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## EXPLORING SOME UNEXPLORED PRACTICAL ISSUES

JACK H. FRIEDENTHAL\*

Classes in Civil Procedure provide a golden opportunity for instructors to share with their students significant information about a number of realities of trial and appellate practice, including ethical considerations, that are often forgotten or overlooked in view of the pressures to “get through” a host of materials for which there seems never enough time, particularly in those law schools that have cut the hours available for the course.<sup>1</sup>

Once we can put behind us the myth that even the old year-long six-semester-hour Civil Procedure course<sup>2</sup> of yesteryear could cover all the important areas that could be explored and recognize that one must pick and choose among topics, it is worth considering whether some non-traditional matters should be handled, even though that might mean that an issue or two of the “standard material” must be left for exploration in advanced courses. Because a basic course in Civil Procedure is, in the vast majority of law schools, part of the first-year mandatory curriculum,<sup>3</sup> instructors can often spark student interest and provide practical information by discussing those factors that color practitioner’s decisions regarding procedural matters that rarely are dealt with frontally elsewhere in law school or even among lawyers outside of their particular cases. The desirability of exploring real-life issues has not escaped the notice of a number of instructors who have used books

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1. A number of schools in the 1950s devoted three hours a week to a required first-year Civil Procedure course. *See, e.g.*, THE LAW SCHOOL OF HARVARD UNIVERSITY, ACADEMIC YEAR 1959-60 at 137 (3 hours throughout the entire academic year); STANFORD UNIVERSITY SCHOOL OF LAW, ANNUAL ANNOUNCEMENT, 1958-59 at 11 (*Course 209*) (average of 3 hours throughout the entire academic year). In later years, however, the number of hours has typically been reduced. HARVARD LAW SCHOOL, COURSE CATALOGUE, 2001-02 (5 semester units); STANFORD UNIVERSITY [BULLETIN]: SCHOOL OF LAW, 1996-98 (*Course 201*) (4 semester units). Not every law school has followed such a pattern. For example, at George Washington University Law School the required first-year Civil Procedure course was listed at four semester hours until the 1997-1998 school year when it was divided into two first-year courses of three semester hours each. *Compare* THE GEORGE WASHINGTON UNIVERSITY NATIONAL LAW CENTER BULLETIN, 1986-1987 at 53, *with* THE GEORGE WASHINGTON UNIVERSITY NATIONAL LAW CENTER BULLETIN, 1987-88 at 53.

2. *See* sources cited *supra* note 1.

3. *See* sources cited *supra* note 1.

such as *A Civil Action*,<sup>4</sup> or its movie version,<sup>5</sup> to look at a number of Civil Procedure issues in the context of the trial of an actual case. In the same vein, a number of Civil Procedure scholars have advocated changing the approach to the course by looking at the way in which litigation works in practice, emphasizing such matters as settlement and alternative dispute resolution.<sup>6</sup>

There are, however, a number of matters of vital importance to practicing attorneys that generally are not considered at all. Perhaps the prime example involves the tactical considerations in selecting the court in which to bring one's action. In following casebook materials, our courses spend considerable time exploring questions of personal jurisdiction, federal subject matter jurisdiction, and federal venue including transfer from one court to another. We touch lightly, if at all, on matters of state subject-matter jurisdiction or venue, except to discuss the doctrine of forum non conveniens. And even then the emphasis is on its technical aspects as set forth in the leading federal case, *Gulf Oil Corp. v. Gilbert*,<sup>7</sup> decided by the United States Supreme Court in 1947.

What we tend not to do, either with regard to federal or state cases, is to discuss why, in a given situation when a choice of forum is possible, a plaintiff's attorney decides to select one court rather than another and why his or her defense counterpart often does whatever can be done to obviate that choice in favor of another forum. That is not to say that the issue of court selection never arises. It does so particularly in connection with the question of why the Constitution provides for diversity of citizenship jurisdiction and the debate as to whether Congress should or should not eliminate it.<sup>8</sup> The issue also receives some attention when discussing congressional intent regarding transfer of venue provisions<sup>9</sup> and supplementary jurisdiction under section 1367 of the Judicial Code, a statute fraught with uncertainty as to its scope and

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4. JONATHAN HARR, *A CIVIL ACTION* (1996). The book chronicles an actual case involving claims of environmental pollution. To facilitate and enhance classroom use of the book, two law faculty members have produced a volume containing copies of documents from the case plus comments. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION* (rev. ed. 2002). See also the work of another professor, NAN HUNTER, *THE POWER OF PROCEDURE* (2002), providing documents and commentary on the litigation of *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. filed May 6, 1994), for use as a supplementary text in Civil Procedure courses.

5. *A CIVIL ACTION* (Disney Touchtone Pictures 1998).

6. For an interesting discussion of these views, see Jeffrey A. Parness, *Evolving Views of Civil Litigation: Future Civil Procedure Courses*, 31 ARIZ. ST. L.J. 945 (1999).

7. 330 U.S. 501 (1947).

8. See, e.g., JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER & JOHN E. SEXTON, *CIVIL PROCEDURE: CASES AND MATERIALS* 259-64 (8th ed. 2001).

9. 28 U.S.C. §§ 1404(a), 1406(a) (2000).

meaning.<sup>10</sup> But those issues, important and interesting as they are, are discussed generally as matters of government policy and statutory interpretation and not with respect to the choices that an attorney makes in connection with a specific case when options are available.<sup>11</sup>

How, for example, in a case among citizens of the same state whose venue statute provides a broad range of county courts in which to file, does plaintiff's attorney choose among the available courts? What factors govern that decision? The physical location of the court would seem to be important. But what underlying considerations affect the attorney's view of the most desirable location? Should she be most interested in the convenience to her client, or her client's witnesses, or all of the witnesses, or her own convenience? Should she select a courthouse around the corner from her office even though it could be a hardship for others involved to attend trial there?<sup>12</sup> Does it make any difference if she has taken the case on a contingency fee basis, rather than charging for her services by the hour? Does the nature of her schedule and her availability to work for other clients play a justifiable role in her decision? What, if any, moral considerations are involved?<sup>13</sup>

Should a lawyer consider the extent of the hardship she is imposing upon the opposing party? What if the existence of such a hardship in a relatively small case is more likely to result in a favorable settlement for her client? What if none of the available courts is convenient for plaintiff's lawyer, or if the forum selected by plaintiff is very inconvenient for defense counsel? If an attorney has any feeling whatsoever that his or her conduct of the case could be negatively affected, is it incumbent on the attorney to withdraw from the case? Is it a matter of degree?<sup>14</sup>

A somewhat related set of questions involves attempts to select, or at least to avoid, a particular judge. An initial question is when and to what extent is it ethical to take steps to determine that a particular judicial officer will or will not try the case? If there is substantial reason to believe that a judge would arrive with a bias against one's client or the client's case, few would argue that steps taken to avoid appearing before that judge are improper. Indeed, a judge has an obligation on his or her own to withdraw from the case in such a situation.<sup>15</sup> What if the concern is not that the judge will be biased for or

10. See, e.g., COUND ET AL., *supra* note 8, at 308-320; GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL 427-34 (8th ed. 1999).

11. See *supra* notes 8 and 10.

12. See MODEL RULES OF PROF'L CONDUCT R. 4.4 (1983).

13. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1987).

14. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5) (1983).

15. See MODEL CODE OF JUDICIAL CONDUCT Canons 2(B), 3(B)(5) (1999). Both federal and state courts have specific provisions as to when a judge is required to recuse himself or herself. See, e.g., 28 U.S.C. § 455 (2000); ILL. CT. R. 63, Canon 3(C); N.Y. C.P.L.R. 100.3(E)(1) (McKinney 2002).

against the client or the client's case, but for or against the attorney because of the latter's past conduct in unrelated matters? Suppose, for example, that the lawyer recently had a bitter argument with a judge who is well-respected for intelligence and fairness, and it is clear that on that occasion the lawyer acted improperly and was in the wrong. Is it proper for the attorney to take steps to avoid that judge in any subsequent case that the attorney handles?<sup>16</sup> On the other hand, what if a judge is a long time friend and in earlier years was the attorney's mentor? Would it be proper for the lawyer to pull out all the stops to bring a current case before that judge?

Assuming it is appropriate for an attorney to take steps to avoid or select a particular judge, the next inquiry involves how judges are selected for a particular case and what steps can be taken to affect that determination. The instructor can point out to the students that in some jurisdictions judges are assigned to handle a case from start to finish.<sup>17</sup> On the other hand, some systems assign all pretrial matters to so-called law and motion judges who, during a specified term, handle nothing else.<sup>18</sup> In the latter type system, if the case is not settled and ultimately goes to trial, the chief judge selects a judge to try the case from an available pool, often attempting to match the difficulty and complexity of the case to a judge's perceived ability to handle it. A number of years ago, in an interview<sup>19</sup> with the chief civil trial judge in a large California county, he confided, on promise of anonymity, that of some thirty judges available for civil trials, he felt he could assign but six to deal with highly complex matters. Another fifteen could be trusted to handle more or less routine cases such as those involving auto accidents and straightforward breaches of contract. The remainder were best confined to trying uncontested matters such as divorce cases and certainly could not be assigned to conduct jury trials. He allowed, however, that these latter judges often did a good job overseeing settlement negotiations, and that had become their primary duties. An attorney who understands this assignment policy may often be able to

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16. In federal courts, it has generally been held that a judge's antipathy toward an attorney is not a basis for disqualification unless there is clear evidence that it results in bias against the party whom the attorney represents, and even then perhaps should be alleviated by counsel's withdrawal from the case. *United States v. Sykes*, 7 F.3d 1331, 1339-40 (7th Cir. 1993). For similar state court cases, see *Clawans v. Waugh*, 77 A.2d 519 (Essex County Ct. 1950); *Berman v. Herbert Color Lithographers Corp.*, 636 N.Y.S.2d 98 (N.Y. App. Div. 1995).

17. For example, that is the basic system in New York. N.Y. C.P.L.R. 202.3(a) (McKinney 2002). However, a specific New York court that has multiple judges can instead choose to employ a master calendar system whereby one judge handles pretrial matters and another the trial itself. N.Y. C.P.L.R. 202.3(c)(6).

18. *See id.*

19. The interview was conducted by the author in his capacity as chair of a panel appointed by the chief judge of the Court of Appeals for the Ninth Circuit to determine if each lawyer in any federal district court case should have an absolute right, without establishing any ground, therefore, to disqualify for alleged bias one trial judge assigned to hear any aspect of the case.

select a type of judge, and thus avoid a specific judge, by pleading a case either in complex or simplistic terms. Of course, either attorney could try to manipulate the situation by filing a series of complex pretrial motions in what otherwise appears to be a simple case.

Students should be informed that in some jurisdictions, other than requesting a judge to withdraw, little can be done once a judge is assigned to hear a case. However, a judgment can be appealed on the ground that the decision was the result of bias or another grievous impropriety.<sup>20</sup> On the other hand, in some states a party can obtain an independent hearing to disqualify an assigned judge on grounds that the party must be prepared to prove. In a number of these jurisdictions, the request to disqualify must first be made directly to the challenged judge.<sup>21</sup> If, however, the judge fails to recuse himself or herself, the matter will be heard by another judge.<sup>22</sup>

Obviously, such a procedure is fraught with danger for the moving party, especially if the request is denied and the case remains in the hands of the challenged jurist. The situation may not be alleviated significantly even if the rules provide that a request for disqualification in the first instance is sent to a different judge to hear and decide the matter,<sup>23</sup> unless a motion can be filed and decided by a different judge without the knowledge of the judge who is being challenged.<sup>24</sup>

In still other states, a party has an absolute right to disqualify one judge who has been assigned to handle any part of the case merely by filing an appropriate motion. However, the rules vary significantly among these states. In some states, no grounds need be stated and the recusal is immediate and automatic.<sup>25</sup> In others, disqualification is immediate and automatic and no

20. That appears to be the situation in Iowa and New York where there are detailed rules regarding when a judge should be disqualified, *see* IOWA CODE ANN. § 602.1606 (West Supp. 2002); N.Y. C.P.L.R. 100.3(E)(1) (McKinney 2002), but where there appears to be no way that a litigant can, in advance of trial, obtain a hearing before someone else if the judge refuses to step aside. For cases in the above states in which parties raised on appeal the failure of the trial court to self recuse, *see State v. Haskins*, 573 N.W.2d 39, 44-45 (Iowa Ct. App. 1997); *State Div. of Human Rights v. Mercts. Mut. Ins. Co.*, 399 N.Y.S.2d 813, 815-16 (N.Y. App. Div. 1977).

21. *E.g.*, MICH. CT. R. 2.003(C); TEX. R. CIV. P. 18a(c).

22. *See* sources cited *supra* note 21.

23. That is the situation in Ohio where a Justice of the Supreme Court hears and decides the matter. OHIO REV. CODE ANN. § 2701.03(D) (West Supp. 2002). *Cf.* UTAH CT. R. 63(b)(1)(C)(2) (must first make an “informal” request to the assigned judge before another judge is assigned to decide if recusal is justified).

24. In a master calendar situation in which a chief judge assigns cases for trial, a party can, immediately upon the chief judge’s announcement of the judge to whom the case has been assigned, raise an objection. The matter could then be decided by the chief judge and the objection rejected or a new judge assigned without the challenged judge ever having knowledge of the proceedings.

25. *See, e.g.*, ARIZ. R. CIV. P. 42(f)(A); MINN. R. CIV. P. 63.03; MO. CT. R. 51.05(a).

hearing is held, but the requesting party must nevertheless provide a good faith statement of the grounds.<sup>26</sup> In federal courts, not only must the grounds be stated, but the challenged judge will conduct a hearing to determine if the allegations are, on their face, sufficient to require disqualification.<sup>27</sup>

The students may be asked what advantages and disadvantages there are to such an automatic dismissal system and how best such a system should be operated? Does it make a difference how a substitute jurist is selected? A number of years ago, a study<sup>28</sup> was conducted to determine whether an unconditional automatic system should be adopted for federal judges in the district courts of the Ninth Circuit. The initial reaction of the judges was decidedly negative, but the attorneys, who largely confined their practices to federal courts, were quite positive. Their enthusiasm waned considerably, however, when they learned that under the state systems they sought to emulate the replacement judge was determined by the chief trial judge rather than by a random selection from the pool of remaining judges. To some extent, this was their reaction to the practice in one state court in which two judges, thought to be particularly harsh in handing down sentences in criminal cases, were often subjected to automatic dismissal. The chief judge in that court tended simply to switch the cases from one of the judges to the other.

Note that the automatic dismissal regulations nearly always provide for only one automatic dismissal for each “side” of the case.<sup>29</sup> However, in some

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26. See, e.g., CAL. CIV. PROC. CODE § 170.6 (West Supp. 2002); HAW. REV. STAT. ANN. § 601.7(b) (Michie 2002).

27. The federal provision, 28 U.S.C. § 144 (1994), on its face, appears to require automatic disqualification upon presentation of the motion and an affidavit stating the alleged facts of partiality, but it has been interpreted in such a way as to substantially undercut its efficacy. The judge is to be disqualified if, on the face of the motion for disqualification, the allegations justify relief even though the judge knows them to be untrue. *In re Martinez-Catala*, 129 F.3d 213, 218-19 (1st Cir. 1997); see *U.S. v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993). However, the federal judges scrutinize the allegations strictly to determine their sufficiency. A majority of the Supreme Court in *Liteky v. United States*, discussing both § 144 and 28 U.S.C. § 455 (requiring self-recusal), upheld such strict scrutiny and took the position that, in general, any bias to require recusal must be alleged to result from an “extrajudicial source.” 510 U.S. 540, 555 (1994). A judge’s bias formed as a result of evidence or events occurring in the case will not suffice unless it can clearly be shown that “a fair judgment [is] impossible.” *Id.* Four justices concurred in the outcome, but argued that the majority’s opinion placed too much emphasis on the source of a judge’s alleged partiality. *Id.* at 557.

28. The author was the chair of the committee that conducted the study.

29. ARIZ. R. CIV. P. 42(f)(A); CAL. CIV. PROC. CODE § 170.6(3) (West Supp. 2002). See MO. CT. R. 51.05(d) (each type of party, plaintiffs, defendants, third-party defendants, and intervenors, have but one automatic challenge). Minnesota appears to have no restrictions on the number of automatic challenges that a party can raise. See, e.g., MINN. R. CIV. P. 63.03. No state attempts to restrict a party from raising as many non-automatic challenges as the party believes justified, but they will, of course, be decided on the merits of the claimed grounds, in many cases,

states there is flexibility allowed in determining what is a “side.” That determination could permit multiple dismissals by defendants or plaintiffs or third parties who have interests adverse to one another.<sup>30</sup> An interesting question is whether a prior agreement among plaintiffs or among defendants that each would recuse certain judges would result in a finding that the parties who entered into the agreement are all on one side.

The question of automatic dismissal of judges could raise a fascinating constitutional question. Suppose that an employment discrimination case is filed by a woman in a state court which has an automatic dismissal law, against a handful of male defendants with related yet somewhat factually divergent interests that, at least technically, are hostile to one another. The pool of judges available to try the case consists of a number of females whom the lawyers for the defendants fear may tend to favor plaintiff’s case. Suppose further that counsel for each of the defendants agrees that each, in turn, will automatically eliminate any female judge who is initially or subsequently assigned to try the case, thus virtually ensuring that a male judge will ultimately be selected. Does such an agreement run afoul of the Equal Protection Clause of the Fourteenth Amendment under the Supreme Court’s reasoning in *J.E.B. v. Alabama ex rel. T.B.*,<sup>31</sup> which held the use of peremptory challenges of jurors based solely on the basis of gender is invalid?

There are, of course, other techniques for avoiding or limiting the decisions that a particular judge might make even in courts that do not employ an automatic recusal system and where a challenge for cause would be unavailing. Thus, for example, in federal courts,<sup>32</sup> as well as in many state courts,<sup>33</sup> a party may request that a case be transferred to another district court or to another division of the same court “for the convenience of parties and witnesses in the

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at least initially, by the very judge who is being challenged. *See supra* text accompanying notes 20-24.

30. The flexibility may be written into the provision itself, *see, e.g.*, ARIZ. R. CIV. P. 42(f)(A)(2001), or result from judicial interpretation, *see, e.g.*, *La Seigneurie U.S. Holdings, Inc. v. Superior Court*, 35 Cal. Rptr. 2d 175, 178-79 (Cal. Ct. App. 1994).

31. 511 U.S. 127 (1994); *see also* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (peremptory challenges based on race are improper in federal courts under the anti-discrimination provisions of the Fifth Amendment).

32. 28 U.S.C. § 1404(a) (1994) (limiting transfer to a court where plaintiff could have obtained personal jurisdiction and venue over the defendant had the case been originally filed in that court).

33. *See, e.g.*, CAL. CIV. PROC. CODE § 397(c) (West Supp. 2002); FLA. STAT. ANN. § 47.122 (West 1994); N.Y. C.P.L.R. 510:3 (McKinney 2002). Not all state provisions are as broad. A number limit the court’s power to change venue to cases in which the inhabitants of the place where the case has been filed are prejudiced for or against a party or where a party or counsel has undue influence over jurors. Convenience of witnesses or the more general “in the interest of justice” are not listed as grounds. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-1001.5(a) (West Supp. 2002); MO. CT. R. 51.04(a).



interest of justice.” As one might expect, however, judges do not always look favorably upon those who make such motions without very substantial reasons<sup>34</sup> and, thus, would not likely grant such a motion if it was based primarily on the desire to have the case heard before a more favorable judge. In courts in which judges are shifted periodically from one assignment to another, a litigant may delay setting a case for trial until an assigned judge, considered to be unfavorable, is no longer handling civil trials. In rare situations, a trial may be put off the calendar until the assigned judge retires.<sup>35</sup>

Another area worthy of student consideration involves the important role tactical decisions can play when deciding whether to seek an immediate appeal of an interlocutory order when such an appeal appears available. In federal<sup>36</sup> and most state<sup>37</sup> courts, the basic rule allows appeal only of final judgments, but there are numerous exceptions.<sup>38</sup> Thus, there are times when it will be possible to obtain review of an interim decision that ultimately can have a profound effect on the outcome of the case.

A number of factors are significant when determining whether to go forward with such an appeal. One key issue that a lawyer must consider, apart from a belief that the appeal will be successful, is the cost of the appeal to the client including the additional attorney’s fees. Is the client willing and able to afford the cost? To what extent does a second appeal at the end of the case seem likely? And there are, of course, a number of other considerations. How important is the issue to the case? If the appeal is successful and the matter returned to the trial judge, will the latter be upset by being overturned and will that prove to be a negative factor in the overall resolution of the case? Will success likely lead to a favorable settlement for the client? What will be the

34. See, for example, the humorous, somewhat biting opinion of Judge Samuel B. Kent, denying defendant’s motion to transfer a case to another division of the same federal district court in which he sits. *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782 (S.D. Tex. 1996).

35. As we have seen, judges who control assignments may themselves be a source of manipulation in order to help ensure “right” results. See *supra* text accompanying notes 19 and 28. Consider the “Procedural Appendix” to Judge Boggs’ dissent in *Grutter v. Bollinger*, in which the judge, in effect, accused the Chief Judge of the Court of Appeals for the Sixth Circuit of purposely delaying notification of the members of the court of a requested hearing en banc until two of the judges had retired so that the case would be heard before nine rather than eleven members. 288 F.3d 732, 810-14 (6th Cir. 2002). It was clearly implied that the result in the case, which was decided by a 5 to 4 vote, might well have gone the opposite way had the two retired judges participated. The action involved the emotionally charged issue of whether the University of Michigan Law School’s consideration of race and ethnicity in its admission process violated the federal constitution and the Civil Rights Act. Judge Boggs’ charges did not go unanswered. *Id.* at 752-58 (Moore, J., concurring); *id.* at 772-73 (“Response to the Dissent’s ‘Procedural Appendix’” by Judge Clay in his concurring opinion).

36. 28 U.S.C. § 1292(a) (1994).

37. JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 13.1, n.1 (3d ed. 1999).

38. *Id.* §§ 13.2, 13.3

impact if the appeal fails? Will the appeal cause delay at the trial level? If so, which of the litigants will that favor? Is it legitimate to consider the fact that a delay will be of benefit to one's client regardless of how the appeal is decided? To what extent is it justifiable to take such an appeal, even though it is non-frivolous, when it is filed primarily for the purpose of driving up the cost to an opposing party whose financial resources are limited and who, as a result, may be forced into an unfavorable settlement before the trial has been completed?

Another set of issues that has received considerable attention from legislators as well as attorneys and law professors,<sup>39</sup> and yet has not generally been a focus of a basic course in Civil Procedure, is that of confidentiality agreements among parties. Typically, settlements in products liability cases contain clauses barring the plaintiff from revealing information obtained during discovery or other investigation regarding dangerous products and the harm that they can cause to their users. Major policy considerations are involved in the determination of the extent to which such agreements can and should be enforced by the courts.<sup>40</sup> There are a myriad of fascinating questions to be explored in this regard. For example, is it ethical for an attorney to participate in drafting an agreement that conceals or attempts to conceal the existence of a danger to the public? And, from a practical point of view, how far can one go in putting a "lid" on disclosure of information? Can the lawyer for a plaintiff be barred from revealing what he or she has learned in one case when handling a second case involving the same product? To be effective, would not such a ban require the lawyer to forego representation in future actions involving the same subject matter? That would appear to be in violation of the American Bar Association rule of professional conduct that bars an attorney from 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."<sup>41</sup> It is unclear the extent to which courts will nevertheless enforce such an agreement or distinguish between an attorney's "unethical" limitation on future representation of clients and a commitment not to reveal or use information learned in one case when others are being litigated.<sup>42</sup>

A fundamental issue is the extent to which the courts themselves have a duty to reveal, or at least not to conceal, the existence of dangerous

39. See Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 300-16 (1999); Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 81-85 (2000); Richard L. Marcus, *Evidence and Procedure for the Future: The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 459-68 (1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429-32 (1991).

40. See Dore, *supra* note 39, at 300-16; Friedenthal, *supra* note 39, at 69-97; Marcus, *supra* note 39, at 467-87; Miller, *supra* note 39, at 463-90.

41. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (1990).

42. See Friedenthal, *supra* note 39, at 93-94.

instrumentalities. Do we want to require judges to pick up the telephone and call the press whenever it appears that use of a product may be of danger to the public? What role should the courts play? The failure of the court to approve of, and, therefore, its refusal to enforce, a confidentiality agreement does not necessarily mean that such dangers will be widely publicized.<sup>43</sup>

Would refusal by the court to enforce such an agreement inhibit settlements or, at least, limit the amounts that defendants are willing to offer? Why not allow the parties freely to decide for themselves how to resolve a legal dispute and leave to the press and to the governmental agencies charged with protecting the public the obligation to deal with defective products? Is it proper to require a litigant to be subjected to intensive disclosure under modern discovery rules and then to turn that information, containing unflattering details, over to the public even though, in the final analysis, that litigant would prevail in the lawsuit? Do we want to encourage additional litigation by other potential plaintiffs who learn that defendant has “paid off” a plaintiff, even though the settlement was simply a means of avoiding embarrassment and further action in what amounted to a nuisance suit?

In concluding, I certainly do not advocate turning our Civil Procedure classes away from those traditional issues that play a significant role in orienting new students to the study of law and their understanding of the ways in which it has developed in the past and will continue to develop in the future. But I do believe it would be of substantial interest to explore on occasion some of the intensely practical matters that illuminate the realities of litigation and that students, especially first-year students, find absorbing. With careful planning, a class meeting with an invited guest or two, for example, a thoughtful judge or practitioner, can invoke interesting debates on such issues in which the students will prove to be active participants. It can be an exciting, and a somewhat different, experience.

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43. *See id.* at 89.