Testimony of

Stephen G. Morrison

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TESTIMONY FOR HEARING ON
"COURT SECRECY AND PUBLIC HEALTH AND SAFETY"

BY
STEPHEN G. MORRISON

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My name is Steve Morrison. I am a trial lawyer who usually defends people who get sued. I have tried over 240 cases to jury verdict and argued over 60 appeals in the highest courts of the federal and state systems of this nation. It has been my privilege to be lead counsel in 27 states. I have represented large multi-nationals, Fortune 500 companies, and Main Street businesses. I have represented individuals and families. I am a past President of the Defense Research Institute representing over 21,000 defense lawyers nationwide. I am a past President of Lawyers for Civil Justice, a coalition of corporate and defense trial lawyers, major American corporations and defense bar associations. I am a past Chairman of the House of Delegates of the South Carolina Bar.

I have been involved on a first hand basis with hundreds of cases which were successfully litigated or settled precisely because the parties involved in the litigation knew that the private information which they shared in discovery would remain confidential. The parties understood that if their private information was to be shared with the public, it would be shared in the context of judicial supervision and due process, with each party being allowed to comment and to set the context on the data that was placed before the public. The current legislation contemplated, euphemistically designated the "Sunshine and Litigation Act," threatens the fundamental right of litigants to privacy and property. This legislation would increase the cost and burdens on the parties and decrease the efficiency of the court system. Certain parties would receive unfair tactical advantages at the expense of others. As importantly, the need for such legislation has not been demonstrated in the nearly two decades since it was first introduced. In my experience, legislation such as this would cripple the ability of the parties to reach a just determination of their disputes without offering any offsetting benefits. The legislation currently contemplated also directly contravenes the views expressed by the Judicial Conference Committee on Rules of Practice and Procedure which address this issue in the context of then pending Senate legislative initiatives. Any attempt to restrict or eliminate the power of the courts to issue protective orders to maintain the confidentiality and privacy of personal or sensitive information would have clear negative consequences for our nation's legal system.

I would like to make it clear that I am not speaking on behalf of any client or on behalf of any organization that I have led or am a member of currently. I speak from personal experience with deep conviction and I speak for myself.

The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by the United States Constitution. In my experience, both of these rights are lost when private information becomes public or a trade secret is revealed in a competitive arena. Most of the time when an individual is seeking to release private information into the public domain in the context of litigation, they are motivated not by a desire to protect human health and public safety but rather by a desire to leverage information out of context to increase the value of a particular piece of civil litigation. In other words, the motive for disclosing private information in the context of civil litigation is frequently simply a matter of economics.

Moreover, litigants have a right to privacy in pretrial matters just as they have a right to due process. In America we have open access to courts. This means that anyone with the ability to pay the filing fees, usually $100 or so, and file a complaint stating that someone has wronged them can begin a lawsuit. The lawsuit then takes on a life of its own. The publicly filed papers are public, available to the newspapers, the internet, etc. However, litigants can then avail themselves of the police power of the state to demand and get private confidential information from each other. The fact that this private confidential information is exchanged in our civil justice system does not mean that that information is of interest to, or necessary to be disclosed to, the public on a unilateral basis without court supervision. Moreover, the exchange of this private information frequently does not lead to evidence that is admitted in any court of law.

In my experience hundreds of thousands and even millions of documents are released by parties to each other in individual cases throughout the country. Only a small fraction of these documents are relevant to any legal issue that is actually put before the court or placed in front of a jury in a trial. This means that massive amounts of private and confidential information are exchanged in the context of our civil justice system in order to resolve disputes peacefully and amicably.

If this information were to be released immediately to the broadcast media or the internet without context, without judicial supervision, without due process, massive mischief could and would take place. Portions of documents would be released without a witness to explain the document or to place it in context. Documents would be released solely to attempt to embarrass one of the parties. Documents would be released so as to create an "in terrorem" effect as to the parties. The massive amount of information generated in litigation in this electronic age often forces litigants to place their privacy and proprietary information at risk to vindicate their legal rights. Protective orders protect those rights while allowing the legal disputes to be resolved fairly and efficiently through a balance process of protecting privacy rights and allowing the dispute resolution.

If confidentiality cannot be protected in the context of our civil justice system, in my experience, litigants will be more inclined to oppose every document request or attempt to narrow the request for information by the opposing party in each and every case. This will cause an increased burden on our court system in the form of increased hearings, increased legal costs to both parties and increased costs to the public. The legislation contemplated with impose new burdens on the courts by requiring them, at the earliest stages of litigation, to make preliminary determinations on an incomplete record regarding important questions such as whether protecting the confidentiality of any among thousands of documents requested would endanger the public health and safety. Overburdened courts are ill-equipped to assume such a role in modern trial practice and lawyers are generally able to agree on a procedure that both protects the confidentiality of sensitive documents and gives the opposing parties access to them and provides for the disclosure of those documents in an orderly process in open court when appropriate. Once a preliminary protective order is entered and the key documents have been identified, under the current system, the parties can then litigate whether they should be disclosed to the public. That litigation takes place with total respect to the fundamental rights of the party who owns the private documents as well as the party who wishes to disclose them to the broader public for whatever purpose.

Protective orders and settlement agreements are currently used to balance the broad and invasive nature of modern discovery. Historically, protective orders have worked well to balance competing interests in private discovery disputes. In my experience, generally, when a party wishes to have disclosure of past settlements in litigation, they are wishing to create an atmosphere where the settlement of the civil lawsuit is cast as an "admission" of wrong doing by the settling party. The effort is not simply to disclose that a case has been settled but to cast the party who has settled in the role of the "evil-doer". Does anyone really believe that such a use of past settlements will promote future settlements? If one of the goals of our justice system is the peaceful resolution of disputes among parties, then settlement should be promoted and not discouraged. There are many reasons to settle a case which have nothing to do with an admission of wrong doing. Any fundamental change in American Law restricting judicial authority to issue protective orders and sealing orders would create a tactical advantage for contingency fee lawyers hoping to file more lawsuits against corporate deep-pocket defendants.

Information about public hazards is available to the public under existing law and there is no compelling need to consider legislation that would restrict judge's discretion nationwide. Professor Arthur Miller, the nation's foremost expert on privacy and procedure set forth his view that to impose any further restrictions on a judge's discretion to protect privacy and property rights or to "favor" or "disfavor" either privacy or openness in the exercise of that

discretion by legislation or court rule, is not warranted by empirical evidence. The courts already have law discretion to balance the competing goals of promoting openness and protecting legitimate interest in privacy and confidentiality when information is sealed upon settlement as well as when the production of confidential information is compelled in the course of litigation. Recent research on this issue concludes that the current system is working effectively and needs no change.

Moreover, regulatory agencies already have the power to obtain information from companies about matters effecting "public health and safety." These agencies do not need courts to serve as freedom of information clearing houses. In fact, federal statutes already require regulated industries to provide a massive amount of information to government agencies about the products they produce before they go to market, as well as after they are on the market. The findings of empirical research conducted by the federal judicial center, the research arm of the federal courts, as well as extensive public comments submitted to the judicial conference committee on rules of practice and procedure, failed to detect anything wrong with the current protective order practice of the use of confidentiality agreements.

Professor Miller was correct in concluding, "the appropriate concern is not that there is too much 'secrecy'. Rather, it is that there is too little attention to privacy, the loss of confidentiality and to interference with the proper functioning of the judicial process."

Confidentiality serves several values in the civil justice system. The benefit of public access to certain litigation materials simply does not rise to, much less, transcend the essential rights of privacy. The present practice should be retained. We should continue to rely on our courts to use their discretion to issue confidentiality orders to protect the legitimate interest of the parties. We should continue to allow the parties to retain their rights to negotiate confidentiality agreements voluntarily. Our current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is simply no reason to believe that existing court rules of practice create any risks to public health and safety. I strongly recommend against enactment of restrictive legislation. The truth is, the courts rarely use their authority to seal information, especially in today's environment. When they do, there is compelling evidence that preserving confidentiality is of primary importance. Even if the courts have the resources to assume a public information function, they are not the appropriate institutions to do so. As we all know, a multitude of executive, administrative and law enforcement agencies exist for the purpose of protecting the public health and safety. This is not the role of the civil justice system or the role of individual private litigants no matter how much they aspire to that role. Courts are in the best position to make judgments in the context of the full adversarial process, with the rules of evidence and cross examination procedures and full due process placing all information in context to determine whether or not information should remain confidential or whether it should be disclosed to the public and in what context.

Thank you for the opportunity to present this information to the committee. I hope it has been helpful.