COMMENTARY AND ANALYSIS

Don't Settle for Secrets

Confidential Deals Can Threaten Public Health and Safety

BY RICHARD ZITRIN AND CAROL M. LANGFORD

Eight years ago last month, Bill Lockyer, then the powerful chairman of the California Senate Judiciary Committee, introduced a "sunshine in litigation" bill. As "a matter of public policy," the legislation provided that—with rare exceptions—no case involving allegations of defective products, environmental hazards, or financial fraud could be settled in secrecy, and no evidence supporting these allegations could be kept from public disclosure. Lawyers who entered into secret settlements in violation of the act could be disciplined. In 1993, Lockyer won approval from both houses of the California legislature for what would have been the broadest such law in the country. But then Gov. Pete Wilson vetoed it.

This January brought a new governor to California, and Lockyer is now the state attorney general. Perhaps this year, a sunshine-in-litigation bill will become law. So far, only three states—Florida, Texas, and Washington—have strong prohibitions against secrecy in litigation. And although these states have clear language creating presumptions of openness for filed court documents and discovery, not even these more progressive regimes include relevant impositions of discipline for offending counsel, as the California legislation proposed to do.

Richard Zitrin and Carol M. Langford are in private practice in the San Francisco Bay area, and both teach legal ethics at the University of San Francisco and the University of California, Hastings College of the Law. They write a regular column for Open Court, the commentary section of the Law News Network (www.lawnewsnetwork.com), a Web site affiliated with Legal Times.

HAPPY DEFENDANTS

For years, plaintiffs and defense lawyers alike have been using secrecy as a settlement tool. Secrecy keeps the defendants happy: Evidence of a client's defective product or toxic waste won't be broadcast to the world at large. And plaintiffs lawyers find that secrecy is often part of an offer they can't refuse—their clients will be paid the fair value of the case, but only if they agree to keep everything they've learned, including discovery materials, confidential. Given the choice, most plaintiffs lawyers feel ethically bound to recommend a settlement that is in the best interests of their individual clients (not to mention their own pocketbooks), even when they know secrecy might hurt other victims down the road.

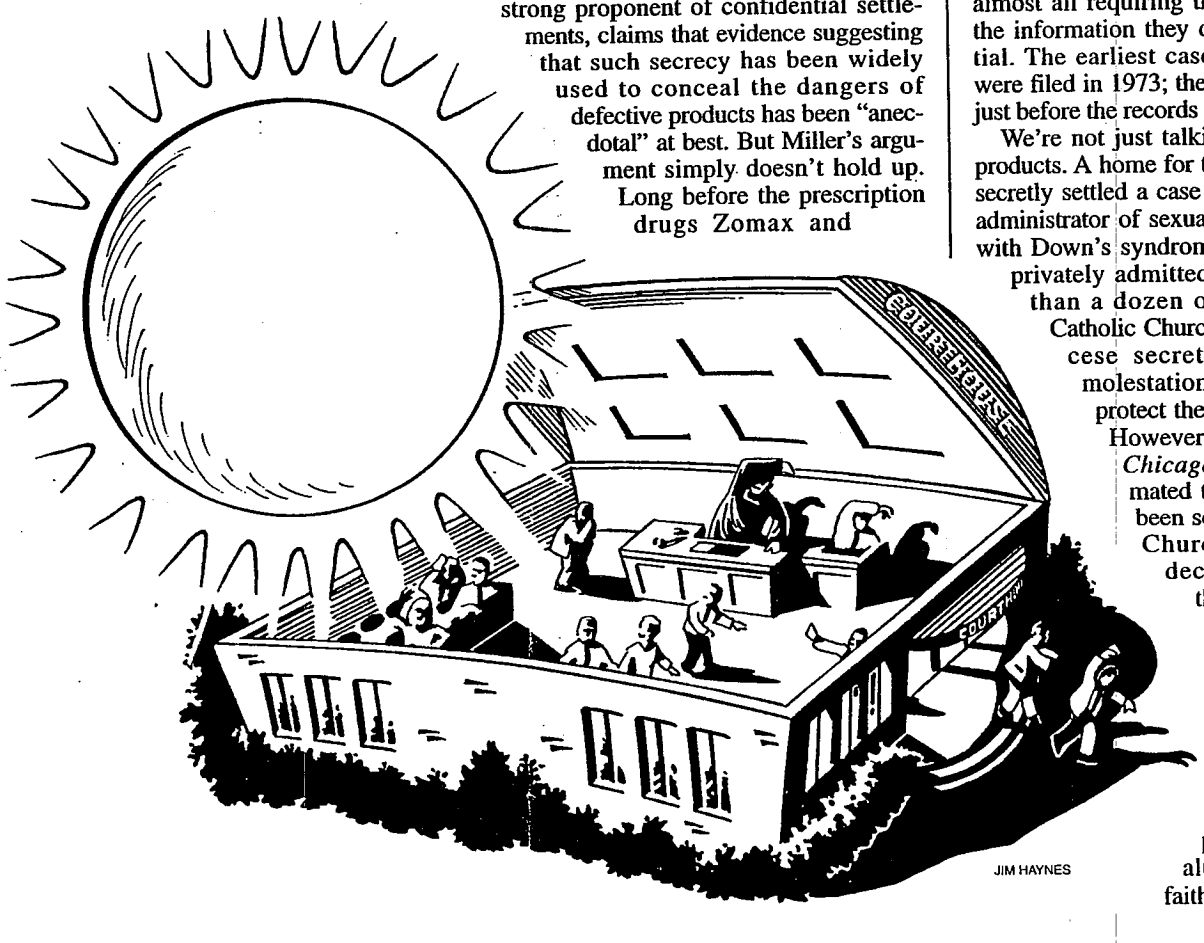
The long-standing precept of our adversarial system that an individual client's interests come first, ahead of everything else, should give way, however, when secret settlements hide serious and substantial dangers from the public.

Harvard Law Professor Arthur Miller, a strong proponent of confidential settlements, claims that evidence suggesting that such secrecy has been widely used to conceal the dangers of defective products has been "anecdotal" at best. But Miller's argument simply doesn't hold up. Long before the prescription drugs Zomax and Halcion, the Bjork-Shiley heart valve, and the Dalkon Shield intrauterine device were taken off the market, numerous secret settlements kept the public in the dark about the dangers of these products.

A British investigation provided the proof against Halcion. Disclosures about Zomax came only after a scientist experienced a near-fatal allergic reaction and decided to investigate. By the time Zomax was removed from the market, it was reportedly responsible for a dozen deaths and more than 400 severe allergic reactions, almost all of which were kept quiet through confidential settlements worked out by McNeil Laboratories, the drug's manufacturer. Attorneys for A.H. Robins, maker of the Dalkon Shield, even tried to condition their secret settlements on plaintiffs lawyers' promises never to take another Dalkon case—a clear violation of the ethics rules of almost every state.

No product with a suspicious track record has been more thoroughly defended by more lawyers on more fronts than General Motors' pickup trucks with side-mounted gas tanks. In 1993, the automaker's lawyers went on the offensive by suing consumer advocate Ralph Nader and the Center for Auto Safety for defamation. Meanwhile, other GM lawyers were quietly settling lawsuits over the exploding pickups with amazing frequency. In 1996, Nader lawyers obtained GM's own records of those suits in discovery, revealing some 240 individual cases—almost all settled and almost all requiring the plaintiffs to keep the information they discovered confidential. The earliest cases marked "closed" were filed in 1973; the latest 23 years later, just before the records were turned over.

We're not just talking about dangerous products. A home for the mentally disabled secretly settled a case accusing the home's administrator of sexually abusing someone with Down's syndrome; the administrator privately admitted to molesting more than a dozen others. The Roman Catholic Church's Chicago archdiocese secretly settled a child molestation case, ostensibly to protect the identity of the child. However, an investigation by *Chicago Lawyer* later estimated that 400 lawsuits had been settled by the Catholic Church in the previous decade—almost all of them secretly.



JIM HAYNES

Allegations in a lawsuit don't prove anything, of course. Some cases are filed for publicity, others to reach into deep pockets. Still others, although filed in good faith, may not have merit. Just because a car has defective brakes doesn't mean the brakes caused the accident in every case; perhaps the driver was drunk or inattentive. Even if the brake defect played a role, other factors might have contributed. A settlement may signal nothing more than a defendant's desire to avoid having its name linked with accusations of a defective product, whether true or false. It may be smarter to settle, particularly if all evidence of the defect remains secret.

Still, it's hard to conclude that the secret settlements of hundreds of lawsuits involving dangerous drugs, exploding gas tanks, and child molestations result merely from unsupported individual claims. At some point, "anecdotal evidence" begins to take on a clear pattern. Where that pattern points to the existence of a danger to the public health and safety—or even the serious possibility of such a danger—it is time to question how our legal system can afford to allow secrecy.

TILTED PLAYING FIELD

Suppressing evidence not only denies information to the public, it unbalances the scales between plaintiff and defendant. Plaintiffs lawyers have to start each case from scratch, with no evidence from previous cases and unable to share either information or strategies. Meanwhile, defense attorneys are aware of the entire history of litigation over a product. They're able to learn from experience, raising new and higher hurdles for plaintiffs lawyers to leap in order to get information that others already obtained but promised not to reveal.

What about the concern expressed by lawyers from both sides that without secrecy cases will no longer settle, at least not for their "true" value? So far, no evidence supports this. In those states that have a sunshine-in-litigation law, cases continue to settle, and no one has yet shown that they settle for less than before the law went into effect.

Currently, nothing in the ethics rules prevents lawyers from settling cases secretly and keeping the public in the dark. Even the strong Florida, Texas, and Washington laws have exceptions: Plaintiffs and defense lawyers in those states can work together in the name of "zealous advocacy" to convince a judge that their case is the rare one where secrecy is needed. And too often, judges are more focused on clearing their dockets than on considering the larger issues.

For these reasons, we believe that lawyers should be prevented from advocating secrecy for a settlement where a substantial danger to the public health and safety exists. As U.S. Rep. Lloyd Doggett, architect of Texas' groundbreaking legislation, put it: "To close a court to public scrutiny of the proceedings is to shut off the light of the law." ■