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Senator Thomas Umberg, Chair
Senate Judiciary Committee
1021 O Street
Room 3240
Sacramento, CA 95814

Dear Chair Umberg:

We write to express our strong support for SB 1149, the Public Right to Know Act, sponsored by Sen. Levya. The Center on the Legal Profession focuses in significant part on how to improve the civil justice system for the benefit of the public. This bill would do exactly that.

A major problem with today's civil justice system is the pervasiveness of protective orders, stipulations, and non-disclosure agreements that cloak critical information about health and safety surfaced during litigation. These modes of litigation secrecy have been used in cases involving the drug Zyprexa, the weed killer Roundup, Dow Corning's silicone gel breast implants, the Dalkon Shield, cigarettes, Firestone tires, GM's faulty ignition switch, and defective triggers on Remington rifles. If information from these litigations had been made public, many victims could have been spared. And as Zitrin and Powers have argued, the risk of harm from dangerous products and environmental hazards may fall disproportionately on people of lower incomes and education.

Though we believe the U.S. adversarial system of dispute resolution has considerable benefits, it can also have downsides in certain situations. One such situation arises when the judge assesses whether to cloak discovery in a protective order—or to permit the parties to file motions or exhibits under seal. In such cases, it can be in the interest of both the plaintiff and defendant to maintain secrecy, and judges frequently acquiesce to the parties' demands. But the public is unrepresented, and its interests are frequently overlooked. *See Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 785 (3d Cir. 1994) ("[S]ome courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders."); *Quality Inv. Properties Santa Clara, LLC v. Serrano Elec., Inc.*, 2010 WL 2889178, at *1 (N.D. Cal. 2010) ("[B]lanket protective orders governing the handling of confidential information exchanged in discovery are routinely approved by courts in civil cases."). By creating a presumption against court orders that conceal information about defective products or dangerous environmental conditions, the Public Right to Know Act would put an important public-policy thumb on the scale for judges to consider when making these important decisions.

This thumb on the scale in favor of transparency is particularly important because secrecy provisions keep litigation from playing its vital role, informing and supplementing regulatory activity. That is, if litigation about public health hazards is fully public, public health litigation can complement and catalyze regulatory activity. *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health*

Through Litigation: Lessons from Tobacco and Opioids, 73 STAN. L. REV. 285, 361 (2021). But, if litigation about public health hazards is shielded by secrecy provisions (such as broad protective orders and NDAs), public health hazards will not come to light in a timely manner, stunting regulators' efforts.

As an organization that focuses in part on the ethical rules governing lawyers, we are particularly supportive of SB 1149's provision making it a matter of professional discipline for an attorney to move for such a provision, or encourage their client to sign such a provision. Current rules, norms and practices put lawyers in a bind—between serving the narrow interests of clients and the broader interests of society. Indeed, currently, lawyers can feel compelled to favor secret settlements—even when they may be morally opposed to doing so—because California Rule of Professional Conduct 1.2(a) mandates: "A lawyer shall abide by a client's decision whether to settle a matter." *See* Davan Maharaj, *Firestone Recall Puts Spotlight on Secret Liability Settlements*, MILWAUKEE J. SENTINEL, Sept. 10, 2000, at 3A (quoting attorney Rowe Brogdon who represented the parents of a person killed in a Firestone/Ford accident and who accepted a settlement on their behalf requiring that discovery information be kept secret: "You're there to represent your client, not . . . the world, although you wish you could. . . . Ethically, there's no question that you have to do what's in the best interest of the client."). Proposed section 1002.9(g) changes that calculus, and frees lawyers from that untenable position, by helping to underscore and make concrete lawyers' obligations to the public, not just their individual clients.

For these reasons, we strongly encourage you to pass this bill as soon as possible. Thank you for your consideration.

Sincerely,

Jason Solomon