Hearing entitled "Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

November 5, 2013

Statement of Senator John Cornyn

Mr. Chairman,

In two days, the Judicial Conference begins a series of hearings soliciting input on proposed changes to the Federal Rules of Civil Procedure. The proposals include common-sense amendments to the rules of civil discovery that address dramatic changes in communications technology and data storage, which have changed the face of modern civil litigation. Discovery, in particular electronic discovery, dominates modern civil litigation; and its complexity and expense have distorted the ends for which civil litigation is intended.

The hearings beginning later this week are an important step in the rulemaking process established under the Rules Enabling Act. They are part of a public comment period through which stakeholders can provide input on the proposals, a process culminating eventually in promulgation of new rules by the Supreme Court and either codification or Congressional action. This process is designed to solicit input widely, and Congress is given a role at the end.

I am concerned that this hearing is intended to give congressional input to prevent that process from working properly. First, the timing coincides directly with the public hearings being conducted by the Judicial Conference. There is no need for congressional input at this point, especially since Congress has a clearly-defined role in the process. Second, the title of this hearing, which asks whether the proposals will "diminish accountability and leave Americans without access to justice," suggests its intended conclusion.

The Judicial Conference-led process should proceed apace. Not only is it a thorough one, in the case of dealing with the proliferation of e-discovery the proposed rule changes follow years of study by professionals, including the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. According to a report they published in 2009, based on surveys of plaintiff and defense litigators, "there are serious problems in the civil justice system generally."[1] The litigators surveyed believed that modern discovery deters the prosecution of meritorious claims, encourages the settlement of frivolous ones, "costs too much and can become an end in itself" and is poorly managed by judges.[2] Reform is necessary – it is not a threat.

Technological change is the most important driver of the discovery crisis that litigants face. The rise of electronic communication and the expanded capacity for data storage have resulted in a proliferation of

[1] *See* "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System" (Mar. 11, 2009, rev. Apr. 15, 2009) at 2.
[2] *See id.*

documentation in modern life that cannot have been anticipated by the drafters of the rules. Even simple litigation now requires the storage, review and production of gigabytes of data. In complex litigation, the volume multiplies. So does the cost. And the arcane details of e-discovery are often lost on lawyers and judges, preventing effective management.

Technological progress is a good thing, but the law must change to account for it. That is, at core, what the Judicial Conference is trying to achieve through this rulemaking process.