Testimony of

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STATEMENT OF ROBERT N. WEINER
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I want to thank the Subcommittee for inviting me to present my views on confidentiality in litigation, an issue I have thought about, written on and litigated extensively. I am a partner at the law firm of Arnold & Porter LLP. We have served as national counsel in product liability cases involving drugs, medical devices, and other products, where issues regarding protective orders frequently arise. We also have been extensively involved in recent years with electronic discovery. In addition, I was a member of the Sedona Conference Working Group on Protective Orders, which included plaintiffs' lawyers, defense lawyers, lawyers for newspapers, judges, and academics. Though I did not agree with all the conclusions of the Group, they do provide a counterpoint to the some of the attacks on confidentiality in litigation. As was true when I participated in the Sedona Working Group, the views I offer today are not on behalf of my firm or any client.

I testified before Senator Kohl's subcommittee in 1990 on this very same subject in a hearing "examining the use of secrecy and confidentiality of documents by courts in civil litigation." Hearing on Court Secrecy before the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary, 101st Cong., 2nd Sess. (May 17, 1990). It is striking how many of the arguments on this issue have remained constant, even while the world around us has changed. The changes, in my view, make it more important than ever that courts have adequate discretion to protect the confidentiality of information produced in discovery.

The most relevant difference between 1990 and today is the accelerating erosion of privacy. The internet results in instantaneous publication of any new fact, or factoid, about an individual or business. Public disclosure now is far more public than it was in 1990.

The potential for rapid, widespread, and irretrievable dissemination of private information makes compelled disclosure in litigation more problematic. Few of us stop to think about how far litigation departs from the ordinary manner in which we deal with one another in personal or business affairs. Suppose the father of a child who broke her leg in a soccer game believed the coach should have trained the players better to avoid injury. No one, I believe, would contend that the father had a right to show up at the coach's home or office and rifle through his files. Or, to take another example, if a customer suspected the butcher had held her thumb on the scale, we would not argue that the customer had a right to go behind the counter, inspect the meat, and review the butcher's invoices. But once the father or the customer filed suit, then through the good offices of counsel, he or she would gain license to inquire at least as intrusively.

Whether meritorious or not, the filing of a lawsuit generally entitles the plaintiff to delve into the defendant's files and ask the defendant in deposition about anything conceivably relevant to the plaintiffs allegations. And "relevant" is broadly defined to include not only documents or information that may cast light on the plaintiff's claims, but also anything that could lead to evidence casting light on them. For an individual defendant, discovery could encompass almost any aspect of his or her private life, depending on the plaintiff's claims. Perhaps the potential invasion of privacy is more worrisome with regard to individuals, but corporate defendants have a significant interest in confidentiality as well, and so do the people who work for them. For a corporate defendant, document requests in litigation can include its personnel files, marketing strategies, pricing policies, and manufacturing processes, even in a case between competitors. A plaintiff who sues a manufacturer alleging a defect in its product, for example, may be

able to ask an employee his or her salary and bonus, on the ground that it is relevant to the employee's credibility or that the sales of the product affect the employee's income. The plaintiff also might be able to ask about the employee's health, on the ground that the employee's medical condition contributed to the product defect.

Electronic discovery has heightened the prospect that sensitive commercial or personal information will be produced in discovery. The volume of materials sought in discovery is in some cases so huge and the cost of producing it so great that companies increasingly turn over raw electronic files and tell their opponents to search electronically for what they need. Defendants in such cases often do not have the time or the budget to screen out information that could cause competitive harm to the company or personal harm to its employees.

Those who think this problem only affects multi-billion dollar manufacturing companies should think again. The rules apply to a newspaper sued in a libel action, where a plaintiff may seek to review reporters' notes and research materials. They apply to a health insurer sued for insurance fraud, where medical records could be part of discovery. And they apply to a university in an employment discrimination case, where a plaintiff may seek scholars' private reviews of each other's work.

Protective orders generally do not affect the parties' ability to review this information, but rather their ability to disclose it. The premise underlying the argument against such protective orders is that a plaintiff has a right not only to question the defendant in a deposition, and to review the defendant's files, but to make public whatever these efforts uncover. It is not clear whether the right claimed is constitutional, statutory, or natural. The advocates argue that it derives from the public's legitimate right to know. But spreading the supposed right over more people does not clarify its genealogy. The public does indeed have a constitutional right to know what goes on in a courtroom. And generally, the public has a qualified right of access to what is filed with a court. The taxpayers, after all, fund the courts and have an interest in knowing what they are getting for their money. But that is not what we are talking about with respect to protective orders. The materials yielded by the far-ranging romp through the opponent's files that the Federal Rules of Civil Procedure authorize are exchanged between the? parties. They generally are not filed with the court, and they far exceed the scope of what is introduced in evidence in any subsequent trial. The taxpayers do not pay for these materials, and a defendant would not be required to disclose them absent a lawsuit -- and being involved in a lawsuit is generally not voluntary. As the Sedona Guidelines observe, "Pretrial discovery that is simply exchanged between the parties is not a public component of a civil trial."

Richard Zitrin's writing in particular reflects a fundamental misconception in this regard. He refers to protective orders as "secretizing information." If there were such a word as "secretize," it would connote making public information secret. But the information produced in discovery is usually not public. Take a small scale example. Few of us make our personal medical records public or want them made public. That does not mean that we "secretize" them. They are private to begin with. If we had to produce them in litigation -- as might be required in some states -- they would still be private records. A protective order would merely keep them private, not somehow change their status. The same is true of private records produced on a larger scale.

The Supreme Court in Seattle Times v. Rhinehart, 467 U.S. 20 (1984), made short work of the notion that there is a public right of access to discovery materials. Recognizing the distinction between documents filed in court and materials exchanged between the parties in pretrial discovery, the Court rejected the contention that the First Amendment prohibited entry of a protective order:

As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes.... A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. ... Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modem practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

467 U.S. at 32-33 (citations omitted).

The Court also acknowledged the concerns regarding privacy -- more than a decade before the internet heightened the intrusion:

It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense: discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information.... There is an opportunity, therefore, for litigants to obtain - incidentally or purposefully -- information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.

U. at 34-35 (citations omitted).

In short, the Court found that confidentiality has a place in litigation, that a defendant does not lose the right to prevent publication of his or her private papers merely by suffering the misfortune of being named in a lawsuit.

Federal courts have authority under Rule 26(c) of the Federal Rules of Civil Procedure to balance the competing interests of the parties affected by discovery, and, for good cause, to enter orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Among the things a Court can do is order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." The Federal Rules, and the many state analogues, contemplate that the court will make a determination in each case of the appropriate type and degree of protection discovery materials should receive.

Why should we depart from this system? The primary argument is that protective orders conceal information related to product safety. A number of articles cite a safety problem with a product, and then note that there were protective orders in litigation. What is generally lacking is a link between the two, an indication that protective orders in litigation somehow papered over the safety problem. The assertion of such concealment strains plausibility, because, as noted above, protective orders generally cover only materials exchanged between the parties. The complaint alleging the plaintiffs' injuries and the defendants' misdeeds is a public document. It is also privileged under the law of libel and slander. The plaintiff can send it to anyone, can issue press releases when filing it and can cultivate all the publicity he or she wishes. Increasingly, it is available electronically to lawyers, journalists, and business competitors across the globe. Westlaw provides the ability to search for new complaints filed in many federal courts. Pacer provides electronic access to federal dockets. Electronic clipping services can provide notice of any new suit against a particular company or individual. Protective orders affect none of that. Nor do they prevent a plaintiff, when bringing a lawsuit, from also notifying regulatory agencies. In addition to all these mother lodes of information, a judge weighing the facts and circumstances of the individual case can take into account whether discovery has turned up information that for some reason should be public, and can make it public. But those arguing for compelled disclosure of information that "concerns" or "relates to" public safety would impose impossible burdens on courts and would give litigants leverage to extract settlements based on the risk that their opponents' trade secrets will be disclosed. In a case alleging a product defect causing injury, almost all the information produced may somehow "concern" or "relate to" safety. Whether that information shows a real risk, whether the risks of the product outweigh the benefits or exceed what an ordinary consumer would expect, is the ultimate issue in the case, frequently decided by a jury after full discovery and a trial. Asking a court to prejudge it at the outset of the case without the benefit of a developed record invites an ill-informed, overbroad, and potentially unfair determination.

A second attack on protective orders focuses on how they are obtained. The parties generally agree on them, it is lamented, and the courts routinely sign off without exercising serious review. Indeed, there is a germ of truth to this argument. Courts are, and should be, loath to foment litigation regarding issues on which the parties agree. Absent a public right of access to discovery materials and absent a demonstrable impact on public safety, there is normally no good reason to clog the courts with additional procedural wrangling. Nonetheless, the courts do retain authority to check any excesses. No one forces a plaintiff to agree to a protective order. The plaintiff can, if he or she believes it is justified, litigate the issue just like any other of the innumerable issues raised in a litigation. Even after an agreed protective order is entered, virtually every such order gives opposing counsel the right to challenge the confidentiality of particular documents.

Indeed, with electronic discovery, a broad initial order with a right to challenge particular designations is becoming an essential tool in litigation, a tool that serves the interests of the court and the parties. When a party produces hundreds of gigabytes of data, to require review of every document for confidentiality before production would delay litigation interminably and raise the cost prohibitively. Therefore, parties frequently agree that the defendant can produce information subject to a protective order and allow the plaintiff subsequently to challenge certain confidentiality designations or categories of designations. Without this safety valve, large litigations would grind to a halt. Suits would be settled because of discovery costs, not because of the validity of the claims.

In any event, even if a plaintiff agrees to a protective order, third parties, including the press and public interest groups, can often enter the case to challenge it, and they have done so repeatedly. In short, that parties often stipulate to protective orders stands as no indictment of the case-by-case approach to the issue embodied in the Federal Rules of Civil Procedure.

I am a defense lawyer. My ethical obligation is to represent my client zealously. The plaintiff's lawyer has the same obligation to his or her client. Each of our clients -- indeed, in many cases, each of us personally -- may gain or lose depending on how issues regarding protective orders are resolved. Congress should be skeptical of efforts by any of the combatants to paint this picture in black and white. Neither side of this question has a monopoly on truth and virtue. There are legitimate issues regarding the appropriate degree of public access to information on the one hand, and legitimate concerns about privacy, abuse of discovery, and protection of valuable trade secrets on the other. The balance of competing values can only be struck case by case, where the court can weigh the particular facts before it and enter an appropriate order. That is how the system works now in federal court. There is no evidence that this system has broken down, that it has endangered the public health, or that it has denied any litigant his or her day in court.

The effort to change the law regarding protective orders is thus a solution in search of a problem. On any measure of the problems facing courts in this country, protective orders are not even a blip on the screen. No major overhauls are necessary. No rigid rules that strip the courts of discretion to decide each case on its merits are warranted.

In sum, when considering sunshine in litigation, Congress should remember that too much sun is harmful.