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The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

I am writing on behalf of the American Bar Association to voice our strong opposition to S. 537, the “Sunshine in Litigation Act of 2009.”

The Act would change Federal Rule of Civil Procedure 26(c) by limiting a court’s ability to enter an order in a civil case (1) restricting disclosure of information obtained through discovery; (2) approving a settlement agreement restricting the disclosure of such information; or (3) restricting access to court records in civil cases – unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

The ABA opposes S. 537 for two reasons. First, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts. Second, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the burdens of litigation in both time and expense. The existing provisions of Rule 26 are currently operating to protect the public interest against unnecessary restrictions on information bearing on public health and safety, and protective orders are important to facilitate the prompt flow of discovery in litigation without imposing the additional burdens contemplated in the bill.

Rules Enabling Act Issues

S. 537 is an unwise retreat from the balanced and inclusive process established by Congress in the Rules Enabling Act. The Rules Enabling Act process is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members

of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

S. 537 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could do harm to the effective functioning of the judicial system.

Substantive Issues

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be in it in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) reported to this Committee in 2008 that empirical studies since 1991 show “no evidence that protective orders create any significant problem of concealing information about public hazards.” A copy of the Rules Committee’s letter of March 4, 2008, is attached to this letter.

Second, requiring particularized findings of fact before any protective order could be issued in *any* case would impose an enormous burden on both the courts and litigants.

Only a small fraction of civil cases involve issues that implicate the public health and safety. Yet, the bill would impose a broad rule that would apply to every civil case. Even in cases that arguably may bear on public health and safety issues, requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point when the parties and the court can understand their significance and context.

The Rules Committee correctly noted in its letter to this Committee that the proposed legislation “would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.”

Third, the requirement that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk,

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and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no material impact on the public's ability to be informed of potential health or safety hazards.

The ABA has adopted policy regarding secrecy and coercive agreements on this very issue:

Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information;

Following adoption of this ABA policy, the Rules Committee and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as S. 537. Both committees concluded that these changes are not warranted. They are not warranted for one overriding reason: the federal courts are already addressing these concerns when they consider whether to enter a protective order.

Conclusion

The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure. S. 537 would not serve the public interest.

Sincerely,



Thomas M. Susman

cc: Members, Senate Committee on the Judiciary