrutiny.

I found that in practicality, the actual sealing of records—maintaining the seal, educating the clerk's office as to what that means, creating the structure to have a sealed record, etc.—is in and of itself a real stumbling block to the sealing of records. As it turned out, this information gets leaked. It gets leaked in weird ways, and it is always non-deliberate. People aren't set up and aren't accustomed to dealing with a sealed record, to dealing with a file that is supposed to be confidential, and unless you've got procedures in place you might as well not seal it, because it is not going to be sealed for long.

I try to explain to the parties when they request the records be sealed that I don't have a problem with it, but what they are doing is waving a red flag to the newspaper, saying, hey, there is something here you want to see. We have a wonderful clerk's office that is almost guaranteed to call the paper when there is a sealed record. When the papers come in under the Freedom of Information Act or the sunshine law, and try to get it unsealed, they do. So I say, slip it in the file quietly. We have so many papers filed that it is almost impossible for anybody to pull them out. If it is quietly filed away, it will just go its merry way, and nobody will notice it.

Do you know when a settlement is reached?

The judges did not really sense that there were secrecy orders being entered without their knowledge, but some did note that their knowledge of a case being settled might happen after the fact.

Sometimes you don't even know the case is settled until the case comes up on the court docket and the court service will tell you the case is settled. You don't know anything at all about the case, other than that it was settled.

I don't want the legislative branch stepping in and telling us how we are going to handle settlements and judgments and issues of confidentiality. I think that is something that is solely within the providence of the judicial system.

Lately, sometimes we are just getting the message on email that the case has been settled, you know, "Case number whatever is settled off docket." That is it.

To the extent that those cases come before you for approval of a settlement because it involves a minor or, in our jurisdiction, it is a wrongful death, it has to be approved for the settlement. I know in many instances, a case that is settled during trial in our jurisdiction is routinely made a matter of record. The settlement is put on

the record, whether or not the doors of the courtroom are open.

Is it preferable to enact "sunshine" legislation or to adopt court rules on secrecy—or should decisions on secrecy be left to the discretion of the court?

There was a considerable divergence of opinion on whether legislation is needed to combat secrecy, or whether courts should handle it themselves, either by court rule or through the individual judge's discretion. Some viewed legislative action as infringing upon the independence of the judiciary, while others viewed the secrecy issue as an important public policy matter better left to the legislature.

If one of the things that we are interested in this day and age is the independence of the judiciary and the ability of the judges in the court system to maintain something of its own existence, shouldn't we have some separate responsibility to develop the mechanisms by which we address this kind of issue, apart from the necessity for legislation?

I don't want the legislative branch stepping in and telling us how we are going to handle settlements and judgments and issues of confidentiality. I think that is something that is solely within the province of the judicial system.

I am not sure you need legislation. Any contract that is in violation of public policy is unenforceable, to that extent.

Our legislature gave us a mandate—“The Supreme Court will adopt rules establishing guidelines for the courts of this state to use in determining whether, in the interests of justice, the records in a civil and only a civil case attaining settlement should be sealed.”

You don't want the legislature to get into making court rules.

If the legislature gives it to us, they are going to have the power to take it away at some point.

What we are really talking about around the table is judicial discretion. Do we really want that to be controlled by the legislature? They always do a bad job of that every time they get involved. Maybe the courts ought to think about trying to pass their own rules to control this in a more measured fashion than leaving this to the political arena.

If you leave it to the trial judges to exercise their discretion in these cases, it really works out to the benefit of all parties—plaintiffs, defendants, whoever—in the long run. It is slower and it

gets very contentious sometimes, but it really is good to leave it in the hands of your trial judges and your lawyers.

I am not sure you need legislation. Any contract that is in violation of public policy is unenforceable, to that extent.

How likely is it that the legislative branches of government are going to confer this additional power on the judiciaries, given the historic ongoing

systemic and endemic tension between the legislative branch and the judicial branch? I just don't see it. All you have to do is tell the legislature, you are giving more power to the judiciary.

The kind of proactivity we're talking about in our state comes from the legislature. The legislature is now insisting on accountability plans and, while it might infringe on independence, it is happening.

I think it is a real tough issue of public policy that legislators maybe have to have hearings on.

There was a time and a day when the issues the courts looked at was who got to the intersection first. They were very provincial, very local, very limited kinds of cases. Now, since we have come into product defects with design defects practices, whether commercial or other kinds of practices that affect large numbers of people, class actions, etc., either in terms of substance or procedure, we are looking at cases that do have global impacts. It has the implication of evincing legislative and administrative agency sort of responses, and they just aren't inherent in the judicial powers. You either have to get the legislation or get some sort of ethical commitments to obligations to cross that barrier.

It is just a question of whether we get legislation to do that, or try to exercise those powers when they are historically not there.

It sounds to me that the only way you can effectively proscribe that kind of a secret settlement, the only way the court could ever enforce a rule would be if it was a substantive law that says,

“Thou shalt not make a contract keeping secret the amount of a settlement.” Theoretically, a legislature can do that. If it has got constitutional problems, that is a different issue.

I still think, as an appellate judge, if cases come that have confidential clauses in it and I had some reason to believe that they were hiding something that was affecting the public interest, I would punt the ball to the legislature. If, after some reasonable period of time—and I don’t know what that might be—the legislature did not take action, I think I would become an activist.

As judges, as courts, we necessarily have to confront these questions to the extent that rules need to be adopted. We need to make a choice. Is what we do a part of the public’s business? So, should it remain part of the public record, or are there other

We need to make a choice. Is what we do a part of the public’s business?

policy reasons not to make it part of that public business? The mechanisms can be there to do that, but you certainly cannot do it in the course of litigation. You do it as you try to draft rules and I just think the legislature is probably more competent to fight out those battles, because they make those kinds of policy choices. Ultimately a choice would have to be made, but I would rather see the legislature make those choices because they can look at the whole public interest in a way that is harder for us in performing our role to do.

It seems to me that the issues are so important now that someone—ATLA, the ABA, the Defense Research Institute, whomever—should be importuning the legislators and legislatures to enact some legislation to require those sorts of reporting responsibilities.

I really think that it is a legislative matter. That is really my conclusion.

I think that in the real world, lawyers take care of a lot of this outside. There is no involvement of the judges. They make a lot of agreements on their own between the plaintiff’s lawyer and the defense lawyer, that voluntarily conceal certain documents or amounts or whatever, and I think what happens, two attorneys walk up to the bench and say, “Judge, can we have a stipulation here, we have reached an agreement here.” I don’t know many judges in our midwestern state who will pursue that further. I think in the discussion you have said the same time, because of judicial resources, or for one reason or another, they don’t want to write the contract. I just think that is why the legislator has to get involved. They have in other states, and there have been some constitutional challenges that were upheld. I know some higher courts have looked at this. I just don’t think in the real world that judges ought to do that on their own.

I think I would probably agree that the legislature can say that the parties can or cannot do something if it affects the public interest generally. I think any legislation should be narrowly focused on what that is.

Courts look at this from their institutional perspective and make decisions on what is good for the courts as the judges perceive what they are doing, and it is not that I cannot make choices based on what is good for me, but I would like the legislature to get this battle.

I can’t think of something of greater public policy importance than what we are talking about here. The question of whether agreements should be confidential and when they should be confidential,

the impact on the business climate of a state, if you have an ironclad rule that they are always confidential or they are never confidential, this is what legislatures are for. This isn't what judges are for. It seems to me that it is a classic public policy issue that legislatures and governors should address. When they run for elections, these are issues that the legislators and governors put to the people.

Some judges believed that a balanced approach using both courts and the legislatures would be the best way to handle the issue of secrecy.

We took the position that under common law there was no authority to seal it. If there were going to be any exceptions to that, it would have to be done either by a legislature, by a court rule or by a change in that common law, which we could control.

The middle ground is some legislation authorizing or instructing, as the case may be, the court to instruct the party or something of that sort to notify the appropriate government agency. Get some legislation to say that.

I think that there are overarching public policy issues here that legislatures should probably deal with. But I also think that there are important issues about how we run our courtrooms that are also involved. So it is not an either-or kind of thing.

Our supreme court, and when I was chief justice, started a campaign, or at least an investigation, as to whether or not the courts could control this better than the legislature, with the aim of judicial discretion in mind. So I appointed lawyers, both plaintiff and defense lawyers, and I appointed media people. I appointed trial judges on this committee, and they worked for the better part of a year and came up with a rule and then published it for comment and, boy, did we get the comments. What happened is, eventually, the same thing that happens with any kind of legislation, it happens with a rule also, is you have exceptions and pretty soon the exceptions ate up the rule. So what we decided to do, at least for the time being, is to leave it like it is because if it is not broken, you don't fix it. What it is ultimately is a discretionary matter with the trial judges and unless the trial judge abuses his discretion, which is very difficult to do, let them decide it. That may not be the solution that some people want. Plaintiff lawyers have one view, defense lawyers have another view, trial judges have a third view, supreme courts have a fourth view because they are trying to protect the system. It is a very delicate balancing act that we go through.

I think that there are overarching public policy issues here that legislatures should probably deal with.

Legislative distrust of the judiciary

Some judges believe that the motivation behind sunshine bills and other similar measures is distrust of judges and the legal system.

In testimony when the U.S. Senate "Sunshine in Litigation" bill was being introduced, it was made clear the senators did not trust the courts, and that was the reason the sunshine litigation

bill was brought through Congress. They thought the legislature needed to step in. I think there is that distrust that they share that motivates a large part of this reform effort.

I think another part of it is even not so much even the distrust of the judiciary as much as it is distrust of lawyers. I think my experience with this type of legislation has been not so much that we don't trust the judges on this. It is we want to get past the lawyers because we really don't trust the lawyers because they are going to make secrecy agreements.

Some judges specifically discussed the use of court rules affecting secrecy, with some favoring them and some doubting their usefulness.

Every time you pass a rule, it is going to require hearings, it is going to require motions, and I don't know that any rule is going to solve that particular problem that you are bringing up. If the courts are lazy to begin with, they are going to be lazy with a new rule. We always pass rules with the purest of hearts, in order to make the practice of law more understandable and easier and I have yet to see a rule that does that. You have to use language to pass rules and when you talk about a language that is a living language like English, lawyers learn how to use that and abuse it, and I am just not sure that a rule, certainly not a statute, will solve the problem that the lawyers are facing with discovery abuses.

I think it is a much more complicated issue than maybe we are giving it credit for. I don't think a disciplinary rule makes any sense at all. I think that is just silliness, to think that that is the solution.

I don't know that any rule is going to solve that particular problem that you are bringing up. If the courts are lazy to begin with, they are going to be lazy with a new rule.

I am almost embarrassed to say this, but not only do we not have sunshine in litigation laws in our northeastern state, our supreme court decided to pass a rule of court a few years ago allowing protective orders, secrecy orders to enter by counsel, and what is called a "rule of court" motion. So, if somebody files a motion for the secrecy order and it is unopposed you are supposed to automatically enter it. I was the only trial

court justice that refused to sign the recommendation to the supreme court that the rule be adopted, and I actually did some research and presented it to the Chief Justice of the supreme court explaining that most other U.S. jurisdictions are not doing this.

Maybe you would just have to limit it, say in these kinds of cases, and only these, even if a settlement is made, whether with court approval and subject to an order or an unfiled settlement, the court would have to hold a hearing to determine whether or not there was a public hazard issue involved, and then make a finding before you could seal it.

As I am sitting here trying to think what rule I would draft if I were trying to draft a court rule, I have difficulty in my own mind making it narrow enough to address the issues that I think we all are concerned with, but not so broad that it just swallows everything else.

A few judges suggested that perhaps a third party, such as a government agency, be involved in administering secrecy orders.

You are going to have to create some sort of quasi-legislative or executive administrative agency, interfacing with some change in the ethical rules that require the lawyer to disclose and to cooperate with that new agency. In other words, create a new body that is going to collect these documents and make them available to a regulatory agency. I don't see how the courts can do it.

You can create repositories in some sort of regulatory agency, if one is germane, or just simply require that the defendant keep it on file for an indefinite period of time. They certainly can't object on the basis of space nowadays. You can put everything in the world in a matchbox, in electronic format.

Some judges discussed their experiences in other branches of government.

I am a strong proponent, an advocate, of public access. I guess it dates back three decades. As I may have mentioned, I have only been a judge for four years. Before that, I served in the legislature. I was also the attorney general of our southern state. So, I have served in all three branches of government for lengthy periods of time. Having done that, I was a co-sponsor of the "government in the sunshine" legislation when it first passed the state legislature back in the 1970s. In the four years I have been on the bench, we have seen a lot of discovery issues that have come to us on appeal, either as non-final orders, or we have treated it as writs for cert. I don't have any problem with those.

I am a former legislator, but I was involved a lot earlier. When I was in the my state legislature, the majority of legislators in both the House and the Senate were lawyers. Now not only are

I served in the legislature for seven years. One of the things that you don't want to have is committees deciding how the courts are run.

they in the extreme minority, but we have people living year round on the \$28,000 salary legislators get, and doing nothing else. They have never held a job before, and believe me, if you want to work on public policy, you've got to get nervous.

I want to at least caution people about letting the legislature draft the rule. I

just tend to think it should be done by the court. I served in the legislature for seven years. One of the things that you don't want to have is committees deciding how the courts are run. First you've got the public opinion, and the question of whether, if you vote for this, you're going to be re-elected. You've got the strong lobbies, the competing interests. I spent seven years there. I found that most legislation that comes out of the legislature has little thought whatsoever. Even when you have an idea that you think is perfect, you almost have to vote against your own bill by the time people put their different amendments. Most legislators do not understand the court system, about as much as we understand the legislative system. So my preference is for the court to develop its own rules without leaving it to statute, because you start having problems. Being a former member of the legislature, when I look at all of the laws that are on the books, that I know exactly why they are there—who was mad that particular day, what interest groups were there, etc.

AFTERNOON DISCUSSIONS

Is there an identifiable judicial culture in your state with regard to secrecy?

I don't think we do have an identifiable judicial culture regarding secrecy in our midwestern state.

I think the overall view of our court is that it would take a major shift in thinking in order to get us to start looking behind all of the agreements that the parties enter into.

In our court, nobody is coming in requesting that the court enter any kind of a confidentiality order. In our midwest state probably our culture is not to enter such orders, except in extraordinary circumstances. I think most judges would probably not sign an agreement that they felt would cause information that should not be kept secret to be kept secret, but the truth is that I wouldn't see one of those every six months, or maybe once a year.

I almost wonder if there are some kind of cultural differences among the places that we come from, where these issues are handled in such different ways. In my jurisdiction, I can sense that we very rarely seal

things. It is a much more open court, versus elsewhere in the smaller communities in our state. I have seen or heard anecdotally of other cases and I do get the sense that perhaps it does happen more often elsewhere. I don't think we have very well defined statewide rules as to how to approach the issue.

I think you are either committed to the culture of openness or you're not.

I think the only way to change a culture is through the rules. There is not a rule that there is a presumption of openness, and I think if we had a special court rule the lawyers would expect to go to the court for a hearing, whereas I don't think they expect that now.

I think you are either committed to the culture of openness or you're not. Either you are with the idea of openness, whether it comes from your state constitution or the legislature or your internal court rules, or you are not.

Several judges spoke in personal terms, describing how they handle secrecy issues.

I don't have a problem with things being part of the public record. I'm a big disclosure person.

I am very careful even in signing confidentiality agreements among parties where there is no disagreement, because I'm not always sure if I am setting a precedent that will do harm in the next case.

I wouldn't get into secrecy—I am on the appellate bench—unless it came up as some sort of issue. However I got it, if I got it, I would refuse secrecy without any question. I wouldn't think a nanosecond about it. I would just refuse it.

When I was on the trial court, going back 11 years now, in malpractice cases, when they wanted to stipulate to anything and they wanted it sealed, I wouldn't let them do it. I told them to withdraw the case and pay up, whatever they were going to do, and go home and that will take care of that. In the worst cases, involving peoples' own personal business, unless there is some great matter of public interest, I'm willing to seal the file.

I tend to lean towards saying, "Yes, we should be careful about allowing them to seal even the stuff that is in the lawyers' filing cabinets, because it got into the filing cabinets by virtue of the court process.

I guess I consider myself a moderate when it comes to confidentiality and protection orders in the discovery phase, because we often have issues involving contracts not to compete, and I

If it is a court order, that is going to be open and anything that is attached to it is going to be open.

pretty much feel in general that unless there is some necessity to disclose this information for some public good or whatever, that it is an acceptable order to the court to seal any records for confidentiality relating to contracts and so on.

I try to make protective orders or stipulated orders as specific and narrow as I can. I can tell you that some of the motions will cover everything from an employee's manual to what kinds of materials people use on the floor, and they claim that those are trade secrets. I usually look at trade secrets in a very narrow sense, in terms of what my supreme court has defined them to be. Most of the time I get arguments about "trade secrets," the materials requested don't always turn out to be trade secrets, nor are they proprietary, nor is there any privilege attached to them.

In several states, court rules or statutes seem to shape the culture on secrecy in which judges work.

At least in our mid-Atlantic state, if it is a court order, that is going to be open and anything that is attached to it is going to be open. I just want to make clear where we are.

In our northeastern state, you have to disclose all settlements.

In our midwest state, we have a provision in our code where the courts can decide whether public records should be sealed. We have to have a hearing on that, and a notice of that has to be posted at the place in the courthouse designated for posting notices, and you have to make findings of fact and explain why it is going to be sealed.

I think our state supreme court and our other courts have construed the issue uniformly. They consistently said that unless it is a court record—and I know there is some latitude about how you define "court record"—that the power of the state and the compelling interest of the state to require disclosure just doesn't exist.

Our midwestern state is one that has no common law, no statutory law, no local rules that bear on this. We have the usual protective order rules and statutes that allow the courts to do

pretty much whatever they believe in their own discretion, but we are completely like everybody else where if the lawyers on both sides agree on something then the presumption is that the law favors settlement of issues whether it is the whole case or discrete issues within the case, and we are likely to look into it as a matter of course, but not many of us in our state are likely to say anything about it. I happen to be in a very small minority of judges in our state who are crosswise with that practice, but I probably don't go as far as some of the other proponents of rules and ethics and practices would recommend. I always tell my lawyers who are before me not to make the assumption that protective orders of any sort will be issued and do me the courtesy of at least presenting it to me, and so that is the way I handle it, but I am interested in what goes on in other jurisdictions.

All of these records exist by virtue of the state constitution, the state statute, or state rule. That is how they are generated—by virtue of those laws and rules. They are there because of them. It is part of the structure, and I think you can look to your plenary power that you can rely on to say, “Yes, I want you to produce it.”

The only statutory authority in our southern state for using anonymous names is for juvenile proceedings in juvenile court and expedited appeals requesting judicial permission for an abortion. That is the only law that we have that I know of that even permits any type of confidentiality.

Several judges talked not so much about an indentifiable culture, but simply how things tend to be done in their jurisdiction.

Most of us don't seal things. We could do it under the existing law. We could make a court rule—any judge could make a court rule to produce any agreements from discovery. So, it is something that we could do, but we don't.

In our southern state we don't have any special laws other than the general protective law for discovery, but it is pretty much a general practice I think to sign off on the secrecy orders. We don't close files that I am aware of on a regular basis, but all the time we do the orders about keeping the documents secret. Listening to everything today I agree in principle with the pro-access advocates and everything but I really have a question about the practicality of the suggested solutions.

I would see secrecy orders if they had been granted in our jurisdiction, and I haven't seen one.

Generally, my sense is that our courts, at least in the larger communities, generally fall on the side of not entering secrecy orders very often.

This is only my perception as a court of appeals judge, because we don't get many appeals as most courts do on these issues. I think that my perception is that most trial judges in our western state, when presented with a stipulated order of some type of secrecy, will as a matter of course sign it. I would have to think that is the way it is all through the states except for those that might have rules.

Some judges spoke of outside factors and groups that could influence the judicial culture regarding secrecy.

I come from a state where we elect judges, and if you sign an order like you are talking about, you do it at your peril because somebody finds out that you signed an order like that, and you come up for retention, and you have got a problem. Newspapers love this kind of stuff.

There are a number of instances where judges are targeted by one interest group or another. So, if you refuse to sign a protective order for a major industry in your state, then that industry or business association targets you for that.

I don't care about industry. I don't care about pressure groups. That is their problem. What I care about is whether I am doing what the law requires me to do.

For every entity, from the little historic commission that was running around telling you that you can't put window frames on your house, right up to the public utilities commission, everything has to be disclosed.

If you refuse to sign a protective order for a major industry in your state, then that industry or business association targets you for that.

In our jurisdiction, at least both sides get together and they exchange documents voluntarily, just because many defense and plaintiff's attorneys have an ongoing relationship. So, they do a lot of stuff outside of court, and the court never gets involved. I know in several federal court jurisdictions

there is a rule that says that on any discovery matter, attorneys have to get together and confer before they can file any motion on discovery, and that is pretty prevalent among the federal district courts.

I can't believe that the majority of the people really would advocate for a position that all settlements in civil cases should be disclosed. I just don't believe that plaintiff's lawyers want that and defendant's lawyers want it, and I can't believe the parties really do, either.

I am wondering if there isn't a need for a shift in thinking for one thing that is relatively new, and that is the way that the business of the courts is being scrutinized by the public. When I say the public, I mean the media and other aspect of the public, public interest groups, people with special interests from different perspectives. They are coming in and they are taking a look at the courts in a new way and, in some respects, a much more intrusive way than they ever did before.

Under what conditions should secrecy be permitted?

A few judges noted that the conditions under which secrecy should be allowed are set in their state by statute or court rule.

I know that we have a definition that "court document" only means a document that has been filed, but that just doesn't seem to be any real reason for distinguishing what ought to happen as a result whether it is filed or unfiled.

There is a statute in our southern state that says that, if a governmental agency is involved, the record is open. If no governmental agency is involved, then it is presumed to be open and the defendant has to show something to overcome that presumption of openness and show that it cannot be handled in any other way than by sealing the documents. Then the judge he has to put that in the order so that the appellate court can look at it. This is new, so how well it is going to work, I don't know.

Several judges spoke of the burden they require before they will issue a secrecy order.

It is like any other motion. If you want something from me, meet the burden and show me why I should do that.

I don't have much of a problem with a motion to dismiss. It is when they want something more. When they want an agreed order or they want a dismissal based upon a stipulation and to which

If you want something from me, meet the burden and show me why I should do that.

they are looking for my imprimatur as a judge of the court, then I want to know what I am putting my name to. I think I have a right to ask, "Why dismiss this?" If you are looking for the next step where you are looking towards some kind of imprimatur of the court on your piece of paper, you are going to have to tell me

what is behind it. I don't know how deeply I want to go into it, but I certainly want to know what it is that I am approving of. In effect, they are asking for my approval.

I take the position that a court has a duty to determine that something like the good cause requirements have in fact been proved.

The trick is that good cause really should be good cause as determined by case law development or statutes and not just some perfunctory filled-out affidavit that says the types of things you say in an affidavit.

The upside of this is that judges can take a strong stance if the parties fail to produce. When they have the presumption that they are supposed to produce it and they don't come up with a good reason not to, strong trial court judges can always bar the defense.

Shouldn't there be some understanding that it is an affirmative obligation on the part of someone that wants to seal something in a court to demonstrate that it should be sealed, and provide the judge with a weighing process, weighing the reasons given for its sealing against the reasons for it becoming public?

I am more concerned about the pretrial aspects. I think there is general agreement on the sealing of records. We can do the balancing test. They are court records. We have to decide which side has the better argument with or without these statutes. But in the pretrial discovery part, what I am hearing is most of us are saying, "No harm, no foul. If it is not in my ball game, it is not my problem."

Why don't we as trial judges have a responsibility to require that people who want sealed documents have to show some basis for their having to be sealed?

You can shift the burden to the party that wants secrecy. You say, you know, enter an order saying that nothing is going to be sealed or kept confidential absent my approval, and you have got the burden, and then if they go ahead and enter into something sub rosa, and you don't know about it, then they put their own contract in jeopardy. Maybe that is the way to do it.

We have the same thing in our northern state. We have the uniform rule for trial courts. If we seal we have to say what good cause there is to do it. We have to justify that judgment.

When they want your help as a judge, you have the right to go a little bit further and ask them to at least articulate why they want your help. Even if it is a threshold discovery stipulated

Judges should not just ministerially sign the first protective order that comes along. We have a firm duty to look at these things.

protective order, you can still tell them, "Yes, I will sign a stipulated protective order governing discovery, but I want you to tell me more about what I am protecting here." Do more than just say, "We think confidential stuff is going to be produced." That is probably not going to be enough. You can draft a stipulated order and require

them to say what categories of documents you think are going to be produced, and is there a claim for confidentiality over this document, and you might even assert some control in terms of the filing of that discovery. You know, sometimes these stipulated orders will say, "You produce the discovery. It is automatically going to be filed under seal." You know, if either party files it, it is going to be under seal. Well, you could say, "Well, that seal is only going to stay for a certain period of time. At some point I am going to lift the seal unless you can demonstrate again that there is a reason to rebut the presumption."

That is why we have a rule in our western state saying secrecy is disfavored unless X and Y conditions are met. Judges should not just ministerially sign the first protective order that comes along. We have a firm duty to look at these things.

Good lawyers should make sure that their proposed orders contain that kind of language.

When I consider this question, I do it on the record, and what I do is I ask the attorneys to identify to me what statutory or common law-based confidentiality privilege we are talking about here, and if they cannot point to one like trade secrets or attorney-client privilege or something like that, then I know we are talking about *secrecy*, and then I can say, "What supports the sealing of the record or what supports the nondisclosure?" Then the burden shifts to the party requesting secrecy.

I think you can just follow the law and the criteria in establishing what is protected by the attorney-client privilege, or trade secret confidentiality or executive or legislative privileges, whatever it is they are trying to hide. You know there is plenty of case law.

When presented with a stipulated order that results from negotiation between the parties, some judges said they will sign it, but not until they ask some hard questions.

Every now and then, I'll get a stipulated secrecy order. It always concerns me, because a stipulated order during discovery covers all discovery. Generally, prior to discovery even beginning, I will not sign one that will cover everything in discovery. So if there is going to be a request for a protective order or some confidentiality agreement, I require that it be specific as to a piece of discovery.

I will see one where both parties have agreed to seal the discovery based on trade secrets. I don't have any problems with that, and I will routinely sign those orders. It is normally the ones I get and there is some objection, to like medical records being disclosed. Those I will look at in camera, looking at the relevancy of the records as well as the prejudice of the parties, and then determine

If there is going to be a request for a protective order or some confidentiality agreement, I require that it be specific as to a piece of discovery.

whether or not they should be disclosed. I also get requests for financial statements on a regular basis. In our state, in punitive damage cases, we have bifurcated trials on punitive damages. What I would do in those situations is to order that the financial statement be disclosed, but that it be sealed and sent directly to me as opposed to going to the clerk's office. In the event the case goes to the punitive stage,

then at that point I will disclose that information to the parties requesting the financial statement. That is pretty much the extent of what I receive as far as sealing records and disclosure in discovery.

The only time I am talking about confidentiality and protective orders is during discovery. But I usually sign off on an order of dismissal, saying the parties have reached an amicable settlement. We don't deal with figures and conditions that are attached to the release. So from that perspective, the settlement agreement is between the parties outside of the court, but I will sign off on this order of dismissal, based on the settlement.

I receive a six-page document that says that everything that is produced in discovery has to be given back at the end of the case, whether it was settled or there was a trial. I am sitting up there thinking, "I can't believe an attorney agreed to do this." When those kinds of stipulated agreements come in, I have problems.

With respect to discovery, I will usually receive a stipulation relatively early on—a prepared stipulation spelling out all kinds of things. I will routinely sign it, unless it seems to be binding the court. I'm not going to sign something that says if it goes to trial that it stays confidential or that my court reporter can't do something. But if it is just between the parties, I'll read it and approve it.

Judges spoke of the differing conditions for granting secrecy based upon the type of case involved, with some cases naturally receiving more scrutiny.

There are some things that we just believe people shouldn't be able to get to, such as privileged medical information, or priestly confessions. With the medical privilege, whether there is confidentiality or something that has to be kept secret, in child abuse cases a physician who learns

his patient who has been molested still has to come forward in the interest of safety and health and disclose that to law enforcement. So I think through the rules and the statutes there are already some natural confidentiality limitations in existence.

There are things of a personal, intimate and private nature that occur in domestic relations that just aren't present in product defect cases. If you have got a man that has been called on adultery, there would be some reason for confidentiality as opposed to having a document that said the president of the corporation said, "Turn the damn thing loose, let's burn those people up." So there's a little different reason for confidentiality in products liability cases.

I readily concede that in domestic cases, confidentiality orders ought to be routinely granted.

Not to be a devil's advocate, but in domestic, you say they should be routinely granted in domestic cases. Child incest, child molestation, and sexual abuse. But two angry people who are doing horrible things and using the private system of litigation to perpetuate their anger, I'm not so sure I would ever enter a protective order to protect them, because all they are trying to do is insulate their perjury.

One of the other aspects is the amount of settlement, even the fact of settlement. It seems to me that the parties have the right to be able to keep that confidential. We have had situations where the verdict is published and immediately the banker, the stockbrokers, the insurance, they all descend on the litigant. They want their privacy.

If a doctor committed malpractice and you found out, in the course of litigation, he had a terrible drug problem that had gone untreated and was still untreated, I think that would be a pretty bad situation. Make them go to trial.

If a doctor committed malpractice on that child and you found out, in the course of litigation, he had a terrible drug problem that had gone untreated and was still untreated, I think that would be a pretty bad situation, even if they were going to pay extra money to keep it secret and weren't going to settle unless it was secret. Make them go to trial.

What I found was happening is, everything in discovery they would try to put under a protective order. But everything that you are entitled to discover doesn't deserve to be under a confidentiality agreement. It has to be a trade secret, have some proprietary interest, or be privileged. Otherwise, discovery is not something that is confidential.

How do we explain to those litigants who don't get confidentiality why they don't and somebody else does? Let us say, for example, that we have a garden variety case where somebody has been injured in a car accident and is disfigured. We know that at trial they are going to show the jury pictures of the plaintiff to show the disfigurement, and people are going to see this disfigurement, and it is going to be terribly embarrassing and humiliating. The plaintiff's lawyer will tell the client, "This is the price you have to pay if you want to proceed against these defendants," and the plaintiff thinks long and hard and finally says, "I am going to do that."

They go through this process, and let us say that the outcome is favorable, but the memories of the process are painful.

Then the plaintiff is sitting home and reading the newspaper, and sees that confidentiality has been granted to the XYZ chemical company, and the plaintiff is sitting there wondering, “Why did they get confidential treatment and not me? My day in court was embarrassing, too, but I didn’t qualify for any kind of protection.” What do we tell that plaintiff about why it was perfectly all right for him or her to lose privacy as a cost of using the system, when it was perfectly okay for the chemical company with its clever lawyers, and high-priced defense team, and the high stakes involved, to get protection from public scrutiny?

In our western state, I think that would be approved if there were injuries to a woman that were particularly embarrassing or would only appeal to someone’s prurient interests who happened to be going through the court files, I don’t think there is any question that the court would seal it.

Why should the person with the \$10 million estate get his or her or their agreement sealed, when the person with the \$50,000 estate, who may be even more embarrassed in their community, not get theirs sealed as well?

The problem I have with that is that it almost seems to be a policy issue. Either they are all sealed or none of them are sealed. Why should the person with the \$10 million estate get his or her or their agreement sealed, when the person with the \$50,000 estate, who may be even more embarrassed in their community, not get theirs sealed as well?

Some judges expressed concern that the parties can sometimes control the case in such a way that, when a secrecy order is presented to the judge, it is almost a fait accompli. Of course, many judges don’t feel bound by the parties’ prior negotiation. This echoes the earlier discussion about who “owns” the case.

For me, the settlement agreement again is a contract between the two parties. I might be called on to enforce the settlement agreement, but the two parties have their contract to reach settlement. The only thing I need from them is the agreement that this case now can be removed from the docket, and they have reached amicable settlement.

Sometimes their settlement agreements will make the dismissal order or even dismissal stipulation part of the consideration, such that if there is a violation of the settlement agreement, they can go in and ask to vacate the dismissal stipulation. It becomes very, very messy. You are just sucked right in the middle of this thing whether you signed the dismissal stipulation or not. It gets very dicey. I don’t know what the solution is.

Sealing by agreement of the parties is often done pro forma. For example, material related to motions for summary judgment is often filed under seal without even the benefit of a court order. Both attorneys agree that these are sealed documents, and they are filed under seal.

Take the court rule. It is not just a question of enforceability but also of applicability to settlements. If the plaintiff simply dismisses the case and gives no reason, assuming he has a right to do that, I don't see how the rule can even be applicable, much less enforceable.

I have a real problem with the parties being able to dictate to a reviewing court, by way of this settlement, that the case should in essence be vacated or should stay there according to their negotiations.

That is a process that the court knows what the right answer is already, and it is back to this sort of underlying issue—can litigants make courts do things by negotiation with each other?

What do you do in those states where the court doesn't have to approve any settlements? A routine case, or even a product liability case, and one lawyer, the plaintiff's lawyer, just files a dismissal. They made their deal and they filed a dismissal. The judge never even sees the agreement. It goes in to the clerk, the file is closed, that is it. What do you do in that case, if you are going to have this proactive role?

They want you to approve in the dismissal to somehow incorporate the settlement into your dismissal order, so that to some extent it is easier to enforce their private agreement. There is an additional sanction, that specter of contempt of court, and also a breach of contract action

I have a real problem with the parties being able to dictate to a reviewing court, by way of this settlement, that the case should in essence be vacated.

to think about. For example, let us put in a damage clause, and it would be very difficult for them to prove damages in terms of what is their actual monetary loss from the breach of the confidentiality. I approve that, and so they want your approval on their settlement somehow in addition to the breach of contract action

because they know not only can they go to you for contempt of court but, also, that you have somewhat of a continuing jurisdiction to monitor the settlement agreement. They can go back to you.

The judge has got to go in there at the very outset and say here is where we are drawing the line. I think you have to control the litigation, you have to manage it. If you allow it to get away from you, you've got problems.

Can/should judges work more actively to diminish secrecy in litigation?

Judges expressed a variety of views on whether courts have an obligation to resist secrecy.

I don't think a judge has any obligation at all to ferret out the facts of the case or the way the injury occurred or anything of that sort.

Don't we have a public duty, though, as a public governmental body, to our public, that is, the citizens of the United States, to conduct our courts in an open fashion? If people want to settle their cases outside the courts, they can do that. But if they want to utilize a governmental function, what is wrong with having sunshine there and let the people see what is going on?

Trying to prevent, as a matter of law, sealing of material for any reason whatsoever, is a very dangerous concept.

Isn't there a broader issue? If the parties think there is a medical malpractice case, they eventually come to the court for the purpose of using the public institution and all the weight and all the moral persuasion that it has, in order to resolve the dispute. We have some obligation to make sure the public understands how those disputes are resolved and to be able to see the public process as it operates.

We do a lot of *in camera* work in our district, and we see some pretty raunchy things going on, and we are asked to look at certain documents and decide whether or not they should be given to the other side. I have often wondered, in some of the asbestos and tobacco cases that I have been involved in for 25 years, what my responsibility is. I am the only one who has them. Sometimes when I look at these documents, I see that there are some pretty bad things been going on for 50 years, but I can't release them. Under what authority can I release them to the public?

Don't we have a public duty, though, as a public governmental body, to our public, to conduct our courts in an open fashion?

How do you go about then making a decision, by what guidance, by what principle, by what policy concerns do you say, "Yes, these people wanted litigation that way, but I want to help other people advance their cases; I think there is an institutional value in that." I think it puts the court in a very awkward position to try to sort out the wisdom of making those decisions.

I think that our courts and our precedential history has long been involved in part of the decision making process with consideration of social issues and social policies, and I just cannot believe that anyone thinks they are not. You only have to look at the array of various social issues that have been addressed through the years and they have been in the courts. In fact, most of these decisions have eventually evolved into legislation. Most of the important issues dealing with our society emanated from court decisions firstly and secondarily where they are adopted by courts.

Maybe you should ask the lawyers what the evidence is going to be, as to whether something is dangerous or isn't dangerous. It may well be that there are a thousand reasons why the defendant should win this case. None of the fact issues have been tried yet. How can I assume that something is inherently dangerous, and that they are going to kill other people, when none of that has yet been proven—or, in fact, no evidence has even been offered of it yet in this case.

But you have information. Admittedly, it may require some interpretation, but you have information that does concern an injury or harm to the public. You can't just sit on it.

I'm not suggesting that it is my responsibility to go through the carload of stuff, but where there is, as it is put here, a danger to the public health or safety, which is apparent from the papers there, I think the judge has some independent responsibility to make a determination beyond the litigants' agreement, as to whether there should be a sealing order on these documents. I think the trial judge has that responsibility where it is so clear, that it is something which affects the public health or safety.

How would we react to two lawyers who came to court and the complaint was filed, and the answer is filed, and immediately there is a stipulation, and both lawyers say, "We want all discovery of all kinds, every piece of information in this case under seal"? Most of us would say, "Wait a minute. We are public courts." We wouldn't just do that. Now, what we are doing is sort of chipping away and allowing them to do parts of it.

If in some future case you suspect there is relevant information that you need behind that secrecy order, you go litigate that. Why should I as the judge, or the lawyers in the instant case, sacrifice judicial economy to try to preserve somebody's future claim, when all I have to do is say, okay, here is a secrecy order, stipulate a secrecy order? It is public record. If someone wants to fight about that later on in another lawsuit, have at it, but we're going to get this one done.

I am not comfortable with courts determining social policy.

I want courts available to resolve individual cases. I am not comfortable with courts determining social policy.

We can only rule on what is before us. That is the problem with this whole topic, that it is about secrecy and confidentiality which, by their nature, aren't going to come before us. They are secret.

Suppose you came across some very, very damaging information which was harmful to the public, a drug that somebody reveals to you, intentionally or by misadventure, that there is a drug involved in this case that is still on the market now that is killing a couple of dozen people and has the potential for killing dozens more. Do you have any obligation at all to do anything about that?

The evil I think that is the focus for this Forum today is, where the water is being poisoned, the gas tank is defective, and the people who are responsible for it are hiding it, and other people are going to be seriously hurt and injured, is there is some kind of responsibility to let the world know that these things are dangerous right now, not three years or six years from now or 38 years later?

How does the workload of judges affect their approach to secrecy requests?

A number of judges pointed to the overwhelming workloads they face, and said that doing the work required to investigate secrecy issues thoroughly could make it impossible for them to handle their docket.

Don't you think we as judges have enough to do? I have this image of one of these products liability cases with railroad cars full of documents with escalating or declining degrees of relevance to some unknown and unfiled future dispute, and I am to sit down now and make a determination whether there is good cause to suppress one or any of those conceivably innumerable documents? As a practical matter, couldn't we discharge our duties by a rule that requires people to publicly file?

I had a lawyer summarize it real well once on an *in camera* inspection. He said, "Judge, with all due respect, you're a real good judge, but you ain't going to understand what this is." And he was dead right.

We may be getting a lot compared to what other states get. I am not saying judges are lazy. I am saying the judge has a docket of guilty pleas and jury trials and a two-year backlog in jury trials and a full week of postconviction relief hearings, and all that has to be heard. And they have very little help, very little office help, very little typing help, and so when it comes to taking three days or a week or three weeks to wade through thousands of documents, the judge just looks at that and says, you

know, on the list of things that I have got to get done, I have got to push that down the calendar and hope that by doing that I make the parties work it out.

Part of it depends on the court system you are in and the judge that is part of that system. For instance, in our midwestern state, we are talking about 400 judges. We have separated them into all these various specialty areas. As a result of it, you give an inventory to a judge in a specific area. Your problem is when you are mixing complex litigation with the other stuff and all of a sudden a judge has a major case for a four-week trial. The judge has not got the time to go through all these agreements. What I am hearing is this is the problem you have in some jurisdictions.

Very few people in our southern state, even lawyers, know just how damn busy we are doing non-decision-making things. We spend millions of dollars in revenues—where do we put that? One of the committees I sit on just went through a massive commercial litigation jury instruction drafting session. It took a year and a half. I don't have time to draft rules.

I had a lawyer summarize it real well once on an *in camera* inspection. They brought it about 26 boxes. He said, "Judge, with all due respect, you're a real good judge, but you ain't going to understand what this is. So, I don't know what you're reviewing it for, and I don't mean you couldn't understand it. I mean in the context of this litigation, this lawyer and I have been with this case for five years, and we know what this means, and we're not going to sit here and explain it to you, but you're going to look at these documents and they won't mean a thing to you. You won't understand what it means to the litigation without other explanation in evidence." And he was dead right.

How many of you have time to tell lawyers, "Drag your files in here; I want to go through your files and make sure you are doing it right?"

Isn't it possible that individual judges may not see the big picture? They just want to get on to the next case and they will sign off on anything.

Several judges spoke about the presumption of openness and how it relates to secrecy.

If there is a presumption of openness, you can write a rule that, if there is going to be closure then you have to have a hearing. You can limit the hearing, but there has to be something in the hearing so that there is a judge's ruling on it. But I don't think two parties can say, "Judge, we want you to close this up." If you have that presumption, then the judge has the responsibility as the judicial officer to hold a hearing and hear evidence on why.

I did like the idea of the presumption of openness, because a presumption is rebuttable, which means that if there are things that should be—we should generally move toward being open, but if there are reasons that can be justified to the court, then only when that burden has been met do we start talking about closing off access to the information.

If we would unify ourselves behind the proposition that the presumption is that everything is open, then that would be a great step forward.

If you just had a simple rule that said it was presumed to be open and put a fairly heavy burden on the opposing party, 98 percent of all your problems are going to be resolved just by that mechanism.

If we would just unify ourselves behind the proposition that the presumption is that everything is open, and anybody who wanted it to be closed bears the burden of showing it is in the public interest to be closed, then that would be a great step forward.

I can have a presumption of openness, but if I get this piece of paper asking me to sign a stipulation on a very busy day, I just get it off my desk. If there is something that says that is not good enough, I've got to do more, then I won't sign it and get it off my desk.

We all have a bully pulpit, and to some extent we can use it for good things. I know in our state we are busy talking about independence of the judiciary at every chance we have, and this isn't a bad message to toss in as well—reminding lawyers that the presumption is for openness, and you had better come prepared to tell us why your particular case should not be subjected to that presumption. We often get requests from bar associations to suggest topics. So not only do we speak, but we are able to speak about anything we wish.

One thing is, if you come from a state as I do where there is a presumption of openness, and so many of us regularly are featured speakers at CLE at the bar, I think it is not inappropriate for all of us to from time to time remind the bar.

Several judges spoke of the effect that secrecy has on judges and the legal profession, and how the role of the courts is changing, in that they now may be looked at as protectors of the public interest.

It is the public perception that certain people are going to be treated more favorably than others based on status, position, wealth, that sort of thing, and it gets back to that generic question that I think all this raises about the public's confidence in the system. We live in such a cynical

world now that people figure that, if something is closed, the judge must be up to something bad, too. No matter what fine points we work out to come up with a solution that we think is acceptable, it has got to be produced in terms that the public understands and accepts. The public

We are making a mistake if we don't recognize that the role of the courts is changing.

in my neck of the woods isn't overly interested in accepting the answer, "Trust us, we are professionals; we know what we are doing." Most of them are convinced you have no idea what you are doing.

I think the problem is, when we become proactive in any way, we begin taking one side or the other. Then we lose our impartiality. It seems if those kinds of inquiries are going to be made, they need to be made by a group other than the judges, in order for us to remain neutral.

Let's look at this in a different way. One of the things that some people in some court organizations today are saying is that the role of courts and the role of judges are changing. I suspect that that is true. If you look way back to the circuit rider days many judges—perhaps most everybody at this Forum—thought of themselves as people who simply decided legal and factual controversies between two opposing parties and announced a ruling and went on to the next docket item. Today, for a fact, the public is looking to the courts for a broader response, almost a problem solving response, almost a social problem solving entity, at least in some parts. Take a look at the lawsuits for violence against women. Take a look at the drug courts and how the courts are being urged to provide and coerce treatment. Take a look at the juvenile courts.

There is a change in what the public is expecting of the courts. It is not as unrealistic for us to be re-looking at our obligation when we identify unsafe products and practices. I am really not sure where I personally come down on that. But we are making a mistake if we don't recognize that the role of the courts is changing.

Then there is one other issue I would like to throw out that I find troublesome and that is the public perception issue of the courts. A reporter from a local newspaper just a couple of weeks ago wrote an article, that said, "It would seem to me that the secrecy and sealing of these settlements preventing even the dissemination or public access or certainly media access to the documents has a sense that hush money was passed by the defendant to the plaintiff." He ended his article with, "You know the metaphor that silence is golden should just be that, a metaphor." I thought the ending was rather appropriate.

I agree that the role of the courts is changing. There is going to be rather a thin line or a barrier that describes the constitutional responsibility of the judiciary. You may cross that line when you make judge into police dogs to the extent of construing documents and then mandating their disclosure. I want a rule that protects the public, but I don't want one that is going to get struck down as being unconstitutional, and then just leaves a void. I want a plank that crosses the gap that is going to stand. The problem exists, and I'm just not sure how to solve it without inviting some sort of collaborative response from administrative agencies.

Have you ever encountered, even anecdotally, a case in which a secrecy agreement was concealed, even from a trial judge?

Some judges recounted their experiences, or that of a fellow judge, with a secrecy agreement kept from them.

I've had them do that to me. I didn't know until the thing was over, and they'd already gotten some agreement.

I know it is a products liability case. I can read the complaint. I can see the allegations. They have kept me out of the loop. I haven't signed off on any kind of secrecy agreement, but they bring the order of dismissal at the end when the case is settled. What do I do?

I remember I was on a case in which writing the opinion was not assigned to me. It was assigned to another judge. It was a very complicated case, and he had spent forever and a day working on it. It had some issues of first impression. We released the opinion, and they wanted us to withdraw it. Of course it never dawned on any of us why they might want to do that. The judge who wrote the opinion said, "I put too much work into that. That opinion is staying right there." But it wasn't because we thought they were pulling a scam. That was not what motivated us to refuse to withdraw the opinion.

Many of us are appellate judges. Of course, we are limited to review only those issues that have been raised at the trial court unless, I suppose, if we see an ethical violation, then we are required to report it, just like everybody else. Our hands are really tied, if we are true to our scope of review, trying to dig into the file to find out something that has not been addressed at the trial court level.

We can get involved any time the issue is raised in the trial court, and then that issue is raised as an issue on appeal, at least in our jurisdiction.

They might be hiding something. So, I have got to find out.

If I as a judge know this stuff is floating around sub-radar, I am really going to step up to the plate on my obligation, and am I going to ask the trial court what is in their court records that they have in their custody.

We can get involved any time the issue is raised in the trial court, and then that issue is considered to be an issue on appeal, at least in our jurisdiction.

POINTS OF AGREEMENT AND CLOSING COMMENTS

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it was achieved—on the issues raised by the standardized questions, and to characterize their groups' points of agreement in a few sentences, to be announced at the Closing Plenary Session. The standardized questions mentioned by the moderators as having been discussed significantly and the moderators' informal summaries of their groups' discussions follow, edited for clarity. Most, but not all, of the standardized discussion questions were mentioned by the moderators, and several other relevant topics not covered specifically in the standardized questions also received attention. While some moderators summarized discussion of some questions very briefly (sometimes in one word), others elaborated more fully.

Frequency with which judges attending the Forum had encountered secrecy issues, either in trial or in appellate matters:

Our group was surprised to learn that secrecy is a problem, because most of the judges have not seen difficulty in their courts with secrecy problems.

There was a general feeling in our group's mind that the issue was more complex than we had originally thought.

Very few of our judges had much experience with issues of secrecy. Our appellate judges don't have a lot of opportunity to rule on a secrecy issue, because of the way in which those issues often come before them—in the form of a dismissal of a case with no explanation, or because of the type of issue presented. And, obviously, when there has been a stipulation by the parties, there is no real opportunity for the court to intervene. Our judges agreed that they will have a heightened awareness in the future of these issues.

Secrecy and “public hazards”:

We could agree on hypotheticals where the terms of a settlement or the secrecy of discovery documents could have a probable or identifiable adverse effect on public health and safety. In a case like that, our judges would intervene, or at least ask questions, and rule on it on a case-by-case basis.

Our group felt that the problem might be intractable in many respects, because only a small percentage of cases would affect the public interest.

I think there was a general feeling that it would be good for the public to have knowledge of dangers that were identified in information in the courts' files. . . . There should be a reticence to enter orders that would prevent the public from acquiring that information, but the problems that surfaced there were mostly associated with stipulated orders.

Whether availability of secrecy helps to promote settlement of litigation:

None of the judges in our room could point to a situation where secrecy was the factor that would have determined whether a case settled or not. In other words, where there was a proposed settlement, it went through whether or not the judge enforced a secrecy provision. So it appears that, despite the rhetoric we often hear about how restricting secrecy in the courts will lead to fewer settlements, secrecy is not necessary in order to achieve settlement—at least in the experience of the judges in our group.

One judge told us that he has routinely and steadfastly refused to sign orders calling for secrecy in settlement amounts, and that it has had absolutely no discernable effect on whether or not cases did go ahead and settle. In fact, it was a consensus observation from our group, from what evidence we had anecdotally, that nobody had had an experience in which refusing to sanction the secrecy provision of a settlement ever prevented the settlement from going forward.

What material it is legitimate to keep secret:

Discovery

With regard to discovery—whether filed or not—we saw both of the positions that Professor Doré mentioned: “Doesn’t this litigation belong to the parties?” versus “We are public officials doing a public job at public expense, and what we do should be in the public domain.” On one hand we heard the question, “What interest does the court have in documents that are not formally filed?” On the other, we heard the proposition that discovery exists only by virtue of the court rules, and thus the discovery rules *make discovery a part of the court system*, whether or not specific documents are formally filed in court.

Settlement amount

There was a little less consensus regarding keeping the amounts of settlement secret, whether those should remain open or could be closed.

Information disclosed during judge-facilitated settlement discussions

One judge brought up the scenario in which the judge acts not as a judge in the usual sense but as a *mediator* in a case and becomes privy to secret settlement terms. How does that square with the courts’ public role and the open court presumptions?

What can/should be done to reduce secrecy in the courts:

Recognize and maintain a presumption of openness for court matters

Our group agreed unanimously that there should be a presumption of openness, and that, perhaps, some form of noticed hearing might be required as the way to overcome that kind of

presumption. The group felt that a generalized rule might be unworkable and too burdensome to the courts, but that there might be some role for a properly declared public policy—whether expressed legislatively or by court rule—that would aid that presumption.

When we backed off and stopped looking at an overall abstraction and looked at specific solutions, everybody thought that the overwhelming majority of problems could be avoided by a simple procedure—a presumption of openness, with a significant burden of proof on a party opposing disclosure.

In our group there was general agreement that there should be a presumption that the public files should remain open, and a feeling that no special court rule was really necessary here; that the court can proceed as it has traditionally done, applying that presumption and looking at the individualized case where there may be an extraordinary need for some sort of enhanced privacy.

I think generally, though, there was a feeling that a presumption of openness is a good idea, and that a judge is a public official and that there is a public trust and public confidence aspect to the job, and if judges are sealing information and endorsing secrecy, that that could affect the public trust and confidence. I think most of the judges in the room believe that some sort of a rule favoring openness would be a good idea and would be a necessity if the judge is going to go beyond a stipulated order of dismissal and make further inquiries. A rule favoring openness would give the judge a reason to ask those kinds of questions.

Adoption of court rules or legislation on secrecy

As to the matter of filing documents under seal, there was a feeling that a court rule would be helpful. There was some disagreement as to whether this rule should come from the legislature or from within the court system itself, and we really didn't reach a resolution of that disagreement.

Where does the court get the authority or the power to unseal a document that is sealed by a stipulated order and turn that information over to the media or a governmental agency? In our group there was a growing realization that that kind of action might require legislation or a court-made rule, that there might be some constitutional problems with courts doing that on their own without that kind of aid.

Our judges did not reach consensus on whether there should be rulemaking by courts to address secrecy. Judges told us that they have varying levels of rulemaking authority in some states. We did discuss the question whether this should come from the legislature or whether that would be an invasion of judicial authority.

If it is necessary to address secrecy formally, it should be done through a court rule, not a statute. It should be a judge-fashioned rule that would create a presumption of openness for cases in which the matter sought to be held in secrecy was not purely private, to take the burden off the parties from having to litigate this issue. It should be a rule that dealt with cases where there could be an effect on the health, safety and

welfare of someone other than the litigants, and the burden should be on the party seeking secrecy. And one of the most pointed comments in the group was that this should not be a consensus rule between the plaintiff's bar and the defense bar. This should be a court-generated rule. In essence, the court would say, "This time we are going to do it for the people."

What can judges do individually to diminish secrecy in litigation?

A culture of openness could be encouraged in informal ways, through educational forums, speaking to bar associations, making use of orientation programs for new judges, and not only educating the lawyers but actually prodding them towards openness.

Is the judge solely an adjudicator or also a legitimate maker of "social policy"?

There was a recognition that the roles of courts are changing dramatically in our society, and that courts in many other respects are doing things similar to notifying the public of danger, but our group felt that they were more comfortable with courts addressing individual issues than they were with determining social policy. . . . When courts begin to determine social policy, that does invite consideration of issues that are historically in the realm of the legislature or the executive branch's administrative agencies.

Our group felt that they were more comfortable with courts addressing individual issues than they were with determining social policy.

We had a very spirited discussion. There were two positions on what the role of the judge should be. One side says, "My job is to be an adjudicator and to decide the cases or controversies that are before me." Some judges characterized the alternative role of getting into public health and safety as being more of a "social worker"

approach. So we have the "adjudicator" model versus the "social worker" model. Interestingly enough, the judge who advocated for the "adjudicator" model is up for election every four years. The judge who favored more of a "social worker" model, on the other hand, has a lifetime appointment. That tenure question appeared to be an issue as to whether a judge, when presented with a stipulated order of dismissal saying a case is settled, would take it upon himself or herself to ask questions—to go beyond the stipulated order and, in effect, to start questioning two members of the court's bar who might be potential candidates running against them sometime in the future.

When it was discussed in the abstract, all of the judges favor the open court rule and would default to that position, but they would tend not to take a particularly proactive role in avoiding secrecy or enforcing openness of the courts. When we discussed that in some detail, however, people agreed that the court does have an obligation to the public health and safety that might be addressed outside the bounds of a given case and its settlement—not just the limited obligation to the particular parties that the lawyers in the case have.

Panelist Comments at Closing Plenary Session

Gene Pavalon: I have a couple of thoughts. First, I am not surprised that many of you have not really encountered secrecy issues with any great degree of frequency, because, first of all, they don't affect a great number of cases. Second, many of the problems dealing with this issue involve settlement agreements dealing with non-filed records.

But when you do have a problem that affects the public health and welfare, as has long been demonstrated by a number of cases, it could be a major and serious problem for society. I would prefer to see a court rule on this rather than legislation. I would like to see a court rule that would be fashioned similar to the Texas rule, although, after reading it, I have some questions about whether or not I wouldn't remold that rule because there seems to be some ambiguity with regard to the settlement agreement it refers to and whether it just refers to sealing. But I think a refashioned Texas rule, coupled with an ethics provision like the one recommended by Professor Zitrin, would go a long way in addressing some of the problems with regard to secrecy.

Tom Crisham: My only parting thought would be to observe that I have great faith in trial judges to make the decisions that have to be made in the rare—and I emphasize rare—instances where somebody has a plausible argument for asking something to be under seal. For that reason, recognizing the fact that the word “judge” is also a verb—and that is what you ladies and gentlemen get paid to do—for that reason, I am opposed to codification or one-size-fits-all rules or statutes. They are like the minimum sentencing guidelines in the criminal field. I think that anything that ties the hands of the trial judge is not desirable.

Jim Gilbert: I found interesting what Kathryn Clarke said—that it comes down to who is there to protect open access to the information and to assure full disclosure. Is it the courts or the legislature? I think it has got to start with the courts. We have all seen what happens in our state legislatures. They often speak with the voices of the same people who typically appear, time and time again, as defendants in litigation—especially the kind of litigation that involves common design defects, which have exposed millions of American consumers to injuries.

Those consumers typically have never been before a state legislature, but all of the defendants in all of these hundreds of cases are there frequently, and they pay a lot of money to lobbyists to try to influence the legislatures. I think ultimately it is the courts in America that are there to protect the one-time litigants and the people who need the protection because of the disparate resources. I think that has got to start with the courts to assure full disclosure of all of the information, so that, if there is an adjudication, if there is a settlement, it will be on the merits of the litigation and not because of the disparate resources.

Secondly, hand in hand with full disclosure is the need to allow sharing of information among attorneys, because unless litigants can share information and save judicial economy, unless litigants can share information and proceed to the inexpensive and speedy determination of each action, all of us suffer—including the courts. So I emphasize what Brother Hare said about information sharing, but it is full disclosure and information sharing plus open access that is going to make the system work.

Richard Zitrin: I have learned a great deal from all of you, particularly about what comes across your desks and what you see and don't see in your courtrooms, whether they be in trial or appellate courts. I think this has been a very successful day, because all of us, speakers included, have made ourselves more aware of what the problems are. That alone was reason enough to have this conference. I am also gratified that there seems to be at least a general consensus that there should be a presumption of openness. I think four out of the six of the discussion group moderators mentioned that phrase specifically, and the others kind of indicated it. To me, that is already a step in the right direction.

I also want to echo what Jim Gilbert said about the legislature versus the courts. Clearly, legislatures have the authority to make these laws. You can see that in your materials. Florida and Washington have among the strongest laws. Illinois has proposed one. California's Senate Bill 711, which was passed in 1992 and vetoed by Governor Wilson, would have been the strongest of all these laws. But if you want the ball to be in your court, rather than in the legislature's court, I think you are going to have to take up that ball and deal more directly with formulating rules in your own jurisdictions before the legislature gets around to putting a bunch of gobbledygook language out there that you will then have to live with.

There are trial judges in America and lawyers in America who want to do the right thing, who do not want to practice in such a way, or judge in such a way, as to harm the public, and who still want to give the parties their day in court.

Two other very brief points. First, there are trial judges in America and lawyers in America who want to do the right thing, who do not want to practice in such a way, or judge in such a way, as to harm the public, and who still want to give the parties their day in court. I hope you will give them the opportunity to balance those two goals by coming up with rules that give sufficient guidance so that lawyers aren't put in the position that I

suggested earlier today, where they have to engage in these settlements in order to do their zealous job on behalf of their clients, knowing that they are doing it at the expense of the public health and safety.

Finally, I want to suggest that there are interlocutory measures that can be taken. I know you can't write local rules in every state, but every time I walk into a judge's courtroom, there are idiosyncratic rules in that courtroom that I have to follow. Judges have very wide discretion. You can think locally and act globally, but you can also think globally and act locally in your courtroom.

Professor Doré: I would really welcome your additional thoughts on this topic. This is a continuing interest of mine, and I hope to write some additional articles on it and continue researching it. I would like to point out, again, that I think trial court discretion is absolutely essential in this process. But it need not be unfettered trial court discretion, and even if courts are willing to endorse something like a stipulated protective order, they need not be hamstrung by the parties' agreements concerning the contents of that order. Judges can take a role—even at the inception of discovery—in deciding what that stipulated protective order is going to say.

So, for instance, there could be a provision in an order that expressly provides for discovery sharing. There could be a provision in the stipulated protective order governing the sealing of discovery if it is filed with the court.

I think trial court discretion is absolutely essential in this process. But it need not be unfettered trial court discretion, and even if courts are willing to endorse something like a stipulated protective order, they need not be hamstrung by the parties' agreements concerning the contents of that order.

The order can indicate that it will not last for an infinite period of time and that once filed, the judge will consider the continued seal on a document-by-document basis after a certain period of time has elapsed. You have to keep in mind that a protective order, even a stipulated protective order, is an injunction—and that trial courts thus have continuing authority to modify a protective order or to vacate it at any time, including after termination of the lawsuit.

Those of you who are on appellate courts don't necessarily need a formal court rule to deal with this. Again, many courts are taking it on themselves under what I call common law sunshine reform to formulate common law guidelines—particularly from, let's say, supreme courts or higher courts of appeals. In that regard, I recommend that you review the Third Circuit decision in the *Pansy* case, which I have cited in my paper. It offers some guidance to the trial courts within the Third Circuit concerning the handling of these kinds of secrecy orders and the considerations they should take into account before issuing them. That might be the way to go, rather than a formal rule of court or statute passed by the legislature.

APPENDICES

Participants' Biographies

Paper Presenters

Professor Laurie Kratky Doré teaches at Drake University Law School in Des Moines, Iowa, specializing in civil procedure, evidence, pretrial advocacy, complex litigation, criminal law, and conflict of laws. She received her B.A. degree (summa cum laude), from Creighton University, and her J.D. degree (cum laude), from Southern Methodist University, where she was managing editor of the Southwestern Law Journal and a member of the Order of the Coif. Prior to becoming a law professor, she was a partner in a large Texas law firm, where she spent seven years in civil litigation and appellate practice in the areas of antitrust, medical malpractice and products liability. In addition to her writing in the areas of criminal law and products liability, Professor Doré published a comprehensive article on court secrecy in 1999: Laurie K. Doré, "Secrecy by Consent: the Use and Limits of Confidentiality in the Pursuit of Settlement," 74 Notre Dame L. Rev. 283 (1999).

Professor Richard A. Zitrin serves as an adjunct professor at both Hastings College of the Law and the University of San Francisco School of Law, and conducts a private practice of law centered on legal ethics and legal malpractice in San Francisco. He coordinated the ethics curriculum at USF for ten years, and in 2000 was named the first Director of USF's new Center for Applied Legal Ethics. He received his A.B. degree from Oberlin College and his J.D. degree from New York University Law School. He has written extensively on legal ethics matters for professional publications, and is co-author of two books on legal ethics—Legal Ethics in the Practice of Law (Lexis 1995) and a general-audience book, The Moral Compass of the American Lawyer (Ballantine 1999). He also writes a periodic on-line column, "The Moral Compass," for American Law Media, which can be accessed at www.lawnewsnetwork.com/opencourt/. In a recent article, Mr. Zitrin proposed an amendment to the ABA's Code of Professional Responsibility to address the problem of secret settlements: Richard A. Zitrin, "The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)," 2 J. Inst. for Study Legal Ethics 115 (1999).

Panelists

Honorable James D. Brosnahan, Oak Lawn, Illinois, has represented the 36th District in the Illinois House of Representatives from 1997 to the present. He received both his B.A. and J.D. degrees from Loyola University of Chicago. In the legislature, Representative Brosnahan serves on the House Committees on Aging, Health Care Availability & Access, Judiciary I-Civil Law, Mental Health & Patient Abuse (Vice-Chair), and Transportation and Motor Vehicles. He was a sponsor of a recent House Bill related to secrecy in litigation.

Thomas M. Crisham practices law in Chicago with the firm of Quinlan & Crisham, Ltd. His litigation practice concentrates on professional liability, product liability, insurance, reinsurance, insurance coverage, construction, and environmental law. He received both his B.B.A. and J.D. degrees from Loyola University of Chicago. He is the author of *Prosecuting and Defending Insurance Claims* (Wiley 1989) and a co-author of *Architects/Engineers Liability: Claims Against Design Professionals* (Wiley, 2d ed., 1995). He is a Fellow of the American College of Trial Lawyers, a Diplomat of the American Board of Trial Advocates, has served as president of the Defense Research Institute, and has been a member and officer of other trial lawyer and defense attorney organizations. He has also been active with Lawyers for Civil Justice and the Product Liability Advisory Council.

Lucy A. Dalglish is the Executive Director of the Reporters Committee for Freedom of the Press in Arlington, Virginia—a voluntary, unincorporated association of reporters and news editors dedicated to protecting the First Amendment interests of the news media. She received her B.A. degree in journalism from the University of North Dakota in 1980; a Master of Studies in Law degree from Yale Law School in 1988; and a J.D. degree from Vanderbilt University Law School in 1995. She was a reporter and editor at the St. Paul Pioneer Press for 13 years, and worked as a media lawyer in Minneapolis before joining the Reporters' Committee in January, 2000. She has received awards from the Society of Professional Journalists and the American Library Association, and was a charter inductee into the National Freedom of Information Act Hall of Fame in Washington, D.C.

Honorable Gerald T. Elliott currently sits on the Johnson County District Court in Olathe, Kansas, and has chaired several judicial district committees and activities. Judge Elliott is a past president of the American Judges Association and has been a judge since 1972. He received his A.B. and LL.B. degrees from the University of Kansas, and practiced law in Kansas City in 1965-90. Judge Elliott is a member of the American Judges Foundation and the American Judicature Society and has served on the executive committee of the Kansas State Bar.

James L. Gilbert practices with the firm of Gilbert, Frank, Ollanik & Komyatte in Arvada, Colorado. The firm specializes in product defect litigation for plaintiffs, primarily involving automotive and truck products. He received his B.A. degree from Colorado State University and his J.D. degree from New York University Law School. He is the co-author of two books on court secrecy and related subjects: *Confidentiality Orders* (Wiley 1988), and *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press 1994).

Honorable Thomas E. Hoffman is a presiding justice of the Illinois Appellate Court, in Chicago, Illinois. He received his B.B.A. degree from Loyola University and his J.D. degree from the John Marshall Law School. Justice Hoffman began his public service as a Chicago police officer and attended law school at night. He served as an Assistant Corporation Counsel for the City of Chicago from 1971 to 1976 before entering private practice. Judge Hoffman was appointed an associate judge of the Circuit Court of Cook County in 1984, elected a Circuit Judge of the Circuit Court of Cook County in 1988, and elected an Appellate Judge of the First Appellate District in 1994. Judge Hoffman is a member of the executive committee of the Illinois Judicial Conference and serves as a trustee and vice chairman of the Judges' Retirement Board.

William V. Johnson practices with the law firm of Johnson & Bell in Chicago, Illinois, specializing in general civil litigation, insurance defense, medical malpractice, products liability, and other personal injury work. He received his B.A. degree from Marquette University and his J.D. degree from Chicago-Kent College of Law. He has been a frequent speaker at educational events held by both defense and plaintiff bar organizations, including the 1988 Roscoe Pound Foundation conference on “Health Care and the Law: Patients, Doctors, Lawyers and Juries.” He is a Fellow of the American College of Trial Lawyers and of the International Society of Barristers, and has been a member and officer of numerous other trial lawyer and defense attorney organizations.

Eugene I. Pavalon is a partner in the Chicago law firm of Pavalon & Gifford, specializing in products liability, medical malpractice, aviation, railroad accidents, commercial, and general personal injury and wrongful death litigation. He received both his B.S.L. and J.D. degrees from Northwestern University. His other activities include service as a member of the Visiting Committee of Northwestern University School of Law, the Board of Overseers of the RAND Institute for Civil Justice, the Illinois Supreme Court’s Rules Committee on Civil Discovery Procedures, and the Editorial Board of Shepard’s Illinois Tort Reporter. He is a past president of the Association of Trial Lawyers of America, a past president of the Illinois Trial Lawyers Association, a founder and past president of Trial Lawyers for Public Justice, and a Lifetime Fellow and past president of the Roscoe Pound Foundation. He has authored multiple articles and lectured frequently on tort law, and is the author of two books, *Your Medical Rights* (Little, Brown 1990), and *Human Rights and Health Care Law* (American Journal of Nursing Co. 1980).

Discussion Group Moderators

Kathryn Clarke is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received a B.A. degree from Whitman College, an M.A. degree from Portland State University, and her J.D. degree from the Northwestern School of Law of Lewis and Clark College. She served as president of the Oregon Trial Lawyers Association in 1995-96.

Jeffrey P. Foote practices in Portland, Oregon, specializing in professional negligence, products liability, toxic tort, and other personal injury cases. He received his B.S. degree from the University of Oregon and his J.D. degree from the Northwestern School of Law of Lewis and Clark College. He is the author of legal articles on environmental law, business litigation, and personal injury law, and has been a frequent speaker on civil trial issues, including personal injury, products liability, trial strategy and securities law. He has been a member and has served as an officer of the Association of Trial Lawyers of America, the Oregon Trial Lawyers Association, Trial Lawyers for Public Justice (President, 1992-1993) and the Roscoe Pound Institute. In 1984-86 he served as a member and vice chair of the Oregon Council on Court Procedures.

William A. Gaylord practices in Portland, Oregon, specializing in major products liability and medical negligence litigation. He received his B.S. degree from Oregon State University and his J.D. degree from the Northwestern School of Law of Lewis and Clark College. Most recently he has been integrally involved in constitutional litigation involving Oregon legislation on damage award limits. He is a member of Trial Lawyers for Public Justice and a past president of the Oregon Trial Lawyers Association.

Francis H. “Brother” Hare Jr., is of counsel to the Birmingham, Alabama, law firm of Hare, Wynn, Newell & Newton, and is chief legal officer of the Attorneys Information Exchange Group, a not-for-profit cooperative organized by plaintiffs attorneys to assist one another in preparation for trials of product defect cases. He received his B.S. degree from the University of Alabama and his J.D. degree from the University of Virginia. He is a Fellow of the Alabama Bar Foundation, the American Bar Foundation, and the American Board of Trial Advocates. Among other publications, he is co-author of *Full Disclosure: Combating Stonewalling and Other Abuses* (ATLA Press 1994), *The Preparation and Trial of a Products Liability Case, 2nd Edition* (Little, Brown and Co., 1992), and *Confidentiality Orders* (Wiley 1988). Since 1975, he has served as Associate Professor of Law at Cumberland School of Law, Samford University.

Stuart A. Ollanik practices law in Arvada, Colorado, in a practice that emphasizes product liability, particularly auto design defect litigation. He is co-author of *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press, 1994), and has authored numerous magazine articles regarding automotive safety, design defects, and discovery issues.

A. Russell Smith practices law in Akron, Ohio, specializing in medical malpractice, products liability, and general personal injury law. He is certified as a civil trial advocate by the National Board of Trial Advocacy. He received both his B.A. and J.D. degrees from Ohio State University, and an M.Ed. Degree from East Tennessee State University’s Storytelling Program in 1999. He is a Fellow and trustee of the Roscoe Pound Institute, a sustaining member and governor of the Association of Trial Lawyers of America, and a past president of the Ohio Academy of Trial Lawyers.

Kenneth M. Suggs practices law in Columbia, South Carolina, specializing in medical malpractice, products liability, insurance bad faith, mass torts, and general negligence law. He received his B.A. degree from Clemson University and his J.D. degree (cum laude) from the University of South Carolina. He is a member of the American Board of Trial Advocates, the American Inns of Court, and the American College of Trial Lawyers. He is a past president of the South Carolina Trial Lawyers Association, a sustaining member of the Association of Trial Lawyers of America, and a Fellow of the Roscoe Pound Institute.

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Larry S. Stewart practices law in from Miami, Florida, specializing in medical malpractice, products liability, and general personal injury and commercial matters litigation. He received both his B.A. and J.D. degrees from the University of Florida. Mr. Stewart is president of the Roscoe Pound Institute, a sustaining member and past president of the Association of Trial Lawyers of America, and a member of the American Law Institute.

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The Roscoe Pound Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Roscoe Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual forums, in reports and publications, and through grants and educational awards, the Roscoe Pound Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

What Programs Does the Institute Sponsor?

Annual Forum for State Appellate Court Judges—The Annual Forum for State Appellate Court Judges brings together judges from state Supreme Courts and Intermediate Appellate Courts, legal scholars, practicing attorneys, legislators, and the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as secrecy in the courts, judicial independence, the jury as a fact-finder, and the use of scientific evidence. The Forum is one of the Institute's most respected programs, and has been "one of the best seminars available to jurists in the country."

Regional Trial Court Judges Forum—Following the overwhelming success of the Annual Forum for State Appellate Court Judges, the Institute created a program for trial court and other judges conducted at judicial seminars around the country. In order to expand our outreach to the judicial community, this program is held in conjunction with national and regional groups working with judges. These programs feature panels comprised of judges, lawyers, and legal scholars engaging the attendees in a dialogue on important judicial issues. The Pound Institute has held regional Forums in Texas, Hawaii, and South Carolina and examined such topics as judicial independence, scientific evidence, and the secrecy in the courts.

Law Professors Symposium—One of the primary goals of the Roscoe Pound Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on the

subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The Pound Institute is planning the next Symposium in 2005 on medical malpractice at Vanderbilt Law School.

Research—The Institute actively promotes research through grants to scholars and academic institutions, as well as through in-house scholarship. We have sponsored academic research on soft-tissue injury cases, juror bias, and the contribution that lawyers make to the economy. Our goal is to ensure that first-rate, respected, and useful research is conducted on the civil justice system.

Civil Justice Digest—The *Civil Justice Digest* was created to alert judges and law professors to information and scholarship that supports the utility of the civil justice system or counters negative campaigns against it. Through the *CJD* we seek to provide a sophisticated readership of judges and law professors with information and commentary on current issues affecting the civil justice system, including material that debunks the myths of a jury system run amok. The *CJD* is distributed without charge to more than 10,000 federal and state judges, law professors, and law libraries. If you would like to be on the mailing list for *CJD*, please e-mail us at pound@roscoepound.org.

Law School Awards—The Pound Institute annually presents three law school awards which recognize individuals whose accomplishments serve to further the cause of justice: The Elaine Osborne Jacobson Award was established in 1991 to recognize women law students with an aptitude for, and commitment to, a career of advocacy for the health care needs of women, children, the elderly, and disabled persons; the Richard S. Jacobson Award for Teaching Trial Advocacy recognizes outstanding law professors who exemplify the best attributes of the trial lawyer: teacher, mentor, and advocate; the Roscoe Hogan Environmental Law Essay Contest is a designed to develop law student interest and scholarship in environmental law and serves to provide law students with the opportunity to investigate and offer solutions to the multitude of injustices inflicted on the environment.

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PAPERS OF THE ROSCOE POUND INSTITUTE

Reports of the Annual Forums for State Court Judges

1999 • *Controversies Surrounding Discovery and Its Effect on the Courts*. Report of the seventh Forum for State Court Judges. Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery. (Price per bound copy-\$40)

1998 • *Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty."* Report of the sixth Forum for State Court Judges. Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses to these challenges by judges, judicial institutions, the organized bar, and citizen organizations. (\$40)

1997 • *Scientific Evidence in the Courts: Concepts and Controversies*. Report of the fifth Forum for State Court Judges. Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence (Only available in electronic format at www.roscoepound.org). Free

1996 • *Possible State Court Responses to the American Law Institute's Proposed Restatement of Products Liability*. Report of the fourth Forum for State Court Judges. Discussions include the workings of the ALI's Restatement process; a look at several provisions of the proposed Restatement on products liability and academic responses to them; the relationship of ALI's

proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts. (\$35)

1995 • *Preserving Access to Justice: The Effect on State Courts of the Proposed Long Range Plan for Federal Courts*. Report of the third Forum for State Court Judges. Discussions include the constitutionality of the Federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan. (\$35)

1993 • *Preserving the Independence of the Judiciary*. Report of second Forum for State Court Judges. Discussions include the impact on judicial independence of two contemporary issues: judicial selection processes and the resources that are available to the judiciary. (09R) \$35

1992 • *Protecting Individual Rights: The Role of State Constitutionalism*. Report of the first Forum for State Court Judges in which more than 100 judges of the state supreme and intermediate appellate courts, lawyers, and academics discussed the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal. (\$35)

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