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What Would Make Atticus Finch Flinch?

Robert Westley*

I. INTRODUCTION

For my own edification in preparation for this project, I watched the classic American film, *To Kill A Mockingbird*. The central character inspired the title of this essay.¹ I watched the film for several reasons, but mostly because when the title, *What Would Make Atticus Finch Flinch?*, was suggested to me, I could not recall who in the world Atticus Finch was, and therefore, I could not understand why my audience or readers should care about what would make him flinch

As I learned through viewing or reviewing the film, Atticus Finch is a figure who represents an ideal of the good, ethical lawyer. His qualities include a devotion to justice that puts him and even his family in jeopardy. He helps the poor with their legal problems and even accepts barter as a fee. Atticus approaches law as a learned profession, not a business. We learn in the course of the film that Atticus is competent and skilled at what he does, though he recognizes his own limits, leading one of his neighbors to comment, "Well, he can make somebody's will so airtight can't anybody meddle with it."² He is genuinely sensitive to the feelings of others, not only those of his clients, and tolerant of their differences. While Atticus is both charming and polite, and accepts the informality of being called "Atticus" by everyone, he is, above all, dutiful to the demands of his profession. When asked, he accepts without hesitation the *pro bono* defense of the criminal defendant, Tom Robinson, a black man accused of raping a white woman in the South in the 1930's. Beyond his strong sense of ethical obligation, Atticus is an idealist lawyer: in a seated segregated courtroom, before an all male, all white jury, he argues that "[i]n our courts, all men are created equal,"³ and seems to actually believe it.

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1. This paper was originally prepared as a lecture for the Defense Research Institute's Toxic Torts & Environmental Law Seminar in New Orleans, March 18-19, 2004.

2. Harper Lee, *TO KILL A MOCKINGBIRD* 104 (HarperCollins Publishers 1995) (1960).

3. *Id.* at 234.

In this essay, I propose that few practices or trends within the legal profession as it has developed since the American Bar Association's Model Code went into effect in 1970 would be more likely to make Atticus Finch flinch than this: the practice of engaging in secret settlements in cases where public safety is at risk or public interest affected. There are many examples of these risks. From lawsuits over exploding Ford Pinto gas tanks⁴ and the revelation in the 1970s of secret settlements by Johns-Manville of asbestos-related litigation claims⁵, to the Firestone/Ford tire suits of the 1990's,⁶ it has been charged that settlements cloaked in secrecy kept regulatory agencies as well as consumers in the dark for years. The Johns-Manville secret settlements, for instance, occurred in 1933, when lawyer conduct would have been governed by neither the 1970 Model Code nor the Model Rules (adopted in 1983 by the American Bar Association House of Delegates), but rather by the Canons of Ethics (adopted in 1908). Whether governed by the provisions of the Canons, the Code, or the Rules, even as amended in 2002, ethicists (Stephen Gillers of New York University School of Law and Geoffrey C. Hazard, Jr. at the University of Pennsylvania School of Law)⁷ have concluded that the existing rules of ethics do not forbid secret settlements.⁸ Secret settlements have been used in cases involving:

- defective medical devices and pharmaceuticals, e.g., Eli Lilly's Prozac litigation, the Dalkon Shield intrauterine device, and Dow Corning's silicone gel breast implants;⁹
- exploding automobile fuel tanks, e.g., General Motors trucks with side-saddle gas tanks;¹⁰
- toxic oil spills and chemically contaminated water and soil;

4. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (Cal. Ct. App. 4th Dist. Div. 2 1981). See also <http://www.fordpinto.com/blowup3.htm>.

5. See, e.g., *Devlin v. Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985).

6. See, e.g., *In re Bridgestone/Firestone Inc., Tires Product Liability Litigation*, 134 F. App'x 86 (7th Cir. 2005).

7. Stephen Gillers, *Free the Lawyers: A Proposal to Permit No-sue Promises in Settlement*, 18 GEO. J. LEGAL ETHICS 291, 312 (2005); Keith Bradsher, *S.U.V. Tire Defectes Were Known in '96 But Not Reported*, N.Y. TIMES, June 24, 2001, at A1 (quoting Geoffrey C. Hazard, Jr.).

8. See Richard A. Zitrin, *Why Lawyers Keep Secrets About Public Harm*, 12 No. 4 PROF. LAW. 1 (2001), and Martha Neil, *Confidential Settlements Scrutinized*, 88 A.B.A. J. 20, 22 (Jul. 2002).

9. See Daniel W. Schuman, *Making the World a Better Place Through Tort Law? Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM.RTS. 739, 750-4 (1993) (mentioning settlements in cases involving mental illness).

10. See, e.g., Warren Brown, *GM Found Negligent in Fuel Tank Case*, WASHINGTON POST, Feb. 5, 1993, at A1.

- dangerous cribs and playground equipment, e.g., Miracle Recreation Merry-go-Round;
- physical or sexual abuse of children, the elderly, or the mentally ill, e.g., the Catholic Church scandal;
- race and sex discrimination or discrimination against those infected with HIV or who have AIDS;¹¹
- tobacco; and¹²
- financial fraud and corporate rip-offs¹³

The absence of a legal ethics rule that would prevent lawyers from making secret settlements in cases where public safety is at risk or the public interest is affected has led legal ethicist Richard Zitrin, Director of the Center for Applied Legal Ethics at the University Of San Francisco School Of Law to propose just such a rule.¹⁴ His proposal would amend Model Rule of Professional Conduct 3.2 to add section (B), as follows:

(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).¹⁵

Zitrin's proposed amendment to 3.2 would add the following language to the Comment section:

2. 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

11. Karen S. Lovitch, *State AIDS-Related Legislation in the 1990s: Adopting a Language of Hope Which Affirms Life*, 20 NOVA L. REV. 1187, 1191 (1996) (mentioning settlements in AIDS related cases) (citing Joseph A. Slobdzian, 'Scott Doe' AIDS Lawsuit Is Settled, PHILA. INQUIRER, Nov. 1, 1994, at A1, A8).

12. Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U.L.J. 601, 645 (1998) (mentioning secret settlements in tobacco litigation) (citing Alix M. Freedman and Suein L. Hwang, Phillip Morris, *RJR and Tobacco Plaintiffs Discuss a Settlement*, WALL ST. J., April 16, 1997, at A1).

13. 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, 123 (1999) (discussing a California bill aimed at eradicating secret settlements involving financial fraud).

14. *Id.* at 116.

15. *Id.*

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.

3. 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 permit disclosure to persons not affected by the dangers.¹⁶

Zitrin's proposal is clearly not a wholesale attack on secret settlements. However, it does suggest that existing ethics provisions, court rules, and so-called "sunshine in litigation" laws¹⁷ have been insufficient to curb the making of secret settlements in cases where public safety is at risk or public interest is affected. In Part II of this paper, I will delineate the forms that secret settlements may take and the rationales for openness in civil as opposed to criminal litigation. In Part III, I will examine the ethics of secrecy under existing rules and whether there is a need for a new ethics rule. In Part IV, I will explain my reasons for believing that, despite the current dynamism of the secret settlement issue, it is unlikely that a new ethics rule governing secret settlements will be adopted by the American Bar Association in the near future. Finally, I will conclude with my thoughts on whether the moral compass provided by the example of Atticus Finch should inform how the legal profession deals with the continued use of secret settlements.

So as not to pull any surprises at the end, let me say up front that Atticus Finch, the American model of the good, ethical lawyer, agreed to a secret settlement. At the moment when his family was most threatened by the violence of white supremacy and when his children were attacked, Atticus agreed with the constable that their attacker's death would not be reported as a homicide. Atticus' daughter, Scout, signals the denouement of the film's plot by offering a justification for Atticus' decision to keep secret the true nature of the death. She says to Atticus in a moment of inverted parental encouragement:

16. *Id.*

17. The term "sunshine in litigation" refers to reform movements that prohibit agreements between parties which conceal public hazards or information regarding public hazards that may go against public policy. Florida passed the first such reform in 1990 with its Sunshine in Litigation Act which created a statutory presumption of openness in agreements. See FLA. STAT. ANN. § 69.081(4) (West 2004).

"You see, it would be like killing a mockingbird." As we learned earlier in the story, Atticus had been told by his father that it was a sin to kill a mockingbird. By analogy, the mockingbird in this instance is the savior of Atticus' children, Boo Radley, played by Robert Duvall, the emotionally disturbed secret admirer of Atticus' children and mysterious neighbor who never left home and never grew up. Boo was the mockingbird for Atticus' children, and his exposure to the glare of public inquiry or even public expressions of gratitude, viewers are told, would be enough to kill this mockingbird. Atticus' secret settlement involved potentially criminal matters, as well as civil claims, and could easily be characterized as a cover-up.

Thus, when I come to consider what would make Atticus Finch flinch, I must take into account how the ideal of the good, ethical lawyer combines with forgetfulness about moments of ethical challenge and moral failure. And though I believe that Atticus' actions would survive scrutiny under Professor Zitrin's proposed 3.2(B) rule, that may say more about the limitations of the proposal than the ethical fulfillment of the lawyer's duty to the public.

II. SECRET SETTLEMENTS

A. *Defined*

There are several forms that secret settlements may take. As Zitrin's proposal makes clear, these include protective orders obtained from a court, usually by agreement or stipulation of the parties to a lawsuit.¹⁸ However, secret settlements may also come in the form of standalone confidentiality agreements between disputants without the involvement of a court, such as agreements to return unfiled discovery from plaintiff to defendant. The sealing of court files and/or the changing (redaction) of the names of parties in a lawsuit has also been referred to as a form of secret settlement. Zitrin would consider stipulated reversals, wherein parties may settle a case during the pendency of appeal by agreeing to stipulate to reverse the trial court's judgment, depublishing of published opinions, and pre-adjudicated trials, to be forms of secret settlement.¹⁹

18. See Zitrin, *supra* note 13, at 118.

19. See *Nearly v. Regents of University of California*, 834 P.2d 119 (1992) (approving the use of stipulated reversals). See also JOHN CORNWELL, *THE POWER TO HARM: MIND, MEDICINE, AND MURDER ON TRIAL* (Viking, ed., 1996) (recounting the trial and background issues raised by the Eli Lilly Prozac litigation in which Lilly paid plaintiffs to rest their case without presenting their strongest evidence rather than risk losing).

Zitrin would define secret settlements as those agreements between plaintiff and defense lawyers to keep information about a known harm from the public—whether it (is) a defective product, toxic waste, or molesting soccer coach.²⁰ This definition, however, is both too broad and too narrow, and merely restates the problem with some secret settlements. In the terminology of this paper, a secret settlement will be defined as an agreement between represented parties, with or without the involvement of a court, or an agreement between a lawyer and a non-client to keep public or otherwise discoverable information private. Under this definition, a secret settlement only raises ethical concerns either when the information withheld from public scrutiny entails a substantial risk of continuing future harm to public safety or the public interest is affected.

B. Rationales for Openness in Civil Litigation

Articulated rationales for openness in civil litigation often cite the legitimacy and integrity of courts, the common law right of access to judicial proceedings, the First Amendment, and due process.²¹ Unlike the guarantee of an open criminal trial under the Sixth Amendment and the due process clause of the Fourteenth Amendment, the public's right of access to a civil trial, while widely recognized, is not specifically enumerated in the federal Constitution.²²

Nevertheless, some commentators have argued and courts have ruled that an adjudication, as opposed to pre-trial discovery proceedings, constitutes a formal act of government which, in order to be excluded from public scrutiny in a free society requires that the public interest be taken into account.²³

20. See Zitrin, *supra* note 8, at 1.

21. See Brian T. Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381 (Winter, 1990).

22. See U.S. Const. amend. VI and XIV.

23. See *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). See also David A. Schulz, *Rethinking Confidentiality and Access in Civil Litigation*, 23 COMM. LAW. 24, 26 (Fall 2005); David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1227-28 (2003); Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 317-24 (1999); David Luban, *Limiting Secret Settlements by Law*, 2 J. INST. STUDY LEGAL ETHICS 125 (1999); Zitrin, *supra* note 13, at 118-21.

III. ETHICAL LIMITATIONS

A. *Existing Rules*

The Model Rules, even as amended in 2002 by the ABA Ethics 2000 Commission, do not prohibit the use of secret settlements, regardless of whether such settlements involve keeping secret information about a known harm or issues affecting public interest. Nevertheless, the Model Rules are not completely irrelevant to the issue of secret settlements. Model Rules 3.4(a),²⁴ 1.6,²⁵ and 5.6 (b)²⁶ may apply in very limited circumstances, and Rule 2.1 exhorts, but does not require, lawyers to render advice to clients on the moral and ethical dimensions of their actions. Since the Model Rules contemplate that the client's decisions concerning the objectives of representation shall prevail and that the lawyer is required to consult with the client as to the means by which to pursue these objectives,²⁷ any lawyer who refused to make use of a secret settlement on behalf of a client in the proper circumstances quite possibly has failed to render competent representation under the Rules.

1. *Model Rule 3.4(a)*

Model Rule 3.4(a) states that a lawyer shall not “unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.” Model Rule 3.4(a) may apply to some secret settlements. For example, when there is the potential that similar litigation has been concurrently filed and that secret settlements would conceal or obstruct documents and other evidence needed in that trial, there may be a duty under Model Rule 3.4(a) not to enter into such a settlement. However, this rule would apply only in very narrow circumstances, such as if the client informed his lawyer that the document would be

24. See MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2002) (stating that a lawyer “shall not unlawfully obstruct another party's access to evidence or unlawfully . . . conceal a document or other material having a potential evidentiary value”).

25. See *id.* R. 1.6 (2002) (covering confidentiality of information in general and times at which a lawyer might choose to reveal information otherwise protected by attorney client privilege).

26. See *id.* R. 5.6(b) (2002) (stating that “a lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties”).

27. See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.2 (2002).

destroyed by the client or deliberately concealed in discovery during future cases.²⁸

2. Model Rule 1.6

Model Rule 1.6 gives lawyers discretion to disclose information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or substantial bodily injury."²⁹ The American Bar Association House of Delegates approved amendments to Model Rule 1.6 in February 2002, so that the governing standard of Model Rule 1.6 is no longer that the lawyer may exercise his discretion to reveal information "to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm."³⁰ The change in language from "a criminal act that is likely to result in imminent death or substantial bodily harm,"³¹ to prevention of "reasonably certain death or substantial bodily harm,"³² should clearly be viewed as an increase in the scope of lawyer discretion to reveal otherwise ethically protected client information. With respect to secret settlements, one interpretation of the rule suggests that an attorney's agreement to a secret settlement may be unethical when the bargain for settlement would require the lawyer to sign away his discretion to disclose information about the physical well-being of third parties in danger from something unearthed during discovery. However, it is important to note that this issue has not yet been tested.³³ The revelation of otherwise ethically protected client information, even after the 2002 amendments, remains discretionary for the lawyer, and does not affect the ability of a non-lawyer to be bound by a secrecy agreement.

3. Model Rule 5.6(b)

Under Model Rule 5.6(b), an attorney may not agree to a restriction upon his right to practice. Ethics opinions have been written addressing the question of whether or not an attorney may agree not to

28. See Patrick Emery Longan, *Ethical Issues in Settlement Negotiation*, 52 MERCER L. REV. 807, 820-821 (Spring 2001).

29. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002).

30. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) (amended 2002).

31. *Id.*

32. *Id.*

33. See Heather Waldbeser & Heather DeGrave, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815, 821 (2003) (citing Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 808 (1992)).

use any of the information learned in the course of the current litigation in any future representation against the same defendant.³⁴ Professor David Luban refers to this provision of the Model Rules as a ban on lawyer buyouts and writes, it is "virtually the only piece of the ethics codes that recognizes that accumulated legal skills are a public good that should not be squandered on a single favorable settlement."³⁵

The American Bar Association Formal Opinion 93-371 (1993), interpreting the application of Model Rule 5.6(b), led directly to a revision of the secret settlement agreement at issue in *Georgine v. Amchem Products, Inc.*³⁶ In *Georgine*, consolidated asbestos litigation concluded early in 1994 between a group of experienced asbestos plaintiffs' lawyers and the Center for Claims Resolution (CCR), a claim-settling organization incorporated by asbestos defendants.³⁷ The plaintiffs' lawyers and CCR negotiated an agreement, which would potentially affect millions of people, then filed the class action and settlement on the same day (a so-called "settlement class action").³⁸ After extensive hearings, the Federal District Court for the Eastern District of Pennsylvania approved the settlement in August 1994.³⁹

The *Georgine* settlement established procedures and payout schedules for the class of individuals to develop asbestos-related illnesses in the future. Although future plaintiffs could opt out of the settlement, the usual incentives likely dissuaded most from doing so, and strictly speaking, future plaintiffs bound by the settlement were not class members, and thus, were not represented by class counsel. Moreover, the *Georgine* class was defined to exclude pre-existing asbestos clients whose cases were settled by a separate agreement on more favorable terms.⁴⁰ Professor Susan Koniak estimates that by this maneuver, which class counsel apparently considered a deal-breaker, lawyers for the class increased their own fees by somewhere between 100% and 250%.⁴¹ The pre-existing clients were being represented on a contingency fee basis, which offers substantially higher compensation to plaintiffs' attorneys than the fees established in the *Georgine* settle-

34. See, e.g., ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000).

35. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2624 (1995).

36. 157 F.R.D. 246 (E.D. Pa. 1994).

37. *Id.* at 260-61.

38. *Id.*

39. *Id.* at 337.

40. *Id.* at 257-58.

41. See Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products*, 80 CORNELL L. REV. 1045 (1995).

ment for attorneys representing members of the *Georgine* class. In addition, the plaintiffs' lawyers initially included "lockout agreements" in the settlements with CCR. These are settlement terms in which the plaintiffs' lawyers agree not to represent future claimants against the same defendants in similar cases, an arrangement Professor Luban calls lawyer buyout agreements.⁴²

After the American Bar Association issued a formal ethics opinion declaring that the lockout terms would violate Model Rule 5.6(b), the agreements were redrafted to preserve much of their force but to avoid the technical violation.⁴³

Thus, an attorney may not agree to a settlement that would prohibit the attorney from using any of the information learned during the current representation in any future representation against the same defendant. A question of the use of the information could arise in every future case because no attorney can simply forget what he or she learned of a defendant when preparing for future representation of plaintiffs. However, the ABA's opinion held that Model Rule 5.6(b) does not forbid agreements restricting the disclosure of information regarding the defendant.⁴⁴ The opinion reasoned that the attorney is obligated to maintain the confidentiality of information relating to the representation of a client in any event, and a settlement agreement prohibiting the disclosure of the information would not present any further restriction on the attorney's rights. Under Model Rule 1.9(c), a lawyer may reveal information relating to the representation of a former client only if the client gives consent, a condition not likely met when the client has agreed to a secret settlement.

4. Model Rule 2.1

Finally, Model Rule 2.1 states that a lawyer may use "considerations such as moral, economic, social and political factors that may be relevant to the client's situation"⁴⁵ in rendering advice. This rule, however, leaves the decision ultimately with the client who can choose to take or leave the lawyer's advice. The Model Rules as a whole are structured to ensure that a lawyer act "in the best interest of the client." On the other hand, nothing in the Model Rules demands that

42. Luban, *supra* note 35.

43. See, e.g., *Georgine*, 157 F.R.D. at 301-02. In the new agreements, plaintiffs' lawyers reserved the right to represent future asbestos claimants even if they opted out of the settlement, but agreed to advise all such future clients not to opt out. *Id.* at 300-01.

44. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2002).

45. MODEL RULES OF PROF'L CONDUCT R. 2.1. (2002).

lawyers enter into secrecy agreements. As a last resort in extreme situations, Model Rule 1.16(b)(3) states that a lawyer may “withdraw from representing a client if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.”⁴⁶ Depending on the egregiousness of the information, withdrawal may be an option for lawyers who morally oppose secret settlements.

B. *New Rule*

Because no current Model Rule explicitly addresses secret settlements, Professor Richard Zitrin proposed to the ABA Ethics 2000 Commission to add Rule 3.2(b) to prevent lawyers from making secret settlements in cases where public safety is at risk or the public interest is affected.⁴⁷ Clearly, his proposal was rejected. The Ethics 2000 Commission rejected Zitrin’s proposal on the grounds that “it is legal for clients to enter such agreements,” and thus “it should be ethical for a lawyer to help the client with such an agreement by drafting it.”⁴⁸ Although the Commission recognized the societal risks associated with secret settlements, it concluded that “it was better to have a court rule regulating the parties.”⁴⁹

Certainly, it would be difficult to enforce Zitrin’s proposed new rule. Perhaps the most damaging criticism of the proposed new rule was made by Professor Luban. He observed that Zitrin’s rule would not prevent parties from entering into secret settlements out of court without lawyer assistance where such settlements are not forbidden by law.⁵⁰ Moreover, it may be very difficult to determine what amounts to a “substantial danger” to the public health or safety. For instance, if a lawyer gains information that one in ten thousand gas tanks explodes, is that a substantial or insubstantial danger? What if a pharmaceutical raises the risk of cancer by one percent? Zitrin’s rule leaves this determination to the individual lawyer, making the rule difficult to apply uniformly. Additionally, it would be virtually impossible to apply

46. See *id.* R. 1.16(b)(3).

47. See Zitrin, *supra* note 13.

48. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 807 (1992).

49. See ABA Center for Prof’l Responsibility Comm. On Evaluation of the Rules of Prof’l Conduct, Minutes, Feb. 16-17, 2001, available at <http://www.abanet.org/cpr/e2k-02-16mtg.html>.

50. See David Luban, *Limiting Secret Settlements By Law*, 2 J. INST. FOR STUDY LEGAL ETHICS 125, 128 (1999). Indeed, Luban suggests that Zitrin’s rule would lead plaintiffs and defendants to “simply make an end run around the lawyers who are now estopped from participating in and negotiating the secret settlement.” *Id.*

Zitrin's rule where the extent of the conduct and effect on public health and safety is unpredictable, as perhaps was the case with respect to child molestation in the Catholic Church.

Overall, it seems more promising to regulate secret settlements that involve danger to the public health and safety, not through the ethics rules, but through so-called "sunshine in litigation" laws, or court rules, as has been done in some states with respect to Mary Carter Agreements.⁵¹ In 1989, the American Trial Lawyers Association began intensive political activity to curtail secret settlements and protective orders. Numerous state courts and legislatures also began deliberating over open records or "sunshine in litigation" rules. Texas and Florida adopted pioneering rules, and federal legislation was introduced in 1995. Although it was ultimately defeated by a slim margin, Senator Herbert Kohl, the author of the legislation, reintroduced it in April 2003.⁵² Moreover, in the wake of the Firestone tire scandal, thirteen states considered legislation that would ban confidential settlements in cases that compromise public safety.⁵³ As recently as 2003, then-Governor Gray Davis of California signed into law legislation that would prohibit secret settlements in cases involving elder abuse.⁵⁴ More broadly, in 2002, the U.S. District Court of the District of South Carolina created a sensation when it voted unanimously to ban the secret settlement of any lawsuits brought before it.⁵⁵

IV. LIKELIHOOD OF FURTHER ACTION BY THE ABA

Given the Ethics 2000 Commission's rejection of Zitrin's proposed new rule, the limitations of the rule in eliminating the use of secret settlements in cases where public safety is at risk or the public interest is affected (it only appears to restrict lawyer participation in

51. See, e.g., *Trampe v. Wisconsin Tel. Co.*, 252 N.W. 675 (1934) (holding Mary Carter Agreements to be void); Victoria Holstein, *Mary Carter's True Colors: Champertous Settlement Agreements Under Louisiana's Nullity Doctrine*, 77 TUL. L. REV. 885 (2003) (discussing prohibition on such agreements in Texas and Florida, and proposing their elimination in Louisiana).

52. See Kohl Press Release, available at <http://www.senate.gov/~kohl/press/040803.html>.

53. See Diana Digges, *Confidential Settlements Under Fire in 13 States* LAW. WKLY. USA (April 30, 2001).

54. See *California Law Seeks To Strengthen Law Against Elder Abuse*, 11 No. 4 ANDREWS HEALTH L. LITIG. REP. 9 (Sept. 2003).

55. See Richard A. Epstein, *The Disclosure Dilemma: Why a Ban on Secret Legal Settlements Does More Harm than Good*, BOSTON GLOBE, Nov. 3, 2002 (Magazine), at D1. See also Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1.

the making of secret settlements), as well as the recent trend toward dealing with the problem of secret settlements through legislation and court rules, it appears unlikely that there will be further action by the ABA on this issue in the near future. Indeed, as evidenced by recent reforms through legislation and court rules—the trend to treat the matter as one of substantive law rather than as ethics—will likely take the wind out of the sails of further efforts to turn the issue back into an ethics one.

V. CONCLUSION: THE MORAL COMPASS OF ATTICUS FINCH

In light of the decision of the U.S. District Court of South Carolina to ban the secret settlement of all lawsuits brought before it and the growing trend toward imposition of “sunshine in litigation” laws across the country, the defense bar would be well-advised to re-examine its reliance on secret settlements in cases that may involve substantial danger to the public health and safety in order to preserve the ability to make use of secret settlements in the proper case.

Frances Komoroske suggests that it may be possible to balance a client’s needs and the public interest with a little creative lawyering.⁵⁶ By this view, it is usually consistent with the client’s long-term best interest to take account of and be sensitive to the public interest implications of litigation strategy.

The balancing suggested by Komoroske brings us back to the ethical example of Atticus Finch. Komoroske recommends that secrecy should never be automatic and should be accepted by the lawyer only as a last resort.⁵⁷ In the case of Atticus, he did not readily agree to the secret settlement. In fact, Atticus’s first instinct was to report the information to authorities. Komoroske also suggests that secrecy should only be permitted in cases where there is little or no danger that the facts of the case will be repeated, and thus there is minimal impact on public health, safety, and welfare.⁵⁸ After some consideration of what it would mean “to kill a mockingbird,” Atticus decides in the end to agree to the secret settlement, but only because he is convinced that to do otherwise would not achieve justice.

Nevertheless, the example of Atticus Finch is a problematic exemplar of ethical lawyering. It cannot be overlooked that Atticus

56. Frances Komoroske, *Should You Keep Settlements Secret? Not If You Can Help It. You Can Balance Your Client’s Needs and the Public Interest With a Little Creative Lawyering*, 35 TRIAL 55 (June 1999).

57. *Id.* at 59.

58. *Id.* at 57.

makes a secret settlement, not in the context of a civil suit while representing a private litigant; rather, he opts for secrecy in the context of a criminal investigation where someone (albeit a bad man) dies. Would Atticus' actions meet the standard set forth in Zitrin's proposed rule, i.e., a reasonable belief that the restricted information does not directly concern a substantial danger to the public health or safety or the health or safety of any particular individual(s)? Even if Atticus' actions of not reporting the homicide (killing?) as a homicide met Zitrin's proposed standard, there still may be a violation of Model Rule 3.4(a) which prohibits unlawful obstruction of access to evidence. Moreover, under Model Rule 8.4, it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation or conduct that is prejudicial to the administration of justice.⁵⁹ The concealment of a homicide by a lawyer, where not based on ethically protected information, seems to qualify as prejudicial to the administration of justice. *What would make Atticus Finch flinch may be to consider that in doing what he believed to be the morally right thing to do, he may have crossed the ethical limits of his profession.*

By empowering lawyers to make judgments about the public interest, the duty to consider the public interest should be a condition of any confidentiality agreement. This is especially necessary when information subject to a secret settlement relates to criminal matters. Rather than eliminating the option of secret settlements, we ought to ask whether public disclosure in any given case really serves public safety or other well-defined public interests. If it does, we should ask how much should be disclosed, to whom, and when. Ideally, the right balance can be achieved by conscientious adjustments in existing practices. The trouble with eliminating secret settlements altogether is that it would not encourage lawyers to consider the public interest at all and may discourage litigants from seeking settlements. If Komoroske is right that it is possible to balance the client's needs and the public interest with a little creative lawyering, then the elimination of all secret settlements, as was done in South Carolina, overshoots the mark and kills the mockingbird in search of a worthy objective.

59. MODEL RULES OF PROF'L CONDUCT R. 8.4. (2002).