Responses of Robert N. Weiner

QUESTIONS FROM SENATOR KOHL

1. **You argue that we should let judges decide protective orders and that legislative bodies ought not interfere. Do you believe that a judge has an obligation to take into consideration the public's interest in knowing about a serious hazard, perhaps like the example Judge Anderson cited of the go-carts that injured young children and remained on the market? Should a judge do something beyond simply adjudicating the case before him or her?**

If a judge became aware that maintaining the confidentiality of information in litigation would in fact impair the ability of members of the public to protect themselves from danger, the judge, under current law, would have discretion to consider that fact in determining whether to grant or sustain a protective order. If that situation arose -- and I have not encountered such a scenario -- I would expect the judge to exercise his or her discretion in a manner that would protect the rights of the litigants insofar as it is possible to do so without endangering others.

The judge's obligation in our constitutional system is to adjudicate the case before him or her. There is sufficient discretion built into the Rules of Civil Procedure to allow the judge to perform that function without being blind to any broader impact of the his or her orders.

2. **In your testimony, you highlighted the advent of electronic discovery and the increased potential for sensitive commercial or personal information to be produced in discovery.**

   (a) Do you agree that courts ought not to grant protective orders absent a rigorous, bona fide showing of "good cause," as required by Rule 26(c)?

Rule 26(c) of the Federal Rules of Civil Procedure requires a showing of "good cause" for the entry of a protective order. The Rule does not add the adjectives "rigorous" and "bona fide." I believe the standard in the Rule does not need amplification.

   (b) Does electronic discovery provide a more efficient means of distinguishing between documents that may be relevant to public safety and those that clearly are not?

No.

3. **On page three of your written testimony, you cite the several examples where you are concerned about the privacy of litigants. Can you please explain how legislation that requires a judge to weigh the public's interest in disclosure of information "relevant to the protection of public health and**

safety" could result in an "invasion of privacy" in three of the examples you cite:

(1) a newspaper sued in a libel action

Consider this hypothetical case. A newspaper story alleges that a particular drug causes some users to stop breathing and that the manufacturer knew about, but did not disclose, the problem. In fact, a tiny percentage of patients who take the drug experience a severe allergic reaction known as anaphylactic shock -- about the same percentage as experience that reaction to aspirin. Anaphylactic shock can obstruct a patient's breathing. The labeling for the drug, which is appropriately directed to doctors as the law requires, prominently warns of anaphylactic shock in language that the FDA specifically considered and approved. But the labeling does not say in terms that the drug can cause people to "stop breathing." The drug company sues the newspaper for libel and requests the reporter's notes of interviews with sources. Under the standard in the bill, the information in the reporter's notes may be "relevant to the protection of public health and safety." That does not mean the information is correct, or that there is indeed a health problem with the drug. It just means that the notes *pertain or relate to* an issue of health and safety, as that is the definition of "relevant."

(2) a health insurer sued for insurance fraud

Consider a hypothetical case in which a health insurer refuses to pay for a bone marrow transplant that a cancer patient needs. The patient cannot afford the treatment unless insurance pays for it. By the time the insurance company relents and agrees to pay, it is too late, and the patient dies. The patient's family sues the insurer for fraud, alleging that it has routinely denied payment for treatments needed by policyholders who have cancer, putting them at risk of death or injury. To establish this pattern of conduct, the plaintiffs ask for medical records of every other cancer patient to whom the insurer denied payment. The company can redact the names of patients, but that may or may not prevent knowledgeable reviewers to match the records to specific individuals. The medical records may be "relevant to the protection of public health and safety." At the end of the case, the evidence may well show that the insurer only denied coverage for inappropriate treatments. Nonetheless, at this stage, the standard in the legislation could require that medical records exchanged in discovery be publicly available.

(3) an employment discrimination case.

Consider a hypothetical case in which a former employee sues a manufacturer of medical devices, alleging that she was fired because she was a minority. She claims that she had more training and was more productive than employees who were not fired, and that substance abuse, lack of training, and the general incompetence of employees on the assembly line create a danger to users of the device. In discovery, she asks for employment records of other employees. .Given the allegations, this information may be "relevant to the protection of public health and safety," and therefore, under the standard in the bill, a protective order may be inappropriate.

4. You argue that public access to complaints and other public court filings is sufficient to alert the public to a potential health and safety problem. How do you respond to Mr. Bradley's assertion that if information currently subject to a protective order, which his lawyer has unsuccessfully fought, were made public that Cooper Tire would be pressured to fix the problem with its tires?

Mr. Bradley suffered a terrible tragedy and deserves the greatest sympathy and respect. But at the time of his accident, there were already so many lawsuits involving Cooper Tire that the federal cases had been consolidated in a multi-district litigation proceeding. In New Jersey, a court had before it a nationwide class action settlement involving allegedly defective Cooper tires. Cooper Tire was already receiving significant adverse publicity, including stories in the Wall Street Journal and New York Times on Cooper Tire settlements. There is simply no reason to believe that protective orders contributed to Mr. Bradley's accident.

5. In your written statement, on page 7, you state that "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." As you know, the Sunshine in Litigation Act does not compel or require the disclosure of any information, and it requires a judge to consider whether the information is "*relevant to the protection public health and safety,*" (emphasis added), not simply information that "concerns" or "relates to" public safety. Indeed, it gives the judge discretion to balance this public interest with privacy interests, including trade secrets.

With respect, the draft legislation does not simply require a court to consider whether information is relevant to public health and safety. It requires a court to make a specific finding when entering a protective order that the order would not "restrict the disclosure of information which is relevant to the protection of public health and safety." § 1660(a)(A). And the Court is directed to enter the narrowest order possible.

As regards the word "relevant," the first definition in the Oxford English Dictionary is "[b]earing upon, connected with, pertinent to, the matter in hand." Requiring that the documents be relevant to the "protection" of public health and safety does not narrow the scope of the statute. For example, any document regarding pharmaceutical products -- which, after all, are intended to protect public health -- is arguably "relevant" to that issue, particularly given that every drug has side effects, which are often at issue when pharmaceutical companies are sued.

(a) Do you think that a judge should have the discretion to reject a protective order when he or she determines that such an order would prevent critical public health and safety information from reaching government officials and consumers?

I think judges have that discretion now.

(b) Are you concerned that judges will not respect recognized privacy interests, such as trade secrets, when using the discretion that the Sunshine in Litigation Act allows them?

Yes. The Act does not clearly afford discretion, but rather restricts it. A judge can only grant a protective order if he or she finds that the interest in public health and safety is outweighed by a specific interest in confidentiality. At the outset of a case, before the evidence has been developed and submitted to a trier of fact, the judge will have a very difficult time assessing this balance. Because the default position in the statute is denial of a protective order and disclosure of information, the consequence could well be disclosure of trade secrets and private information. At the very least, in a case involving many documents -- and electronic discovery has increased the magnitude of document productions --sorting this issue document by document out will be backbreaking.

QUESTIONS FROM SENATOR HATCH

1. Mr. Weiner, in your testimony you made note of the burden of e-discovery, and the need to consider this practice in the Sunshine in Litigation Act of 2007, S. 2449. Could you discuss in greater detail what e-discovery entails, when it arose, and how it has changed the ordinary course of litigation?

E-discovery has been around for years, but the burdens mushroomed with the rise of e-commerce, the increasing prevalence of email, and the adoption of the amendments to the Rules of Civil Procedure, effective on December 1, 2006. Parties must identify potentially relevant electronic documents that are reasonably accessible and those that are not. Many, if not most, companies do not have an inventory of the electronic systems that have been used historically through their business, the data created on those systems, and how that data has been stored, recycled, or otherwise maintained.

Compiling and reviewing information even from the reasonably accessible sources can be enormously burdensome. One commentator estimated that for a large company to search for, review, and produce electronic documents from 100 custodians would cost an average of $5 million. Experts in e-discovery estimated that the total cost for all litigants in 2007 would be $2.4 billion.

Moreover, the possibilities of error -- either in missing caches of material, or in failure to suspend operation of some automatic system deleting old records -- are legion, and can result in sanctions. Most lawyers went to law school because they are *not* technologically adept, which often compounds the problem.

The result is that litigation has become more costly, and discovery is even more a game of "gotcha" than it was previously. Given the costs, some companies simply turn over the electronic files of many custodians and tell the opponents to search. That increases the risk of disclosure of private matters, particularly in light of the ways employees frequently use email for personal communications. Even companies that attempt to sift out such materials from discovery will miss some in the enormous volume of materials reviewed.

2. Mr. Weiner, your testimony highlighted the privacy concerns that courts must protect in litigation, specifically with respect to information exchanged between parties but not filed with the court. Could you elaborate on the interests of plaintiffs in maintaining privacy during discovery? In your view, would this legislation adequately protect the privacy interests of plaintiffs?

The hypothetical cases outlined in answer to Senator Kohl's question illustrate how discovery can require production of personal and private information. Business litigants often have to produce the personnel files of employees and executives for purposes of impeachment or to establish lack of training or oversight. Employees' email is often produced. People frequently make observations in emails to close colleagues that they

would not make publicly. They reveal private information about themselves. They make comments about other employees. All of this information can be, and often is, produced in discovery.

In addition to document discovery, both plaintiffs and defendants have to testify in depositions. They frequently must answer questions that could provide material for impeachment at trial -- whether they have been convicted of a crime (even if the record of it was expunged), whether they are taking drugs that could affect their ability to remember or testify, whether they have lied, or made stupid mistakes, or uttered unfortunate remarks. This kind of discovery implicates privacy interests.

A plaintiff who brings a lawsuit claiming to be injured by a defective product generally must produce his or her medical records to substantiate the injury, and to demonstrate that it did not result from some prior condition. These records may "relate to the protection of public health and safety," and therefore this statute could disable the Court from maintaining their confidentiality.

3. Mr. Weiner, the Sunshine in Litigation Act would prohibit court approval of settlements restricting access to materials obtained through discovery unless the court finds that such an order "would not restrict the disclosure of information which is relevant to the protection of public health or safety." In your opinion, would this requirement allow a judge to enter a protective order in a product liability case?

The legislation would preclude a protective order in many, if not most cases. To begin with, the standard appears to shift the burden to the defendant to prove that its product is *not* harmful, and to do so at the outset of the case before the factual record has been developed. Judges who apply this standard strictly may insist that information produced in discovery about an allegedly harmful product must be disclosed unless and until the defendant shows that the product is safe.

This is particularly problematic in cases involving pharmaceutical products. As noted, every drug has side effects. Therefore, most of the information produced in a product liability case involving an alleged side effect of a drug could well be "relevant" to the protection of public health or safety. The standard is also problematic in cases involving automobiles. We know that there will be crashes of automobiles In a lawsuit about the crashworthiness of a car, virtually all the documents and testimony may be "relevant" to the protection of public health and safety.

I cannot say that this provision would doom *all* protective orders in product liability cases. But it could inflict a mortal wound.